ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

Submissions to the House of Lords

Draft of a Protocol concerning the extension of the "Eurodac" system for the comparison of fingerprints of applicants for asylum to certain categories of illegal immigrant (Doc 12943/98)

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The Immigration Law Practitioners' Association ("ILPA") has been asked to provide to the Sub-Committee its views on the draft protocol extending the scope of the Eurodac Convention to certain categories of illegal immigrant. This extension of scope was suggested during the Luxembourg Presidency and strongly supported by the German and Austrian Governments.

The rationale for the Draft Protocol is the further facilitation of the application of the Dublin Convention which came into force on 1 September 1997. However ILPA considers that the Draft Protocol is unworkable and far from facilitating the application of Dublin Convention, it will add grey areas.

The Draft Protocol as a Community measure

ILPA welcomes the proposal to include the Convention and Draft Protocol in Title IV of the EC Treaty as amended by the Amsterdam Treaty, rather than as a Third Pillar instrument. This would at least provide judicial supervision of matters falling within the Convention and Protocol by the European Court of Justice, as well as bringing into play the provisions of the Data Protection Directive in respect of access to data maintained by the EURODAC Central Unit.

Distinguishing Asylum Seekers from Illegal Immigrants

The extension of the Eurodac system to persons other than asylum seekers is an unwelcome measure in so far as it blurs the distinction between asylum seekers and other types of immigrant. This is not only undesirable from an administrative point of view, but at odds with obligations under international law. With regards to asylum seekers there is an obligation on Member States not to *refoule* persons in fear of persecution under the 1951 Convention on the Status of Refugees and not to return a person to a country where there is substantial risk of treatment amounting to torture or inhuman or degrading treatment under Article 3 of the European Convention on Human Rights. With regards to other forms of immigration, it is for the Member State to consider whether or not to admit a person for as a matter of international law States have the right to maintain immigration control.

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It is significant that in the application of both the 1951 Convention and the European Convention, Member States are under a duty not to return persons requiring protection regardless of the method of entry employed to enter the Member State. However in the case of other forms of immigration it is for the Member State to control entry by visas or other method.

The importance of maintaining two distinct systems as regards asylum seekers and other types of immigrant is not only desirable but also necessary if those in need of international protection are to be recognised. Any system which seeks to obfuscate the distinction between the two groups will inevitably have the undesirable effect of failing to afford protection to those who need it by mistakenly channelling them through normal immigration controls rather than appropriate asylum procedures.

Additionally it is clear from the preamble to the Dublin Convention itself that there is no competence to include matters other than those that relate to asylum procedures in the Member States of the European Communities. The extension of the Eurodac system to persons not seeking asylum is outside the competence of the Dublin Convention.

The Practical Application of the Draft Protocol

ILPA takes the view that the Draft Protocol is unworkable and will in fact be a cumbersome mechanism with no practical value as Member States will have no incentive to apply its provisions.

The Draft Protocol requires EU Member States to fingerprint all persons over fourteen who are caught "illegally crossing" into the Member State and provides for the option to fingerprint persons "illegally present" on their territory. Article 7 of the Dublin Convention states that "the responsibility for examining an application for asylum shall be incumbent upon the Member State responsible for controlling the entry of the alien into the territory of the Member States..." A Member State will have no incentive to fingerprint an alien attempting to illegally enter its territory. This is particularly so if the alien has come directly from a non-Member State and eventually claims asylum in another Member State, whereupon the first Member State becomes responsible for determining the application.

No doubt the implementation of the Draft Protocol will be costly to Member States. If in practice Member States are reluctant to register aliens illegally crossing into their territory or illegally present in their territory in fear of some time in the future becoming responsible for

their applications for asylum, the system will be meaningless and a waste of resources. Conceivably the burden will fall on those Member States which border non-Member States, which in some cases are ill equipped and therefore unlikely to implement the procedures.

The Terms of the Draft Protocol

Certain terms used in the Draft Protocol are unclear and undefined. They are crucial to the operation of the Draft Protocol and will render it unworkable. The use of "*irregular crossing*" in Article 3 has no meaning. It is open to wide variations of interpretation by Member States. Without proper definition disputes will arise between Member States in the future if a variation in approach is taken.

The use of the term "*illegally present*" in Article 7 is also undefined. Member States within the EU take a very different approach to who is considered "*illegally*" present in their territory. It is not clear what the approach of the United Kingdom authorities will be in relation to persons who may have been lawfully in the United Kingdom for a consderable period but who, because of an alleged deception on entry, for example, are declared "illegal entrants". This difficulty is highlighted particularly given the reference to the ECJ on the subject and the position taken by the European Court of Human Rights in **D v United Kingdom** (2 May 1997).

Furthermore there is no reference in the text of the Draft Protocol to the rights of third country nationals that might have been acquired under Community law for instance under Regulation 1612/68 EEC as the spouse of EU nationals or under the Europe Agreements which as a matter of Community law are directly effective but might not have been recognised by the Member State.

A "residence permit" referred to in Article 5 is likewise undefined and unclear in meaning. In the United Kingdom for instance "residence permits" are only granted to EEA nationals whereas other persons are granted leave to remain for an indefinite or finite period. The term "residence permit" thus has no meaning in terms of United Kingdom immigration law.

Given the divergence in immigration systems across the EU, the lack of clear definition of essential terms used in the text of the Draft Protocol will undoubtedly lead to confusion and inconsistency.

Conclusions

In summary ILPA submits that the Draft Protocol is not properly defined and contains terms which are unclear and which will be inconsistently applied across the Member States. It is arguable that there will be little incentive for Member States most affected by the Draft Protocol to apply it properly and consistently and that for this reason the system will not be cost effective.The merging of systems applicable to asylum seekers and other types of immigrant risks preventing those in need of international protection from entering asylum procedures. Finally, ILPA believes that it is essentila that the Convention and Protocol should be adopted as Community measures in order to protect the right of judicial supervision and data access.