

ILPA Response to the Hague Programme: EU Immigration and Asylum Law and Policy

1) Introduction

The establishment of a truly European system of immigration and asylum law and policy which fulfils the EU's obligations regarding human rights must not only set out a fair and equitable system but also ensure justice for the individual. For the individual there is no justice, no matter how good the legal texts, if there is no access to justice in the form of a right of appeal under fair circumstances and time limits. Where the life or liberty of the individual is at risk, a right of appeal must carry suspensive effect. This most important feature of any system of justice is insufficiently safeguarded in the current and proposed EU immigration and asylum system. A declaration to be attached to the Hague Programme stating in clear and unambiguous terms the commitment of the EU and its Member States to full and suspensive appeal rights in this field is urgently required.

At the outset, it is important to point out that two fundamental issues have been left out of the Hague Programme altogether. First, there is no reference to the importance of legal aid to ensure effective access to administrative and court proceedings for immigration and asylum cases, including relevant data protection disputes, or to sufficient funding for data protection authorities. Secondly, extensive harmonisation of national law and the creation of multiple interoperable data systems at EU level must be accompanied by an EU budget contribution towards legal aid in the Member States and further support for data protection authorities, in order to ensure that individual rights are protected effectively against disproportionate measures concerned with security and control.

2) A Common European Asylum System

a) Adoption of Asylum Procedures Directive

Notwithstanding concerns raised during the process of negotiation of the directive, and warnings from UNHCR and NGOs concerned in this field (even calling at one stage for the withdrawal of the Directive entirely), the call in the Hague Programme for adoption of this instrument has been promptly followed up at the Justice and Home Affairs meeting on 19 November 2004. No heed has been paid to UNCHR's concerns, reiterated in their comments on the new multi-annual programme, that there is a genuine risk that the Directive, in practice, may lead to breaches of international law.^[1] It is also ILPA's view, as set out in our legal analysis of the Directive, that many of the Directive's provisions will lead to fundamental rights violations in their implementation. The volume of litigation this will bring forth can only be avoided by the annulment of the Directive in its entirety and there is every likelihood, given the precedent of legal action brought in respect of the Family Reunification Directive, that the European Parliament will think it right to bring a challenge before the Court of Justice in respect of this instrument too.

ILPA was further concerned to learn that the directive has been adopted without the list of so-called 'safe countries of origin' in its annex. We understand that this was due to lack of unanimous agreement on the supposed 'safety' of the ten countries listed (Benin, Botswana, Cap Verde, Ghana, Senegal, Mali, Mauritius, Costa Rica, Chile and Uruguay) and that a vote on it is due to take place at a later stage by qualified majority. Given that EU member states were divided on the proposed list on account of serious human rights concerns in the relevant countries, it is highly questionable that this list should be adopted at all, let alone pushed through by QMV to overcome a lack of agreement on issues of such a fundamental nature.

Aside from the clear human rights concerns and the issue of procedural propriety in agreeing the common list by QMV, ILPA has serious reservations about the legality of a common EU list of safe countries of origin. As highlighted in our legal analysis of the directive, some Member States do not currently operate safe country of origin systems. Accordingly, this is the first time that EU Member States will be required to dilute their standards of protection by a measure of Community law. This raises serious competence concerns, as the EU is only entitled to establish 'minimum standards' in this area. We believe that there is no power to adopt the common list under Title IV of the EC Treaty and any further efforts to do so should be abandoned.

b) Implementation of first-phase instruments

ILPA welcomes the Programme's call to the Commission to conclude the evaluation of the first-phase instruments in 2007. An extensive assessment of the Community legislation adopted to date is necessary to determine where legal and practical gaps exist and may require further legislation or amendment. The European Commission has also a legal responsibility to monitor transposition and implementation of the directives into national law. Given the low standard of the safeguards contained in some of the instruments adopted in the first phase, strong monitoring of transposition of Community instruments into national law, taking into account the obligation to apply this legislation in accordance with the Geneva Convention and human rights principles and treaties, will be crucial in ensuring that member states maintain or adopt legislation and policies that are in line with international law.

c) New instruments

Subject to evaluation of first-phase instruments and to making the required amendments in those areas that fall short of international standards, ILPA supports Member States' objective of supplementing and developing further the legal instruments in the common European asylum system, in accordance with the 1951 Refugee Convention and other relevant international law, provided that the EU's objective is to establish common high standards, rather than common low standards.[\[2\]](#)

A fully harmonised system will also need to address the position of individuals receiving subsidiary protection status in Member States, a status that remains largely unregulated under Community law. Particularly, we would welcome the adoption of a directive on a harmonised family policy which would grant immediate family reunion rights for those with subsidiary status, as well as the extension of EC "long-term resident" status for refugees and persons with subsidiary protection.

d) Studies on joint processing of asylum applications

The idea of joint processing within and outside EU territory is highly ambiguous and is not further elaborated upon in the document. ILPA has particular concerns with the issue

of joint processing of asylum applications outside EU territory. Is this the revamped concept of off-shore processing, i.e. camps outside EU borders? The idea of joint processing outside the EU has been around for some time now – it is a highly objectionable objective to pursue and there have been a plethora of studies and analysis, including by the Commission, which question its feasibility, practicality and legality. We don't see the need for pursuing this idea further, and indeed no justification for it is being provided. The European Parliament has also made it clear that any approach implying the establishment of holding camps for the assessment of either protection or immigration status would amount to 'off-shore' the EU's own responsibilities for those seeking sanctuary and could not be accepted.

e) The European Asylum Office

ILPA welcomes coordination between Member States' asylum authorities provided that the objective is to ensure effective application of EC legislation in conformity with international law, human rights obligations and high standards of protection. This cooperation provides an opportunity to establish a system of audit and evaluation (carried out *not* by national authorities' peers in other national authorities, but by independent observers), which *inter alia* can examine asylum policies which have failed in some Member States (such as vouchers, dispersal and cut-off of benefits for 'late' applications) as an example of 'bad practice' to be avoided by others.

There could be a connection between effective implementation of EC law and funding from the European Refugee Fund, and the Commission needs to devote sufficient energy and resources into ensuring effective implementation by Member States.

Current and future coordination measures (including the Commission's Committee on immigration and asylum and Eurasil committee) should be fully transparent, providing full information on their activities to the public, civil society and national parliaments, and engaging in open dialogue with and ensuring effective participation by NGOs and the UNHCR.

3) The External Dimension of Asylum

Calling upon non-EU states to ratify and adhere to the Geneva Convention is certainly not enough to strengthen national protection capacities in third countries and should not become a justification for making expulsions of asylum seekers to the states concerned easier.

The external dimension of asylum opens up a highly complex area in which it will be extremely important

- to ensure strict adherence to standards of international human rights and refugee law in particular to the principle of non-refoulement
- to safeguard the possibility for those in need of protection to access safety and have their claims properly processed.
- to prevent solutions in the sphere of reception in regions of origin and more generally migration management which prejudice the right to seek asylum spontaneously and have the effect of undermining the international protection system.

ILPA welcomes in principle the recent emphasis on strengthening protection in the region and finding durable solutions. However, the EU's input to help resolve

international protection challenges beyond EU borders would be better spent in addressing the causes and consequences of flight, such as poverty, conflict resolution, good governance and human rights. We note in this respect that there has been no effective follow up to the 2002 Commission Communication on the question of root causes.

ILPA believes that the EU's recent focus on protection and solutions in regions of origin is unduly influenced by self-interest, i.e. the desire to ensure that refugees and asylum seekers are prevented or deterred from making their way to the territory of EU Member States. It constitutes a form of burden-shifting. The UK experience of 'migration partnership' so far has shown that engagement with third countries is more a means to enhance their border controls with the intent of preventing people moving on. This is equivalent to abdicating protection responsibilities.

EC legislation should more clearly prohibit *refoulement* at the border (whether at a maritime or other border) or *refoulement* by means of interception on the high seas. Under no circumstances should EC law or policy encourage interception on the high seas with a view to *refoulement*, rather than ensuring the safety of the persons concerned.

4) Irregular Migration

a) Terminology

The European Council persists in using the term 'illegal immigration', in accordance with the developing EU law and policy in the field of irregular migration and the measures adopted to date, in contrast to the more neutral terminology now used by the other major actors working on migration questions, such as the ILO, the IOM and the Council of Europe. The use of the term 'irregular migration' avoids the negative connotations implicitly associated with the terms 'illegal immigration' and 'illegal migrant', which render such migrants as effectively without rights and closely related to criminal elements. In a similar vein, the European Council continues to use military language referring on a number of occasions in its Conclusions to the 'fight against illegal immigration'.

b) The 'fight against illegal immigration' and Fundamental Rights

The 'fight against illegal immigration' is referred to in two important contexts in the Hague Programme. Firstly, under the heading 'legal migration and the fight against illegal employment', the Programme notes that 'the informal economy and illegal employment can act as a pull factor for illegal immigration and can lead to exploitation', and urges Member States to meet the targets for reducing the informal economy in line with the European employment strategy. While the recognition of this connection between exploitation in the informal economy and irregular migration is welcome, it is unfortunate that there is no explicit recognition in the Programme that one of the ways of reducing the informal economy is to devote more efforts to protect the employment rights of all those persons engaged in it, including both national and irregular migrant workers, and to increase resources to conduct labour inspections in those sectors where exploitation is prevalent. The Hague Programme refers in several places to the protection of fundamental rights as an important objective and also underlines in the section on 'General orientations' the need 'to ensure that in all... areas of [EU] activity, fundamental rights are not only respected but also promoted'. These are welcome exhortations, but it must be remembered that fundamental rights are not the exclusive entitlement of EU citizens and such principles must apply to all persons within EU

territory, including those deemed by national authorities to be in an irregular situation. Similarly, the Programme's declared commitment to oppose racism, anti-Semitism and xenophobia cannot possibly be implemented effectively if a large section of the population of irregular migrants, a significant proportion of which is also of a different racial or ethnic origin, remains marginalised and stigmatised in host societies.

c) Legal Labour Migration and the Link to Irregular Migration

Moreover, the continuing scepticism about Member States' ability to develop a coherent and positive strategy for increasing legal labour migration routes into the EU is hardly conducive to achieving successfully an overall reduction in irregular migration. The draft Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities^[3] has been abandoned and the European Council, referring to the forthcoming Commission Green Paper on labour migration and best practices in Member States, merely invites the Commission 'to present a policy plan on legal migration including admission procedures capable of responding to fluctuating demands for migrant labour in the labour market before the end of 2005' (see further the 'legal migration' section below). It would seem therefore that there is little political will among Member States to tackle the question of admission of third-country nationals to their labour market in any binding legal instrument, a position supported by the reiteration of the reference in the Constitutional Treaty that the determination of volumes of admission of third-country nationals coming from outside the EU for the purpose of seeking employment or self-employment is a competence of the Member States^[4] and by the fact that the Hague Programme's call to the Council to apply qualified majority voting to asylum and immigration measures does not encompass legal migration. Consequently, 'the fight against illegal immigration' is once more to be conducted without any concerted EU efforts to address the lawful admission of third country nationals for employment. Indeed, the only positive suggestion on legal migration in the Hague Programme is the reference to the use of Community funds to assist third countries to inform on legal channels of migration.

d) Return and Readmission

The Hague Programme reflects the current lack of a balanced approach in the current EU law and policy on irregular migration by its overemphasis on return measures. While the reference to the establishment of an effective removal and repatriation policy based on 'full respect for [migrants'] human rights and dignity' is welcome, the adoption of minimum standards in this important area (where a proposal for a Directive is planned by the Commission) is insufficient. The need to agree principles which meet the highest standards of human rights protection is particularly pressing given that the measures adopted to date have all focused on enhancing cooperation between Member States' officials in the return process and are based on the assumption that human rights are already respected in this area, which is clearly not the case as seen in European Court of Human Rights judgments against certain Member States.^[5]

Any emphasis on encouraging voluntary return appears to have now been abandoned in favour of forced or compulsory return. In this respect the reference that migrants who do not or no longer have a right to stay legally in the EU 'must return on a voluntary basis' is somewhat of a misnomer. Moreover, the position of such migrants cannot in practice be viewed as a *fait accompli* given that many such persons are indeed permitted to stay and work in a number of Member States on the basis of regularisation programmes. The failure in the Hague Programme to give any recognition to this common 'response' to irregular migration practiced in Member States reflects a disturbing blissful ignorance of

at least some Member States to this valid approach.

The idea of a 'Special Representative' for readmission policy shows a shallow and negative attitude to this issue. Why not appoint a Special Representative for ensuring the protection of asylum-seekers?

5) Borders and Visas

a) Borders

ILPA welcomes the call in the Hague Programme for a swift abolition of internal border controls. We note that this has been a legal requirement of the Member States since 31 December 1992, the end of the transitional period under the Single European Act. We would suggest that securing the abolition of intra-Member State border controls also requires a modification of article 2(2) Schengen Implementing Agreement which was incorporated into the EC Treaty by the Amsterdam Treaty. We would also remind the Council that the abolition of internal border controls, as initially described in 1987, is not essentially connected to 'the integrated management system for external borders and the strengthening of controls at and surveillance of the external borders of the Union.' The insertion of the Schengen Implementing Agreement into EU law by way of a protocol does not change the fundamental obligation of the Member States contained in Article 14 EC to abolish intra-Member State controls on the movement of persons.^[6] It is quite an inversion of the hierarchy of law in the EU to make such an implicit suggestion.

The linking of freedom of movement within the Union with repressive border measures at the external frontier is not a necessary or natural correlation. The Member States' external border law and practice is the result of more than a century of national law. Why should this be considered inadequate simply because internal border controls are removed? Further, the EU's Neighbourhood policy^[7] is based on the sound principle that the security of the European Union depends on its neighbours enjoying stability, the rule of law and respect for human rights. The EU's security requires that its neighbours are also secure. Part of this normalcy is that practices at the border recognise that the movement of goods, persons, services and capital across borders is a way of assuring stability and economic development. The objective of the neighbourhood policy is the gradual relaxation of restrictions on border controls with the EU's neighbouring states with a view to an extension of the whole of the internal market, including free movement of persons to them. This has already been done in respect of Norway, Iceland and Switzerland with positive consequences for the EU's security. The strengthening of controls at the external frontier runs directly counter to this policy and in ILPA's view is counterproductive as regards securing both the short and long term security and stability of the Union for the reasons which the Commission itself has most cogently expressed. For example, there is a contradiction between supporting democracy in Ukraine as an essential part of the Neighbourhood Policy, and visa and border control rules that severely disrupt the personal and economic contacts between Ukrainians and EU citizens in neighbouring EU Member States.

The establishment of a European Agency for the Management of Operational Cooperation at the External Borders is an ambitious task. We understand the Council's wish to highlight the need and added value of such an agency in respect of which substantial time and money has already been expended. However, we would stress here that the Agency's orientation must be to carry out the policy of the European Union not only as understood within the framework of security but also as part of the internal market and external relations, and in accordance with the *non-refoulement* principle. The

external border of the EU should not be approached as if it were the site of invasion, crime or cultural warfare. It must be understood both in law and practice as that which it is: the marker of normal economic, social and cultural relations between neighbouring states. Movement of persons across borders must not be presented as something to be feared as a danger and a threat but as a normal part of the modern world and part of a beneficial definition of globalisation.

The use in the Hague Programme of the discourse of ‘exceptional migratory pressures’ is in our view very unhelpful. The image which is conjured up is one of invasion and submersion rather than normal border activity. The use of this type of image demands the interpretation of particular events as consistent with it. It is important to remember that every day, millions of people, both citizens of the Union and third country nationals, cross the external borders of the EU. This is part of the strength of the EU’s market and the means towards the future prosperity and security of the Union. When the image of exceptional migratory pressure is used, it counters the normalcy of these movements of persons. Thus the arrival of a small group of third country nationals, say a few hundred individuals from North Africa, instead of being interpreted as part of the normal every day movement of third country nationals into and out of the EU, is transformed by this discourse first into a potential ‘exceptional migratory pressure’ then almost immediately into an actual one. The arbitrariness of the allocation of this title to one group of persons arriving in one place as opposed to another group of third country nationals arriving in another is palpable. The negative impact of describing the nationals of our neighbours as an ‘exceptional migratory pressure’ is also substantial. We would not accept our nationals being so stigmatised, we should be very slow to so stigmatise the nationals of our neighbours if we want stability and security on our borders.

Moreover, it seems from early drafts of the Hague Programme and more recent Council conclusions that these provisions of the Programme aim to provide the basis for joint EU-level measures to intercept persons travelling on the high seas, potentially with a view to violating the principle of *non-refoulement*. This is unacceptable for the reasons set out above (asylum section).

Furthermore, in accordance with recent practice, the European Council affirms that operational measures at the border are to play a pivotal role in preventing irregular migration, such as ‘the firm establishment of immigration liaison networks in relevant third countries’, which was recently also provided with a legal framework by the Council Regulation on the establishment of a network of immigration liaison officers.^[8] With regard to operational measures, the following sentence is worth noting in particular: ‘[T]he European Council welcomes initiatives by Member States for cooperation at sea, on a voluntary basis, notably for rescue operations, in accordance with national and international law, possibly including future cooperation with third countries’. Given that Member States have cooperated in joint operations at sea, with the use of military vessels and aircraft, to apprehend irregular migrants in unseaworthy boats, actions that have allegedly contributed to the death of migrants at sea, there is supreme irony in the reference to ‘rescue operations’ notwithstanding the subsequent reference to compliance with national and international law. Moreover, the fact that the European Council envisages possible future cooperation with third countries should be treated with particular caution given the establishment of recent cooperation between Italy and Libya to prevent irregular migration by sea, in light of the human rights record of Libya (on both points, see further the asylum section above).

ILPA very much welcomes the establishment of an evaluation and supervisory mechanism within the structures of the EU’s External Borders Agency. Among the problems which we consider the most pressing is the uneven application of EU law in

this field. Even as regards nationals of the Member States and their third country national family members (particularly as regards citizens of the Union of the newer Member States) there is a questionable application of the right of free movement of persons in many of the older Member States. These problems are particularly common when the individuals are arriving from outside the European Union. We trust that the proper application of EU law in the field (including free movement law, asylum law and the EU's association agreements) and its correct implementation at the external frontier will be a matter of substantial concern for the Agency.

b) Visa Policy

The European Council calls for a further development of the common visa policy, through greater harmonisation of national legislation and a more uniform handling of visa applications at the local consular level. In this regard, the establishment of common visa offices in the long term can only be supported once the rules on issuing visas are transparent and equitable and meet certain guarantees (see below). While 'tackling illegal immigration' is identified as one purpose of such measures, another is 'facilitating legitimate travel' and this reference to a positive aspect of the common visa policy is welcome. However, it is unfortunate that the European Council has not advanced these proposals on visa policy in a human rights and rule of law framework by requiring the anticipated improvements in the harmonised and uniform visa-issuing procedures to conform to robust procedural guarantees and to include clear effective remedies in the event of refusal.

We support strongly the proposals which the Standing committee of experts on international immigration, refugee and criminal law made to the chairman of the European Parliament LIBE Committee on the draft Regulation establishing a Community code on the rules governing the movement of persons across borders (COM (2004) 391, 26 May 2004) dated 24 November 2004.^[9] We would highlight the following recommendations of the Standing Committee on the issue as follows:

“Considering the consequences of the EU wide application of national criteria applied to persons to be refused entry and the fact that Member States apply very different criteria to record a person into SIS, the Standing Committee advises to provide in this Community Code, or in another binding legal instrument, certain minimum standards with regard to the grounds being used to refuse third country nationals entry to the EU territory. The provision of clear, specific criteria, on the basis of which individuals may be refused entry, should prevent arbitrary and unpredictable use of relatively 'light' criteria by national authorities.

These minimum standards should be based on the principle that decisions on the basis of which individuals are refused entry or visa, must be justified by overriding reasons of public interest: they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary to attain that objective.

Therefore, the Standing Committee advocates to amend Article 5 (1) in: 'For stays not exceeding 90 days, third country nationals shall be granted entry into the territory of Member States if they fulfil the following conditions....', and;

The condition of Article 5 (1) sub e should be amended in: 'the personal conduct of the persons concerned, does not indicate a specific risk of an actual and serious prejudice to the requirements of public policy or national security of one or more Member States'.

The Standing Committee proposes to incorporate in this draft Regulation an explicit

regulation of the right of every individual within the jurisdiction of the European Union, to an effective legal remedy. We refer to the provision, Article 6, of our draft Directive on Border Control and Movement of Persons, mentioned above:

Article 6 of the draft Directive of the Standing Committee on minimum guarantees:

Everyone within the jurisdiction of a Member State or the European Community [European Union] has the right to an effective legal remedy before a court against any decision as referred to in Article 1.

This remedy shall be easily and promptly accessible and offer adversarial proceedings before an independent and impartial court competent to review on the merits of the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The court will decide within a reasonable time. The court will decide speedily when detention is at issue or when personal liberty and integrity are affected in any other way.

Proceedings shall offer the individual concerned the opportunity to be heard either in person or by representative. The principle of equality of arms must be abided.

The court shall have the power to order effective suspension of the execution of measures whose effects are potentially irreversible for the period of the proceedings.

The court shall have the power to annul a decision when it finds the decision arbitrary, disproportionate or unlawful.

The courts shall be competent to order any appropriate measure against the responsible authority of any Member State repairing or compensating damages caused by such decisions.

According to the Standing Committee these rights should be explicitly included in the draft regulation on border crossing. Article 11 (3) of the Community Code provides that the authorities should make a 'substantiated decision' which shall state the available remedies. This provision should be completed by adding that the decision refusing an individual a visa or entry, should be written and in a language which is comprehensible for the individual concerned or providing an English summary of the decision. The decision should indicate the legal provisions or provisions underlying the decision and all relevant reasons. The decision should state the competent court, and its address.

With regard to third country nationals who are refused entry on the basis of a SIS entry, the decision should also state which Member State has entered the entry into SIS, and on which grounds the person is entered into SIS.

The obligation of Member States to report to the EU institutions should also have to apply to the emergency procedures as regulated in Article 22. The Standing Committee proposes to amend Article 24 (2) in 'These checks may only be reintroduced for a limited period of no more than 30 days. If the serious threat to public policy, internal security or public health has not ceased to exist, this period may only be extended by another period of 30 days on the basis of a proposal by the Commission.'

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Commission.’

The Standing Committee proposes to add to Article 28 a paragraph which limits the possibility of confidentiality, conforming to Article 4 of Regulation 1049/2001: ‘Information on the reintroduction and prolongation of checks may only be kept confidential if disclosure of these information would undermine overriding interests of public security, defence and military matters, and international relations.’

The emphasis on the establishment of the European Visa Information System (VIS) and the need to implement it quickly reasserts an undue faith in new technology. The European Council also invites the Council and the Commission to examine whether short-stay visas can be facilitated to third-country nationals, on a case-by-case basis and on the basis of reciprocity, in the context of EC readmission policy. This appears to suggest that the ‘carrot’ for agreeing to the ‘stick’ of readmission agreements would be facilitated travel to the EU for the nationals of compliant third countries, a proposal with resonances in the Italian practice of setting aside labour migration quotas for nationals of those third countries prepared to agree to readmission agreements with Italy. Such an approach is particularly problematic given that the European Commission has already expressed concerns in its June 2004 Study on the links between legal and illegal migration^[10] that while offering preferential labour quotas to target third countries may improve cooperation with those countries in the short term, the discriminatory effect of such quotas on third countries which have not entered into readmission agreements is likely to frustrate cooperation with the EU in the long term.

6) Biometrics, Borders and Visa policy

Border checks, visa policy and controlling ‘illegal’ immigration are all linked to the issue of biometrics and information systems. The Hague Programme places considerable faith in security measures in the form of the development of a coherent EU approach to biometric identifiers and information systems as a way of managing migration flows. In keeping with the security context of this subject, the European Council observes that ‘such measures are also of importance for the prevention and the control of crime, in particular terrorism’. Once again, the association of irregular migration with crime and terrorism is unsubstantiated. We are less convinced than the Council of the benefits of biometrics in the management of migration flows. The express “security continuum” seems to us to be rather devoid of meaning. We fail to understand what the meaning of security is in this sense nor what the concept of “continuum” is supposed to add. Further, we remain sceptical that border control measures on persons contribute in any substantial way to the prevention or control of crime or terrorism. The experience across the EU in respect of terrorism and border controls has been that the Member States have consistently rejected a correlation of efficiency (let alone legitimacy). The examples of Northern Ireland and the Basque country are only the most striking in this regard. If the Council wishes to justify the securitisation of the external border through the use of biometrics we would suggest that more cogent reasons will need to be presented to justify the expenditure. The effectiveness of expensive mass databases in combating terrorism and other serious crime, as compared to spending that money to ensure more accurate and effective intelligence on these crimes, is highly doubtful.

The European Council requests the Council to examine how to maximise the effectiveness of the interoperability of EU information systems, such as SIS II, EURODAC and the future VIS, in order to tackle irregular migration on the basis of a forthcoming Commission communication on this question. While the reference to the ‘need to strike the right balance between law enforcement purposes and safeguarding the fundamental rights of individuals’ is welcome, this faith in new technology as a ‘simple

fix' to the problem of irregular migration is unwarranted and disproportionate in the absence of efforts to adopt other more traditional and less costly measures, such as increasing lawful avenues for third-country nationals to take up employment opportunities in Member States considered above. No particular reason is given for this mixing of personal data collected for very different reasons and over which the data subject's rights are differently configured. Tackling 'illegal' immigration requires, as a very minimum a common definition of what it is. Without this, no measure taken to tackle it will be satisfactory. So long as the underlying criteria and reasons for the issue or refusal of a visa or entry into the EU remain in practice defined and applied at the national level there can be no common definition of irregular immigration. Thus the tackling of the phenomenon becomes a struggle with a phantom opponent which is quite ridiculous. Rather than demonising the data subject by making references to illegality and terrorism, the EU would do well to strengthen security by putting in place proper controls to safeguard the rights of the data subject.

Everyone is concerned about misuse of their personal data and about the threat of identity theft. It is not just citizens of the Union who are concerned about these risks. Because of the risks posed by governments' population registers and interoperable data bases on different aspects of our lives, at the national level there are substantial controls which protect us from any sort of heavy handed approach to data collection and use. ILPA is even less enthusiastic about the possibility that foreign governments hold this sort of information about us in data bases which they can use as they wish.^[11] Why then, does the Council wish to antagonise our EU neighbours by seeking to use information about their nationals in a way which we would consider unacceptable if it were applied to ourselves? Surely this is not a sensible or rational approach to friendly relations with third countries. Particularly in light of the lack of any evidence of the benefit which such an approach would provide in terms of policing or otherwise, it seems particularly ill founded and likely to result in tensions and poor relations with third countries and their nationals.

7) Legal Migration

There are important reasons for standards to be laid down at the European Union level in relation to legal migration. This is an area where it is desirable to counteract the tendency of Member States to seek to arrange legal migration on terms which exclusively reflect their own interests, and those of employers, while ignoring the interests of migrants themselves. There are moreover significant fundamental rights in play in this field, including the right to respect for family life (Article 7 of Fundamental Rights of the European Union of the Charter), rights to work and to pursue an occupation (Article 15 of the Charter) and the right not to be discriminated against (Article 21 of the Charter).

Against that background, we are concerned by the very low priority given to measures on legal migration within the Hague Programme. That is reflected in the fact that legal migration is the only aspect of asylum and immigration policy to which it is not proposed to extend the co-decision procedure (see point 1.1.2 of Chapter III of the Hague Programme and the draft Council Decision of 12 November 2004). It is not clear why this area alone has been excluded, not least given that it will become subject to co-decision if and when the proposed Constitution for Europe comes into force.

The low priority given to legal migration is reflected too in the absence of any proposal to review the main existing measures in this area. This is especially problematic because of the very low standards contained in the existing measures. The guarantees contained in Directive 2003/86 on family reunification clearly fall below those required under

Article 8 ECHR in several respects. For that reason, the European Parliament has applied for the annulment of this Directive in Case C-540/03. Directive 2003/109 on long-term residents meanwhile provides only very limited rights for third country nationals who have long-term resident status in one Member State to move to another. We have a particular concern about the exclusion of refugees and those with subsidiary protection from the scope of Directive 2003/109. The absence of a right for these groups to move between Member States is a serious omission from the legislative initiatives taken to date under Title IV. The adequacy and implementation of Directive 2003/86 and Directive 2003/109 should be examined within the framework of the Hague Programme, including questions of the scope of both Directives (extension of Directive 2003/109 to both refugees and persons with subsidiary protection, and extension of Directive 2003/86 to persons with subsidiary protection: see the asylum section above), along with the family reunion rights of EU citizens who have not exercised free movement rights.

The one concrete proposal in the Hague Programme in this area is that the Commission should present a proposal on legal migration “including admission procedures capable of responding promptly to fluctuating demands for migrant labour in the labour market.” ILPA welcomes the apparent intention to exercise EC competence over economic migration. We are concerned however that the focus is on a flexible admissions system, and therefore exclusively on the interests of employers and Member States. It is also necessary to recognise the rights of migrants concerning admission for employment purposes, and their right to fair and equal treatment after admission. It is unfortunate that the Hague Programme makes no mention in this regard of relevant treaties concluded within the framework of the International Labour Organisation (which a number of Member States have accepted), of the UN Convention on the Rights of Migrant Workers, of the General Agreement on Trade in Services or of the overall need to develop a fair international framework on this subject.

In this regard, we are concerned too by the concession in the Hague Programme to the effect that ‘volumes of admission of labour migrants is a competence of Member States’. Member State control over the numbers of persons admitted to the labour market is not something which is expressly set out in the EC Treaty at present. It is true, as noted above, that Article III-267(5) of the proposed Constitutional Treaty protects “the right of Member States to determine volumes of admission of third-country nationals coming ... to their territory in order to seek work”. On close examination, however, even this appears to recognise the right of Member States only in relation to those *looking for* work, as distinct from those seeking admission in order to take up employment. Also, it should not be forgotten that the Constitutional Treaty only reserves competence to the Member States to set economic migration quotas on persons coming from *outside* the EU; the EU will have competence (as it does now) to remove or limit the use of quotas restricting the movement of third-country nationals between Member States.

Conclusions

In comparison with the fanfare which surrounded the Tampere Conclusions launching the first five year period of an area of freedom, security and justice in the EU, the unveiling of the Hague Programme was a decidedly muted event. The sense that the first five years have been something of a qualified success is no doubt part of the reason for the relative quiet around the start of the second five year programme. However, of more concern to this Association, the second five year plan for the area appears to have lurched into a securitarian understanding of the movement of persons. This manifests itself in a number of ways.

- First, the commitment to the principle of non-refoulement as regards the protection of asylum seekers is increasingly tenuous. While statements regarding the importance of the protection of refugees abound, the application of the principle of non-refoulement on which these statements are founded is increasing lacking. Instead the vision of asylum seekers as floods and a menace is increasingly at the fore.
- Second, all of the measures regarding border controls highlight the need for more and more security at the borders. The movement of persons across borders is constructed as a threat rather than the source of our prosperity as it is in the EU, even an EU of 25 Member States. It is both incoherent and inconsistent to treat the nationals of our neighbours as threats one day, but to transform them into citizens of the Union the next day and welcome their movement as central to our economic security.
- Third, the dominance of biometrics as a solution to movement of persons is clearly absurd. The insistence of some ministries and private sector actors that identifying everyone is the way to secure security is clearly faulty. Finding criminals is about targeted intelligence rather than tagging the whole population. Masses of irrelevant information are not valuable in crime control. But it is all too easy for the temptation to use the mass of information to ends other than those for which they were designed and contrary to the interests of the population and the individual.
- Fourth, the focus on irregular migration as 'illegal' migration fails to take into account that individuals who move from one country to the next normally wish to do so within the law. It is the establishment of specific laws which render their presence irregular or 'illegal'. As is very clear in many parts of Europe, third country nationals fall into and out of regularity as a result of events in their lives, a failed year at university, the failure of family to send sufficient money to support their studies, divorce, etc. To found a large section of EU policy in the field of freedom, security and justice on harassing and criminalising this small section of the community rather than seeking to find ways to adapt laws to ensure that they remain in a regular status is ridiculous.
- Finally, the failure of the Hague Programme to address the pressing need for measures on legal migration to the EU is unacceptable. Without a common system of legal migration, the concept of irregular migrant is meaningless. Until there is a common system whereby people can regulate their lives when coming to the EU to work the whole system of immigration and asylum is incoherent.

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[1] UNHCR, The European Union, Asylum and the International Refugee Protection Regime: UNHCR's recommendation for the new multi-annual programme in the area of freedom, security and justice, September 2004.

[2] On these points see the prior comments of ILPA and other NGOs on various EC law proposals and

developments in this field.

[3] COM (2001) 386, 11 July 2001.

[4] Article III-267(5) of the Treaty Establishing a Constitution for Europe, OJ 2004 C 310.

[5] E.g. *Čonka v. Belgium*, Eur. Ct. H.R., judgment of 5 February 2002, (2002) 34 EHRR 1298.

[6] The judgment of the Court of Justice in Case C-378/97 *Wijsenbeek* came some 12 years later, and obviously was influenced by national interior ministries' subsequent take-over of the frontier abolition project by way of the Schengen Implementing Convention.

[7] COM (2003) 104 final.

[8] Council Regulation 2004/377/EC of 19 February 2004 on the creation of an immigration liaison officers network, OJ 2004 L 64/1.

[9] See also the Standing Committee of Experts in International Immigration, Refugee and Criminal Law (Meijers' Committee) draft Directive on effective legal remedies in matters of migration and border control, presented to the European Parliament on 24 February 2004.

[10] COM (2004) 410, 4 June 2004, p. 9.

[11] See for instance the European Parliament's challenge to the Commission's and Council's acceptance of the US data protection laws as sufficient to justify the exchange of passenger data (PNR).