

ITALY



MINISTRY FOR FOREIGN AFFAIRS

INTER-MINISTERIAL COMMITTEE ON HUMAN RIGHTS

Comitato Interministeriale dei Diritti Umani

**ITALY'S COMMENTS
ON THE MEMORANDUM
BY THE COE'S HUMAN RIGHTS COMMISSIONER,
Mr. T. HAMMARBERG,**

FOLLOWING HIS VISIT TO ITALY (JUNE 19-20, 2008)

Rome, 21 July 2008

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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 data-base 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 Malibrán 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 process¹¹). 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)^{vi}. 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

¹ 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.

² With UNICEF and the major Italian non-governmental organisations for the rights of the child. It took place in Rome on July 16, 2008.

³ 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.

⁴ Previously through the AENEAS programme, currently through the Thematic programme for cooperation with Non-EU Member Countries in the areas of migration and asylum.

⁵ 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.

⁶ 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.

⁷⁸ 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

• APPLICATIONS 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		

⁷⁹ 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).

⁸⁰ See the observations concerning paras. 54-55