

## **ILPA Response to the House of Lords Committee on the European Union call for evidence on the action plan on migrant smuggling**

### **Summary**

- i. We answer questions 1, 2, 4, 5, 6 and 8.
- ii. In answer to question 1 we emphasise, as did UNHCR, Amnesty International and Human Rights Watch in their evidence to the Committee, that the evidence indicates that those crossing the Mediterranean are for the most part, refugees and that the world is in the middle of the biggest refugee crisis since the second world war. The European Action Plan is more focused on pull than push factors and as such does not present a comprehensive response. Safe, legal ways into the EU should be the priority and in this context we draw attention to the conclusions of the recent study for the LIBE on the Dublin III regulation which identified the main tools needed to stop dangerous journeys across the Mediterranean. We warn of the risks of resources being diverted and doubt the efficacy of some of the proposed measures.
- iii. We answer “no” to question 2, because the Action Plan starts from the wrong place in failing to acknowledge the extent to which it is dealing with a problem of forced migration. We touch on the minimum standards with which the plan must comply to be compatible with international refugee law.
- iv. In answer to question 4 we suggest that the question of political will is central to the question of whether the mandate of the EU Agencies will suffice and express concern that funds will be directed at more general immigration enforcement work and as a consequence the sums allocated to address the humanitarian crisis in the Mediterranean will be lower than the headline figure.
- v. We answer “no” to the first part of question 5: the Action Plan does not sufficiently differentiate between smuggling and trafficking. As to the extension of Council Directive 2004/81/EC of 29 April 2004 from the trafficked to the smuggled, we are in favour of this provided that the safeguards in its preambles (4) to (7), as to the primacy of refugee protection and respect for human rights, remain in place.
- vi. We answer “no” to question 6; the Action Plan does not strike the correct balance between law enforcement and the human rights of migrants, most fundamentally in that it fails to give effect to the rights of refugees as set out in the 1951 UN Convention Relating to Refugees and its 1967 protocol.
- vii. We answer no to question 8: the actions proposed in the Action Plan are not compatible with the UN Protocol on Smuggling of Migrants by Land, Sea and Air because that protocol requires compliance with the international law of the sea and explain why we do not consider that the Action Plan complies with this.

## **ILPA Response to the House of Lords Committee on the European Union call for evidence on the Action Plan on migrant Smuggling**

1. The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organisations.

**1. One of the priorities of the European Agenda on Migration is the prevention of migrant smuggling, with the goal of transforming migrant smuggling networks into “high risk, low return” operations. Are the four objectives of the Action Plan the right ones to achieve this goal? Which, if any, of the proposals in the Action Plan should be prioritised in this context?**

2. ILPA concurs with the evidence given by Andrej Mahecic of UNHCR<sup>1</sup> and by Steve Symonds of Amnesty International and David Mepham of Human Rights Watch<sup>2</sup> that the evidence indicates that those crossing the Mediterranean are for the most part, refugees. They come predominantly from Syria, from Eritrea, from Afghanistan and consideration of figures on rates of recognition as a refugee in the European Union attest to their protection needs.
3. In 2014 there were a total of 624,000 (first) applications for asylum made in the 28 EU Member States. For the 1<sup>st</sup> quarter of 2015, 185,000 (first) asylum applications were made in the EU. Of them:
  - 4% were made in the UK
  - 8% were made in France
  - 39.6% were made in Germany
  - 1.4% were made in Greece (Sweden with a similar size had 6.3% of the total)
  - 8.2% were made in Italy.
4. Over half of the total number of persons seeking asylum in the EU came from one of three countries: Syria, Kosovo or Afghanistan.
5. Some 94% of Syrian asylum applications made in the EU were granted in 2014. In the same year 90% of Eritrean applications were successful and 88% of Iraqi applications. In the same period, 66% of Afghan applications succeeded.<sup>3</sup> Statements such as the Action Plan's "...migrants are likely to pay a high price to smugglers to bring them to the EU if they know that they will be returned home quickly after reaching their destination" fail to acknowledge that many of those on boats have no choice but to flee for their lives and fail to

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<sup>1</sup> Evidence session No. 1 15 July 2015 10.30am.

<sup>2</sup> Evidence session No.3 Wednesday 22 July 2014 10.30am.

<sup>3</sup> Asylum: 1<sup>st</sup> Quarter 2015: Eurostat news release 112/2015 18 June 2015; 2014 statistics: EUROSTAT news release 53/2015 20 March 2015.

acknowledge that many will be recognised as refugees or persons in need of humanitarian protection.

6. As the witnesses mentioned explained and other commentators have addressed,<sup>4</sup> the world is in the middle of the biggest refugee crisis since the second world war, with countries through which persons are travelling hosting enormous numbers of refugees, for example some two million are in Turkey. Mr Mahecic reminded the Committee in his evidence that every second Syrian is now forcibly displaced. Professor Guy Goodwin addressing the *Parliamentary Assembly of the Council of Europe's Ad Hoc Committee on Large Scale Arrivals of Refugees to Turkey* said in June:

*The movement of people leaves few States untouched, and much of that movement is driven by desperation – unremitting conflict and persecution, failed and exhausted economies. Nor is that movement a problem waiting for a solution; on the contrary, it is a phenomenon in a modern, globalized world presently no more able to resolve major economic challenges than to broker peace in conflict. It is a phenomenon we must learn to live with, and to manage as best we can in the interests of all. Among other matters, this will require States dealing with each other on a basis of equity and equality, not outmoded and unrealistic expectations of sovereign entitlement. In addition, better 'management' will require investing in long-term responses, not short-term, ad hoc measures focused simply on symptoms, not causes. Only an approach combining protection, humanitarian assistance and opportunity with political and financial investment in mitigating and removing the underlying push factors can have any impact.*

7. The European Action Plan is more focused on pull than push factors and as such does not present a comprehensive response. With its focus on measures such as taking stronger action against the employment of irregular migrants, it is written for those who have a choice to stay put, ignoring that so many of those crossing the Mediterranean have no choice but to move if their human rights are to be secured. The 1951 UN Convention Relating to the Status of Refugees contains some 34 substantive articles,<sup>5</sup> of which the majority are about the rights and entitlements of refugees. These rights and entitlements are not respected and protected in overburdened or unsafe<sup>6</sup> States.
8. The current system of distribution of persons seeking asylum around the EU is the Dublin III Regulation which is predicated on returns to the first EU country in which the person could have sought safety: thus in theory funnelling persons toward Greece, Italy, etc. until such

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<sup>4</sup> See Professor Guy Goodwin Gill's *Refugees – Challenges for Protection and Assistance in the 21st Century*: Notes for a Presentation Parliamentary Assembly of the Council of Europe Ad Hoc Committee on Large Scale Arrivals of Refugees to Turkey, 15 June 2015 available at <http://www.kaldorcentre.unsw.edu.au/news/professor-guy-goodwin-gill-speaks-challenges-refugee-protection-and-assistance-21st-century> (accessed 19 August 2015); 'Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action' Notes for a Presentation Jean Monnet Centre of Excellence on Migrants' Rights in the Mediterranean University of Naples 'L'Orientale' Palazzo du Mesnil, May 2015 available at <http://www.jmcmigrants.eu/guy-s-goodwin-gill-refugees-and-migrants-at-sea-duties-of-care-and-protection-in-the-mediterranean-and-the-need-for-international-action/> (accessed 19 August 2015); 'Regulating "Irregular" Migration: International Obligations and International Responsibilities' An International Workshop" National and Kapodistrian University of Athens Faculty of Law Friday, 20 March 2015 available at <http://www.kaldorcentre.unsw.edu.au/news/professor-goodwin-gills-address-regulating-%E2%80%99Irregular%E2%80%99-migration-international-obligations-and> (accessed 19 August 2015).

<sup>5</sup> Articles 1 to 34.

<sup>6</sup> See the comments of Mr Symonds and Mr Medham on Libya.

time as because of problems of capacity or competence those states are deemed unsafe.<sup>7</sup> It is estimated that only about 3% of asylum seekers are ever actually subject to a successful Dublin transfer<sup>8</sup> yet most have their claims determined in a country other than that in which they entered the EU. The recent study for the LIBE Committee of the European Parliament *Enhancing the Common European Asylum System: Alternatives to Dublin*, paper for the LIBE committee of the European parliament,<sup>9</sup> concluded that the Dublin system

*... does not work effectively from the viewpoint of Member States or asylum-seekers. ... as long as it is based on the use of coercion against asylum seekers, it cannot serve as an effective tool to address existing imbalances in the allocation of responsibilities among Member States. The EU is faced with two substantial challenges: first, how to prevent unsafe journeys and risks to the lives of people seeking international protection in the EU; and secondly, how to organise the distribution of related responsibilities and costs among the Member States.*

9. As Mr Symonds of Amnesty International pointed out in his oral evidence, while the preamble to the Action Plan refers to the importance of opening “more safe, legal”<sup>10</sup> ways into the EU, this is not addressed in the body of the document. It should be the priority.

10. The study for the LIBE committee concluded that

*Those seeking refuge undertake dangerous journeys as they have few other options - mandatory visa requirements coupled with carrier sanctions on transport companies preclude regular means of travel. Without these two EU measures, unsafe access and the demand for the services of smugglers would greatly diminish.”*

11. It identified the main tools as (1) humanitarian evacuation and transport; (2) humanitarian visas, (3) resettlement; and (4) immigration visas.

12. The study for the LIBE Committee also argues for mutual recognition of positive asylum decisions so that those recognised as refugees are free to move and is critical of the wrongful characterisation of the onward movement of persons seeking asylum as ‘irregular secondary movement’, asylum seekers and refugees are seeking a place of refuge and access to reception standards and fair procedures in line with their entitlements under international and EU law.

13. It suggests that distribution keys which identify the reception capacity of states based on indicators, such as population, GDP, economic success and current hosting of asylum-seekers and refugees could be used and that this could compel closer attention to the extent to which Member States are meeting their responsibilities and provide benchmarks

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<sup>7</sup> See *M.S.S. v Belgium and Greece* (Application no. 30696/09), European Court of Human Rights and *NS v UK* (C-411/10), Court of Justice of the European Union.

<sup>8</sup> European Asylum Support Office, Annual Report on the Situation of Asylum in the European Union 2013, July 2014, section 2.6, p 30, <https://easo.europa.eu/wp-content/uploads/EASO-AR-final1.pdf>, accessed 4 July 2015.

<sup>9</sup> PE 519.234. Authors Professor Elspeth Guild; Dr. Cathryn Costello; Ms. Madeline Garlick, and Dr. Violeta Moreno-Lax. Professor Elspeth Guild is co-convenor of ILPA’s European subcommittee.

<sup>10</sup> See further the response to question 3 below: in the circumstances described in Article 31 of the Refugee Convention there is nothing illegal in a person’s crossing the Mediterranean in a boat to seek asylum, although those who convey them may be committing one or more crimes.

for developing institutional capacity. However it cautions against distribution keys that lead to coercive transfers or allowing Member States to buy their way out of their protection responsibilities. On the other hand, additional financial support for those who provide protection over and above their allocation should be made available.

14. We recognise a response couched in terms of enforcement is designed to appeal to those States whose political stance on immigration is based on an enforcement approach. But insofar as this approach was designed to sugar the pill of responsibility-sharing and make it politically acceptable to States to agree to take refugees from Italy, Malta, Greece and parts of Europe under most pressure, it has failed. States rejected calls for compulsory quotas in May and June 2015. It carries with it risks, including risks of diverting resources to information-sharing, prevention of illegal working, etc. While States may choose to fund these from other budget lines, they should not be counted as part of the funding used to deal with the movement of refugees across the Mediterranean and for their reception in Europe, where funds are already limited and evidence of responsibility sharing scarce. Mr Maheic reminded the Committee in his oral evidence that UNHCR's appeal for Syria is "severely underfunded" and described the current responsibility sharing in Europe as "untenable." He reminded the Committee that the UK has resettled a mere 187 Syrians, compared with Germany's 30,000.
15. Demand for a passage across the Mediterranean looks set to remain high and with it the profits of smugglers. We are doubtful whether increased criminal penalties will affect the behaviour of smugglers in those circumstances.
16. Financial investigations are long term measures and new EU bodies are only as effective as their mandate and resources. The need to respond to the current movements and deaths at sea is the higher priority in the short to medium term.
17. Many of the vessels used to transport persons across the Mediterranean are unseaworthy. They are used once and abandoned to the persons being carried to bring to shore, so that the smugglers escape prosecution. In these circumstances we question the extent to which measures to establish lists of vessels and to destroy vessels will have much effect on patterns of movement and suggest that priority should not be accorded to them.
18. Work with third countries to tackle border management, youth and employment and mobility are unlikely to affect patterns of movement where the causes of that movement are war, famine, pestilence and death.

**2. According to the European Commission, the Action Plan "should be seen in the broader context of EU efforts to address the root causes of irregular migration". Does it suggest the correct set of measures to bring this about?**

19. No.

20. As set out in response to question 1 above, the Action Plan starts from the wrong place because it fails to acknowledge the extent to which it is dealing with a problem of forced migration. The failure to treat the movement as a humanitarian crisis and a crisis of

protection has led to a rich wealth of material, analysis and recommendations such as that described in response to question 1, being overlooked.

21. Article 31 of the Refugee Convention provides

*1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*

*2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.*

22. See further s 31 of the Immigration and Asylum Act 1999.

23. These set out minimum standards with which the Action Plan must comply to be compatible with international and UK domestic law.

24. The Action Plan appears to place undue faith in the efficacy of gathering and sharing information without identifying clearly the use to which the information will be put. There is considerable joint working between states in the areas of transnational organized crime, of which smuggling is one example, and the notion that increased regional information gathering and sharing could make the step change in tackling smuggling is nowhere justified in the Action Plan. Our experience over the years suggests that smugglers are very quick to adapt to interference with their activities. Information gathered is almost always yesterday's news.

**3. Are Member States currently meeting their obligations under the existing EU framework against migrant smuggling? What are the deficiencies of the current framework, and do the actions foreseen in the Action Plan address these?**

25. Not answered.

**4. EU Agencies are expected to play a significant role in carrying out the objectives of the Action Plan. Do they have the mandate, budget and other capacities to fulfil this role?**

26. We suggest that as with the question of compulsory quotas, the question of political will is central to the question of whether the mandate of the EU Agencies will suffice.

27. As to budgets, the sums allocated to States are also relevant. The European Commission approved financial allocations for asylum, migration and integration for some of the front line states for the period 2014 – 2020 as follows:

- Cyprus: 32 million euro
- Greece: 259 million euro

- Italy: 310 million euro
- Spain: 257 million euro
- Sweden | 18.5 million euro.

28. The funding is being released urgently to the front line states in light of the reception crisis. As explained in response to question 1 above, we are concerned that funds will be directed at more general immigration enforcement work and as a consequence the sums allocated to address the humanitarian crisis in the Mediterranean will be lower than the headline figures.

**5. Does the Action Plan sufficiently differentiate between migrant smuggling and human trafficking? What is your opinion of the proposal to extend the 2004 Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings to smuggled migrants?**

29. No.

30. *Smuggling* is the clandestine movement of people across borders. It is a crime against the State. People hide in vehicles, or use false documents, to cross borders. Many are brought by an agent, or smuggler and disrupting smuggling routes is a key concern of those involved in migration control. In the UK media attention has focused on disrupting routes used to bring people to claim asylum in the UK. Article 31 of the 1951 Refugee Convention says that countries should not impose penalties on people fleeing persecution who have had to use clandestine methods of entry to flee. This does not prevent States from taking action against the person who did the smuggling.

31. *Trafficking* is the movement of people in order to exploit them. It is a crime against the individuals concerned and a violation of their human rights. It need not involve clandestine measures: some people move on their own passports.

32. The distinction between trafficking and smuggling does not present a conceptual difficulty: see above, the differences are clear. However, when looking at factual situations, it is can be complex to sort out what is going on. Imagine two persons wish to flee. The smuggler's charge is £10,000. The man can pay, and does. Once he reaches his destination, he never sees or hears of the smuggler again. The woman cannot pay. The smuggler says that he will still carry her, but she will have to pay back the £10,000 once she gets to her destination. So far so good, neither she nor than man have been trafficked. But if she works for the smuggler once she gets to her destination, if the smuggler can *control* her actions because of her debt and uses that control to exploit her, then the situation starts to look like trafficking. By contrast, if the smuggler simply wants his money and she engages in forced and exploitative labour for someone else to repay her debt, she may be a victim of slavery, but she is not trafficked.

33. We recall preambles four to seven to Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities:

*(4) This Directive is without prejudice to the protection granted to refugees, to beneficiaries of subsidiary protection and persons seeking international protection under international refugee law and without prejudice to other human rights instruments.*

*(5) This Directive is without prejudice to other provisions on the protection of victims, witnesses or persons who are particularly vulnerable. Nor does it detract from the prerogatives of the Member States as regards the right of residence granted on humanitarian or other grounds.*

*(6) This Directive respects fundamental rights and complies with the principles recognized for example by the Charter of Fundamental Rights of the European Union.*

*(7) Member States should give effect to the provision of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or belief, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.*

34. Provided those safeguards remain in place, then we consider that the extension of the Directive to persons who have been smuggled could offer valuable additional protection for such persons.

**6. Does current EU action against migrant smuggling, including the actions suggested in the Action Plan, strike the correct balance between law enforcement and the human rights of migrants, including particularly vulnerable migrants such as minors and pregnant women?**

35. No.

36. See above, most fundamentally it fails to give effect to the rights of refugees as set out in the 1951 UN Convention Relating to Refugees and its 1967 protocol. These obligations apply to all: minors, pregnant women and single adult men.

37. It fails to recognise that the risks of staying put may be as great as the risks of undertaking a hazardous journey. The suggestion that a person would not flee Syria or embark from Libya if warned of the hazards of the journey is, for the reasons given in the oral evidence of Mr Symonds and Mr Medham, dubitable. It wholly underestimates the desperate need of those trying to flee. Alternatives, rather than deterrents, are required to change behaviour.

38. The Action Plan suggests "...monitoring of the pre-frontier area for early identification of smuggler and prevention of irregular departures of migrants". This carries a clear risk of breaches of human rights if persons are left in places where their life and freedom is threatened and in circumstances where they face persecution on the territory or return from the territory to a place where they face persecution and *refoulement* contrary to Article 33 of the UN Refugee Convention, which provides

*1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*

2. *The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*

39. Similarly if Immigration Liaison Officers act to prevent persons from embarking from places where their life is in danger.

40. It also appears to envisage extra-territorial operations, for example on Libyan territory. Such operations, unless the free consent of the Libyan authorities to them were secured, which appears unlikely, would be acts of aggression and unlawful under the Charter of the United Nations unless a specific UN mandate were obtained, which also appears unlikely.

**7. Do the Action Plan and other, related EU strategies (such as the European Maritime Security Strategy, Cyber Security Strategy and the EU Strategy towards the Eradication of Trafficking in Human Beings) form a coherent whole?**

41. Not answered.

**8. Are the actions proposed in the Action Plan compatible with the international framework on preventing human smuggling, including the UN Protocol on Smuggling of Migrants by Land, Sea and Air? Do they add to this framework in a coherent and meaningful manner?**

42. No.

43. That protocol requires compliance with the international law of the sea.

44. The primary obligations of Shipmasters and member States of the International Maritime Organisation when faced with persons in distress at sea are set out under the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea and the International Conventions on Search and Rescue and Salvage.

45. Regulation V 33.1 of the International Convention for the Safety of Life at Sea obliges the Master of a ship to proceed with all speed to assist persons in distress at sea. See also Article 98(1) of the United Nations Convention on the Law of the Sea. Article 98(2) of that Convention obliges coastal States to promote search and rescue services in cooperation with other States. See also Regulation V/7 of the International Convention for the Safety of Life at Sea. The International Convention on Search and Rescue at chapter 2.1.10 obliges State Parties to provide assistance to persons in distress at sea, Chapter 1.3.2 requires States to provide for initial medical or other needs and deliver persons to a place of safety.

46. Thus rescue is situated with a framework of obligations to commit resources to search and rescue and these must be the primary focus of all actions. Within that framework it is vital that the judgement of Masters of their ships on the safety of rescue obligations be accepted. In particular, it should be for Masters to assess the time for which a ship should stand by before attempting rescue and rendering assistance. It is vital that the

action plan recognise that a place of safety means dry land, and specifically a place where obligations under the Refugee Convention can be met or from when there is a plan to be able to render the person safely, without delay and with respect for their dignity to a place where those obligations can be met.

ILPA

21 August 2015