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European Civil Liberties Network

Essays for civil liberties and democracy in Europe

While Europe sleeps......

- under the "war on terrorism" a veneer of democracy is legitimating the creation of a coercive (and surveillance) state

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I. The context

Four years on we know that the "war on terrorism" is going to be permanent, not temporary.[1] This is not just because of 11 March 2004 (Madrid), 7 and 21 July 2005 (London) and terrible terrorist bombings elsewhere. It is also because the pre-conditions for further attacks persist and show no signs of abating - Iraq, Afghanistan, Palestine, US militarism, Guantanamo Bay, rendition and global free market economics which perpetuate poverty and gross inequality.

The "war on terrorism" is going to be permanent for another reason. There are major differences between the USA and the European Union (EU) over the war against the "axis of evil" - Iraq, Iran and North Korea. However, there are few, if any, differences between them over the "war on terrorism" - apart from ones of style. As to content we have seen the creation of a EU-US "axis" on matters of tackling terrorism, money-laundering, organised crime, and crime in general not just at home but globally.[2]

The permanence of the "war on terrorism" means that new repressive laws and powers given to the security and intelligence community and the law enforcement community (LEAs) cannot be seen as exceptional and time limited to meet a temporary crisis. In combination they change the relationship between the state and individual and, in turn, constitute the new norm.

The "war on terrorism" (and the "politics of fear" based on the clash of civilisation and barbarism) serves another, deeper, purpose. For a brief period the "Cold War" and globalisation, which emerged as the new global economic system in the early 1980s co-existed. But with the end of the Cold War in 1989 globalism (the ideology of globalisation) lacked a political ideology to legitimate itself. This gap left globalism exposed as the raw, aggressive, exploitative, capitalism that it is - where tackling poverty and disease will always be secondary to the maintenance and advancement of western standards of living.

The "war on terrorism" was a god-send (and not just in George Bush's conversation with the Almighty). Globalisation, the economic, now had a legitimating, political, ideology. This is why, if for no other reason and there are many, the "war on terrorism" is with us for the foreseeable future.

- the differences and similarities between the Cold War and the "war on terrorism"

There are a few similarities but many differences between the Cold War era and the "war on terrorism".

Between 1945-1989 there were several competing ideologies. To name a few, there was capitalism and "liberal-democracy" in the West, Soviet-style state communism, Chinese communism, and many different kinds of socialism in the Third World. Today there are no competing ideologies which makes the "war on terrorism" all the more pervasive and dangerous because it is on its way to becoming hegemonic.

A Sivanandan described this moment in "Race and Class":

"Globalisation has set up a monolithic economic system. 11 September threatens to engender a monolithic political culture, if they come together

they spell the end of civil society".[3]

He is not arguing that civil society will disappear, simply that critical alternatives - whether in the media, trade unions, academia or the NGO/voluntary sector - will become marginalised (or criminalised).

Another difference between the Cold War era and the present one is that in the latter there was a very real threat that nuclear war could indeed have destroyed "our way of life" and our "democracies". However, the terrorism we are now witnessing in Europe is terrible and horrific but it will not destroy "our way of life". **What will destroy "our way of life" and "democracies" is the reaction of governments and the EU to terrorism.**

There is yet another difference. In the era of the Cold War the west espoused "liberal-democracy". As an idea this included representative democracy (political parties, elections and parliaments) and a political culture of tolerance, diversity and pluralism. It also, in Western Europe, extended to the welfare state, state-run industries for the essentials of life (like water, electricity and gas, and transport) and even the notion of the redistribution of wealth to help the poor.[4] Of course it only partially, and in some areas never, delivered but as an idea it marked the high-water mark for "democracy" and liberal values. Now it is bereft of almost everything but a shallow "representative democracy".[5]

In Europe "representative democracy" is the norm where principles have given way to pragmatism, and the retention of power is the primary aim of the main political parties.[6] This shallow form of democracy (centred around elections and not a democratic culture) combined, since 2001, with its authoritarian direction leaves us with the veneer of democracy masking the creation of the coercive (and surveillance) state.

II. A "gulf of understanding"

There is in the EU what can be called a "gulf of understanding" between the its institutions, national governments and officials and critical civil society. Since 11 September 2001 we have both been looking at the same world events through different eyes and have come to utterly different conclusions.

So when the EU speaks of "core values" and/or "shared values" - as if referring to a consensual response to threats, like terrorism - what are these values and have they changed?[7]

Are the values of the late 1990s, when they were 12 broadly social-democratic governments and three on the right (the EU then had 15 member states), the same as today when there are five on the so-called centre-left (including the UK government) and 20 on the centre-right or extreme right?

Certainly I would have to say that if the polices and practices in reaction to terrorism since 11 September express these "shared values" then they are not ones that I, and many others, share.

For example, EU institutions and national governments claim that all the measures introduced and planned *balance* the demands for security and the rights and liberties of the individual - and what is frightening is that they actually believe this.

In 2004 (Mr Vittorino, previous Commissioner for Justice and Home Affairs) and in 2005 Mr Solana (Secretary-General of the Council of the European Union, representing the 25 governments) said in answer to critics of the responses to terrorism that:

"Our way of life has not changed"[8]

To which can be asked:

"Whose way of life has not changed, the lives of white Europeans?"

Life changed dramatically for refugees, asylum-seekers and third country nationals resident in the EU. Laws and rights were changed to exclude whole categories from applying for asylum, applications for asylum fast-tracked and legal advice by lawyers curtailed by cutting back on their fees, detention centres mushroomed across Europe, "voluntary" repatriation (expulsion) is backed by forcibly expulsion in chains, countries never considered "safe" before were declared "safe" to send people back to [9], hundreds have died trying to cross the Mediterranean or end up dead on beaches and increasingly sophisticated technology is employed to track and seek out people fleeing from persecution and poverty.[10] All refugees have come to be viewed by the EU as potential terrorists, and if not terrorists then potential criminals.

Third world people legally resident or citizens of the EU, especially Muslim communities, have became the target for "stop and search" on the street (where police often cannot distinguish between "muslims" and "third-world-looking people") and raids of community centres and homes.

In the autumn of 2001 the German government proposed that each state should set up a database of

all resident third country nationals in the EU. At the time this was rejected by the other EU governments as going too far as only Germany and Luxembourg had such registers. In 2003 the EU agreed that all third country nationals resident in the EU should be fingerprinted and given a biometric card (with the fingerprint data on a chip) and the details held, initially, on a national database.[11]

Life for third country nationals granted the right of residence has changed in another way too. Now country after country is insisting that this (and the granting of citizenship) is dependent on migrants and their families learning the host country language and "integrating" into its society. As Europe, imbued by the "politics of fear", moves from multiculturalism to monoculturalism third world peoples are expected to adopt the values of the host country above their own histories and culture.

In the UK people granted citizenship now have to attend an official ceremony swearing allegiance to the Queen - as subjects not citizens - and sing "God Save the Queen". There are millions of British people who would refuse to do this, me included.

It can only be described as wilful deception to suggest that "our way of life" has not changed - for it is to say that we, the people of Europe - are not responsible for what is being done in our name to everyone who is not a white European.

But even this assessment is too generous.

Since 11 September the EU has embarked on a series of measures which it would never have dared bring in during the Cold War era - some of which have not even been proposed in the USA.

III. How the landscape of the EU is changing

- the surveillance of telecommunications

First, there is the mandatory retention of all telecommunications traffic data - phone calls, e-mails, faxes, mobile phone call (including location at the time of the call) and internet usage. That is the details of all communications by everyone present in the EU.

Perhaps the least of our concerns is that we are all going to end up paying for the cost of being put under surveillance (whether through increased charges or state subsidies).

Of greater concern is how is that data going to be used. The security and intelligence agencies (and usually the police) already have access to this data when targeting a "suspect", where a specific person is under investigation the powers already exist to intercept their communications and view/read the contents of them.

In the UK the agencies have daily access to reams of data collected by Government Communications Headquarters (GCHQ) and its global network (shared with the National Security Agency in the USA).[12]

So if security and intelligence agencies can already get access to the data for the purpose of combating terrorism why is the new measure being proposed? It is argued that the hundreds of law enforcement agencies (LEAs) in the EU need the data to combat terrorism (and a lot more) – *but nowhere do you see in any EU document that these powers are needed by the national security and intelligence agencies.*

The great danger is that access to traffic danger will be used by the LEAs to go on "fishing expeditions" during what is called the "investigative" stage (ie: prior to there being any concrete evidence to pursue a criminal investigation that could lead to charges and trial). The danger too is that traffic data (and other "intelligence" on file) gathered by an agency in Country "A" is passed to another in Country "B" which adds further "intelligence" being passing the file on to Country "C" (which may be outside the EU).[13]

There is nothing in the European Commission's proposal on data protection for police and judicial cooperation which would stop this scenario happening everyday.[14] Such exchanges would simply require the agreement of the "owner" (the agencies not the individuals) of the personal data, an agency in Country "A", to pass over the information and "intelligence" (which may be correct or simply supposition) to Country "B" and agree it can be passed on to Country "C" (which could be a non-EU state like the USA). The process will be "self-regulated" by the agencies and not subject to direct scrutiny by external bodies (eg: data protection authorities). The person on whom the intelligence is held has no right to be told of the transaction nor to what further uses it is put (unless, of course, they are brought to trial).

- the surveillance of movement (PNR)

Second, the EU agreed in April 2004 to introduce checks on all movements in and out of the EU by air - with its very own "passenger name record" (PNR) system. This followed the highly controversial EU-US agreement to allow the USA access to all PNR details for those flying there. At the moment this data (and many suspect that for other destinations) is extracted from the airlines computer reservations

system operated by companies like Amadeus.[15]

In the UK it is not possible to book a flight online with British Airways for an internal flight (eg: London to Aberdeen) without agreeing that the PNR data can be passed to the USA.[16]

The EU-US PNR agreement is being challenged in the European Court of Justice by the European Parliament. The primary concerns, voiced inside and outside the parliament, were over the adequacy of data protection in the USA (where its Privacy Act only gives rights to its citizens) and how many and which US agencies would have access - which the US government could not answer.

In the USA itself there was a major debate over collecting passenger information and how it would be used. CAPPS II was the original system which was going to check all passenger data against a host of state and private databases to catch suspected terrorists and criminals, to exclude "undesirables" and build up "profiles". This was until the General Accountability Office (GAO) report which failed CAPPS II on seven out of eight privacy and data protection criteria - from that point on the scheme was dead.[17] In place of CAPPS II is "Secure Flight" which will carry out much more limited checks against a suspected terrorist list of around 125,000.[18] At least it can be said that the US "Secure Flight" list appears to be limited to suspected terrorists, whether EU lists will be similarly limited is not known.

The EU PNR scheme, when the "technical details" are agreed, will track the movement by air of everyone in and out including that of EU citizens and resident third country nationals.

Once in place PNR databases will be used not just who enters and leaves but under the "Advanced Passenger Information System" (APIS) will put all passengers into one of three categories: Green, you can board. Yellow, subject to extra checks of baggage and person and/or questioned or place under surveillance on arrival. Red, placed under arrest on arrival at the airport or at the check-in desk. Of course there are flaws in this system, tests have shown that between 5-15% of passengers can be classified as "yellow" depending on whether a narrow (terrorist suspects) list is used or a wide (terrorist, organised crime and any crime) list. And the biggest flaw of all is that if the intelligence and security agencies do not know that a person is a terrorist then they will simply get on the plane through the "green" channel.

- Visa Information System

For visitors to the EU the Visa Information System (VIS) is being set up. The plan is that all visitors will have to have their fingerprints taken (all 10 of them) and this biometric data is inserted on a "chip" in the visa to be put in their passport. Finger-prints will usually be taken at an EU member state mission in their home countries. Personal details and the biometric will be put on national and then the EU-wide VIS database.

The VIS database is being built to cope with 100 million records dealing with 10 millions visa-holders a year. As a number will be regular visitors it is estimated that in the first ten years a total of 70 million records and sets of fingerprints will be held. This is a very ambitious project as it will be the biggest finger-print database in the world (currently the largest is the FBI's with 45 million records). Moreover, a feasibility study on VIS in 2003 pointed out the difficulties that could occur as the size of the database grows - that the error rate increases and with the size of the database and this could not be quantified.[19]

Another major, and as yet unresolved, issue arose in the autumn of 2004.[20] There will be a "clash" of "chips" if the non-EU passport issuing countries opted for biometric passports themselves. The visa chip would "kill" the passport chip rendering both unusable.

Whether the non-EU states will object to having an EU biometric visa inserted into its passports is not known.[21]

To make a start the EU has selected a number of target countries (including Russia and China) to start a dual process covering visas and the EU demand for the automatic re-admission of people who have come from that country and that EU states want to deport back to them. The tactic is one of blackmail - called "Visa facilitation and readmission". The EU will agree to "facilitate" issuing visas to a country's citizens in return for agreement on re-admission. The aim is for:

"a visa-free travel regime as a long-term perspective."

In the so-called "visa dialogue" with third countries the "carrot" is to offer moving that country to the "white-list" of countries (for whom visas are not required, like the USA and Japan) from the "black-list" (countries whose people need a visa - which in future will require the taking of their finger-prints). They are reminded of the:

"Relevant factors to be taken into account in any discussion on the transfer of a third country from the black list to the white list"

To the wholesale surveillance of telecommunications and of movement can be added the wholesale surveillance of everyday activities of everyone resident in the EU through biometric documents.

- the onset of biometrics

The decision of the EU to introduce "biometric" passports in December 2005.[22] It was argued that the EU needed to respond to international demands for "biometric" travel documents in line with the adopted standard of the ICAO (International Civil Aviation Organisation) - a move emanating in G8 lead by the USA and the UK. However, the ICAO standard is only for a digital picture of a person to be included - this is simply the normal passport picture sent in with a postal application being "digitised" and the image inserted into a "chip" which can be read. This allows "one-to-one" checks at the points of entry and departure that the person carrying the passport is the same person as on the digitised picture.

It provides for a very basic check and has been erroneously referred to by government ministers and officials as the introduction of "biometric passports".

The biometric passport measure adopted in the EU is going to involve the taking of two fingerprints from everyone applying for a new passport (or for the first time). As many people living in the Schengen area (12 EU countries plus Norway, Iceland and Switzerland) travel within these countries using their ID cards there is a proposal under the Hague Programme [X] to set "minimum standards" for ID cards - which no doubt will "harmonise" the use of fingerprints on them.

The UK has not "opted-in" to the Schengen provisions on border controls and immigration and is thus not covered by the EU scheme - which is why it is proposing to introduce its own "biometric passports" (this leaves Ireland which also has not "opted-in" to decide what to do). The UK is proposing to introduce biometric passports from the autumn of 2006 (for first-time applicants) and then for all renewals. This will involve the taking of fingerprints and a facial scan (a scan plotting and storing up to 1,840 unique features on a person face) and maybe even a "iris scan" as well.

Biometrics and the personal details of the individual will initially be stored on national databases and later be brought together on an EU-wide database.

The implications of this move are enormous. Over the next ten years as passports are renewed millions of people will have to physically go to a "processing centre" to be "enrolled". In the UK the estimated number is over 5 million people a year. "Enrolment" will involve not just having to go to a centre - instead of putting an application in the post - when there people will be interviewed and have to present documents to prove who they are. Then the biometrics will compulsory taken.

In the UK the government is trying to get a Bill through parliament which will everyone issued with a new passport (whether renewed or first time) will automatically be issued with an ID card as well.

People living in the Schengen area (26 countries) who have ID cards will be subject to the same processes when the new measure is adopted.[23]

- biometrics and surveillance

When the whole picture is put together we are heading for a Europe where:

- all visitors with visas will have been finger-printed and will be tracked in and out, and a historically record of each visit will be held (a bit like the US-VISIT programme) for future reference.

- all resident third country nationals will be finger-printed and issued will a biometric card; their movements in and out will be tracked.

- all EU passport-holders will be fingerprinted from 2007 onwards

- all ID cards will also include fingerprints - travel in the Schengen area is usually carried out with ID cards

to which can be added, in the longer-term,

- biometrics on driving licences

- health cards with biometrics and personal medical record on the "chip"[24]

When biometrics become the norm pressure will grow from companies to have access to the data, for example, to know the health record of a potential employee.

I do not believe most people in the EU realise what is happening and that they will have to:

- compulsorily have to present themselves in person at an "enrolment centre"[25]

- be "interviewed" to prove they are who they say they are

- to compulsorily have their fingerprints taken (and a "facial scan" too in the UK which will log 1,840 unique feature of their face)

We are heading for a Europe where in time - with bank and credit cards added - when everyone will have one card containing a myriad of personal details that will have to be presented to establish "identity", to get access to everyday services and buildings.

As national databases give way to EU databases, which are "interoperable" (as those who inhabit the institutions talk) or when there are "synergies" between the databases, then the "principle of availability" will pave the way to a nightmare society.

Under plans for "interoperability" "synergies" are to be created between Schengen Information System II (SIS II), the Visa Information System (VIS), the Customs Information System (CIS) and Eurodac (holding all the finger-prints of asylum-seekers) including fingerprints and DNA - PNR will no doubt be added when the EU has decided how to set it up.

The creation of biometric databases is going to start in 2007/8 and because passports and ID cards are generally issued for ten years the process will not be complete until at least 2018.

The rationale (and claimed legitimation) for the creation of the world's largest collection of personal biometric data is the "war on terrorism", the need to trade privacy and rights for security. In security and intelligence terms this argument is nonsense. By 2012, at the earliest, only 50% of people in the EU will be covered and 50% will not which not much use if 50% of the suspected terrorists (and those who are not suspected) get through or can move around undetected.

- the "principle of availability"

The EU governments in the Council of the European Union are preparing a proposal, under the "principle of availability", for law enforcement agencies (police, customs and immigration) to exchange information and intelligence - including DNA - held by them or secret, but unpublished, documents show that their plans go much further. Law enforcement agencies should:

"have direct access to the national administrative systems of all Member States (eg: registers on

persons, including legal persons, vehicles, firearms, identity documents and driving licences, as well as aviation and maritime registers"[26]

A later document elaborates on this. Law enforcement agencies in the EU should exchange information and intelligence not only held ("owned") by them but also "information held in databases not owned" by them in other state databases (eg: vehicles) and:

"information held in private databases (eg: a telephone numbers database owned by a telecom company) but which is <u>available</u> *to law enforcement authorities"* [emphasis in original][27]

The draft definition of "information and intelligence" to be exchanged within the EU (and outside) is defined as that held by the agencies and:

"any type of information or data which is held by public authorities or by private entities and which is <u>available</u> *to law enforcement agencies without the taking of coercive measures"* (emphasis in original, op.cit)[28]

Under these mechanisms for wholesale surveillance everyone becomes a "suspect". The "principle of availability" will mean, in time, that if there is anything "suspicious" the state will know. And the mass of personal data gathered will be marginal in tackling terrorism. It is like building an ever higher haystack while trying to find the same number of needle - replacing targeted intelligence-gathering with a great mass of innocent "chatter" may indeed hinder rather help stopping terrorist attacks.

According to an unpublished overview report on this "principle" EU citizens want "freedom, security and justice" but:

"It is not relevant to them [citizens] how the competencies are divided (and information distributed) between the different authorities to achieve that result"[29]

The EU is heading down the road where the law enforcement agencies will have access to masses of personal and intimate data without any data protection worth the name.

IV. What is the rationale and who are the forces behind these developments?

A few of these proposals were around before 11 September 2001 but were "on hold" either because even EU governments thought they were a step too far or due to sustain pressure from civil society (eg:

over mandatory data retention).

The "war on terrorism" changed the rules of the game. Now, the argument, goes there is a continuum running from terrorism to money-laundering (though this primarily concerns organised crime and drugs, not terrorism), organised crime, serious crime and all crime. After all, one European Commission report argued the methodology is often the same as all use mobile phones - but does this make everyone who has a mobile phone a "suspect"?

The Commission report, on exchanging information on terrorist offences argued for bringing together the:

"Union's arsenal of weapons against terrorism. Many of these are not specifically anti-terrorism but range wider while including terrorism [and] a link should be established between terrorism and other forms of crime [even though these are] not immediately obvious... If the fight against terrorism is to be totally effective, it must be handled in conjunction with the fight against other forms of crime".[30]

Many of the measures agreed or planned have no place in a democracy worthy of the name and result from a *confusion of aims* - is the aim to tackle terrorism or something quite different? After the dreadful attacks in Madrid on 11 March 2004 the EU re-vamped its Action Plan on terrorism. Statewatch examined these and concluded that 27 of the 57 measures had little or nothing to do with tackling terrorism.[31] At the time we commented:

"Under the guise of tackling terrorism the EU is planning to bring in a swathe of measures to do with crime and the surveillance of the whole population. After the dreadful loss of life in Madrid we need a response that unites Europe rather than divides it"

It is consistently argued that the "law enforcement agencies" needs all these measures to fight "terrorism". There are many flaws in this argument. First, the front-line in combating terrorism are the intelligence and security agencies not the law enforcement agencies. It is they who collect SIGINT (signals intelligence), COMINT (communications intelligence), OSINT (open source intelligence) and HUMINT (human intelligence) - though the latter was significantly run down prior to 11 September 2001 as the old "enemies" of the Cold War were no more and the new one not clear.[32] In most countries these agencies have all the powers they need. While the law enforcement agencies, in respect of terrorism, play a secondary and supporting role.

Combating "terrorism" has, and is, used by governments and officials, the law enforcement agencies keen to extend their powers, status and budgets even if their roles is secondary.

The other vested interest is the multinationals who are going to make billions out of the new technological demands of wholesale surveillance. Once established in Europe (and the USA) these new standards will become the benchmark for "global standards" (and even more billions of profit).

A classic instance of the state-multinational interface at the EU level was the setting up of the "Group of Personalities" in the autumn of 2003. This was set up, meet in secret and reported back without any consultation with parliaments or public. It was comprised of 30 people, one-third from the Council and Commission, one-third from big "research" organisations and one-third from multinationals.[33] Its final report laid down the need for a "European Security Research Agenda", for which billions of euro should (and are going to be) allocated. Among its proposals are the creation of a military-civil interface (with vetted experts and academics), the creation of a "military-industrial complex" to compete with the USA and the production of tracking devices for vehicles, goods and people.

When faced by terrorism governments ask for solutions. The form and specificity of the many of the "solutions" offered is a combination of the long-standing demands of the law enforcement agencies and the technological "fix" offered by multi-nationals seeking to create and exploit new, global, long-term, markets. The decision-making process is mediated by high-ranking officials in national Home/Interior Ministries, the General Secretariat of the Council and their counterparts in the USA and G8.

V. The EU state and the state of democracy in the EU

Some academic theorists discount the idea that a European state is under construction largely because their theories are based development of the "first pillar" (the economic and social) of the EU. They suggest the EU can be best be understood as multi-level governance which is multi-faceted with a multitude of actors or as enhanced transgovernmentalism.

On the other hand, it was obvious to some that the economic project, starting with the Treaty of Rome (1957) and developed by the Single European Act (1986), would develop a political superstructure

sooner or later to protect its interests from internal and external threats.[34]

The failure to recognise that there is a European state is also because people are looking for a traditional national state at the EU level. This would involve the centralised direction and control of economic and social policies and practices, whereas in the EU implementation and variation (within broad norms) are largely left to implementation at national level. What may be true for the economic and social however does not hold for the political. For the political it is possible to trace a different historical path for the emergence of the *EU coercive state* which embraces internal and external security.

Ad hoc cooperation on terrorism (1976) policing and then immigration (1986) began under the Trevi arrangement and was formalised with the Maastricht Treaty (1993). The Amsterdam Treaty (1997) incorporated Schengen and its *acquis* from 1999 and the Nice Treaty (2000) heralded the beginnings of an independent military role in the world ("second pillar").

The current justice and home affairs (JHA) *acquis* - a body of laws and measures, some "hard" law, some "soft" law, some operational - is composed of the *acquis* of Trevi (1976-1993), Maastricht (1993-1999), Schengen (1980-2004) and Amsterdam (May 1999 and ongoing) *acquis* all rolled up into one. Some 800-plus measures and decisions form the JHA *acquis* which existing and applicant countries are obliged to implement in national law and put into effect.

What is significant about this great edifice of laws and practices is that it is a classic case of *a democracy built on sand*. All of the measures in the JHA *acquis* were adopted without national and European parliaments having a real say. The European Parliament was "consulted" and its views routinely ignored. National parliaments have powers of "scrutiny" (known as a "scrutiny reservation") which is in effect "consultation" and their views too are routinely overridden by governments.[35]

The policy programme for what is called in the EU "justice and home affairs" (JHA, policing, immigration and asylum, and judicial cooperation) is set by the European Council (the 25 Prime Ministers).

The long-standing, embedded, attitude of EU governments is that the "real" negotiations take place in the meetings of officials and experts in the Council's working parties and high-level groups - not in parliaments or society at large.

The content of neither the "Tampere" (1999-2004) or the "Hague" (2004-209) programmes were known in advance of their adoption by the European Council. The same goes for "Action Plans", like the ones on terrorism and immigration adopted by the Council. These Programmes and Action Plans set the agenda for all the EU institutions and are adopted without any democratic debate.

It is possible to roughly divide the history of justice and home affairs into three periods:

1) the *ad hoc* Trevi era (1975-1993) which in its later years included meetings of Ministers and the creation of a Coordinators Group;

2) formalisation of the decision-making structure under the Maastricht Treaty (993-1999). Creation of the Justice and Home Affairs Council of Ministers, high-level committees (eg: KA Committee) and working parties, and growth of the Council's General-Secretariat in D-G H (full-time officials and seconded national experts).

3) (1999 and ongoing) It was the Tampere Summit in 1999 that marked the beginning of the present era. Instead of individual proposals which often took years to get through (eg the Europol Convention) for the first time there was a comprehensive programme across the whole of justice and home affairs. Out is this programme came not just a raft of new measures but the growth of new bodies and agencies and operational powers for the General Secretariat in DG H (which is now the largest directorate-general in the Council). Some of the new bodies set up by the Council have no legal status and no mechanisms for accountability and scrutiny and are effectively self-regulating, for example, the Police Chiefs Task Force and the Joint Situation Centre (SitCen). What epitomises the emergence of the coercive (surveillance) state is the new Standing Committee on Internal Security (COSI). Although conceived as part of the EU Constitution it is one of the first to be rescued from the debris. In the two previous eras (Trevi and Maastricht) policing, immigration and judicial cooperation developed on independent tracks and tailored legal powers. Here for the first time the all-embracing concept of "internal security" is employed – covering crime, terrorism, exchanging intelligence, "public order management", "illegal immigration and trafficking", "integrated management systems for external borders" and crisis management (which could involve the military)[36]

The fulltime officials in the Council's Directorate General H (JHA) are supplemented by "seconded national experts" (police, border guards, judges) who in addition to contributing to policy-making carry out

missions to evaluate how the various elements of Action Plans (and the Schengen acquis) are being implemented.[37]

In the field of justice and home affairs the General Secretariat of the Council plays a quite different role to other policy areas. It plays the:

"role of a motor, legal drafter and initiative taker"[38].

It is usually the same official who goes to the various international fora that is drafting or is responsible for EU policy-making. In this field (internal security) there is a powerful, and quite small, nexus (coterie) of officials from national ministries, the Council's DG (JHA) and Commission representatives who are pivotal in determining and propagating policy options in the EU, G8 (and its working parties) and in discussions with the USA.

What also distinguishes the role of the Directorate-General for Justice and Home Affairs (within the General Secretariat of the Council) from other policy areas is that they are not just the "motor" for policy-making but also increasingly undertake operational functions. For example, it is currently being proposed that the operational control of the new Schengen Information System (SIS II) is shared between the Council and the Commission. The idea that the EU governments, through the Council should exercise operational control is outwith any democratic norm.[39] Moreover, in a number of areas like "soft law" (Recommendations etc which are not subject to any parliamentary right of scrutiny) and operational matters the Council's Ministers and its officials are the executive, the legislature and the implementors.

The ability of parliaments and civil society to make their views known on policies and practices developed in the Council is severely limited. This is because the Council routinely refuses access to most documents when an issue is under discussion (or minutes which mentioned the discussions) before the final draft is agreed and published.[40] In other words, parliament and public are not allowed to know what differences, options and influences effect the final text. The Council is even more secretive when it comes to documents concerning third states, like the USA, which are routinely refused (or the relevant text censored) as this could undermine "international relations".[41]

- the EU-US axis and its global influence

One of the during features of the "war on terrorism" is the emergence of the "EU-US axis". There have always been regular meetings following on from the New Transatlantic Agenda (NTA, 1995) under which the EU-US Senior Officials Group and the EU-US Task Force met six-monthly. But after 11 September and the Bush letter to the EU of 16 October 2001 a new era of cooperation set in. Now during each six-monthly EU Presidency there are at least twenty high-level meetings or video-conferences, US officials attend Council working parties and lobbying the "Troika" of EU Presidencies (current, past and future).[42]

This alliance in the "war on terrorism" between the EU and the US is a major influence in G8 and its working parties - with the USA and UK in the lead.[43] This, in turn, links into the construction of global enforcement regimes.[44]

A classic case is the decision of the EU to introduce "biometric" passports in December 2005.[45] It was argued that the EU needed to respond to international demands for "biometric" travel documents in line with the adopted standard of the ICAO (International Civil Aviation Organisation) - a move emanating in G8 lead by the USA and the UK. However, the ICAO standard is only for a digital picture of a person to be included - this is simply the normal passport picture sent in with a postal application being "digitised" and the image inserted into a "chip" which can be read. This allows "one-to-one" checks at the points of entry and departure that the person carrying the passport is the same person as on the digitised picture. It provides for a very basic - one-to-one - check and is erroneously referred to by government ministers and officials as the introduction of "biometric passports".

The EU has used the ICAO recommendation, and the demands from the USA that any European going there must have a biometric passport to qualify for the US Visa Waiver Scheme, to introduce the wholesale surveillance of movement.

VI. The road ahead

The coercive European state has been constructed at the same time as liberal-democratic norms are ignored, abandoned, or declared redundant. New norms and morality are set by governments and the political class, and are honed and spun by officials. They result not from informed debate and political struggle, emerging over the years as a new consensus, rather they are handed down from on high.

The passing of principled values and morality are only too evident. The UN Declaration of Human Rights (1948) set out the aspirations of liberal-

democracy on economic, social and political rights. Today it reads like a radical document. The 1951 Geneva Convention on the rights of refugees and asylum-seekers has all but been written out of EU law. And now the protection given by the European Convention on Human Rights (ECHR) against people (who cannot be bought to trial for lack of evidence) being returned to countries where they would face "torture or inhuman or degrading treatment or punishment" is being actively pursued by the UK (and is on the EU agenda too).

The slippage in language and intent, law and practices is frighteningly rapid. Terrorism is a problem and needs to be countered to prevent loss of life and injury. But what is terrorism? Charles Clarke, the UK Home Secretary told a parliamentary committee in October 2005 that it:

"cannot ever justify using violence to bring about change" (11.10.05)

When asked about Iraq he declined to answer.

If we look at history is the "use of violence to bring about change" to be applied to the (state) violence which led to the expansion and maintenance of the British Empire, or only to the mass civil disobedience and liberation movements which freed their peoples from colonialism?

Draconian measures have been put through before, but we have never seen such an assault on peoples' rights and democratic standards. What is happening has been characterised as "sleepwalking into a surveillance society" (Richard Thomas, UK Information Commissioner) and the people of Europe are certainly doing that at the moment.

This is expressed as trading "privacy for convenience", making life easier by having just one "chipped" card for every transaction (eg: shopping, getting cash), entry (to work and flights) and verifying identity to get services (like education, health and welfare). Finger-printing, biometrics and databases to confirm identity make life easier and are directed at terrorists and serious organised criminals not at the great law-abiding majority. The notion that once in place and embedded in everyday life these same mechanisms will not be used for social control and the elimination of "unacceptable" behaviour is dangerously naive.

But the danger goes much deeper than that, it is about the quality of the democracy we live in, the political culture, of which elections and parliaments are just a tiny part. At its most extreme "representative democracy" simply means people vote every four or five years and then leave the politicians to get on with running their country (and the world). Governments are elected to get on with the job and the people "should not be seen or heard" in-between elections. This was effectively the attitude of Bush and Blair on going to war in Iraq, ignoring the millions who took to the streets across the globe exercising the only power they had available.

To collude in the demise of democracy is to renounce any sense of responsibility for what is done in our name. Taken to its logical conclusion "representative democracy" ends up legitimating (masking) the construction of an authoritarian era bringing self-regulated, unaccountable, agencies and bodies exercising coercive powers. To be used first against "suspected" terrorists (most are arrested, held, questioned and released) and unwanted "illegal" immigrants who increasingly have no "rights" - whether in detention centres across the EU or small boats in the Mediterranean.[46] And against protestors and those thought to hold "extremist" and "radical" opinions and dissenters and so on.[47]

The reaction of governments and states to terrorism go far beyond seeking to counter it. Rather the "war on terrorism" is re-defining the political culture and re-defining democratic life beyond all recognition. The whole basis of a democracy is that when the basic rights and freedoms of the few are arbitrarily curtailed or removed so too are the rights and freedoms of us all.

The defence of rights and civil liberties in Europe, and globally, will determine whether "democracy" has a future in any meaningful sense. There is an urgent need to unite people, where ever they are, into movements to "resist and build" and to re-awaken the possibility of an alternative world based on humanity, compassion, equality, egalitarianism, diversity, tolerance and immutable rights and liberties for all.

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Footnotes

1. In 2002 I wrote an analysis entitled "The war on freedom and democracy", one year after 11 September. Nothing that has happened since leads me to change the views expressed there, but it is necessary to add and deepen an understanding of where we are going in Europe: see: http://www.statewatch.org/news/2002/sep/04freedom.htm

2. The seeds of this can be seen in the Conclusions of the

Special EU Justice and Home Affairs Council meeting on 20 September 2001 and the Bush letter to the EU of 16 October:
http://www.statewatch.org/news/2001/nov/06uslet.htm
Cooperation has included a Europol-US agreement, a Mutual Assistance agreement on extradition and judicial cooperation and the EU-US PNR (passenger name record) deal.

3. Sivanadan is Director of the Institute of Race Relations.

4. It should be remembered that Spain, Portugal and Greece lived under dictatorships for many years.

5. "Representative democracy", because of its lack of content and principled differences between the parties, is characterised by low voter turn-out, eg: USA around 50%, in UK 60% and the European election in 2004 just 45%. While in Egypt in 2005 only 22% voted for a number of reasons.

6. "Representative democracy" is not a theory but simply a description of the reality.

7. Values of course are not the same as basic principles, such as are enshrined in the Universal Declaration of Human Rights.

8. How this squares with the statement of Mr Blair, the UK Prime Minister, that the "world has changed" and that some traditional rights and liberties have to be sacrificed is not clear.

9. In 2004 Afghanistan was declared "safe" to send people back to - the EU decision however suggested that they should be given counselling as to the danger of unexploded ordinance (largely bombs dropped by US and UK planes).

10. One of the uses of the EU Galileo's space satellite programme will track boats and groups of people as they approach the borders.

11. An "additional counter-terrorism initiative" currently being discussed is a feasibility study "to register entries and exits of third country nationals" at Schengen area borders. This would checks at borders on all third country nationals whether legally resident or entering with a visa. EU document: 11910/05:
http://www.statewatch.org/news/2005/oct/eu-next-steps-05.pdf

12. This data is partly gathered by GCHQ and NSA independently and partly through the ECHELON system (run by them):
http://www.statewatch.org/news/2001/may/prechelon_en.pdf

13. "intelligence" is different to "information". "Information" comprises hard facts, like, person's criminal record. "Intelligence" on the other hand may be very good or highly doubtful depending on the source. "Intelligence" is usually graded on a scale of 1 to 5 as to its accuracy.
14. Commission proposal:
http://www.statewatch.org/news/2005/oct/com-dataprot-475.pdf

15. This is known as the "pull" system, whereas a "push" system is meant to be coming into effect whereby only

that data needed is sent to the USA: see:
http://www.statewatch.org/news/2003/jul/09usdata.htm

16. http://www.statewatch.org/news/2005/oct/ba-usa.htm

17. There similar body in the EU whose status means that its reports carry a similar weight. The report of the Article 29 Working Party on Data Protection produces excellent reports, but as they are only "consulted", these are routinely ignored.

18. It is not known who is on this list and it no doubt includes quite a number who would highly dispute their inclusion.

19. Visa Information System (VIS), Final Report, April 2003, Trasys for the European Commission.

20. See:
http://www.statewatch.org/news/2004/dec/07visas-residence-biometrics.htm

21. At this moment in time the EU is discussing a simpler matter, namely whether there should be exemptions for young children as they can be unreliable and change rapidly. Some member states suggested a minimum age of 12 years old but the majority, including the UK Presidency, wants 5 year of age - even if this means assigning finger-print experts to examine each set of prints at entry points where the children may have to be finger-printed again.

22. The European Parliament was only "consulted" on this measure. Indeed it was blackmailed into giving its "opinion" speedily. The Council of the European Union promised to extends the parliament's co-decision powers to immigration and asylum on 1 January 2005 instead of April 2005 - a move that gave the parliament co-decision powers, not consultation, over exactly measures like introducing biometric passports.

23. UK Presidency proposal:
http://www.statewatch.org/news/2005/jul/07eu-id-bio-plan.htm

24. In the UK a National Health database is being created which will hold the personal medical records of everyone. It has been set up on the basis of "opt-out" rather than "opt-in" - it will happen unless an individual objects. The database will be accessible to over 500,000 medical staff. The EU started issuing a plastic EU Health Card (with no chip yet) in 2005 to replace the E111 form.

25. As distinct from filling out a form and sending with a picture in the post.

26. EU document no: 7416/05, 17.3.05.

27. EU Document no: 12511/05, 29.9.05.

28. This does not exclude the exchange of intelligence which was gathered by coercive means (eg: tapping or bugging) prior to the request for information. Moreover, there is a "consensus" in the Council (as agreed at COREPER, the permanent Brussels-based representatives of the 25 governments, on 5 October 2005) that new coercive means could "be obtained via mutual legal assistance.

29. EU doc no: 7416/05.

30. COM 221, 29.3.04 and see:
http://www.statewatch.org/news/2004/jun/08eu-terrorism-and-crime.htm

31. Statewatch Scoreboard:
http://www.statewatch.org/news/2004/mar/swscoreboard.pdf

32. HUMINT, human intelligence, is gathered by undercover agents or supplied by informants (willing and unwilling, paid and unpaid). Effective HUMINT take years to put in place and even then is clearly less effective against an unstructured target with independent cells acting on their own initiative than a Cold War-style centrally organised state organisation.

33. "Group of Personalities:
http://www.statewatch.org/news/2004/mar/swscoreboard.pdf
and Commission first report:
http://www.statewatch.org/news/2004/feb/security-research-com72.pdf
and
http://www.intelligenceonline.com/NETWORKS/FILES/468/468.asp?rub=networks

34. See, "Towards an authoritarian European state", by Tony Bunyan, Race and Class, vol 32 no 3, January-March 1991.

35. On 1 January 2005 most of the decision-making powers on visas, asylum and immigration (in Title IV of the TEC) moved to co-decision with the European Parliament.

36. EU document: 6626/05.

37. Although the Commission equivalent DG has an increasing right of initiative (eg in immigration and asylum) the final say is always with the Council - a proposal has to meet all the positions and objections of each national government.

38. Council of the European Union, Martin Westlake and David Galloway, p137.

39. For a number of years the JHA DG of the Council has had direct access to the SIS database in Strasbourg with access to individual records. When it comes to the EU the principle of the "separation of powers" does not hold.

40. Under the 2001 Regulation on access to documents, 1049/2001, Article 4.3.

41. op.cit, Article 4.4.

42. See for example, "The exceptional and draconian become the norm", where US demands honed in G8 were then demanded of the EU:
http://www.statewatch.org/news/2005/mar/exceptional-and-draconian.pdf

43. The other EU countries represented are France, Germany and Italy.

44. See the International Campaign Against Mass Surveillance: Report:
http://www.statewatch.org/news/2005/apr/icams-report.pdf
and website: http://www.i-cams.org/

45. The European Parliament was only "consulted" on this measure. Indeed it was blackmailed into giving its "opinion" speedily. The Council of the European Union promised to extends the parliament's co-decision powers to immigration and asylum on 1 January 2005 instead of April 2005 - a move that gave the parliament co-decision powers, not consultation, over exactly measures like introducing biometric passports.

46. A measure now going through the EU institutions – on which there is a consensus between Council, Commission and European Parliament - on the procedural rights for all suspects, like right to bail, a lawyer, access to family, translators etc, excludes giving these rights to terrorist "suspects". How many "suspects" have been arrested and held for questioning across Europe since 2001 but later released for lack of evidence?

47. Six civil liberties campaigners for the UK NO2ID (identity cards) went to Newcastle in two cars in September to protest outside the Informal Meeting of EU Justice and Home Affairs Ministers. They got nowhere near the meeting because they were arrested by police "on suspicion of conspiracy to commit criminal damage and are currently in custody". This small, peaceful, was arbitrarily stopped when it presented no threat to anyone. BBC News, 8.9.05.

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