



COMMISSIONER FOR HUMAN RIGHTS

COUNCIL OF EUROPE



Strasbourg, 28 July 2008

CommDH(2008)18
Original version

MEMORANDUM ¹

by Thomas Hammarberg
Commissioner for Human Rights of the Council of Europe

Following his visit to Italy
on 19-20 June 2008

Issues reviewed:
Roma and Sinti; Immigration

¹ A provisional version of this memorandum was shared with the authorities on 1 July 2008. This revised version takes on board a number of clarifications and comments made by the Italian authorities on 21 July. The observations of the Italian authorities are appended to this report.

I. Introduction

1. The present Memorandum is based on a visit to Italy by the Commissioner for Human Rights (the Commissioner) on 19-20 June 2008, during which he held discussions with the Minister of Interior, Mr. Roberto Maroni, as well as with representatives of non-governmental and international organisations². Through the visit and this Memorandum the Commissioner wishes to develop a substantive and constructive dialogue with the Italian government, in the context of his mission as an independent and impartial institution promoting respect for human rights, as embodied in the human rights instruments of the Council of Europe.
2. A founder member of the Council of Europe, Italy ratified the European Convention on Human Rights (ECHR) in 1955 and it is party to the European Social Charter and its protocols, including the one which provides for a collective complaints system, and has accepted all the articles in the revised Charter. The Commissioner acknowledges that Italy provides a high level of human rights protection, and its efforts to respect human rights are those one would expect from an advanced democracy. He also welcomes the fact that it has frequently played a driving role in improving international human rights standards, and has usually been quick to incorporate them into domestic law.
3. The Commissioner contacted the Italian authorities in mid-May following reports on violent anti-Roma manifestations and indications that the government intended to urgently prepare and adopt new legislative measures concerning, inter alia, stricter immigration controls, Roma and Sinti. On 16 May 2008 the Commissioner sent a letter to the authorities by which he expressed his special interest in these developments and requested to receive more information, not least to avoid misunderstandings on very sensitive issues.
4. On 20 May the Permanent Representation of Italy to the Council of Europe, upon request of the Italian Ministry of Foreign Affairs, assured the Commissioner in writing that the "incoming legislation will abide by the Italian constitutional rules, the deeply rooted democratic Italian tradition, the EU and other international provisions or Conventions which [Italy] is bound to (including the European Convention on Human Rights)".
5. On 26 May the Minister of European Affairs Mr Andrea Ronchi paid a much appreciated visit to the Commissioner, whom he informed about the latest legislative and policy-related developments.
6. On 05 June the Italian authorities transmitted to the Commissioner's Office the Italian texts of the new emergency legislation (Law Decree (Decreto-Legge)) that was promulgated on 23 May 2008, as well as of the other draft legislative texts (see section IV below). The authorities invited the Commissioner to comment on these texts assuring him that his comments would be taken into due consideration. The present Memorandum is also a reply to this invitation extended by the authorities.
7. The Commissioner's visit to Italy took place following a series of anti-Roma and anti-Sinti manifestations, which have been occasionally very violent, and the urgent adoption or preparation of legislation in November 2007, January and lately May 2008, which notably aimed to introduce further controls of the freedom of movement of Roma and Sinti, the criminalisation of irregular immigration and additional restrictions on immigration (including of EU nationals) and asylum.

² During his visit the Commissioner was accompanied by Mr Marc Scheuer, Director of the Commissioner's Office, Mr Nikolaos Sitaropoulos and Mr Stefano Montanari, Advisors.

8. The Commissioner is deeply interested in the protection of human rights of migrants (asylum seekers, refugees and immigrants) in general. Whilst mindful of the member states' prerogatives in shaping immigration policies, he considers that the treatment afforded by member states to foreigners wishing to enter Europe constitutes a litmus test for states' effective observance and respect of the fundamental human rights principles.
9. The same is true with regard to Roma and Sinti, minority populations severely and chronically discriminated against in most of the Council of Europe member states, including Italy. Their fate deserve all the more attention and protection when state legislative measures are being prepared or adopted in an emotionally tense domestic climate tainted with xenophobic prejudices (see sections II and III below).
10. The Commissioner focused during his visit on the following major issues, commented on in detail below:
 - a) Action against racism and xenophobia;
 - b) The protection of human rights of Roma and Sinti;
 - c) The protection of human rights of immigrants and asylum seekers;
 - d) Human rights protection in the context of aliens' forced returns based on antiterrorism legislation.

A provisional version of this memorandum was shared with the authorities on 1 July 2008³.

II. Action against racism and xenophobia

11. The Commissioner has been concerned for some time by consistent reports establishing that behind individual incidents, occasionally very violent, there was a trend of racism and xenophobia in Italy targeting primarily Roma, Sinti and immigrants from EU or other countries (see also following section). While this Memorandum concentrates on specific measures and policies liable to affect mainly the rights of those people, some broader introductory comments on the need to address that trend seem warranted.
12. It is true that in its latest (2006) report on Italy the European Commission against Racism and Intolerance (ECRI) acknowledged that in recent years progress had been made in a number of the fields covered in its report. For example, Italy has established a specialised body to combat racial discrimination (UNAR, see below), and the anti-discrimination legislation has been applied in some cases in the fields of employment and housing. However, ECRI noted that "the use of racist and xenophobic discourse in politics has intensified and targets in particular non-EU citizens, Roma, Sinti and Muslims. Members of these groups have continued to experience prejudice and discrimination across a wide range of areas"⁴.
13. The hostile environment to non-dominant, vulnerable social groups has recently been fostered by statements of certain national and local political figures as well as by a number of mass media in the country. In meetings with the Commissioner representatives of important NGOs deplored an almost total lack of rejection of xenophobic statements by senior politicians. Representatives of Roma and Sinti felt that

³ This slightly revised version takes on board a number of clarifications and comments made by the Italian authorities on 21 July.

⁴ ECRI, *Third Report on Italy*, CRI(2006)19, 16/05/2006, p. 6 and ECRI Statement on recent events affecting Roma and immigrants in Italy, 20/06/2008, www.coe.int/T/E/human_rights/Ecri. See also United Nations Committee on the Elimination of Racial Discrimination, Concluding Observations on Italy, CERD/C/ITA/CO/15, March 2008.

such lack of reaction, combined with the “security package”, had further encouraged violence and hate speech against their communities. They expressed a fairly dramatic need for protection.

14. The Commissioner is seriously concerned about the adoption or preparation by the government of severe legislation which is aimed at ensuring “public security” and imposing a firmer control over immigration, including of EU citizens, and over the presence and movement of Roma and Sinti populations (see sections below). While stronger action against individual criminal offenders may be required, including enhanced international judicial cooperation, the swift adoption of broad packages of the sort currently implemented or considered in Italy entails a clear risk of linking insecurity to specific groups of population and of generating confusion between offenders and foreigners. Such risk should be carefully avoided, if one is not to further feed xenophobic tendencies (the “security package” is further discussed in sections III and IV below).
15. The Commissioner firmly believes that comprehensive, sustained action by the authorities is urgently required in the area of anti-discrimination, especially with a view to protecting in an effective manner the human rights of Roma, Sinti and migrants.
16. An issue that should be examined by the authorities, as a matter of priority, is the reinforcement of the domestic antidiscrimination law and practice, in particular in relation to the transposition in 2003 into domestic law of the two major antidiscrimination EC Directives 2000/43 (Racial Equality Directive) and 2000/78 (Employment Framework Directive).
17. In 2003 two Legislative Decrees (Decreti Legislativi) transposed into domestic law the aforementioned Directives. The Commissioner has taken note of reports⁵ that have highlighted some major problems in this transposition which merit particular mention:
 - a) The Directives seem not to have been effectively applied so far by domestic courts. One of the major reasons for this may well be that the above Decrees did not abolish earlier antidiscrimination legislation or incorporate it into the new one. The legislative outcome seems to be very complex acting to the detriment of an effective application of the new legislation;
 - b) Until 06 June 2008, when Law No 101 was adopted, domestic law did not provide for an explicit shift of the burden of proof from the complainant to the respondent (in civil and administrative law), in cases of “prima facie discrimination” as foreseen by the above EC Directives. The law required that the complainant submit elements of fact suitable to establish “serious, exact and consistent elements” of discrimination, while the judge could evaluate these elements on the basis of the Civil Code rule of “prudent appreciation” of presumptions;
 - c) UNAR (National Office against Racial Discrimination), the specialised antidiscrimination body created in the Department for Rights and Equal Opportunities, part of the Cabinet Presidency and staffed primarily with public servants, started operating in November 2004. It is active in providing assistance to discrimination victims in judicial proceedings, publishing reports (an annual report is submitted to Parliament), issuing recommendations and awareness raising.

⁵ ECRI, *Third Report on Italy*, CRI(2006)19, 16/05/2006, pp. 10-11, A. Simoni, *Report on Measures to Combat Discrimination - Directives 2000/43/EC and 2000/78/EC, Country Report on Italy*, 8/01/2007, http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/itrep07_en.pdf.

However, UNAR has no standing of its own to litigate on behalf of victims, focusing mainly on mediation. Until early 2007 none of the persons assisted had brought an action on the merits before a domestic court.⁶

18. The Commissioner also notes with concern that in February 2006 anti-racism legislation was modified by Law 85/2006 which seriously reduced the sentences provided for in cases of propaganda advocating racial or ethnic superiority or hatred, and instigation to commit or the commission of discriminatory or violent acts on racial, ethnic, national or religious grounds⁷.

Conclusions and Recommendations

19. The efforts made so far by the authorities to reinforce the antidiscrimination legal framework are commendable. However, further, concerted and sustained action is urgently necessary in this field.
20. Most importantly, the Commissioner recommends the authorities to ensure a prompt reaction to condemn strongly and publicly all statements, irrespective of their origin, that generalize and stigmatise certain ethnic or social groups, such as Roma and Sinti or migrants. They should also see to it that their own initiatives, including new security packages, cannot be construed as facilitating or encouraging the objectionable stigmatisation of the same groups.
21. The Commissioner noted with appreciation the approval on 12 June 2008 by the Italian Council of Journalists' Association of a Code of Conduct on reporting, in a balanced and accurate manner, of asylum and migration issues ("Rome Charter"), which was drafted by the above Association and the Italian National Press Federation, in collaboration with UNHCR⁸.
22. The attention of the authorities is drawn to ECRI's General Policy Recommendation N° 7 *on National Legislation to combat Racism and Racial Discrimination* (13/12/2002). The authorities should review and codify anti-discrimination legislation so that it becomes more accessible and applicable. In addition, the Commissioner recommends that the authorities urgently review Law 85/2006 and restore the more severe sentences earlier provided for racist activities.
23. The Commissioner recommends that the authorities grants all the necessary means to ensure independence and effectiveness to the national body specialized in the anti-racial discrimination field (UNAR), enabling it also to initiate and participate in judicial proceedings.
24. In addition, the Commissioner draws the authorities' particular attention to the Council of Europe Committee of Ministers' Recommendation R (97) 14 *on the establishment of independent national institutions for the promotion and protection of human rights*. Aware that previous legislative drafts could not reach the end of the parliamentary process due to the anticipated conclusion of the Legislature, he urges them to proceed promptly to the establishment of an effective national human rights institution.

⁶ See A. Simoni, *ibid.* p. 38. In the first year of operation there were 282 cases where UNAR established that specific antidiscrimination action was required, see Report of Italy to the UN Committee on the Elimination of Racial Discrimination, CERD/C/ITA/15, 29/03/2006, paragraph 342.

⁷ The maximum sentence of three years' imprisonment was decreased to either a fine of 6,000 euros or 18 months' imprisonment.

⁸ UNHCR, Rome, press release of 13/06/2008.

25. Special efforts should also be made in the field of the combat against racism and racial discrimination at school, taking into consideration ECRI's General Policy Recommendation N° 10 on Combating Racism and Racial Discrimination in and through School education⁹. Such efforts may well be framed in a national human rights action plan whose adoption is highly recommended by the Commissioner. In this context, the Commissioner appreciates that during his visit the Minister of Interior accepted – and later shared with the Minister of Education – the former's proposal to examine the possibility of translating into Italian and disseminating at schools the Factsheets on Roma History, prepared by the Council of Europe Directorate General of Education, Culture and Heritage, Youth and Sport (DG IV)¹⁰. Moreover, noting with interest that an ad hoc plan will be launched in September with the aim to help integrate Roma people, the Commissioner wishes to receive further information on the developments and implementation of this plan.

III. The protection of human rights of Roma and Sinti

26. The number of Roma and Sinti in Italy is currently estimated at 160,000. Though the exact proportion seems open to controversy, more than half of them would be non-Italian, coming mainly from South East Europe, that is, former Yugoslavia, Bulgaria and Romania.
27. Despite efforts made by the authorities, there is little progress in the effective protection and enjoyment of human rights by Roma and Sinti. Widespread discrimination against these minority populations, already highlighted by other reports¹¹, continues. The new immigration legislation which has been introduced or is under way (see following section) aims to impose further, stricter controls of, inter alia, Roma who immigrate to Italy, even if they come from other EU states. Representatives of Roma and Sinti met by the Commissioner expressed a mixture of frustration about their lack of recognition and their "invisibility", fear about the security measures, need for protection in a society where they feel exposed to victimisation and hate.
28. Also, the Commissioner has been informed that on 21 May 2008 the Cabinet approved an emergency Decree by which a state of emergency was declared in three regions until 31 May 2009. Under this Decree, issued by the Prime Minister on 26 May and entitled "Declaration of the state of emergency in relation to settlements of the nomad communities in Campania, Lazio and Lombardia", the Prefects (Prefetti) in these regions assume also functions of "Special Commissioners" with the competence to: a) monitor and authorize settlements; b) carry out censuses of the persons living therein; c) adopt measures against convicts that may live therein; d) adopt measures of eviction e) identify new areas where adequate settlements may be built; f) adopt measures aimed at social cohesion, including schooling.
29. After the visit, the Commissioner was concerned about the Minister of Interior proposals to fingerprint Roma people of all ages. In particular, he spoke out against the discriminatory nature of this measure, especially as regards children.
30. In a meeting with the Commissioner on 19 June the Minister of Interior, Mr Roberto Maroni stressed that the "security package" (see following section) aims to crack down on irregular migration and on eliminating criminality without targeting any specific ethnic

⁹ www.coe.int/T/E/human_rights/Ecri.

¹⁰ www.coe.int/education/roma.

¹¹ See ECRI, *Third Report on Italy*, CRI(2006)19, 16/05/2006, pp. 26-28, United Nations Committee on the Elimination of Racial Discrimination, Concluding Observations on Italy, CERD/C/ITA/CO/15, March 2008, esp. paragraphs 15, 16, 19, Centre on Housing Rights and Evictions, European Roma Rights Centre, Osservazione, Sucar Drom, *Written comments concerning Italy for consideration by UNCERD*, January 2008.

- group whatsoever. The Minister informed the Commissioner that around Rome alone there were 85 irregular Roma camps and affirmed the government's decision to close all irregular Roma camps, identifying, at the same time, their inhabitants through censuses carried out by the "Special Commissioners" who should be accompanied by members of the Red Cross.
31. The Commissioner noted with concern that Roma and Sinti have been excluded from Law 482/1999¹² on the protection of historical linguistic minorities, on the grounds that they had no links with any specific area. In Italy it seems to be widely, and erroneously, held that Roma and Sinti are "nomads" who prefer to live in camps. In this regard, it has also been noted that Italy has signed (on 27 June 2000) but not as yet ratified the European Charter for Regional or Minority Languages.
 32. The Commissioner is following closely and is deeply concerned at anti-Roma and anti-Sinti manifestations in Italy which have been occasionally extremely violent resulting into setting on fire Roma camps, reportedly without effective protection by the Police which has also carried out violent Roma camp raids¹³. Of particular concern is the support which has been provided to such manifestations, directly or indirectly, by certain domestic, national and local, political forces and figures as well as by certain mass media. No information is as yet available on the conclusion of any effective investigation into such incidents by the competent authorities. During his discussion with the Minister of Interior, Mr Roberto Maroni, the Commissioner expressed his serious concern at this situation.
 33. During his visit, the Commissioner was informed of the existence of some positive examples of local authorities that have addressed the dire housing situation of Roma, such as the one in the town of Pescara. However, at the same time, the Commissioner received a new worrying report concerning the town of Mestre (Venice) where the construction of a fully equipped camp for Italian Roma, funded by the Venice municipality, was reportedly suspended after the forceful protests and entry into the site of local political forces.
 34. On 20 June the Commissioner visited the Roma camp *Casilino 900*, in Rome, which has been reportedly used as such for forty years and described as "semi-regular". The Commissioner noted with regret that the standards of the living conditions there were unacceptably low. The situation on this site remains basically unchanged since the visit of the previous Commissioner three years ago who had described the camp as a shanty-town¹⁴. It consists of caravans, shacks and chemical toilets, many of the latter in an obviously too bad state for use.
 35. On the date of the Commissioner's visit, the inhabitants of the camp, approximately 650 persons, including approximately 240 minors, had no access to electricity or water. The Commissioner was informed by Roma organisations that he met on 19 June that similar conditions prevail in many other Roma camps, a situation that makes mortality rates there very high. The *Casilino 900* camp, along with four other camps in Rome, is reportedly visited three times per week by the Local Health Agency and regularly by the municipality's "group for assistance to marginalised persons" which forms part of the municipal police.

¹² See also Council of Europe Committee of Ministers Resolution ResCMN(2006)5 *on the implementation of the Framework Convention for the Protection of National Minorities by Italy*, 14/06/2006, www.coe.int/T/E/human_rights/minorities.

¹³ See European Roma Rights Centre, collection of international reports at www.errc.org/cikk.php?cikk=2958&archiv=1.

¹⁴ Council of Europe Commissioner for Human Rights, *Report on his Visit to Italy*, 10-17/06/2005, CommDH(2005)9, paragraphs 210-217, www.coe.int/t/commissioner.

36. In this context, the Commissioner notes that by the decision of 7/12/2005 in the case of *European Roma Rights Centre v Italy* (Complaint No. 27/2004) the European Committee of Social Rights found unanimously that Italy had violated the European Social Charter taken together with the antidiscrimination Article E due to the insufficiency and inadequacy of Roma camping sites, the forced evictions and other sanctions, such as destruction of Roma property, and the lack of permanent dwellings¹⁵. In the context of this case, the Italian authorities have undertaken before the Council of Europe Committee of Ministers to bring the situation into conformity with the Revised European Social Charter.
37. The Commissioner is particularly concerned at the fate of children living in bad conditions in camps such as the one he visited. Even though formally they have access to school education, it is doubtful whether they may effectively enjoy, inter alia, their right to education under such living conditions. The Commissioner was also informed by Roma inhabitants of the *Casilino 900* camp that many of them, originating in former Yugoslavia, lack identification documents, a situation that causes them serious problems, especially when they need to contact public authorities, including schools.
38. The series of “pacts for security”, signed in 2006 and 2007 between state and certain city authorities have targeted criminality which has also been liaised through these pacts to areas where Roma or Sinti have their dwellings. Linked to these pacts is the emergency legislation which was adopted in November 2007 (Law Decree 181/2007 on removals on public security grounds¹⁶) and in January 2008 (Law Decree 249/2008 on expulsion and removals on grounds relating to terrorism and public security). It has been reported that as at the end of December 2007 more than 1,000 persons had been expelled from Italy and at least 1,000 Roma homes in Rome alone had been destroyed and the inhabitants had been evicted by Italian authorities¹⁷.
39. Such expulsions were not an absolutely new phenomenon; they had already occurred in the recent past. The Commissioner has noted that on 19 May 2005 by judgment no 16571/05 the Italian Court of Cassation found against a decision of the Milan court that had annulled the expulsion orders of a number of Romanian Roma. The Court of Cassation recalled that under Article 4 of Protocol N°4 to the European Convention on Human Rights (ratified by Italy on 27/05/1982) the term “collective expulsion” indicated expulsions that target a group of aliens without a reasonable and objective examination of the reasons and of the defence of each of them. It also noted that under Italian law an expulsion may be proscribed on humanitarian grounds or on grounds relating to family cohesion. However, the Court of Cassation struck down the lower court’s decision, noting that the sole fact that the expulsion decrees in question had been adopted at the same time using identical wording and reasoning and against persons of the same ethnic origin was not in itself contrary to Article 4 of Protocol N°4 to the Convention¹⁸.
40. In this context, the Commissioner is gravely concerned at the case of *Hamidovic v Italy*, a case concerning a Roma citizen of Bosnia and Herzegovina, mother of three children, who was expelled from Italy in September 2005 while her individual application was

¹⁵ See relevant Committee of Ministers Resolution ResChS(2006)4, 03/05/2006, www.coe.int/t/cm. See also relevant case of *Husovic and others v Italy*, European Court of Human Rights, Decision (striking out) of 13/05/2008.

¹⁶ It modified Legislative Decree 30/2007 implementing Directive 2004/38/EC concerning EU citizens’ freedom of movement and residence.

¹⁷ Centre on Housing Rights and Evictions, European Roma Rights Centre, Osservazione, Sugar Drom, *Written comments concerning Italy for consideration by UNCERD*, January 2008, p. 5, www.errc.org/db/02/C9/m000002C9.pdf.

¹⁸ See p. 5 in European Court of Human Rights, Decision on admissibility of 11/05/2006 regarding the cases: *Ahmed Husssun and 4 others*, Appl. N° 10171/05, *Yasser Mohammed and another*, Appl. N° 10601/05, *Mohamed Salem and 78 others*, Appl. N° 11593/05, *Kamal Midawi* Appl. N° 17165/05.

pending before the European Court of Human Rights, despite the request made by the Court to Italy under its Rule 39 (Interim measures) to suspend the applicant's expulsion while her application was pending before the Court¹⁹. Even though Ms Hamidovic was afterward granted a stay permit, the Commissioner considers necessary that member States fully comply with interim measures so as to avoid hindering an effective exercise of the right of individuals to apply to the European Court. This right must be seen as a fundamental requisite of the European system of human rights protection.

41. Finally, it is noted that in 2002 in other cases concerning forced returns of Roma families from Italy to Bosnia and Herzegovina the European Court of Human Rights had found admissible the applicants' complaints under Article 3 of the Convention, based on their fear to be persecuted upon return to their village of origin situated in the Serbian entity of Bosnia and Herzegovina²⁰. The cases were finally struck out of the Court's list of cases, following a friendly settlement reached between the parties.

Conclusions and Recommendations

42. The Commissioner expresses his concern at the recent adoption of the "security package" that resulted in the targeting in particular of Roma EU immigrants, and at the declaration of states of emergency in certain regions and the consequent enlargement of powers of Prefects therein.
43. The frequent adoption of emergency legislative and other measures by a Council of Europe member state is indicative of serious weaknesses of the state mechanism that appears to be unable to deal effectively with social problems that are not novel by means of ordinary legislative or other measures.
44. The Commissioner recalls that the vast majority of Roma and Sinti are in urgent need of effective protection of their human rights, especially their social rights, such as the right to adequate housing and to education, by national, regional and local authorities. Adopting the state of emergency and providing greater powers to the "Special Commissioners" and the Police may not be the best available option to deal with the needs of Roma and Sinti populations.
45. The Commissioner urges the Italian authorities to give priority to the prompt adoption of measures for the amelioration of the living conditions of Roma and Sinti who find themselves in camps like *Casilino 900*, Rome, where the standards of living are unacceptably low. The authorities should endeavour to provide all Roma and Sinti with adequate housing, which means a dwelling which is structurally secure, safe from a sanitary and health point of view, not overcrowded and with secure tenure supported by law²¹.
46. Evictions of Roma and Sinti should never take place if the authorities are not in a position to make available alternative, adequate accommodation. If such evictions are deemed justified they should be carried out in a manner that fully respects the safety and dignity of the persons concerned and in close consultation with them or associations defending their interests. Special attention should be given to the effective protection of the human rights of Roma and Sinti children, as enshrined notably in the UN Convention of the Rights of the Child.

¹⁹ The application is pending before the Court (Appl. N° 31956/05).

²⁰ Cases of *Sulejmanovic and others and Sejdocic & Sulejmanovic v Italy*, judgment of 08/11/2002 (friendly settlement).

²¹ See also Committee of Ministers Resolution ResChS(2006)4, Collective Complaint N° 27/2004 by the European Roma Rights Centre against Italy, 03/05/2006, www.coe.int/t/cm.

47. The Commissioner calls upon the authorities to ensure that the term “nomads” is not used in a discriminatory and negative way, to recognise Roma, Sinti and Travellers as minorities and to give full effect to the recommendations included in the Council of Europe Committee of Ministers’ Resolution ResCMN(2006)5 on the implementation of the Framework Convention for the Protection of National Minorities by Italy, adopted on 14 June 2006. The Commissioner also calls on the authorities to proceed to the ratification of the European Charter for Regional or Minority Languages.
48. The Commissioner urges the authorities to adopt and implement promptly a coherent, comprehensive and adequately resourced national and regional strategy with short- and long-term action plans, targets and indicators for implementing policies that address legal and/or social discrimination against Roma and Sinti, in accordance with the Council of Europe Committee of Ministers Recommendation CM/Rec(2008)5 *on Policies for Roma and/or Travellers in Europe* (20/02/2008). The authorities are urged in particular to effectively monitor and publish regular evaluation reports on the implementation and impact of the above action plans in line with the above Recommendation.
49. The Commissioner recalls the authorities’ duty, especially under the European Convention on Human Rights, to prevent and effectively protect Roma and Sinti populations from violent acts by private individuals that put, inter alia, their life and limb in real danger²². Such incidents should always be subject to effective investigations, in accordance with the established case law of the European Court of Human Rights²³.
50. The Commissioner, in view of a number of reports of ill-treatment of Roma, especially of Romanian origin, by police force members during raids in Roma camps, draws the authorities’ attention to ECRI’s General policy Recommendation N°11 on Combating Racism and Racial Discrimination in Policing (29/06/2007)²⁴. The Commissioner urges the authorities in particular to make ensure that all members of the police forces are provided with systematic, initial and ongoing, education in human rights protection in the context of a diverse society, and to ensure effective investigations into alleged cases of illegal use of force by the Police.
51. The prompt creation of an effective national human rights institution, in conformity with the Council of Europe Committee of Ministers’ Recommendation R (97) 14 *on the establishment of independent national institutions for the promotion and protection of human rights*, would be very beneficial in this context as well.
52. Special attention should be paid by the authorities to the effective abidance by Article 4 of Protocol N°4 to the European Convention on Human Rights, which has been ratified by Italy and proscribes collective expulsions of aliens. While noting the Government’s assurance in that respect, the Commissioner insists that any removal order should always be issued on the basis of a reasonable and objective examination of the particular case of each individual person concerned, and it should take into account the circumstances specific to each case²⁵.
53. The Commissioner draws the authorities’ particular attention to the cases of Roma coming from former Yugoslavia, such as those in the *Casilino 900* camp in Rome, who remain in Italy without proper identification documents and are thus de facto stateless. Some of them may also have a well-founded fear of persecution on ethnic grounds and thus be unable to return to their country of origin. All these persons should be identified in

²² See, inter alia, *Moldovan and others v Romania* (N°2), judgment of 12/07/2005.

²³ See, inter alia, *Šečić v Croatia*, judgment of 31/05/2007.

²⁴ www.coe.int/T/E/human_rights/Ecri.

²⁵ In this vein, see also Guideline 3 of the Council of Europe Committee of Ministers, *Twenty Guidelines on Forced Return*, Strasbourg, September 2005, www.coe.int/t/cm.

- a humane and non discriminatory manner and effectively protected. Special attention should be paid by the authorities to children who are frequently not registered and risk losing their right to apply one day for citizenship as they cannot prove legal residence in the country. In this context, the authorities are urged to speed up the process of ratification of the 1997 European Convention on Nationality (signed on 06/11/1997), as well as the 1961 United Nations Convention on the Reduction of Statelessness²⁶.
54. The Commissioner wishes to stress that interim measures issued by the European Court of Human Rights under its Rule 39, prescribing the stay of an alien's forced removal while it examines his or her individual application, must be abided by member States as part of the obligations under Art. 34 of the European Convention on Human Rights²⁷.
 55. Thus, the authorities are urged to apply all necessary measures in order to prevent possible infringements of the European Court's rule, and guarantee Italy's full and effective compliance with Article 34 of the European Convention on Human Rights and the Court's established case law.

IV. The protection of human rights of immigrants and asylum seekers

56. Similarly to other Mediterranean, Council of Europe member states placed also at the external borders of Europe, Italy has been faced with serious migratory pressures, especially of irregular ones by sea.²⁸ The annual numbers of irregular migrants arriving in Italian coastal border areas from 1999 until 2007 ranged approximately from 13,000 to 50,000²⁹.
57. UNHCR has reported that 35% of those reaching Italy apply for asylum, with 22% being granted a form of protection³⁰. In the period 2004-2007 Italy was on the global list of the top-10 receiving countries of asylum seekers³¹. In this context, the Commissioner commends the humanitarian spirit and efforts made every year by the Italian Coast Guard or other agencies as well as fishermen who collect and rescue hundreds of irregular migrants at sea, while trying to reach Italy.
58. While recognizing the serious challenges that large migratory flows present to state mechanisms, the Commissioner wishes to recall that legislative and other measures adopted by Council of Europe member states in order to effectively deal with such pressures should fully abide by international and European human rights law and standards.
59. In 2002 Law 189/2002 ("Bossi-Fini Law") amended the Comprehensive Law on Immigration 286/1998 ("Turco-Napolitano Law") and attempted to reinforce the internal and external systems of immigration control. Among other changes on the domestic level

²⁶ See also Council of Europe Commissioner for Human Rights, « No-one should have to be stateless in today's Europe », Viewpoint, 09/06/2008, www.coe.int/t/commissioner.

²⁷ See *Mamatkulov and Askarov v Turkey*, Grand Chamber judgment of 04/02/2005; *Olaechea Cahuas v Spain*, judgment of 10/08/2006.

²⁸ See Council of Europe Commissioner for Human Rights, *Report on his Visit to Italy*, 10-17/06/2005, CommDH(2005)9, paragraphs 123-204, www.coe.int/t/commissioner.

²⁹ See Report submitted by Italy to the UN Human Rights Committee, CCPR/C/ITA/CO/5/Add.1, 19/02/2007, pp. 13-14 and UNHCR, Rome, press release of 10/06/2008.

³⁰ UNHCR, Rome, Press release of 10/06/2008.

³¹ UNHCR, *Asylum Levels and Trends in Industrialized Countries*, 2007, 18/03/2008, p. 7.

it extended the detention time limits, made expulsions swift by escorting migrants to the border and introduced higher penalties for those not complying with expulsion orders. On the external level, the law promoted, inter alia, readmission agreements with transit countries³².

60. The newly established government that gained the Parliament's confidence on 16 May 2008 has linked the issue of "public security" with immigration control and given both priority. On 21 May 2008 the Italian Cabinet agreed on a "security package", that is, a series of legislative measures imposing further restrictions and controls over immigration, including immigration from other EU member states, as well as asylum (see subsequent paragraphs).
61. During his visit the Commissioner was informed by the Minister of Interior that certain provisions may be subject to amendments while scrutinised by the Parliament. The Minister of Interior also stressed that the "security package" aims to crack down on irregular migration and on eliminating criminality without adversely affecting any specific ethnic group whatsoever.
62. Major immigration-related provisions that entered into force by Law Decree N° 92 of 23/05/2008 entitled "Urgent measures concerning public security"³³ include the following:
 - a) Aliens are deported and EU nationals are removed from the territory by court decision if sentenced to more than two years' imprisonment;
 - b) The irregular status of aliens who commit a criminal offence is added to the list of aggravating circumstances of the Criminal Code;
 - c) The letting of accommodation to irregular migrants is subject to a sentence ranging from 6 months to three years' imprisonment. As soon as the relevant judgment is final, the building is seized, unless it belongs to a person not related to this offence. The revenues originating from the sale of seized property may be used by the state for the reinforcement of activities aimed at the prevention and repression of the offences related to irregular migration;
 - d) The "Temporary Residential and Assistance Centres" (CPTAs), where there have been detained immigrants subject to expulsion or asylum seekers during examination of their applications, are renamed "Identification and Expulsion Centres";
 - e) Mayors have the power to adopt, inter alia, urgent measures for coping with "threats to public and urban security".
63. Moreover, a draft Law was presented to the Parliament on 03/06/2008. Major alien-related provisions of this draft Law are the following:
 - a) Illegal entry is subject to a sentence of imprisonment ranging from six months to four years. In these cases, the court, following proceedings that should be the swiftest possible, should also order the aliens' expulsion.

³² See European Migration Network, Italian National Contact Point, *Return Migration: The Italian Case*, Rome, December 2006, at 12, www.emnitaly.it.

³³ This type of legislation is adopted in circumstances where the adoption of urgent measures is considered necessary by the government. It is always subject to approval by Parliament within 60 days and to possible review by the Constitutional Court.

- b) Aliens may be detained in the “Identification and Expulsion Centres” for 60 days in order to be identified. If this is not possible within 60 days, the extension of the detention for another 60 days may be authorized by a judge upon a request by the Head of Police. The maximum length of detention is increased to 18 months (instead of 60 days until now);
 - c) The Head of Police, even before the deadline of the sixty days of detention may carry out an alien’s expulsion, informing immediately also the competent court;
 - d) The acquisition of Italian citizenship by marriage would be possible after two years’ residence in Italy;
 - e) In cases of requests of money transfer abroad, the applicant should provide his or her residence permit; in cases where such a permit does not exist, the local police should be informed within twelve hours.
64. Finally, three Legislative Decrees have been prepared by the Cabinet with a view to modifying existing legislation that has transposed three EC Directives relating to immigration and asylum (2004/38 on EU citizens’ freedom of movement and residence, 2003/86/EC on family reunification and 2005/85/EC on refugee status recognition procedures). Major provisions included in these Decrees are the following:
- a) As regards EU citizens’ freedom of movement and residence, EU citizens wishing to reside in Italy for more than three months will have to prove that they have sufficient means, from legal sources, to sustain themselves and their families. They should also have a medical insurance or voluntarily registered in the National Medical Service.
 - b) EU citizens may be removed from the territory on grounds of “public security” which include, inter alia, the fact that they have not registered with the competent authorities within 10 days after the three month period or if they may be considered as a concrete, real and serious threat to fundamental human rights or to “public security” or public morals. Their removal will be urgent if their stay seems to be incompatible with a “civil and safe cohabitation”. Previous domestic or foreign convictions of the persons concerned will also be taken into account in this context.
 - c) As regards family reunification (of third country nationals (non-EU citizens)), DNA tests may be requested to take place at the applicants’ expenses in cases where the conditions for reunification may not be verified with certainty through documents submitted by the authorities of the applicants’ country of origin, or if there are doubts about the authenticity of the documents procured.
 - d) As regards in particular asylum seekers, if they are issued with an expulsion or rejection order due to irregular entry or stay in Italy prior to filing their asylum application, they will no longer be hosted in open reception centres but they will be held in the “Identification and Expulsion Centres”. Their detention period there may also be extended up to 18 months. The proposed amendments also remove, in principle, the suspensive effect of appeals against deportations. Exceptionally stay may be allowed by the Prefect for serious, personal or health, reasons.
65. As regards Italy’s cooperation with non European, transit countries to manage irregular migration, the Commissioner has noted the existence of an agreement between Italy and Libya on “the cooperation in the fight against terrorism, organized crime, drug trafficking and illegal immigration”, which was signed in December 2000 and is in force as from December 2002. On the basis of this agreement, the respective states’ Ministers of Interior have been collaborating on a programme of technical assistance to Libya and on

schemes to combat irregular immigration. Even though there seems to be no readmission agreement between the two countries, Italy has returned forcibly to Libya large numbers of irregular migrants. According to the Italian authorities these returns have resulted in the planning and monitoring by Italy of the ensuing removal of the deportees from Libya to their countries of origin³⁴.

66. In this context, the Commissioner has noted that by its Decision of 11 May 2006 the European Court of Human Rights has declared admissible the complaints of a number of irregular migrants who had arrived on the Italian isle of Lampedusa and were subject to expulsion to Libya. The applicants' complaints concerned notably alleged violations of Article 3 of the Convention and Article 4 of Protocol N°4 to the Convention³⁵.
67. Finally, the Commissioner has noted with grave concern that Italy has established the practice of returning forcibly migrants, on the basis of bilateral agreements, to certain countries (of transit or origin), such as Tunisia and Egypt, with long-standing, proven records of torture (see also section V).

Conclusions and Recommendations

68. The repeated adoption of emergency legislative measures by a Council of Europe member state in order to control migratory movements seems to indicate that the state mechanism is unable to deal effectively with a phenomenon that is not novel and thus should have been dealt with through ordinary legislative or other measures. Moreover, the frequent changes of immigration law act to the detriment of legal certainty, one of the constituent elements of the fundamental principle of rule of law on which the Council of Europe is based.
69. The Commissioner is very concerned at the new legislative measures on immigration and asylum which have been adopted or are about to be adopted by Italy. As he informed the Minister of Interior, Mr Roberto Maroni, during his visit, he fears that, despite the authorities' declared intentions, these measures will result in a further social stigmatisation and marginalisation of migrants (including Roma) and in a further rise of anti-immigration and xenophobic climate in the country. The detrimental effects of this legislation on asylum seekers, often obliged to arrive in an irregular manner, is also of special concern to the Commissioner. The authorities' suggestion that the new legislation would not reduce the possibility to apply for asylum should be checked against the practice.
70. The Commissioner notes that the impact of restrictive legislative and other measures on irregular migration is much debated, with some experts arguing that they rather ignite in effect irregular migration³⁶. He strongly feels that Council of Europe member states should undertake further efforts in order to view and tackle migration as a social, not criminal law, issue. That issue requires comprehensive, long-term and sustainable, national action plans in which host and origin states should work together, having as their priority the effective protection of the human rights of the people who feel themselves obliged to migrate for a better life.

³⁴ Report of Italy to the UN Committee on the Elimination of Racial Discrimination, CERD/C/ITA/15, 29/03/2006, paragraphs 65-67.

³⁵ *Ahmed Husssun and 4 others*, Appl. N° 10171/05, *Yasser Mohammed and another*, Appl. N° 10601/05, *Mohamed Salem and 78 others*, Appl. N° 11593/05, *Kamal Midawi* Appl. N° 17165/05.

³⁶ The introduction in 1990 and 1991 of visa requirements for Maghrebis by Spain and Italy has reportedly resulted in the end of the free seasonal and circular labour migration and ignited the irregular migration of these people to Europe, H. de Haas, *Irregular Migration from West Africa to the Maghreb and the European Union: An Overview of Recent Trends*, International Organization for Migration, Geneva, 2008, p. 32.

71. The Commissioner further notes that, despite a widespread opposite state trend, international law has clearly established the principle that aliens whose only offence is the violation of immigration law should not be treated by transit or host states as criminals or potential criminals. As Article 17, paragraph 3, of the 1990 International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families prescribes, migrants detained for violation of provisions relating to migration should be held, in so far as practicable, separately from convicted persons or persons detained pending trial. Even though Italy is not a State Party to this Convention, the Commissioner considers this text as a reference for the protection of migrants' rights and the need to avoid their criminalisation. He notes with regret the Government's disagreement on this point.
72. The Commissioner is particularly concerned at the criminal law amendment by the above-mentioned Law Decree by which the irregular stay of aliens who commit an offence shall be considered as an aggravating circumstance that will lead to the increase of these persons' sentences. This provision may raise serious issues of proportionality and discrimination based on one's immigration status³⁷.
73. The introduction of those aggravating circumstances and the purported punishment for irregular entry and for letting accommodation to irregular migrants contravenes a well established position in international law that the irregular entry and stay of an alien should be in principle an administrative offence³⁸. Departing from such well established principle is a serious matter indeed.
74. In addition, it is to be noted that, as also mentioned during the discussion that the Commissioner had with the President of Italy's National Judges' Association on 19 June, the criminalisation of irregular migration is likely to strain even further the Italian judicial system, which suffers from the systemic problem of excessive length of judicial (including criminal) proceedings and the backlog of cases³⁹. In this context, it should be remembered that Italy is the European state with the highest number of judgments (1,715) delivered against it by the European Court of Human Rights from 1999 to 2007. The majority of these judgments (948) concern the systemic problem of excessive length of judicial proceedings⁴⁰. As at 31 December 2007 Italy was the contracting state with the highest percentage (45%) of judgments delivered against it by the European Court of Human Rights and whose execution was supervised by the Committee of Ministers under

³⁷ See paragraph 4 of the UN Committee on the Elimination of Racial Discrimination (UN CERD), General Recommendation N° 30 : *Discrimination against non citizens*, 2004: "Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim..." See also paragraph 5(a) of UN CERD General Recommendation N° 31 *on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, 2005: "States parties should pursue national strategies the objectives of which include the following: (a) To eliminate laws that have an impact in terms of racial discrimination, particularly those which target certain groups indirectly by penalizing acts which can be committed only by persons belonging to such groups, or laws that apply only to non-nationals without legitimate grounds or which do not respect the principle of proportionality...", www2.ohchr.org/english/bodies/cerd/index.htm.

³⁸ See also UN Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, Report to the Human Rights Council, A/HRC/7/12, 25/02/2008, paragraph 60.

³⁹ See Council of Europe Commissioner for Human Rights, *Report on his Visit to Italy*, 10-17/06/2005, CommDH(2005)9, paragraphs 6-49.

⁴⁰ European Court of Human Rights, *Annual Report 2007*, Strasbourg, 2008, statistics, p.144. The majority of these judgments (948) concerned the systemic problem of excessive length of judicial proceedings.

Article 46, paragraph 2, of the Convention⁴¹. The Commissioner recommends that the authorities fully reflect on this additional dimension of the criminalisation of irregular migration and urge them to review, with a view to revoking, the above-mentioned provisions.

75. The Commissioner is equally concerned at the increase by the aforementioned draft Law of the maximum detention of immigrants and asylum seekers to 18 months, all be it in line with a recent EU Directive on return. He wishes to reiterate that asylum seekers' detention should be expressly proscribed by law and allowed exceptionally only for specific reasons precisely laid down in law⁴². Asylum seekers' removals should also be subject to a suspensive appeal, at least where there are arguable claims that these persons would be subjected, if forcibly returned to their country of origin, to treatment contrary to Articles 2 or 3 of the European Convention on Human Rights⁴³. In this context, the Commissioner also calls upon the authorities to seriously consider the possibility of drastically limiting the practice of administrative detention of migrants, one problem of which is the high degree of discretion and broad powers of the immigration (police) officers.
76. For these reasons, the Commissioner is seriously concerned by the possibility given under the same draft Law to the Heads of Police to expel an alien in detention even before the deadline of the sixty days of detention, solely informing the competent court thereof. Such measure should not be approved.
77. The Commissioner wishes to recall and emphasize that even though there is no absolute right for any category of aliens not to be deported, there are circumstances where the expulsion of an alien gives rise to violations of the European Convention on Human Rights, in particular of Article 8 on the right to respect for private and family life. Expulsions, like other measures restricting human rights, should be based on a domestic law that satisfies the quality criteria provided for by the Convention, that is, it should be accessible and foreseeable and afford a degree of effective legal protection against arbitrary interference by the authorities⁴⁴.
78. Moreover, expulsion measures that affect Convention rights should always be necessary in a democratic society, in particular, proportionate to the legitimate aim pursued⁴⁵. Certain provisions of the new Italian legislation under preparation, such as those concerning the "public security" grounds for expulsion of EU citizens, may well raise serious questions of compatibility with the Convention.
79. All in all, there is thus an urgent need to promptly avoid developing a policy towards migrants driven only by security and control needs. While building on a small number of stated initiatives and experiments, the authorities should establish a comprehensive, sustainable action plan aimed at the effective integration of immigrants and refugees at national, regional and local levels.

⁴¹ See Council of Europe Committee of Ministers, *Supervision of the execution of judgments of the European Court of Human Rights, 1st Annual report 2007*, Strasbourg, March 2008, pp. 209 and 210 and tables therein.

⁴² See Council of Europe Commissioner for Human Rights, "States should not impose penalties on arriving asylum-seekers", Viewpoint of 17/03/2008, www.coe.int/t/commissioner.

⁴³ See also Council of Europe Commissioner for Human Rights, *Recommendation concerning the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders*, 19/09/2001, CommDH/Rec(2001)19, paragraph 11, www.coe.int/t/commissioner, Guidelines 5.3 and 2.1 of the Council of Europe Committee of Ministers, *Twenty Guidelines on Forced Return*, Strasbourg, September 2005, www.coe.int/t/cm.

⁴⁴ See *Al-Nashif v Bulgaria*, judgment of 20/06/2002, paragraphs 119, 121, *C.G. and others v Bulgaria*, judgment of 24/04/2008, paragraphs 39, 47, 49.

⁴⁵ See, inter alia, *Üner v The Netherlands*, Grand Chamber judgment of 18/10/2006, esp. paragraphs 54-60, *Maslov v Austria*, Grand Chamber judgment of 23/06/2008, esp. paragraphs 77-101.

80. The Commissioner questioned the authorities' policy regarding deportations of irregular migrants to Libya, a country with proven records of torture and to date still not bound by the United Nations Refugee Convention. He was assured that no return of foreign citizens to Libya had taken place since April 2006. In this regard, the Commissioner also draws the authorities' attention to the Council of Europe Committee of Ministers' *Twenty Guidelines on Forced Return*, especially to Guideline 20 that regards monitoring and remedies of forced returns.
81. Finally, the Commissioner urges the authorities to stop applying and to avoid in the future the establishment of bilateral agreements for the forced return of irregular migrants with countries with long-standing, proven records of torture.

V. Human rights protection in the context of aliens' forced returns based on antiterrorism legislation

82. In 2005 there was adopted Law Decree 144/2005, converted into Law 155/2005 ("Pisanu Law"), on "emergency measures to combat international terrorism". Major features of this law have been the following:
 - a) It extended the permissible period of detention by judicial police for identification purposes from 12 to 24 hours, making it also possible to restrict suspected terrorists' access to lawyers during this period;
 - b) An accused person may be detained for five days under a reasoned decree by an investigating judge before being allowed access to a lawyer;
 - c) It allowed the Minister of Interior or, under his or her delegation, the Prefects – and not judges, as previously – to order expulsions, for the purpose of preventing acts of terrorism;
 - d) The law did not condition expulsion on the existence of a terrorism-related charge or conviction but allowed it also in cases where there are well-grounded reasons to believe that the person concerned may favour terrorist organizations and activities;
 - e) Finally, it derogated from ordinary law by stipulating that only the administrative courts may hear appeals against these orders, while the lodging of an appeal does not suspend the expulsion.
83. Since its adoption, the authorities have been using this legislation to arrest, question and expel aliens presumed to have terrorist connections, but in respect of whom, one supposes, the necessary proof to press criminal charges has not been found. It is noted that the previous Commissioner had expressly urged the Italian authorities to review this legislation and fully align it with the Council of Europe standards⁴⁶.
84. A well-known case where the "Pisanu Law" was applied was that of *Saadi v Italy*. By its judgment in this case on 28/02/2008, the Grand Chamber of the European Court of Human Rights found that the enforcement of the Tunisian applicant's deportation to his country of origin would constitute a violation of Article 3 of the Convention, despite the diplomatic assurances that had been requested by Italy.

⁴⁶ Council of Europe Commissioner for Human Rights, *Report on his Visit to Italy*, 10-17/06/2005, CommDH(2005)9, paragraph 188, www.coe.int/t/commissioner.

85. The Commissioner has noted with grave concern the report on another deportation (case of Cherif Foued Ben Fitouri) from Italy to Tunisia in January 2007 under the same Law. In this case, it has been reported that the deportee was subjected to torture and other forms of ill-treatment while he was in detention in Tunisia⁴⁷.
86. In June 2008 the Commissioner was informed of a new deportation to Tunisia under the same Law (case of Essid Sami Ben Khemais), this time even though the deportee had earlier lodged an application with the European Court of Human Rights and the latter had requested Italy, under its Rule 39, to suspend the deportation until it had time to examine the applicant's claim that he would face the real risk of torture or serious ill-treatment if returned to Tunisia.
87. On 09 June 2008 the Commissioner addressed a letter to the Italian authorities conveying his concerns and requesting explanations about the policy course which was illustrated by the above deportation to Tunisia. During his visit to Italy, the Commissioner was informed by the Minister of Interior, Mr Roberto Maroni, that the above deportation took place following the receipt of written assurances from the Tunisian Ministry of Justice that the deportee's right to a fair trial in Tunisia would be fully respected⁴⁸.
88. The Commissioner expressed to the Minister of Interior his particular concern at this deportation which happened in disregard of the request made by the Court under its Rule 39 to suspend the expulsion and thus avoid a possible violation of Article 34 of the European Convention on Human Rights. The Commissioner also requested the Minister to take the appropriate measures so that the authorities effectively monitor the above deportee's reception and protect his safety and dignity while in Tunisia.
89. The Commissioner is gravely concerned at the fact that this is not the first case in which Italy has not abided by a request of non deportation made by the Court under its Rule 39 (Interim measures)⁴⁹. Such actions are deeply regrettable and put at risk the effectiveness of the European system of human rights protection.

Conclusions and Recommendations

90. The Commissioner is well aware of the grave difficulties faced by Council of Europe member states in their efforts to protect their societies from terrorist violence. However, European human rights standards prohibit *in absolute terms* torture or inhuman or degrading treatment or punishment of every person, irrespective of their undesirable or dangerous conduct. As the European Court of Human Rights has stressed, freedom from torture and ill-treatment corresponds to one of the fundamental values of European democratic societies.
91. The Commissioner strongly opposes the forced return of aliens on the basis of diplomatic assurances which are usually sought from countries with long-standing, proven records of torture.

⁴⁷ Amnesty International, *Report 2008*, London, 2008, "Italy" p. 170, Amnesty International, *In the Name of Security: Routine Abuses in Tunisia*, London, 23/06/2008, pp. 30-31, www.amnesty.org.

⁴⁸ The deportee reportedly will be subject to a trial before a military court in Tunis in July 2008, Amnesty International, *In the Name of Security: Routine Abuses in Tunisia*, London, 23/06/2008, p.29.

⁴⁹ See case of *Hamidovic v Italy*, Appl. N° 31956/05, pending before the Court. In this case, the applicant, a Roma mother of three children, was reportedly deported to Bosnia and Herzegovina in September 2005, even though the Court had earlier applied its Rule 39 and requested a stay of deportation.

92. The Commissioner wishes to reiterate and stress that the weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged, real risk of torture and ill-treatment. Such assurances should never be relied on, where torture or ill-treatment is condoned by the governments and is widely practised.

93. The inherent weakness of diplomatic assurances has been demonstrated in two major judgments of the Grand Chamber of the European Court of Human Rights, in the cases of *Chahal v the United Kingdom* (15/11/1996) and the aforementioned judgment in the case of *Saadi v Italy* (28/02/2008)⁵⁰. In both cases the Court found that the enforcement of deportation, to India and to Tunisia respectively, of the aliens concerned would constitute violations of Article 3 of the Convention, despite the diplomatic assurances that had been requested (obtained in the former case) by the respondent states.

94. In such circumstances, the accession of a state to international human rights treaties may not be considered to be in itself, or in combination with diplomatic assurances, a sufficient, reliable guarantee against the risk of torture or other forms of ill-treatment which are proscribed by Article 3 of the European Convention on Human Rights⁵¹. In such cases, states are urged to use existing measures alternative to forced return, such as, under Italian law, compulsory residence and special police supervision.

95. The Commissioner draws the authorities' attention to the Council of Europe Committee of Ministers' *Twenty Guidelines on Forced Return*, especially to Guideline 20 that regards monitoring and remedies of forced returns. According to paragraph 3 of this Guideline, forced return operations should be fully documented, particularly with respect to any significant incidents that occur or any means of restraint used in the course of the removal operation.

96. The Commissioner wishes to underline that in cases of enforced return the deporting State has a duty⁵² to effectively monitor the reception of the returnee and ensure full protection of his or her safety and dignity.

97. The Commissioner is particularly concerned that forced returns from Italy on the basis of the "Pisanu Law" are based on appreciations made by administrative organs (Minister of Interior or Prefects), whose decisions are subject to non-suspensive judicial appeals. It is also of special concern that access to legal counselling has been disproportionately curtailed by this legislation.

98. *The authorities are urged to ensure that the rights enshrined in the European Convention on Human Rights and the principle of non-refoulement are fully safeguarded in the specific legislation. In this regard the authorities' attention is also drawn to the Council of Europe Committee of Ministers' Guidelines on Human Rights and the Fight against Terrorism (2002).*

⁵⁰ Affirmed by the Court in its judgment in the case of *Ryabikin v Russia*, 19/06/2008.

⁵¹ See also Grand Chamber of the European Court of Human Rights, judgment in the case of *Saadi v Italy* 28/02/2008, paragraph 147.

⁵² See, inter alia, European Court of Human Rights, judgment in the case of *Ryabikin v Russia*, cited above, paragraph 119, and Committee of Ministers, *Twenty Guidelines on Forced Return*, cited above, Guideline 20 and its commentary.

99. Finally, the Commissioner wishes to stress that interim measures ordered by the European Court under its Rule 39, prescribing the halt of an alien's forced removal while it examines his or her individual application, should be abided by member States as part of their obligations under Article 34 of the European Convention on Human Rights⁵³. Contrary decisions are not acceptable and seriously jeopardize the effectiveness of the European system of human rights protection.
100. The authorities are urged to apply all necessary measures in order to prevent possible infringements of the European Court's rule, and guarantee Italy's full and effective compliance with Article 34 of the European Convention on Human Rights.

⁵³ See *Mamatkulov and Askarov v Turkey*, Grand Chamber judgment of 04/02/2005; *Olaechea Cahuas v Spain*, judgment of 10/08/2006.

A P P E N D I X

COMMENTS BY THE ITALIAN GOVERNMENT

I. Introduction

General Remarks

The Italian Government is pleased that the Human Rights Commissioner wishes to develop a substantial and constructive dialogue with the Italian authorities in the context of his mission as an independent and impartial institution promoting respect for human rights. The Italian Government has examined the draft Memorandum dated July 1, 2008, which was issued following the visit of the Commissioner to Italy on June 19-20, 2008, by paying specific attention to the conclusions and recommendations therein.

The protection of human rights is enshrined in the Italian Constitution. This envisages the protection of all rights and fundamental freedoms as included in relevant international standards, such as the European Convention on Human Rights and Fundamental Freedoms, the Human Rights Universal Declaration or the International Covenant on Civil and Political Rights. The protection and promotion of rights – be it civil and political, economic, social and cultural, be it referred to freedom of expression or to the fight against racism or to the rights of the child and of women – constitute one of the fundamental pillars of both domestic and foreign Italian policies.

The Italian legal system aims at ensuring an effective framework of guarantees to fully and extensively protect the fundamental rights of the individual, providing with a wide range of protection measures. In this regard, it is worthy of mention the role played by the Constitutional Court that deals only with infringements of specific constitutional law (Arts.134 ff. of the Italian Constitution). For example, the Constitutional Court has the power to abrogate any legislation which is not in line with the Basic Law, both in terms of form and substance. Complaints of unconstitutionality may be lodged at the Court, by whoever, in the course of either a criminal or a civil proceeding, claims that his or her basic rights have been infringed by an Act, which might be unconstitutionalⁱ.

Therefore, in developing new legislation, the Italian Government recalls and fully complies with the Italian Basic Law, as well as with international obligations. Along these lines, Italy's policies are forged in light of the EU's legislation, aims and purposes, in particular in the areas of the integration process, the right to freedom of movement and asylum.

The Italian Government suggests that the following comments be taken into account by the Commissioner, when drafting his final Memorandum.

II. Action against racism and xenophobia

In the field of action against racism and xenophobia, it might be useful to stress that in Italy's view, the basic rule - if any -, which should guide modern democracies in the protection of rights is the effective implementation of the principle of non-discrimination, one of the main pillars of our constitutional code, upon which the domestic legislative system is based, when referring to different categories of people, such as women, minorities and other vulnerable groups.

[PARAS. 18, 20] The Government is pleased that the Commissioner appreciates the initiatives taken to reinforce the anti-discrimination legal framework and the approval of a Code of Conduct on reporting by the Italian Council of Journalists.

[PARA. 19] The stigmatisation of certain ethnic or social groups is of serious concern for the Government, state and local authorities. All political forces have firmly condemned all recent attacks against particular groups and will continue to exercise the responsibility to protect all persons present on the Italian territory, as clearly emphasized by the Head of State, Hon. Giorgio Napolitano, on June 2 2008, on the occasion of Italy's National Day.

[PARA. 21] The Italian legal framework contains a wide range of criminal, civil and administrative law provisions to combat racism. In the field of criminal law, it is particularly relevant the so-called "Mancino Law", as modified by Law No. 85/2006, that provides that racial motivation constitutes a special aggravating circumstance, increasing the punishment by the half, for all offences committed with the intention to discriminate on the basis of race, ethnicity, or national or religious background and the prohibition of every establishment of, participation in, or assistance to organizations, associations, movements or groups aiming to incite racial discrimination.

The amendment introduced in February 2006 to the "Mancino Law" mitigated only the punishments attached to the crime, provided by Art. 1, consisting in propaganda advocating racial or ethnic superiority or hatred, and instigation to commit or the commission of discriminatory or violent acts on racial, ethnic, national or religious grounds by reducing the initial maximum term of 3 years of imprisonment to either a fine of 6,000 euros or 18 months imprisonment.

It should also be noted that Italian law (Legislative Decree No. 215/2003) aims at the implementation of the principle of equal treatment for all individuals, regardless of the racial or ethnic origin (Art. 1) and foresees civil action against discriminatory acts committed by individuals or public administration on racial, ethnic or religious grounds (Arts. 4 and 5) and on nationality grounds (Art. 44 of Legislative Decree No. 286/1998 governing immigration and the status of foreign nationals).

[PARAS. 22, 23] As to anti-discrimination legislation, it should be recalled that by Law No. 101 of 6 June 2008 the national legislation has been amended, in order to reverse the burden of proof, which has been shifted to the respondent if the claimant supplies with factual elements sufficient to demonstrate the presumption of a direct or indirect discrimination.

[PARA. 23] As far as the independence and effectiveness of the national body in the anti-racial discrimination field, the Government recalls that the full compliance of UNAR (the acronym stands for the National Office Against Racial Discrimination) with the provisions of the Directive 2000/43/CE has been recognized by the European Commission in June 2007.

[PARAS. 24, 51] Under the 2006-2008 Legislature, many draft laws have been introduced to the two branches of Parliament for the establishment of an independent national human rights institution. On April 2007, the Chamber of Deputies passed a draft law named "Establishment of a National Commission for the human rights' protection and promotion, including for the protection of the rights of prisoners or persons deprived of their personal freedom". The draft law was then transmitted to the Senate for the final adoption, but the anticipated conclusion of the Legislature determined its expiry. Under the current Legislature, a draft law has been introduced to the Senate (A.S. 373) and is waiting to be examined by the competent committee.

[PARA. 25] The fight against racism and racial discrimination, at the educational level, is carried on by the Ministry on Education, from the primary through the secondary school, by means of specific educational programmes, marked by an intercultural approach. For instance, on Holocaust, every year since 2001 more and more classes participate in the annual competition, organized by the Ministry of Education and the Union of Jewish Italian Communities.

All children living in Italy enjoy the right to education, even if their parents have no residence permit. As a consequence, the Italian school system is committed to providing knowledge of different cultures. In this context, the Ministry of Education will consider the *Factsheets on Roma History*, as prepared by the Council of Europe, providing its translation and dissemination at the education level, throughout the country.

The Minister on Education has confirmed, on July 16th, 2008, that an ad hoc plan will be launched in September, inter alia on the basis of the mapping exercise of the children living in the nomad settlements, in order to speed up the integration process of Roma children within the education system. With the aim of facilitating the access to school, the above plan will envisage additional lessons of Italian language, a specific training for the school staff and the teachers - so that they may act as cultural mediators -, and ad hoc memoranda of understanding with relevant NGOs.

On a more specific note, at the regional and local levels, many measures and initiatives have been taken for the integration of Roma and Sinti communities. With the aim of eradicating discrimination at school, Regions and Municipalities have been implementing

specific projects, as jointly financed by the EU Funds and the Italian central state. As a way of example, specific prep-activities are prepared at the kindergartens level by Social Services; opportunities for groups of children to close educational gaps are envisaged, by means of summer educational vacations (*“Programma - estate ragazzi in Bolzano”*, for 66 Sinti children). In addition, ad hoc lessons, cultural mediation and a specific bus transportation are made available.

III. The protection of human rights of Roma and Sinti

[PARAS. 42, 43, 48] The Government will soon adopt specific measures to enhance security for all citizens and to better address immigration-related issues. The aforesaid measures, consistent with the Italian Constitution and with EU provisions (in particular with the Decision of the European Parliament dated June 18), are still under discussion at the Parliament level. In such a context, the “security package” is aimed at addressing more effectively the phenomenon of illegal immigration (as well as its connection with all forms of crime), in order to improve integration policies designed for those legal migrants who are present in Italy.

The measures included in the “security package” are meant to curb criminal behaviours of individuals and no provision at all is envisaged against any community, group or class nor is linked to any form of discrimination and xenophobia.

In fact, the relevant provisions are meant to deal with critical situation, which recently determined locally episodes of intolerance and tension towards Roma communities. These episodes were timely dealt with by the competent authorities that made up all the necessary precautionary measures, also at the social and information levels. The creation of ad hoc Commissioners to overcome rapidly the emergency situation for the cities of Rome, Milan and Naples, where it was more acute (Commissioners coincides with the Prefects of the same cities), matches the necessity of the coordination with the locally competent institutions and relies on safeguarding the general interest and public security.

These measures are not directed to specific groups, subjects or ethnic groups, but to all people who live in the settlements, regardless of their nationality. This was considered necessary and was shared with the Commissioner Hammarberg, during his meeting with the Minister of Interior, Hon. Maroni, on June 19, 2008.

Re-affirming the rule of law and re-assuring appropriate living conditions is in the interest of everybody, including Roma and groups potentially more exposed to the risk of abuses and exploitation. As a consequence, the Orders (Prime Minister decree), dated May 30th, task the Prefects of Rome, Milan and Naples with specific duties, in order to overcome the situation of deterioration faced at many nomad settlements (where there are Roma people from Romania, Italian citizens and nomads coming from Non-EU Countries). Restoring good living conditions within the law is in the interest of the concerned communities and, overall, in the interest of people belonging to the above communities who are the most exposed to abuse and exploitation.

In the above-mentioned Orders, it is clearly stated that these measures arise from the need to “implement all the initiatives aimed at ensuring the respect for fundamental rights and for the dignity of human beings”. In order to implement humanitarian and immigration principles and to allow people to access to basic health-care and social assistance, it is necessary to introduce reliable identification proceedings. Such measure is also necessary to protect children from those individuals or criminal organizations who exploit the uncertain children origin and the lack of I.D. documents, in order to favour trafficking and the relating exploitation”, as clearly mentioned in Art. 1 of the Orders.

Such measures, in line with the EU legislation (including *inter alia* with the June 2008 EU Presidency Conclusions), will envisage specific cooperation projects with Regions, public institutions and the Italian Red Cross.

As to the identification procedure, information is collected without the creation of a database and in accordance with national and international laws and regulations concerning the protection of privacy, through records that are used for all citizens, under the responsibility of authorized entities.

On a more specific note, as regards the use of identifying techniques, various forms of recognition can be used: descriptive, photographic, anthropometric, and fingerprint identification. The latter shall be used only if it is not possible to obtain a valid identification through available documents and certain circumstances. Specific attention is required when identifying minors: in particular, it is allowed to fingerprint only youngsters from the age of 14, onwards, when other means are not implementable.

With regard to children between the age of 6 and 14, fingerprints shall be taken only in order to grant stay permission. In this case, it must be noted that such procedure will take place only upon request by the individual exercising the legal authority over the child concerned. This procedure may also be applied when necessary, upon agreement with the juvenile tribunal and through the judicial police. Below the age of six, fingerprints could be taken only under exceptional circumstances, namely when the children have been abandoned or when there is the suspicion they could be victim of a crime.

Specific attention towards Roma children has been paid by the Interior Minister, Hon. Maroni, on the occasion of a Round-Table on the “security package”ⁱⁱ. The Minister stated that Roma children living in settlements, whose parents cannot be identified, might obtain the Italian nationality. To this end, in order to protect children in need, there might be room for an exception to the ‘jus sanguinis’ principle.

[PARAS. 44, 45, 46] The Italian Government is evaluating additional measures, in order to promote the integration of minorities, and to improve their living conditions. Some of the proposals – still under consideration – include the promotion of social activities, especially for women and children. As a way of example, it is worthy of mention the launching of the CoE's awareness campaign, entitled "DOSTA". Its purpose is to start up a systematic action

for the creation of a network between all relevant actors and stakeholders at different levels (institutional, European, national and regional), in order to disseminate best practices on non-discrimination. Its final goal is to contribute to the transfer of experiences and to the growth of specific competencies in European Countries.

Specifically, an *ad hoc* phase of the DOSTA campaign will take place in Italy in 2008-2009, after being successfully developed in Eastern Europe, adapting instruments and methodologies to the relevant Italian social and cultural context.

As to the access to education for the Roma children, Roma people enjoy the right and have the duty to fulfil education obligations as is the case with all the other students. It must be reiterated that in line with the constitutional principles, the Italian legislation does not discriminate between Italian and foreign students, even if the conditions of the latter do not meet the legal requirements for their stay in the country.

On a more general note, by Legislative Decree dated March 2005, the attendance of the school has been extended and is now compulsory for all the youngsters, up to the age of 16.

In order to increase the attendance, the Ministry of Education has allocated specific financial resources for the schools with high percentage of immigrants, including Roma students, in order to implement educational activities aimed at facilitating their effective integration. By means of cooperation with relevant bodies, representatives of associations, civil society at large, and schools, the Ministry of Education has envisaged extra-curricula activities for Roma students. The Ministry releases periodical instructions in order to earmark the resources. From data collected by the same Ministry, in the school years 2006-2007, 12.000 Roma students attended school nation-wide (229 of them in the secondary school).

Other positive actions for the integration of the Roma are underway, like those contained in the National Plan for the European Equality Year 2007. A specific action for street children has been designed, on the basis of national and European best practices, with particular focus on Roma children, being exploited or involved in illegal activities.

“The road of rights” Project realized by Save the Children Italy (NGO) that won the competition for the funds related to the National Plan, is devoted to Roma children (as requested by the Equal Opportunities Ministry), since they are recognized as one of the most vulnerable groups in the Italian society, in terms of discrimination, as far as the right to education, the right to health, the right to protection from sexual and others exploitations are concerned.

A significant measure for, among others, Roma communities is contained in the Financial Act 2007, which established the “Fund for Immigrants Social Inclusion”, allocating 50 million euros.

By a Social Solidarity Minister Directive, dated August 2007, the facilitation of the access to housing for Roma, Sinti and Travellers has been considered as a priority for the allocation of funds. A further area of intervention regards the inclusion in and the orientation to primary education, with the facilitation of communication between Roma families and educational institutions.

In connection with the National Strategic Plan for Structural Funds 2007-2013, the Equal Opportunity Department elaborated several Plans of Action providing structural interventions for Roma communities through the European Social Fund and the European Regional Development Fund.

In particular, with a view to promoting a higher participation of Roma, Sinti and Travellers in the economic and social fields, UNAR has funded specific projects aimed at providing legal, administrative and managerial support to Regions for the identification, planning and monitoring of regional policies for the elimination of local obstacles to the social inclusion of the concerned communities. To this end, there will be a mapping exercise of the institutions and services available, including local social projects on education, training, labour, health care, etc..

It is worthy of mention the examples of good practices offered by the Municipalities of Pisa and Bologna, mentioned during international conferences, such as the *Supplementary Human Dimension Meeting* on sustainable policies for the integration of Roma and Sinti communities, which took place in Vienna on 10 and 11 July 2008.

[PARA. 47] As to the different views on the term "nomad", there is no intentionally discriminatory attitude. This wording is meant to stress that over the years, primarily Roma people have identified themselves as nomads, since they are not located in a specific territory. In this regard, it is worthy of mention that the oldest and most representative Roma NGO working in Italy is called "Opera Nomadi". The term "nomad" has been used in a general way and in order to simplify the language, without any negative meaning also in the above mentioned Orders. With the purpose to indicate persons without a fixed residence, and who live in temporary settlements.

Within this framework, it is worthy of mention that the Italian basic legislation on the protection of minorities was inspired by Art.6 of the Constitution, which stipulates, "the Republic protects *linguistic minorities* by means of *ad hoc* legislation". Thus, omnibus legislation for the protection of historical linguistic minorities was adopted in 1999, with the aim of fully implementing the general principles established by the European and the International Organisations.

The basic criterion for the label of "linguistic minority" is based upon the stability and the duration of the settlement in a delimited area of the country, which is not the case for Roma people. Accordingly, during the debate at the Parliamentary level, the situation of Roma people was not included in the above legislation due to the specificities of this minority. Implementing the above legislation on linguistic minorities, ad hoc measures have been

adopted, in order to protect the language and the culture of Albanian, Catalan, German, Greek, Slovenian and Croatian populations, as well as those ones of French –Provençal, Friulan, Ladino, Occitan, Sardinian–speaking communities that respond to the above criterion.

[PARA. 49] It is the responsibility of central and local authorities to guarantee the security and the public order throughout the country. As to the events occurred in Ponticelli (Naples), in order to identify the people involved, the police submitted a report to the competent judicial authorities, and investigations are ongoing. At the outbreak of the events, the provincial chief of the police (“Questore”) immediately ordered the strengthening of protection measures towards the Roma settlements and the local police forces were sent to Ponticelli. To guarantee the security, all the police forces were mandated to protect Roma people living in the settlements concerned. All the settlements were thus guarded, on a permanent basis. Due and specific care was paid to the victims by the Municipality and civil protection units, tasked with providing assistance and shelters to the affected people, while monitoring children living there. Thanks to the co-operation provided by “Opera Nomadi”, a prominent NGO committed in this specific field, people living in the attacked settlements were first gathered in the main camp, located in Malibran Street; subsequently they were moved to settlements located outside Naples or in the Reception Centre of “Santa Maria del Pianto”, in the Poggioreale district.

Criminal proceeding against unknown persons were immediately initiated before the Office of the State Prosecutor at the Court of Naples for the offences mentioned in Arts. 110, 419, 423 of the Criminal Code (complicity in committing arson, acts of devastation and pillage). Likewise, the Office of the State Prosecutor of Milan is carrying out criminal proceedings for the fire set in some nomad settlements, between October and November 2007.

[PARA. 50] Law enforcement personnel is routinely trained, in order to deal with minorities and migrants in full compliance with the Italian Constitution and European human-rights standards. The training is constantly fine-tuned to face social development and emergencies. Over the years, specific trainings have been developed in order to better allow police forces to protect and deal with Roma people. Training courses usually deal with the subject of diversity of cultures, under the perspective of cultural mediation, through a presentation of migration routes, the laws about immigration and through the analysis of different types of foreign nationals; the courses also dwell upon the relation between the diversity and the skills necessary for mediation and for cultural conflicts management.

[PARA. 52] According to the Italian legislation, any expulsion of aliens can be taken only on an individual basis. No collective expulsions are allowed.

[PARA. 53] The ratification process of the European Convention on Nationality and the Council of Europe Convention on the avoidance of statelessness in relation to State succession has been initiated by the competent administrations that are assessing the possible impact of both acts on the Italian legislation.

[PARAS. 54, 55] The Italian Government cannot agree with the allegation made by the Commissioner concerning its alleged “practices” contrary to the *ad interim* measures ordered by the European Court of Human Rights. In fact, even before the *Mamatkulov* judgment in 2005, when *ad interim* measures were considered not binding, Italy has always shown its full respect for the Court’s invitation.

Only once, in 2006, an expulsion took place in spite of the *ad interim* measure, but even that case - *Hamidovic v Italia* – clearly shows the Italian approach. A woman belonging to the Roma community was expelled and returned to Bosnia and Herzegovina because the notification of the *ad interim* measure was received within a very short lapse of time, prior to the execution of the order of expulsion. Afterwards, the Italian Government undertook thorough investigations in Bosnia, in order to find Mrs. Hamidovic, and gave her a visa to re-enter Italy. While waiting for the Court’s sentence, Mrs. Hamidovic has been granted a stay permit and currently lives in Italy.

IV. The protection of human rights of immigrants and asylum seekers

The serious dimension of the phenomenon of the flow of foreigners, irregularly entering the Country, is a matter of ever-growing concern. For geographical reasons, Italy remains one of the countries of transit and destination most exposed to such immigration flows. Aware of that, Italy has been engaging in the implementation of its legislation on immigration, and the amendments to the immigration law have been always in full compliance with the constitutional principles and, in particular, with the value of the certainty of law.

On May 14, 2008, when introducing his strategy and political programme, the President of the Council of Ministers emphasized that the immigration is an opportunity for improving and enriching Italy. Over the years, the openness and the willingness to integrate foreigners with Italians has emerged, *“Growing means developing our ability to making exchange with the rest of the world, by including and integrating the migrations, internal and external to the EU: masters at home while being proud of our hospitality and integration ability, without being caught by negative feelings of defeat vis-à-vis the difficulties and the risks of a wild and uncontrolled immigration”*. Along these lines, at the European Council session, held in Brussels on June 18th, 2008, the President of the Council stressed the need to develop an EU common policy to effectively deal with the Mediterranean and Africa countries.

[PARA. 68] Regarding the immigration issue, the following five different draft pieces of legislation are currently under examination at the Parliament level: A Law Decree (*Decreto Legge*) No. 92/2008, entitled “Urgent measures concerning public order” is temporarily in force and has to be confirmed, with possible modification, by the Parliament, before July 25th, 2008 (The urgency of this measure is not based on the emergency nature of the problem, but is meant to speed up the relevant legislative processⁱⁱⁱ). A Bill (Senate Act No. 733), which is still under preliminary discussion before the competent committee of the Senate. Additionally, three Legislative Decrees envisage further provisions concerning asylum, family reunification and the circulation of EU nationals within the framework of the relevant EU Directives and on the basis of an ordinary delegation procedure by the Parliament, in accordance with the Italian rules for the implementation of the Directive

(They are all currently under examination at the competent parliamentary committees, and will be subsequently adopted by the Government).

In this regard, it must be stressed that only very limited aspects of the immigration-related issues have been adopted through Law Decrees, while the main elements are dealt with ordinary legislative measures. Furthermore, Law Decree No. 92/2008 and the above Bill (A.S. 733) do not concern exclusively aspects related to illegal immigration. Common to these texts is the aim to ensure the effective implementation of the principle of legality. They also deal with aspects relating to widespread illegality, organised crime and urban security, including violations of the traffic code (*Codice della Strada*) by persons driving under the effect of alcohol or drugs. The above Bill also envisages the strengthening of the measures aiming at protecting the elderly or the persons with disabilities from criminals who may exploit their condition.

[PARA. 69] The Government deems that the new proposed legislative measures on immigration have no relation with any kind of xenophobic attitude but, on the contrary, have the objective to address more effectively the phenomenon of illegal immigration (as well as its connection with both ordinary and organized crime) and its negative consequences over the society as a whole, including the hundreds of thousands of legal migrants who arrive to Italy every year, to work honestly and to enjoy all the rights and social benefits the law guarantees to them.

With regard to the concern expressed by the Commissioner on the detrimental effect of the new legislative measures on asylum-seekers, it should be noted that no modification is foreseen about the possibility to apply for asylum when illegally entering the Country.

[PARA. 70] At present, there is no National Action Plan, structured in such a way, but several projects concerning the cooperation on migration and asylum-related fields are ongoing, with origin and transit countries. These projects are financed by EU funds^{iv}.

[PARAS. 71, 73] Italy has not signed the 1990 International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families. In fact, no EU member State nor any other country of destination of significant migration inflows has ratified it. So far only 37 States are parties to the Convention. This fact and the widespread opposite state trend noted by the Commissioner indicate that the principle that aliens whose only offence is the violation of immigration law should not be treated as criminals, is not clearly established in international human rights law.

In any case, as above-mentioned, the treatment of the illegal entry in the country as a criminal offence is currently under consideration by both Chambers that will eventually decide, in their full sovereignty and independence, whether or not to adopt such a norm (see A.S. 733).

[PARA. 72] The phenomenon of illegal immigration in the Italian experience is often characterized by crimes committed by illegal migrants specifically related to their condition of irregular presence on the national territory. For this reason, Law Decree No. 92/2008,

currently before the Italian Parliament for examination, introduced an aggravating circumstance (by which the detention penalty may be increased up to one third of its term) for illegal immigrants found guilty of a main crime^v.

[PARAS. 74, 76] No consequences on Italian judicial system can be foreseen with regard to the decision to make illegal immigration an aggravating circumstance. In the discussion about the Bill (A.S. 733), the Italian Parliament will duly consider the possible effects on Italian judicial system stemming from the introduction of the crime of illegal entry in the national territory.

[PARA. 75] The increase of the holding period up to 18 months in the Identification and Expulsion Centres, as envisaged by the above Bill (A.S. 733), is still under consideration by the Parliament. In this context, it is worthy of mention that such a provision would be fully in accordance with the recent EU Directive on return^{vi} which imposes the limit of up to 18 months for holding illegal immigrants into the reception centres in all European countries, including in those that do not foresee yet any time-limits. Moreover, the Bill (A.S. 733) envisages that it is the judge - and not the administrative authority – to be tasked with controlling whether it is necessary and legitimate to extend the holding. Such review, which will take place every 60 days (up to the limit of 18 months) may result in a confirmation or in the expulsion of the Non-EU citizen.

As to the need that the expulsion of asylum-seekers be formally and exclusively prescribed by the law, the Government wishes to recall that the current legislative framework already includes such provisions, and that the current proposals do not affect in any way this principle.

The proposed amendments concern, inter alia, the review of the automatic suspensive appeal against the rejection of the asylum application by the territorial Commissions. This issue has been duly debated by the competent Parliamentary Committees that formulated also observations to this end. According to the proposals, the applicant can always submit to the judicial authority the request for suspending the expulsion when his/her request is grounded by grave and proven reasons.

[PARA. 76] The possibility, to be given to the Heads of Police to expel an alien under detention, even before the deadline of the sixty days of holding, by solely informing the competent court thereof, is contained in the Bill (A.S. 733) and therefore will be debated by the Parliament. More importantly, it should be noted that this proposal, as included in the Bill under reference, does not amend the current legislation on this specific issue.

[PARA. 77] Foreigners illegally entering or staying in Italy who fail to meet the requirements provided by the law, or due to public order or national security, may be refouled, returned under escort to the frontier, expelled, or receive an expulsion order to leave the country.

Despite the pressure of illegal migration, these practices have been always characterized by a strict compliance with the law and the attentive evaluation of each individual situation. Within this framework, it is worth recalling that the national legislation envisages the judicial control over the order of expulsion adopted by the administrative authority. The request for validation of the order is submitted to the competent judge (justice of peace), within 48 hours from its adoption. The judge may confirm the order within the following 48 hours.

In terms of safeguards, please refer to the observations to paras. 97, 98.

Concerning the observations about Art. 8 of the ECHR, the Government recalls that in adopting the order of expulsion against a foreigner who is applying for family reunification, or against a family's member of the foreigner, the nature and effectiveness of the familiar links, the duration of his/her stay on the national territory and the existence of cultural or social links with the country of origin are duly taken into consideration. More importantly, it must be considered that in case of expulsion, the foreigner may return to Italy if a stay permit for family reunification has been granted. In this specific case, there is no need for the "special authorisation" issued by the Ministry of Interior.

With specific regard to the family status/situation of the foreigner subject to an order of expulsion, the Constitutional Court declared (by verdict No. 376/00) unconstitutional letter d) of Art. 19 of the Consolidated Text on Immigration, on the ground that it did not extend the prohibition of expulsion to the spouse of pregnant women, or to the parent of a six-month child.

[PARA. 78] The European Commission is competent for verifying compatibility between the national legislation and communitarian *acquis*. To this end, Italy has provided the services of the Commission with all relevant documentation on the "security package".

Within the framework of full cooperation with the Human Rights Commissioner, Italy would like to confirm that there is no incompatibility between the "public security" grounds for expulsion of EU citizens - provided by the Italian "security package" - and the EU law. Although the free movement is an inalienable fundamental freedom accorded to EU citizens by the Treaties, the respect for the laws of every Member State is the *conditio sine qua non* for the coexistence and social inclusion within the EU. Directive 2004/38/EC of 29 April 2004 expressly provides, by Article 27, that EU citizens, or members of their family, may be expelled from the host Member State on grounds of public security or public health. The Legislative Decree (one among the three under discussion before the Parliament), amending Legislative Decree No. 30/2007 (which implements Directive 2004/38/EC), fully abides by the EU legislation, as well as all other relevant provisions.

[PARA. 79] It is worth recalling that Italy adhered to the principles at the basis of the European actions supported by the European Fund for Refugees, which envisages specific interventions of resettlement through the development of "emergency resettlement" projects for vulnerable individuals, including unaccompanied minors, women in danger,

victims of torture and of physical and sexual violence, the elderly, and people who has suffered a prolonged detention or with serious health diseases)^{vii}. In this regard the Ministry of Interior started an experimental project called “*Oltremare*”, by which there was the resettlement in Italy, in two terms (October 2007 and May 2008) of approx. 70 Eritrean refugees – mainly women – who had been previously held in the Libyan camp of Misratah. In doing so, Italy has both guaranteed with the refugee status, and provided them with a permanent residence, and programmes of protection, care and integration.

[PARA. 80] The last flight to Libya, organized by the Government, in order to return foreign citizens (all Egyptian nationals), illegally landed on Lampedusa Island, took place on April 4, 2006. About these returns all the relevant information has been given to the European Court of Human Rights. It should be outlined that, even if Libya is not a signatory of the Geneva Convention on the Refugee Status, the principle of “non refoulement”, like other fundamental human rights principles, is contained in the Charter of the Organization of the African Union, of which Libya is a party .

[PARA. 81] The Italian Government has always applied the relevant Conventions. For a detailed list of the bilateral agreements made by Italy, please refer to the Annex.

V. The protection of human rights in the context of aliens’ forced return based on anti-terrorism legislation

The Italian legal system aims at ensuring an effective framework of guarantees, to fully and extensively protect the fundamental rights of the individual. Before affecting such rights, the Italian legal system provides individuals with a wide range of protection means. No arbitrary conduct against fundamental freedoms is allowed by the Italian legal system. Mention may be made, on a comparative note, of the Italian measures against terrorism and the ones adopted in other countries. There cannot be any barter between security and freedom.

On a more general note, it is worth stressing that seriousness and the sensitiveness of the choices to be made by Italy depends on and aims at balancing between opposite stances, between the abidance by International obligations and the guarantee of the public order, inter alia to prevent very serious criminal offences, affecting also those fundamental rights that are enlisted in the relevant European Convention (including the right to life, the right not to be victims of ill-treatments as a consequence of terroristic acts, etc.).

[PARAS. 90-94] By considering that the *refoulement* is not allowed, even in the case under which the individual to be returned is a social danger when there is the risk that he might be subjected to torture or inhuman or degrading treatment in the country of origin, the diplomatic assurances do not cover *per se* the risk. Nevertheless, the European Court itself (see Saadi judgment) does not reject the diplomatic assurances *tout court*, but those that are set in a formal and generic way. Specifically, the Court reserves itself the right to assess their suitability, on a case-by-case rule.

[PARA. 95] Relevant return operations are fully documented, since at the conclusion of every single operation, the officer in charge has to provide a comprehensive report on the entire procedure, including any inconvenient and/or incident which might arise.

[PARAS. 97, 98] Most of the main modifications introduced in the criminal area by Act No.155/2005 - which was inspired by the HR protection system, as laid down by the Italian Constitution, the EU relevant legislation and international standards - are hereinafter indicated:

1. As to the identification of suspected persons by the judicial police, Article 349, para.2, of the code of criminal procedure provides for the public prosecutor to authorize the judicial police to carry out tests on the DNA by coercively taking hair and saliva samples, in the respect of the personal dignity of the individual.
2. The time limit for judicial police detention was extended from 12 to 24 hours when suspected persons who are to be identified, refuse to be identified or give presumably false personal details or identification documents (Article 349, para. 4, of the code of criminal procedure). It has to be specified, however, that under Article 349, para 5, of the code of criminal procedure, the public prosecutor is to be immediately informed of the time when the individual is accompanied to the judicial police's premises. The public prosecutor can order that suspect be released when he considers that the conditions to retain him/her are not met. Moreover, para. 6 of said Section provides for the public prosecutor to be informed of the time when the accompanied person is released. An aggravating circumstance is provided for when the suspected person gives false statements^{viii}.
3. The offence of using, possessing and making false documents was introduced by Article 497 bis of the criminal code. With respect to said offence, the discretionary arrest in *flagrante delicto* is now provided for by Article 381, paragraph 2 of the code of criminal procedure. The arrest in *flagrante delicto* is now mandatory also for terrorism offences and for offences committed with the intent to subvert the democratic order (Article 380, para. 2, letter i).
4. Terrorism offences, even with an international scope, or offences committed with the intent to subvert the democratic order are now part of the offences which are subject to police detention (Article 384, para. 1, of the code of criminal procedure). The detention of a suspected person on the initiative of the judicial police is provided for when specific elements are discovered, among which lies the possession of false documents (as explicitly provided for by Article 384, para. 3, of the code of criminal procedure).

As to preventive measures, the arrest of individuals not caught in *flagrante delicto* is re-introduced when the obligations relating to special surveillance have been infringed (Article 9, para. 2 of Act No. 1423/1956).

As to the procedural safeguards, in this context, it is worthy of mention that the Italian legal system aims at ensuring an effective framework of guarantees to protect human rights, by considering that the legal defence is an inalienable right (see Arts. 97 – 98 of the criminal proceeding code in conjunction with Art. 24 of the Italian Constitution). More specifically, by Art.98 of the criminal proceeding code, it is also envisaged the legal aid for the indigents. Also, by Presidential Decree No. 115/2002, the legal aid is ensured in the criminal field (Art. 74 ff.). To enjoy legal aid, neither specific conditions nor formalities are requested; a mere self-certification is sufficient, pursuant to Art. 79, para.1, lett. c.

[PARAS. 99, 100] The Government is fully aware of the legally binding nature of the *ad interim measures* as ordered by the European Court. Italy fully complies with the prescriptions of the Court. Nevertheless, the balance between opposite stances and the relating exercise upon which the Government is called, must be taken into account.

The provisions under Rule 39, as provided by the Rules of Court, consist in an indication to the Government that it would be desirable, in the interest of the parties and of the procedure before the Court, not to proceed to the expulsion of the applicant. As per procedure, the Committee of Ministers is informed of the provision and the Chamber may invite the parties to supply it with any information on any matter relevant to the implementation of the temporary provisions of its indication.

As previously recalled under paras. 54-55, the Court has started only very recently (in 2006) to count the number of the requested *ad interim* measures, either granted or rejected. To date, the Court has not published yet any report considering that situation per State-party. Therefore, it is not possible to provide data as to the term preceding 2006.

As to the term between 2006-2008, the *ad interim* measures released, referring to Italy amount to approximately 20. Needless to say, the amount of requests is much higher, as is also the case with all the other member States.

At the procedural level, it is worth considering two cases: i. When the Court may promptly release the requested measure, *inaudita altera parte*, unless revoking it subsequently if following additional information, it deems that it was groundless (see the last case: *Beganov vs. Italy*); ii. When the Court may postpone the decision while, in the meantime, requesting the State concerned with additional information, with a view to eventually releasing that measure (in the latter case, within the lapse of time provided for the Government to reply), there is not yet a formal compulsory precautionary measure.

In this regard, it should be noted that, with the only exception of the case mentioned in para. 86 of the Draft Memorandum, Italy has always suspended the execution of the challenged measure, even prior to the formal release of the precautionary measure, within the lapse of time necessary to provide the Court with the additional requested information.

The Essid Sami Ben Khemais expulsion order was issued in full compliance with the Italian law and international agreements, having it previously received the authorization of the Italian magistrate, in contact with the Tunisian Authorities. The Tunisian Minister of

Justice has recently affirmed in public that Ben Khemais Essid was allowed to contact his legal advisors and that he would be tried publicly and fairly. The Italian News Agency, ANSA, reported on June 7th, 2008, that Ben Khemais Essid's lawyer had affirmed to have visited his client and that his client has not been subjected to ill-treatment. The Italian authorities are keeping in touch with their Tunisian counter-part, to follow the case.

In conclusion, the Italian Government wishes to reiterate that it is aware of the value recognized, by the case-law of the European Court, to the precautionary measures. Along these lines, the Government also reiterates its commitment to cooperating fully and loyally with the Court, within the European Convention framework, towards the most effective protection of fundamental rights.

In this context, it seems necessary to recall, once again, the seriousness and sensitiveness of choices to be taken by the Government, when challenged by opposite stances, namely between international obligations and the obligation to protect the national security and the public order.

Furthermore, it is also necessary to emphasize that, under any circumstances, Italy has always strictly observed the precautionary measures released by the Court (to such an extent, that an individual expelled by mistake has been re-admitted^{IX}).

For all these reasons, the Government believes that there is not any "practice", resulting in a non-compliance with the *ad interim* measures of the European Court.

ANNEX. BILATERAL AGREEMENTS ON RE-ADMISSION

STATES	RE-ADMISSION AGREEMENT		IMPLEMENTATION PROTOCOL OF THE RE- ADMISSION AGREEMENT	
	SIGNED	ENTERED INTO FORCE	SIGNED	ENTERED INTO FORCE
ALBANIA	1997	1998	1997	1998
ALGERIA	2000	2006	2000	2006
AUSTRIA	1997	1998	1999	1999
BOSNIA and HERZEGOVINA	2004	2007	2004	2007
BULGARIA	1998	1998	//	//
CYPRUS	2002	2003	2002	2003
CROATIA	1997	1998	1998	1998
EGYPT	2007	//	2007	//
ESTONIA	1997	1999	//	//
PHILIPPINES	2004	2005	//	//
FRANCE	1990*1997	2000	1997	2000
GEORGIA	1997			
GREECE	1999	2001	1999	2001
LATVIA	1997	1997	1997	1997
LITHUANIA	1997	1998	//	//
FYROM	1997	1997	1997	1997
MALTA	2001	2002	2001	2002
MOROCCO	1998	//	1999	//
POLAND	1991	1994	//	//
SERBIA	2003	2005	2003	2005
MOLDOVA	2002	2004	//	//
NIGERIA	2000	//	//	//
ROMANIA	1997	1998	1997	1998
SLOVAKIA	1998	1999	//	//
SLOVENIA	1996	1997	1996	1997
SPAIN	1999	2001	1999	2001
SRI LANKA	2001	2001	//	//
SWITZERLAND	1998	2000		2000
TUNISIA	1998	1998	//	//
HUNGARY	1997	1999	1999	1999

* not anymore into force

ⁱ The Court monitors authorities and courts to see whether they have observed the Constitution in their actions and decisions. It arbitrates in disagreements between the highest State organs and decides in proceedings between central and local authorities. Furthermore, it also decides, among other things, on the validity of the Parliament elections. Practically, this court mainly decides the validity of legislation, its interpretation and if its implementation is in line with the Basic Law. The constitutional court decides (and its Decisions may not be appealed): 1. disputes concerning the constitutionality of laws and acts with the force of law adopted by state or regions; 2. conflicts arising over the allocation of powers between branches of government within the state, between the state and the regions, and between regions; 3. on accusations raised against the president in accordance with the constitution.

ⁱⁱ With UNICEF and the major Italian non-governmental organisations for the rights of the child. It took place in Rome on July 16, 2008.

ⁱⁱⁱ In the Italian legislative system, a Law Decree is an order made by the Government with the force of law. This institute describes the executive decisions which can be adopted by the Council of Ministers, in its capacity of collective body, in accordance with Art. 77 of the Italian Constitution. This Article provides that the Government can adopt an act, in cases of need and urgency and under its own responsibility, without delegation by the Parliament. This kind of act is provisional. The same day of its adoption, it must be presented to the Parliament (which has to meet within five days). To maintain their effectiveness, Law Decrees must be converted into law within the term of 60 days, or they will lose effectiveness *ex tunc*. During the parliamentary process modifications and adjustments are quite common. The Government cannot adopt Decrees on issues subject to the political control of Parliament.

^{iv} Previously through the *AENEAS programme*, currently through the *Thematic programme for cooperation with Non-EU Member Countries in the areas of migration and asylum*.

^v Since it has been observed an increasing trend by the Italian judicial system: the involvement of illegal migrants in domestic criminal organisation by which they are used as workforce.

^{vi} European Parliament Resolution dated 18 June 2008, on the proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for the return of Non EU nationals illegally staying within the EU borders.

^{vii} APPLICATIONS FOR ASYLUM AND INTERNATIONAL PROTECTION 2006-2007

APPLICATIONS LODGED	10.348	14.053
EXAMINED APPLICATIONS, OF WHICH	9.260	13.509
ACCEPTED	878	1.408
REJECTED WITHOUT PROTECTION	3.681	4.908
REJECTED BUT WITH PROTECTION	4.338	6.318
OTHER RESULT (RENOUNCE – “Dublin” – Not found)	363	875
Waiting for examination	1.088	544
APPEALS	653	894

APPLICATIONS FOR ASYLUM AND INTERNATIONAL PROTECTION : January – April 2008

- APPLICATION S LODGED: 4.237; EXAMINED APPLICATIONS: 3.803, OF WHICH :
 - REFUGEE STATUS: 452
 - SUBS. PROT. 840
 - TOT. 1.292
 - HUM. PROT. 927
 - NOT GRANTED 1.457
 - OTHER RESULT 127
 - WAITING FOR EXAM. 434
 - APPEALS 110

^{viii} According to the case-law of the Court of Cassation (*Corte di Cassazione*), Article 349 of the Code of Criminal Procedure does not envisage that arrest is mandatory, as it should be carried out only where there are elements to hold that the personal data provided are false (judgment No. 8105 of 26/4/2000, 2nd Criminal Division, and judgment No. 37103 of 13/6/2003, 2nd Criminal Division).

^{ix} See the observations concerning paras. 54-55.