INTERGOVERNMENTAL CO-OPERATION ON IMMIGRATION AND ASYLUM

by Tony Bunyan and Frances Webber

CHURCHES COMMISSION FOR MIGRANTS IN EUROPE

CCME Briefing Paper no. 19

INTERGOVERNMENTAL CO-OPERATION ON IMMIGRATION AND ASYLUM

BY TONY BUNYAN AND FRANCES WEBBER

CCME Briefing Paper no. 19

CHAPTER I
THE STRUCTURE OF DECISION-MAKING

1. The pre-Maastricht period

The first attempt to coordinate national immigration and asylum policies in the European Community was made in October 1986 under the UK Presidency. A meeting of Interior and Justice Ministers decided to set up the Ad Hoc Group on Immigration (AHI) with the aim of ending 'abuses of the asylum process'[1]. The Group met for the first time on 26 November 1986 and set up two sub-groups on the right of asylum and forged documents.

This structure was intergovernmental, that is between the member states of the European Union, and not part of the framework of the European Community. It was serviced by the General Secretariat of the Council of Ministers and the European Commission attended meetings as an observer[2]. This step was taken in the context of the Single European Act of 1987, which aimed to remove internal borders six years later by 1993. The intervening period was to be used to create a 'cordon sanitaire' at the European Union's external borders[3].

In 1989, under the Spanish Presidency, it was decided that formal meetings of Member States' immigration ministers should be held every six months. The issue of concern to the ministers was which statutory framework they use to effect their political decisions. The established procedure with the involvement of the Commission was rejected in favour of continuing the intergovernmental approach by adopting international conventions under the rules of traditional international law and practices. The governments argued that the Community procedure would take too long because it would involve the European Parliament (and possibly national parliaments). It would, in short, expose their decision-making to democratic debate and scrutiny. Moreover, Conventions once agreed and signed by the ministers could not be amended or changed in any way by national parliaments during the ratification process[4].

At the Rhodes Council meeting in December 1988 the decision was taken to set up the Group of 'Coordinators on Free Movement'. This group met monthly and comprised 12 senior officials from interior ministries and the Commissioner of the European Commission responsible for the internal market. Its remit was to bring together, not just the work of

the Ad Hoc Group on Immigration, but also that of the Trevi group (and its working parties), the Mutual Assistance Group (MAG, customs) and the working groups on judicial cooperation. Its first major initiative was the Palma Document, presented in Madrid in 1989 (and the subsequent Report on the Palma Document, London 1992), which reflected a coordinated response to immigration and asylum, policing and terrorism, and legal measures.

Prior to the Maastricht Treaty, the Ad Hoc Group on Immigration and its working groups together held over 100 meetings a year. It had the following Immigration Sub Groups:

1. External Frontiers;
2. Expulsion and Admission;
3. Asylum;
4. Forged Documents;
5. Visas.

In a later stage a sixth sub group was added, namely refugees from the former Yugoslavia.

The Sub Groups' reports went to the Ad Hoc Group on Immigration, who in turn reported to the Coordinators Group, who presented six-monthly reports to meetings of immigration ministers. The latter held their last meeting under the pre-Maastricht arrangement in June 1993 in Copenhagen.

2. The Treaty on European Union

Under the Treaty on European Union (TEU) or as it is also known, the Maastricht Treaty, the old ad hoc arrangements were replaced by a new permanent structure which signalled the creation of the European state alongside the economic and social affairs roles of the four European institutions (namely, the Commission, the Council of Ministers, the European Parliament and the Court of Justice). Under Article K on 'Cooperation in the fields of Justice and Home Affairs', the Council of Justice and Home Affairs Ministers was set up and its work funded directly out of the European Community budget. Work under Article K is often referred to as the 'third pillar' - Foreign and Security Policy (Article J) being the 'second pillar' with the economic and social roles of the European Community being the 'first pillar'.

The Coordinators Group was, in effect, renamed the K4 Committee with the same people sitting on it plus the Commission. The K4 Committee has three steering groups on:

1. immigration and asylum;
2. security, law enforcement, police and customs;
3. judicial cooperation.

The steering group on immigration and asylum has five working parties (sub groups):

1. migration (the renamed 'expulsion and admission' sub group)
2. asylum
3. visas
4. external frontiers
5. forged documents

Reports prepared in the working parties progress from the main steering group, to the K4 Committee and then to COREPER (the Committee of Permanent Representatives of the 15 EU states). COREPER sets the agendas and, if necessary and possible, negotiates a consensus prior to the six monthly meetings of the Council of Justice and Home Affairs Ministers - which is both the executive and the legislative body.

The K4 Committee and the Council of Ministers also oversee the Europol Drugs Unit, the forerunner of Europol[5]. Still in the pipeline is the draft European Information System (EIS), which is in effect an exact replica of the section in the Schengen Agreement on the Schengen Information System (SIS). The SIS is a computerised database covering immigration, asylum and policing. As the SIS is now up and running it is not clear whether it will be brought under the 'third pillar' when the EIS Convention is adopted and ratified.

One of the most important changes introduced under the Maastricht Treaty relates to the forms of decision-making. These have institutionalised the Council of Ministers' practice of agreeing measures which do not have to be discussed prior to adoption by the European or national parliaments. Moreover, as all their deliberations are conducted in secret, behind closed doors, normal democratic scrutiny and checks are simply by-passed.

Under Article K.3 the Council can make three forms of decision:

a. joint positions
b. joint actions
c. adopt Conventions

While it is not specified that joint actions are binding (unlike Article J.3.4. under the second pillar), Article K.5 does say that Member States 'shall defend common positions adopted' in international meetings. The first joint action taken under Article K.3(2)(b) was the adoption of the Council Decision on travel facilities for school pupils from third countries resident in a Member State, on 30 November 1994.

Under Article K.6 the European Parliament is meant to be consulted on 'the principal activities in the areas referred to' and its views 'duly taken into consideration'. However, the Council of Ministers has deliberately ignored the European Parliament - it has not, for example, been consulted on the draft Europol Convention. At the Council of Ministers meeting in Luxembourg in June 1994 the majority wanted the European Parliament simply to be informed of discussions and only to make draft proposals available informally, thereby not inviting the parliament to express an opinion.

Article K.1 defines as 'matters of common interest', to be dealt with by inter-governmental cooperation (ie, the procedure described above), the following:

1. asylum policy;
2. rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon;
3. immigration policy and policy regarding nationals of third countries:
   a. conditions of entry and movement by nationals of third countries on the territory of Member States;
   b. conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment;
   c. combating unauthorised immigration, residence and work by nationals of third countries on the territory of Member States.

Article K.2 makes these matters subject to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Geneva Convention.

The only aspects of immigration and visa policy brought under the 'first pillar' by the Maastricht Treaty were the elaboration of a list of countries whose nationals required visas to enter the EU, and the format of a common uniform visa. These were brought under Community competence by a new Article 100c of the EEC Treaty.

CHAPTER II
PRINCIPLES AND PROGRAMMES

1. The Palma document

The Palma Document, drawn up for the European Council in Madrid in June 1989, described the measures which the Co-ordinators' Group (on Free Movement of Persons) deemed necessary before the removal of internal frontiers which, it was believed, would occur by 31 December 1992 in accordance with the Single European Act. Their proposals related to five areas: visas; external frontiers; internal measures; expulsion; and asylum policy.

On **visas**, the first priority was the establishment of a common list of countries whose nationals would require visas to enter any country within the European Community, and a common list of persons to be refused entry. The harmonisation of criteria for the granting of visas was deemed essential. The development of a common European visa, and a computerised information exchange on visa processing, were seen as desirable.

On **external frontiers**, the essential measures were: the definition of common measures on checks and surveillance of external borders; the definition of ports and airports as internal or external; improved cooperation and information exchange between police and customs of the Twelve; the resolution of problems caused by Member States' agreements with third countries; combating illegal immigration networks; and information exchange on wanted and inadmissible persons. The harmonisation of immigration laws was deemed desirable.

On **internal measures**, it was seen as desirable to study the abolition of checks on third country nationals lawfully resident within the EC, and the compulsory registration of foreigners in hotels throughout the Community. On expulsion, the most important measure was the determination of the Member State responsible for expulsion.

On **asylum** policy, essential measures for the development of a common policy based on the Geneva Convention included the acceptance of identical international commitments; determining the state responsible for examining an asylum request; simplified or priority procedures for the examination of 'clearly unfounded' asylum requests. Seen as desirable were harmonised criteria for asylum, and a data bank registering the date and place of asylum requests.

2. The 1991 work programme on asylum and immigration policies

In 1991 the Commission submitted Communications on immigration (SEC (91) 1857 final) and asylum (SEC (91) 1855 final) policies to the Member States. These Communications described additional measures necessary to harmonise immigration and asylum policies, in order to deal with, in particular, illegal immigration, and to harmonise criteria, procedures and conditions of reception for asylum-seekers so as to ensure, as it were, an even spread across the territory. The documents' generally restrictive and exclusionary tone were taken up and amplified by the Ad Hoc Group, whose work programme was adopted by the European Council at Maastricht in December 1991.

Among measures seen as necessary for the harmonisation of substantive **asylum** law were the 'formulation of unambiguous conditions for determining which applications for asylum are clearly unjustified'; 'the definition and harmonised application of the principle of first host country' and 'countries where there is generally no risk of persecution'. Harmonisation of expulsion policy, whether of rejected asylum-seekers or of others, was also seen as a priority.

The 1991 work programme set out the harmonisation of policies on **admission** for purposes such as family formation and reunion, and admission of students, for work and self-employment as necessary.

On **illegal immigration**, its programme included harmonisation of conditions and checks for combating illegal employment, and harmonisation of principles on expulsion, including the rights to be guaranteed to expelled persons. It also wanted to explore guiding principles on policies of, for example, regularisation. Cooperation with countries of transit and departure in combating illegal immigration and in readmission was seen as vital, including the desirability of linking, whenever practical, external agreements of the Union with third countries to readmission agreements.

Finally, the 1991 work programme wished to examine the possibility of granting long-resident third-country nationals certain rights or possibilities held by Member State nationals, for example concerning access to the labour market.

3. European Council Declaration on Principles governing external aspects of migration policy

In this declaration (Edinburgh, December 1992), while the Council reaffirmed its intention of remaining open to the outside world, it also noted 'pressures on Member States resulting from migratory movements' and recognised 'the danger that uncontrolled immigration could be destabilising'. The principles informing the Community and its Member States included:

a. working for peace and respect for human rights so as to diminish migratory pressures resulting from war and oppression;
b. encouraging displaced people to stay in safe areas nearest to their homes;
c. encouraging economic cooperation and liberal trade with countries of emigration to increase prosperity and reduce economic motives for migration;
d. ensuring appropriate development aid;
e. combating illegal immigration;
f. for readmission agreements to return illegal immigrants to countries of origin;
g. rewarding third countries' willingness to readmit their own nationals expelled from Member States;
h. responding cooperatively to the plight of persons fleeing the former Yugoslavia.

4. Commission Communication on Immigration and Asylum

In a new communication to the Council and the European Parliament (February 1994), the Commission responds to the right of initiative it has in matters of policy under the 'third pillar' of the TEU by calling for an integrated and coherent response to the challenges of 'migratory pressures' and of integrating 'legal immigrants'. It draws a sharp distinction between immigration policies, where it is necessary to be restrictive and preventive (while still defining minimum standards for the treatment of illegal immigrants in accordance with the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families), and on the other hand refugee policies, where, the Commission points out, 'it is by definition impossible to curb the number of refugees to whom Member States are required to give protection'.

In the field of asylum policy, it calls for harmonisation of policies concerning people who do not qualify for refugee status but who should not be returned ('B status', 'tolerated' or 'exceptional leave to remain' categories), as well as temporary protection for eg, those from war zones, and the creation of support structures for Member States to assist those faced with mass influx situations.

On general admission policies, the Commission calls for a Convention on family reunification and for harmonisation of policies on admission of vulnerable groups. On integration, it calls for the strengthening of the legal rights of third-country nationals resident in the EU, and for actions to combat unemployment, including further development of vocational training, as well as the monitoring and prohibition of racial harassment and discrimination in the Union.

CHAPTER III
VISAS AND EXTERNAL BORDERS

1. Visa policy: proposals for regulations

There are two proposals for EU regulations under Art 100c on the table for agreement under the French presidency in June 1995; they are for a common list of countries whose nationals require visas to enter the territory of the EU; and on the format of a common visa.

Since 1987 there has been a common list circulated by the Ad Hoc Group on Immigration (AHI), which, however, includes some countries whose nationals require visas to enter some but not all Member States. The AHI list forming the basis of the Commission's proposal for a regulation is based on the Schengen group's list of 126 countries. The Schengen group also has a 'white list' of countries whose nationals do not require visas, including the US and Japan. The EU has no proposal to follow Schengen on this.

The proposed regulation for a common visa specifies the physical characteristics and format of visas for short stays, transit and re-entry, issued by one Member State but valid for all. It incorporates security features to enable its authenticity to be checked and making it difficult to counterfeit; these features are not to be disclosed. The proposal for a regulation does not go into criteria or conditions of issue, which cannot be dealt with under EU Regulations but only as matters of common interest under K3.

The European Parliament has put forward a series of amendments to the regulations. On the common visa, it suggests a definition of the categories of visas; a shortening of the transitional period for harmonisation of Member States' practices; and the abolition of national visas in the three categories covered (ie, short stay, transit and re-entry). It also proposes a right of appeal to the competent authorities of the Member State concerned against the refusal to grant a uniform visa. So far as the common list is concerned, EP amendments would demand clear, objective and publicly stated criteria for a country's inclusion on the common list, and the EP also stipulates that no third countries whose nationals do not require visas at present should be included.

2. External Borders

In June 1991 the Ad Hoc Group on Immigration finalised a draft **Convention of the Member States of the European Community on crossing of external borders**, to deal with the essential issues of visa controls and external borders. The text was lifted wholesale from the Schengen Supplementary Accord signed in June 1990 by the five Schengen states of Benelux, France and Germany, and later by Italy, Portugal, Spain and Greece.

The draft Convention first requires Member States to define **authorised crossing points**, to provide sanctions for unauthorised border crossing, and to provide effective surveillance of their borders and rigorous checks at the authorised crossing points.

Member States must impose **measures to sanction** air or sea carriers of undocumented or falsely documented passengers.

The Convention provides for harmonisation of **visa policies**, with mutual recognition of visas, a common form and the issue of a uniform visa on common conditions and criteria. It sets out the **criteria for the admission** of third country nationals, ie, the possession of valid travel documents, of a visa if required, of documentary substantiation of the purpose and conditions of the planned stay, and of means for the stay and return or onward travel, or the ability to acquire such means lawfully. The negative conditions are that the passenger does not pose a threat to public order, national security or international relations, and is not on the joint list of inadmissible persons. Anyone not meeting the criteria is to be refused, although there is discretionary admission to the territory of one member state on humanitarian grounds or grounds of international obligation. The **maximum stay** for third country nationals on the territory is three months, either continuous or in the six months following first entry in the territory. For a longer stay the national law of the host state applies, and access is restricted to that state.

Third country nationals resident in another member state are to be admitted for short stays or transit without visas but are otherwise subject to the same conditions. If they live illegally in another Member State they will be repatriated to their state of lawful residence.

The criteria for inclusion in the **joint list of inadmissible persons**, to be compiled and continually updated by Member States concerning third country nationals seen as a threat to public policy or national security, are:

- having served a custodial sentence of more than a year;
- information that the person has committed a serious crime;
- serious grounds for believing that the person plans to commit a serious crime or represents a threat to public policy or national security;
- having committed serious offences against immigration laws.

No Member State is to admit a person on the list without first consulting the State which entered the name. If there is agreement to admit and grant a residence permit, the name is removed from the list. The draft Convention provides for **computerised information exchange.**

There are provisions for **expulsion from the territory** for people there illegally, including rejected asylum-seekers, and on grounds of public policy or national security.

Member States must inform others when they are negotiating on border controls with third countries, and must not enter agreements with third countries without the agreement of the other Member States. This provision does not affect Common Travel Areas such the UK's with Ireland and the Channel Islands, and the Common Nordic Labour Market.

The original draft provided for an executive committee to oversee the application and interpretation of the Convention.

The draft Convention has never been signed because of problems between the UK and Spain over Gibraltar. To try to break the deadlock, the European Commission introduced a new draft text with its proposal for a decision under K.3 TEU in December 1993.

The Commission's draft introduces two main changes: the executive committee is replaced by the European Court of Justice (ECJ) as the body charged with the application, interpretation and resolution of disputes arising out of the Convention. This was proposed in view of the incorporation of visa policy into EU competence and the possibility of the other 'matters of common interest' being so incorporated after 1996 under the TEU. Secondly, the Convention is made subject to the Geneva Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The Commission's draft annexes a list of 129 countries whose nationals are to be subjected to a visa requirement.

It gave a deadline of 31 December 1994 for acceptance of the proposal by the Member States; however the replacement of the executive committee with the ECJ has led to further disagreement among Member States and rendered approval on the Convention even more remote than it was previously.

3. European Information System (EIS)

The draft Convention on the European Information System deals with computerised information exchange across the Member States. Its provisions follow closely those of the Schengen Supplementary Accord of 1990 which set up the Schengen Information System (SIS).

The joint information system will consist of a national section in each Member State and a technical support function, and will enable the authorities of each Member State to have access to reports on persons and objects, through automated search procedures, for border checks and controls, and other police and customs checks within the country, and for the purpose of issuing visas, residence permits and the administrations of aliens. Its purpose is defined as the maintenance of public order and security, including State security, and to apply the provisions of other EU conventions, notably external borders, relating to the movement of persons. The draft Convention defines the sort of information to be included, the criteria for inclusion (eg, being a subject of a deportation, expulsion or removal measure which has not been rescinded, or illegal residence in a Member State); who has access to the data; for how long it is kept; and data protection and security measures.

As with the External Borders Convention, there is a bitter and long-running dispute about giving the ECJ jurisdiction. Belgium, Germany, Greece, Ireland, Luxembourg and the Netherlands want the court to have full powers of interpretation in any dispute arising from application of the Convention. The UK is implacably opposed to the court having any competence. In addition, the UK refuses to give the European Parliament a consultative role, wanting merely to keep it informed; other member states are pressing for consultation of the EP.

CHAPTER IV
GENERAL ADMISSION POLICIES

1. Admission for employment

In line with its work programme of 1991, the Ad Hoc Group put a draft resolution on admission for the purpose of employment to the immigration ministers' meeting in November/December 1992, but it took until June 1994 for an amended version to be approved. The resolution sets out principles for the harmonisation of national policies on admission for employment; the resolution is not legally binding on Member States.

The governing principle is exclusion of third country nationals from employment in Europe. This is apparent from the full title: **Resolution on limitations on admission of third-country nationals to the Member States for employment**. The preamble acknowledges the contribution of migrant workers to the economic development of their respective host countries, but goes on to almost close the door completely on all but the 'very narrow exception' of admission for temporary employment on non-EC and non-EFTA nationals. It does not deal with the issue of third-country nationals who are permanent residents of a Member State. Family reunion for workers admitted to a Member State is not a right, but a discretion reserved to host states.

Member States are enjoined to refuse entry to third country nationals for employment. They may consider such requests only where vacancies cannot be filled by national or EC manpower or non-EC manpower lawfully residing permanently in a member state and already forming part of that state's regular labour market.

Third country nationals may be admitted temporarily for a specific duration for employment demanding specialist qualifications or skills (named workers only); in situations of temporary manpower shortage in a particular sector (named workers only); inter-corporate transfers of key personnel (named workers only); and for seasonal workers (who may stay no more than six months in any one year), trainees (for a year at a time) and frontier workers. All must have prior authorisation to enter. Visitors and students may not remain for employment.

Member States 'may not relax' these principles in their national legislation, which should be brought into line by 1 January 1996. The resolution is not, however, legally binding, and creates no rights for individuals.

2. Admission for self-employment

In December 1994, the Justice and Home Affairs Council (JHA) agreed a **Resolution relating to the limitations on the admission of third-country nationals to the territory of the Member States for the purpose of pursuing activities as self-employed persons**. The preamble once more emphasises the restrictive approach, whose criterion for admission of self-employed people is added value (investment, innovation, transfer of technology, job creation) to the economy of the host country. Self-employed people once admitted will not be allowed to take a job on the labour market. The resolution suggests various kinds of evidence which Member States might require, including 'proof such as police documentation or similar documents, showing the integrity of the person concerned', and checks would be carried out before renewal of permission to ensure that the person 'offers guarantees for the continued orderly pursuit of his occupation'.

A new category of 'service provider' would be admitted for a specific task for a specific period, and would not as a general rule be allowed to stay to establish themselves in self-employment. The same restrictions apply to trainees, seasonal and contract workers, as well as students.

The spouse and unmarried children under a maximum age (16 or 18, depending on the Member State concerned) will in principle be admitted to join the self-employed person.

Member States reserve the right to admit third-country nationals 'who make very substantial investments in the commerce and industry of that Member State where there are strong economic reasons justifying exemption from the principles' in the resolution. This reservation indicates that enough money overrides any other consideration, including, presumably, integrity.

In something of a self-contradiction, the self-employment resolution declares that Member States may not relax the principles set out in it, although it declares that these are not legally binding. Member States should translate them into national legislation by 1 January 1996.

The resolution only concerns individuals and does not affect the setting up of firms.

3. Admission for study

The same JHA Council of December 1994 approved a **Resolution on the admission of third-country nationals to the territory of the Member States of the European Union for study purposes**. The preamble acknowledges the desirability of international exchange of students, but the emphasis is on the prevention of 'switching' by students: ie, their attempts to remain as workers, and, more surprisingly, the prevention of would-be workers switching to study. Criteria for admission as a student include a firm offer of admission to a recognised higher education institution; proof of continuity between previous and intended studies; adequate means to avoid recourse to social assistance; and proof that the student intends to return to his or her own country on completion of studies. There is provision for the admission of would-be students. Switching courses 'argues against a fresh authorisation or extension of the existing one ... ', and extension is contingent on passing exams. Interruption of studies would in principle result in the student having to leave the country. In principle students should not work, although Member States may allow part-time or holiday jobs so long as the income earned is not 'vital for the subsistence of the student'. Member States may admit family members of students, whose stay will be coterminous with that of the student.

4. Family formation and reunion

At their meeting of 1 June 1993 in Copenhagen, immigration ministers adopted a Resolution on **Harmonisation of national policies on family reunification**. As with the employment resolutions, the principles are not legally binding on Member States and afford no ground of action by individuals. The principles set out in the resolution do not apply to family members of their own nationals or of EU nationals, or of refugees or of people staying temporarily in the host state. They apply to family reunification of those who are 'lawfully resident within the territory of a Member State on a basis which affords them an expectation of permanent or long-term settlement'.

According to the principles, Member States would normally grant admission to the spouse and single, dependent children below sixteen or eighteen (at the option of the member state) of such persons. The resolution

gives Member States the right to impose waiting conditions before allowing family reunion, the right to impose a primary purpose test to the admission of spouses, the right to refuse the wife and children of polygamous marriages, a discretion as to the admission of step-children and adopted children and the right to impose a primary purpose test on the admission of adopted children. It gives them a discretion as to the admission of other family members for 'compelling' reasons. States must impose a visa requirement, and have the right to impose maintenance, accommodation and sickness insurance conditions on the admission of all dependants.

5. Resident third-country nationals

Observers estimate that the number of so-called 'third-country nationals' long settled in the host countries of the European Union is 10 million or so people. This population, for the most part from Europe's former colonies and its eastern and southern peripheries, has by and large been ignored in the preparations for the single European space. It has always been taken for granted by those framing the Union (although not by the Commission) that they were to be excluded from the full free movement provisions granted to citizens. The only concession the draft External Borders Convention makes to them is three months visa-free travel in the Union. This is not in force, and the reality for third-country nationals living in Europe has been an intensification of controls at internal frontiers - which has, in some member States, led to litigation about the effect of the legal obligation to remove such controls.

The Commission has, to its credit, called since 1991 for enlarged rights for long-resident third-country nationals. In 1995 it intends to put forward to the Council a proposal granting limited rights to work in other Member States to third-country nationals legally resident in one Member State. It has indicated that the most likely way of doing this would be to give third-country residents of the EU priority over third-country intending immigrants for jobs - although, given the highly restrictive policies adopted on employment, such opportunities are likely to be few and far between.

At the European Council meeting of 30 November 1994, a start towards free movement for resident third-country nationals (albeit a very small start) with the introduction of a **Council Decision on a joint**

action adopted by the Council on the basis of Article K.3(2)(b) of the Treaty on European Union concerning travel facilities for school pupils from third countries resident in a Member State. In future, schoolchildren on school excursions will not need visas for a short stay in other Member States so long as their teacher can present a list of the pupils and 'documenting the purpose and circumstances of the intended stay or transit', and the school pupil presents a valid travel document. An authenticated list of the schoolchildren confirming their residence status and including photographs can be used instead of a travel document.

CHAPTER V
POLICIES TO COMBAT ILLEGAL IMMIGRATION

The combating of illegal immigration has been a priority for Member States which long ago achieved the status of an obsession. In policy documents from the mid- to late 1980s onwards, illegal immigrants have been equated with terrorists, drug smugglers and other serious criminals both in their degree of undesirability and in the opportunities they present for co-ordinated action against them at all levels.

Most measures in the field, however, are operational, involving cooperation on the ground between police and immigration officials but requiring no legislation.

1. Checks on illegal workers and residents and expulsion

In May 1993 the Ad Hoc Group Immigration presented a **Draft Recommendation concerning checks on and expulsion of third-country nationals residing or working without authorisation** for agreement by the immigration ministers in their June Copenhagen meeting. The measure stresses the priority of combating 'illegal immigration' and of combating the employment 'of those known to have entered or remained illegally or whose immigration status does not allow them to work'. The general rule set out in the recommendation is that people who are found to have entered or remained unlawfully, to be liable to expulsion on public policy or national security grounds, or to have failed definitively in an asylum application, should be expelled, unless there are compelling reasons for allowing them to remain. In addition, people who have worked in breach of their conditions and those who have facilitated the entry of others may be expelled. Checks should be carried out on those known or suspected of illegal working or overstaying, and particularly on failed asylum-seekers, and to ensure that people allowed to stay but not to work are observing their conditions. CIREFI is the forum for information exchange on types of checks and control procedures and related legislation.

2. Transit for expulsion

The AHI prepared a draft **Recommendation on transit for the purpose of expulsion** for presentation at the immigration ministers' meeting

of November 1992 in London, but it did not feature in the press release of that, or any subsequent meeting. The draft proposed that the Member State taking the decision to expel a third-country national should be responsible for ensuring that the deportee did not have to pass through another Member State, and laid down provisions for transit agreements if cost, speed or efficacy demanded that the route of expulsion impinged on another Member State.

3. Documents for expulsion

The JHA Council meeting of 30 November/1 December 1994 agreed a **Recommendation concerning a standard travel document for expulsion of third-country nationals not in possession of travel documents**, to be implemented by member States on 1 January 1995. The text of this recommendation is not available.

4. Readmission agreements

The same meeting also adopted a **Recommendation concerning a specimen bilateral readmission agreement between a Member State of the European Union and a third country**, also for implementation from 1 January 1995. The specimen stipulates that each party shall readmit without formality:

a. its own nationals who do not, or no longer, fulfil the conditions in force for entry or residence on the territory of the other, and for that purpose shall issue the necessary travel documents. This applies to people who 'may be validly assumed' to possess the stipulated nationality;
b. third-country nationals who have entered an EU member state via its external frontier (without a valid EU visa);
c. third-country nationals in an EU member State, with a visa or residence permit for the requested state.

The draft has time limits for readmission requests and responses, and transit and data protection provisions. A Committee of Experts is to monitor the application of the agreement and propose amendments as well as appropriate measures for combating illegal immigration.

The purpose of the specimen is to ensure identity of obligation among the periphery states forming a buffer zone around the European Union. By early 1994 bilateral agreements were already in force as follows:

- Austria with Hungary, Poland, Romania, Slovenia and the Czech Republic;
- Belgium and France with Poland, Romania and Slovenia; Denmark with Latvia and Lithuania;
- Germany with Romania;
- Italy with Poland and negotiating with Slovenia;
- Netherlands and Luxembourg negotiating with Poland and Slovenia;
- Norway with Lithuania;
- Spain with Poland;
- Sweden with Poland and Romania, and informal cooperation with the Baltic States.

There are regular meetings between ministers of Justice and Home Affairs of the EU states, on the one hand, and ministers of Bulgaria, Poland, Romania, the Czech republic, Slovakia and Hungary on the other, to coordinate policy against 'disorderly movements' of immigrants and asylum-seekers[6].

5. CIREFI

The Centre for Information, Discussion and Exchange on the Crossing of Borders and Immigration (CIREFI) was set up by the Ad Hoc Group after the ministerial meeting in Edinburgh in November 1992. At its December 1994 meeting, the Council underlined the 'urgent problems posed by illegal immigration' and the need to 'fight against the criminal activities of illegal immigration networks', and, without prejudice to the work programme for CIREFI set out in November 1992, of collation of information on states' practices on carrier sanctions, visa criteria and conditions of entry and residence, defined specific priorities as:

- Collecting information on: legal immigration; illegal immigration and irregular residence; entry of foreigners through networks of clan destine immigration; false or forged documents; counter-measures taken by competent authorities in statistical form, using standardised formulas so as to make for comparability of information, including trends and changes;
- Analysing the information, drawing conclusions and formulating proposals;
- Encouraging the exchange of information on deportation, and particularly on destination countries, airports, transport companies, itineraries,

tariffs, possibilities of booking, conditions, escorts necessary, possibilities of chartering planes, problems relating to obtaining travel documents on which to return deportees.

There has been information exchange on traffickers (ie, couriers or smugglers), on travel routes used for irregular migration, on forged and false documents and indeed on most other matters on an informal level for many years, but CIREFI did not start to work formally on these tasks until 1 January 1995, in the form of a permanent conference meeting, as a rule once a month, preferably with an agenda highlighting one particular theme on each occasion. The Council Secretariat provides administrative and organisational back-up.

CHAPTER VI
POLICIES IN THE FIELD OF ASYLUM

It is in the field of asylum policy that the most measures have been produced, and where harmonisation has gone furthest and cut deepest, pushing all Member States into more and more restrictive national policies and moving further and further away from the principles informing international conventions.

1. Dublin Convention

The first measure in the field of asylum was the **Dublin Convention or the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities**, signed in June 1990. The text of the Dublin Convention was taken by the AHI from the asylum provisions of the Schengen Supplementary Accord signed at the same time.

The principle behind the Convention was that only one EU state should be responsible for determining an asylum claim, no matter where it was lodged. The responsible state was defined as the one which first allowed the asylum-seeker in to the territory, whether by granting a residence permit, a visa or by allowing the opportunity for illegal entry. The only exception to this principle may be applied in the case of the presence in another EU state of the asylum-seeker's spouse or dependent child or (if the asylum-seeker was a child) parent, already recognised as a refugee.

The second part of the Convention is devoted to information exchange, both on migration flows, asylum laws and practices of the Member States, and on individual asylum-seekers, their identity, itinerary and other personal information required to ascertain which country is responsible for determining the asylum request.

As of January 1995 the Convention had still not been ratified by Ireland, Italy or the Netherlands (or by the three new Member States) and, although not in force, its underlying principles inform domestic asylum law and practice of most Member States, and asylum-seekers are regularly sent back to a country of transit for determination of their claim, without regard to their wishes, or to language, culture or other considerations determining their destination.

2. Manifestly unfounded applications and host third countries

The European Commission's Communication on the right of asylum of October 1991 gave pride of place to the need to combat 'abuses' of the right of asylum, and recommended:

- early ratification of the Dublin Convention,
- its extension to other countries,
- accelerated procedures generally and, in particular, a 'fast track' for 'manifestly unfounded' applications;
- exchange of information on asylum policies and procedures in the EU and on asylum-seekers' countries of origin;
- harmonisation of procedures and of reception conditions for asylum-seekers so as to deter them from entering 'generous' countries.

These recommendations were largely repeated in the December 1991 work programme of the AHI (see Chapter II), who also proposed common interpretation of the Geneva Convention concepts (eg, 'persecution', 'Convention reason' and the exclusion clauses), common criteria for manifestly unfounded applications and a common first host country principle.

The AHI produced two **Resolutions** and a set of **Conclusions** which were approved at the immigration ministers' meeting of 30 November 1992, embodying its proposals and going some way along the road of abolishing asylum for claimants originating outside Europe. The **Resolution on manifestly unfounded applications for asylum** declares in its preamble that 'a rising number of applicants for asylum in the Member States are not in genuine need of protection' and 'jeopardize the integrity of the institution of asylum'. It defines a manifestly unfounded application as one in which 'there is clearly no substance' or based on 'deliberate deception or .. an abuse of asylum procedures', and allows these, and those within the principle of 'third host country' to be dealt with by very fast admissibility procedures.

An application which reveals no substance is further defined as one in which the grounds of the application are outside the scope of the Geneva convention, eg, where reasons for flight are given as the search for a job or better living conditions; or 'the application is totally lacking in substance', with, eg, no circumstantial details, or 'is manifestly lacking in any credibility' because it is 'inconsistent, contradictory or fundamentally improbable'. Claimed persecution which is 'clearly limited to a specific geographical area' can be manifestly unfounded if 'effective protection is readily available

for the individual in another part of his own country to which it would be reasonable to expect him to go'. Member States can also treat as manifestly unfounded claims from countries in which 'there is in general terms no serious risk of persecution'.

Examples of deception or abuse include the maintenance of false identity or presentation of false documents, false representations after an asylum claim is made, the destruction in bad faith of identity documents, failure to reveal previous applications for asylum, late submission of an application, a 'flagrant' failure to comply with substantive obligations (eg, submission of fingerprints), and rejection of a previous application for asylum in a Member State.

The Resolution also allows for abridged procedures in other 'urgent' cases involving considerations of public security. The sister **Resolution on a harmonized approach to questions concerning host third countries** expresses concern in its preamble of the problem of refugees and asylum-seekers 'unlawfully leaving countries where they have already been granted protection or have had a genuine opportunity to seek such protection'. The principle of the Resolution is that anyone who came through a 'host third country' can be removed there without substantive consideration of the asylum request. The 'host third country' is defined as a country in which the applicant had an opportunity to claim asylum, in which life or freedom is not threatened and which will afford effective protection against refoulement.

The third document in the package, the **Conclusions on countries in which there is generally no serious risk of persecution**, amplifies this concept as a country which can be clearly shown, in an objective and verifiable way, normally not to generate refugees or that circumstances which might in the past have justified recourse to the 1951 Geneva Convention have ceased to exist. The purpose of developing the concept is to 'reduce pressure on asylum determination systems .. at present excessively burdened with ... clearly unfounded applications'. Member States will exchange information on national decisions on 'safe' countries and will use the criteria for assessment:

- previous numbers of refugees and recognition rates;
- observance of human rights (obligations undertaken and the practice of meeting them);
- the existence of democratic institutions, and the availability and effectiveness of legal avenues of protection;

- the stability of the system.

Applications from countries defined as 'safe' by these criteria can be dealt with under the accelerated procedures as manifestly unfounded.

At the November 1992 meeting, immigration ministers also considered a **Draft Convention parallel to the Dublin Convention**, for signature by EFTA and other interested states including some states of Central and Eastern Europe. It also welcomed the setting up of **CIREA**, the Centre for Information, Discussion and Exchange on Asylum, which had its first meeting, and approved the AHI proposal for a Manual of European asylum practice.

3. CIREA

Like its sister CIREFI, CIREA is a clearing house for exchange and, possibly, evaluation of information on countries of origin and transit, and on the policies, laws and practices of Member States. Neither its databases nor its reports, briefings or conclusions are accessible to NGOs or members of the public and it is not known, therefore, what information from what sources it takes into account or how comprehensive it is. All that the Conclusions require is that Member States collecting information are obliged to take into account information available from UNHCR and the known practices of third countries.

The opacity of CIREA is not only unnecessary but also positively dangerous for asylum-seekers in Europe. States appear to take more notice of reports from eg, diplomatic posts or the US State Department, which are more likely to play down human rights abuses in the interests of trade or diplomatic considerations, than they do of reports from genuinely independent NGOs, which are often stigmatised as anti-government. It is vital for asylum-seekers to know what information and from what sources the assessment of countries as 'safe' is based on.

4. Fingerprinting

In June 1993, the ministers approved a pilot study for an automated fingerprint matching system, to prevent multiple asylum claims. The project, **EURODAC**, presupposed national provisions for the universal fingerprinting of asylum-seekers, which most EU Member States had in place or are putting in place.

5. Temporary protection

In its 1991 Communication the Commission called for harmonisation of rules and practices relating to 'de facto' refugees. In response to this, and to the cries for help from some Member States which were taking large numbers of refugees from the former Yugoslavia, at the November 1992 meeting, immigration ministers agreed to attempt to formulate a common response. There was no agreement on burden-sharing, but the ministers agreed in principle to the temporary admission of persons from the former Yugoslavia, on the basis of proposals from UNHCR and International Committee of the Red Cross and agreed to the formation of a sub-group to consider the situation there. In June 1993 the ministers agreed at their Copenhagen meeting the AHI **Resolution on certain common guidelines as regards the admission of particularly vulnerable persons from the former Yugoslavia.** In the preamble the Resolution emphasised that protection and assistance 'should wherever possible be provided in the region of origin' and that 'displaced persons should be helped to remain in safe areas situated as close as possible to their homes', but reaffirmed their willingness to admit particularly vulnerable persons for temporary protection. These are defined as persons from the former Yugoslavia who:

- have been held in a prisoner-of-war or internment camp and cannot otherwise be saved from a threat to life and limb;
- are injured or seriously ill and for whom medical treatment cannot be obtained locally;
- others under a direct threat to life and limb, whose protection cannot otherwise be secured;
- people subjected to sexual assault with no suitable means of assistance close to home;
- those who have come directly from combat zones within their borders and cannot return because of the conflict and human rights abuses.

Member States will allow temporary stay until conditions are suitable for return, but can remove them on public order or national security grounds. They must provide access to resources enabling the displaced persons to live in decent conditions, but can determine how to do this, whether by access to work or social benefits. They will pay 'special attention to the possibilities for housing the persons admitted' and will 'pay due heed to the possibilities for access to health care'. There are provisions for schooling, contacts with close relatives and encouragement to participate in host countries' cultural and social activities.

6. Harmonisation of criteria and procedures for asylum

At the JHA Council meeting of 30 November 1994, two further proposals on asylum were tabled and debated, though agreement was reached on neither and they were remitted for further work. The **Proposal for guidelines for the harmonised application of the criteria for determining refugee status in Article 1A of the Geneva Convention** is, as its title implies, an attempt to have a common approach to the definition of a refugee. The Geneva Convention definition is someone with a 'well-founded fear of persecution on grounds of race, religion, nationality, membership of a particular social group or political opinion'. The guidelines attempt to codify a narrow and restrictive approach to the definition. All caught up in civil wars are excluded unless they are specifically singled out by the authorities or others and cannot move to safety in their own country. Conscientious objectors and deserters, and others whose activities are deemed criminal by the authorities of the persecuting state, would be excluded from protection unless their activities are 'unavoidable'. People routinely harassed under the guise of a state's anti-terrorist measures, such as Tamils in Sri Lanka and Kurds in Turkey, would be excluded: even those previously subjected to torture are not necessarily protected as previous persecution is no more than a 'serious indication' of the risk of persecution. Restrictions on freedom of religion and conscience will not attract protection unless they are 'so severe as to lead to intolerable personal repression ... thus rendering life in the country of origin objectively unbearable'. Persecution is to be assessed in terms of the ability of the subject to lead a normal life, but normality of life itself 'must be assessed having regard to the prevailing conditions in the country'. Throughout the document, emphasis is laid on the necessity for asylum-seekers to show that they could not reasonably have sought refuge in another part of their country.

The **Draft minimum guarantees for asylum seekers and refugees** purport to lay down minimum procedural safeguards to ensure that genuine refugees are not returned to countries of persecution. These include a guarantee not to expel before a decision is taken (although there is no such universal suspension of removal pending appeal); independent (defined as individual, objective and impartial) decisions taken by a 'competent authority fully qualified in the field of asylum and refugee matters'. The authority has a duty of inquiry and must give the asylum-seeker adequate

opportunity to present and prove the case. The overriding principle is that 'refugee status can be recognised on the basis of adequate presumption, given all the circumstances'. Asylum-seekers have the right to a personal interview, to a publicly funded interpreter, and access to UNHCR, but no right to free legal assistance. Rights of appeal are not universal, and removal need not be suspended pending review or appeal in 'manifestly unfounded' cases and those involving the 'host third country' concept.

There are special provisions for unaccompanied minors, and for women.

Member States are to strive to bring their national legislation in line with these principles by 1 January 1996.

CHAPTER VII
SOME CONCLUDING REMARKS

1. Opacity and unaccountability

Apart from defining visa nationals and introducing a common format for an EU visa, immigration and asylum policy is still intergovernmental, governed by Conventions, Resolutions, Recommendations rather than Regulations or Directives. In fact, there is no Convention in the field of immigration and asylum which has been signed and ratified by all Member States and which is in force. European policy is made by Ministers of Justice and Home Affairs, led by civil servants and police and security officials. It is made without democratic and judicial control by the European Parliament and European Court of Justice, and it is untroubled by exposure to human rights or anti-racist or immigrant and refugee groups. This has led to an emphasis on detecting and combatting abuse. Measures agreed at the European level are then put into practice on the ground, sometimes with no need even for domestic legislation.

For example, the concept of 'safe third country' behind the Dublin Convention was implemented in Britain by ministerial statement, three years before legislation was enacted. In June 1990 the minister told the British parliament that, since refugees are expected to seek refuge in the first safe country they come to, in future asylum-seekers who had travelled through a safe third country on their way to Britain would be returned there. This policy was then immediately acted on, although it was not until 1993 that the principle was enshrined in domestic law.

There is no right of access to the decision-making process or to the documents resulting from that process. There may be many other measures and agreements discussed in ministerial meetings and implemented by police and immigration officials, of which we are unaware. As it is, the measures we know about usually come to our attention when it is too late to change them.

Any country signing up to the EU is signing up to this package, which will almost certainly form the immigration and asylum law of the EU if and when Community competence is extended after 1996.

2. Immigrants and refugees as objects of exclusion and suspicion

The recommendations on employment and self-employment are restrictive, and that on employment appears to herald a return to the discredited guestworker system, which confer no residence rights. That on family reunion is limited in comparison with the rights of EU nationals, who can bring in parents, grandparents, relatives in the descending line who are under 21 or fully dependent, and other de facto dependent relatives.

The restrictive policies on refugees, such as visas and carrier sanctions, effectively prevent many genuine refugees from leaving their countries of persecution and force others to rely on illegal and dangerous forms of travel. Those who are forced to rely on smugglers, or on false documents, are then branded as criminal and bogus. The criminalisation process is, in fact, continued with fingerprinting, detention in waiting zones, subjection to 'fast-track' procedures and to 'bouncing back' (or what is known as the RIO - Refugees in Orbit - phenomenon) under the 'first host country' rule from port to port, within and, increasingly, around the periphery of the EU.

The procedures developed by the ministers have been condemned by Amnesty International and by UNHCR, as well as by immigrant and refugee groups, for their lack of protection against return to the country of persecution. The policies, implemented in national laws and practices with undue haste in the past five years, have resulted in increased brutality towards asylum-seekers by police, immigration and prison officials, and a sharp increase in the numbers of asylum-seekers committing suicide in Europe[7].

Another argument used to justify restrictive policies is that they are needed to 'combat illegal immigration', and 'prevent abuse'. Under the family reunification recommendation, for example, concepts such as 'marriage of convenience' and 'adoption of convenience', which have long disfigured immigration policy in the United Kingdom, emerge at European level. Despite its inclusion on the agenda of every work programme since 1989, there has been no progress on the granting of rights to third-country nationals long resident in Europe - many of whom were born in Europe but who are denied citizenship of a Member State. The failure to protect grant them full citizens rights gives the lie to the often-heard excuse that strict measures on entry are needed for the sake of the black or 'immigrant' communities already settled in Europe. In fact, the systematic

violations of human rights of certain groups[8], their exclusion from rights and remedies (family reunion, freedom of movement, civic rights, employment rights, full and fair legal determination of rights and duties), leads to the creation of a climate in which racial attacks are almost legitimised, and to the erosion of democracy and the rule of law.

Tony Bunyan is a journalist and editor of Statewatch bulletin, which monitors civil liberties in Europe. He is the author of "The Political Police in Britain", 1976 and edited "Statewatching the new Europe: a handbook on the European state", 1993.

Frances Webber is a barrister specialising in immigration and refugee law, and a regular contributor to the IRR European Race Audit, CARF and Statewatch. She is joint author of 'Inside Racist Europe', 1994, and was prosecutor in the Basso Tribunal on the Right to Asylum, Berlin, December 1994.

FOOTNOTES:

1. This development was preceded by the creation of the Trevi Group in 1976 covering terrorism and policing. This too was a UK initiative and was intergovernmental in character (the Commission did not participate). See the following books for background on this Briefing Paper:
   Europe: Variations on a theme of racism, Special issue, Race & Class, Institute of Race Relations, 1991; Statewatching the new Europe, a handbook on the European state, Statewatch, 1993; Inside Racist Europe, Institute of Race Relations, 1994.

2. House of Lords Select Committee on the European Communities, 1992: Border controls of people. HL paper 90, 7 November 1989.

3. One of the first measures to emerge from the Ad Hoc Immigration Group in April 1987 was agreement to penalise airlines bringing in undocumented asylum-seekers.

4. The Dublin Convention, agreed in June 1990, was the first to follow this decision. In the event the argument that the Commission route would take too long was a spurious one, the Convention still has not been ratified by all EU governments.

5. The draft Europol Convention will probably be signed in June. But as it will then have to be ratified by all 15 national parliaments it is not expected to be operational for three to four years.

6. See the chapter on 'Exporting Immigration Control' in Inside Racist Europe, above.

7. See CARF, a bi-monthly magazine on racism and fascism, and in particular its 'Euro-league of death' published every January. Available from BM Box 8784, London WC1N 3XX.

8. See Europe on Trial: An indictment of the violation of the human rights of refugees and asylum-seekers. London, IRR, 1995.

CCME BRIEFING PAPERS

No.3 S. Hune, J. Niessen and P. Taran: *Proclaiming migrants' rights. The new international convention on the protection of the rights of all migrant workers and members of their families.* (March 1991). E/F/G/S

No. 10 E. Guild: *Protecting migrants' rights: application of EC agreements with third countries.* (November 1992). E

No. 11 U. Gibson and J. Niessen: *The CSCE and the protection of the rights of migrants, refugees and minorities.* (March 1993). E*/F/G

No. 12 A. Cruz: *Schengen, ad hoc Immigration Group, and other European intergovernmental bodies.* (June 1993). E/F/G

No. 13 J. Murray and J. Niessen: *The Council of Europe and the protection of the rights of migrants, refugees and minorities.* (September 1993). E*/F

No. 14 A. Dummett and J. Niessen: *Immigration and Citizenship in the European Union.* (November 1993). E*/F

No. 15 J. Niessen: *The making of European immigration policies.* (February 1994) E*/F/NL/G

No. 16 B. Scott (ed): *Combatting racism in Europe.* (April 1994). E/F/G

No. 17 A. Cruz: *Carriers liability in the Member States of the European Union.* (September 1994) E/F

No. 18 J Niessen and R. Zegers de Beijl: *International migration, economic development and human rights.* (December 1994) E/F

No. 19 T. Bunyan and F. Webber: *Intergovernmental co-operation on immigration and asylum.* (April 1995) E

*out of stock

CCME Briefing Papers are addressed to those active in the field of migration and racial justice to provide them with updated information on specific aspects of current events.

The CCME Briefing Papers are published by:
Churches Commission for Migrants in Europe
174 rue Joseph II, B-1040 Brussels. Tel: 32 (2) 230 20 11. Fax 32 (2) 231 14 13

price: 6 ECU