

Mrs. Beatrice Ask
Minister of Justice
Presidency of the Council of the European Union

Mr. Tobias Billström
Minister for Migration and Asylum Policy
Presidency of the Council of the European Union

Brussels, 25 November 2009
Ref. B920

Dear Ministers,

Justice and Home Affairs Council meeting, 30 November-1 December 2009

The upcoming Justice and Home Affairs Council meeting on 30 November-1 December 2009 is expected to agree the next multi-annual programme in the Area of Freedom, Security and Justice (AFSJ) – the so-called Stockholm Programme – and discuss the new asylum proposals published by the Commission on 21 October 2009. Following Amnesty International's observations and comments on the next multi-annual programme from the starting point of the proposals made by the Commission in the Communication of 10 June 2009, we welcome the fact that the Presidency draft Stockholm Programme of 16 October and the latest version of 23 November 2009 addressed a number of our observations, in particular:

- the clarification on centering the EU actions on the citizen *and other persons for whom the EU has responsibility*;
- the clearer articulation of crucial monitoring and evaluation tools;
- the emphasis on the rule of law and fair trial rights in the area of Justice; and
- the broader reference to building a Europe of *responsibility*, as well as solidarity, and to the need to ensure *access to legally safe and efficient asylum procedures* with regard to the priorities in the field of immigration and asylum.

At this crucial moment in the building of the future AFSJ, we would like to complement our previous observations with the following points with regard to immigration and asylum matters.

Asylum: a common area of protection

Amnesty International welcomes that the draft Programme reasserts the European Council's commitment to the creation of a common area of protection, and to ensure a better approximation of Member States' laws and practices so as to guarantee "that individuals, regardless of the Member States in which their application for asylum is lodged, are offered the same level of treatment as regards reception conditions, procedural arrangements and status determination."

As demonstrated in their implementation, the current EU standards are insufficient and vague, and in many ways open to legal challenge. We therefore believe that the Commission's new proposals are a step in the right direction as they seek to clarify some provisions, ensure compatibility with evolving case-law, and achieve a higher degree of harmonization. We refer in particular to the comments of the European Council on Refugees and Exiles (ECRE) in their letter sent this week to Minister Billström. Amnesty International endorses ECRE's view that further measures are needed to ensure that the EU has in place a solid legal framework of protection that is in compliance with international refugee and human rights law and standards. The Commission's proposals also respond to the Hague Programme's call that the Union should continue developing a common policy in this field with a view to establishing a common procedure and a uniform status for beneficiaries of international protection. They further reflect the same objective set out in the Treaty of Lisbon which provides the legal basis for the adoption of common standards. Accordingly, Amnesty International will closely follow the discussions in the forthcoming Council meeting,

and we call on the EU Presidency to lead the process and for all Member States to engage seriously and constructively in the debate.

Immigration: effective policies to combat “illegal” immigration

The Presidency’s draft Stockholm Programme sets out as one of the EU’s key objective “the development of a forward-looking and comprehensive European migration policy”. Amnesty International believes that the fulfillment of this objective is undermined by some major gaps and inconsistencies in the latest draft of the Programme. One of the flagrant gaps is found in the Programme’s approach to irregular migration. Instead of promoting a comprehensive approach, the actions proposed are all directed towards achieving an effective and sustainable return policy. We would like to highlight in this regard the following calls: (i) to step up cooperation on return and readmission with countries of origin and transit in the framework of the Global Approach; (ii) to define a new strategy on readmission, including a common approach towards uncooperative third countries; and (iii) to increase practical cooperation by the regular chartering of joint return flights financed by Frontex.

Amnesty International has consistently argued for a **rights-based approach to migration**, which means that policies in this field, including in cooperation with third countries, must be guided by the principle of safeguarding the human dignity and human rights of migrants, particular those without a regular status who are one of the most vulnerable groups of people in Europe. In practices seen in Member States this has often proven not to be the case. There is compelling evidence that in many instances such policy of cooperation with third countries has given rise to violations of fundamental rights of migrants, particularly arbitrary detention and forcible return in contravention of the principle of non-refoulement. Recently, there have been alarming reports of incidents of failure to rescue boats in distress at sea which have led to the death of migrants.

Against this background, it is striking that the draft Programme defines indiscriminately the **Global Approach to Migration** a success without proposing to address its failings in any way. In particular, we are highly concerned that, while the further development of the Global Approach is being called for, there is silence in the draft Programme on the need for an effective mechanism to monitor and assess all implications of such cooperation. Amnesty International believes that the human rights of migrants, particularly respect for the principle of non-refoulement, must be at the core of any dialogue and cooperation with third countries on migration aspects, whether in the framework of bilateral or EU agreements or technical arrangements between Frontex and third countries. Similarly, independent monitoring mechanisms should also be called for with regard to practical cooperation, including joint operations carried out under the auspices of Frontex, to ensure that they are conducted in full compliance with international human rights and refugee law.

With regard to the **regular chartering of joint return flights**, Amnesty International is concerned that this policy runs counter to the principle that sufficient safeguards must apply to ensure that the individual circumstances of the migrant are always taken into account when effecting returns. This principle is not only established in international human rights law, in particular with regard to the prohibition of collective expulsion in Article 4 of the 4th Protocol to the ECHR, but also in the Returns Directive where Recital 6 reminds Member States that general principles of EU law require removal decisions to be “taken on a case-by-case basis and be based on objective criteria, implying that consideration should go beyond the mere fact of irregular stay.”

In this respect, it is useful to remember that, under the **Returns Directive**, Member States have an obligation to prioritize voluntary return and that return is not a necessary outcome of irregular status. Member States may grant a right to stay for compassionate, humanitarian or other reasons (Article 6.4). Worryingly, one of the major flaws of the Directive is that it does not guarantee that the irregular status of an immigrant will in all circumstances be resolved. On the contrary, the provisions allowing or requiring postponement of removal in certain circumstances provide ample scope for leaving immigrants in a state of potentially indefinite limbo. Amnesty International therefore notes with regret that the Commission’s pragmatic suggestion that the EU should consider the possibility of establishing common rules for taking charge of persons for whom return is not practically possible has been dropped in the Presidency draft. It is, in our view, a major gap that over the next five years there are no plans to identify policy responses to a

prevailing situation in Europe where irregular migrants are vulnerable to exploitation, denied basic social and economic rights and are unable to access justice to enforce basic rights.

We hope these concerns and observations are useful in providing an informed discussion on the Stockholm Programme and the asylum proposals at the Justice and Home Affairs Council meeting at the end of November.

Yours sincerely,



Natalia Alonso

*Acting Director
Amnesty International EU Office*



Lise Bergh

*Director
Amnesty International Swedish Section*