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## COMMENTS RELATING TO THE GREEN PAPER ON THE FUTURE COMMON EUROPEAN ASYLUM SYSTEM<sup>1</sup>

*(2) How might the effectiveness of access to the asylum procedure be further enhanced?  
More generally, what aspects of the asylum process as currently regulated should be  
improved, in terms of both efficiency and protection guarantees?*

**ASGI** believes we cannot ignore the fact that migrants applying for asylum in Europe belong to “mixed” migratory flows, sharing the same journeys as other migrants defined as “economic”, and that their journey does not lead them directly from their country of origin to Europe but often lasts a number of years, during which they cross several transit countries in which potential asylum seekers, and particularly the most vulnerable, such as women and children, suffer all kinds of abuse.

According to **ASGI**, it is fundamentally important to guarantee that the duty to protect human life is fulfilled during checks carried out by States at maritime borders. Given that the vast majority of asylum seekers are forced to travel and enter the territory of Europe as part of

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<sup>1</sup> By means of this document, ASGI submits a number of comments regarding the Green Paper on asylum to the Immigration and Asylum Unit of the Directorate-General for Justice, Freedom and Security of the European Commission. The following comments do not deal with all the issues raised by the Green Paper but are limited to suggesting answers to some of the queries raised by the Green Paper (specifying the relevant query in each case) which are considered to be particularly important.

so-called illegal flows, measures taken to stop illegal immigration may involve fundamental breaches of international and Community law if they are taken on the high seas and without rigorous procedures for verifying the individual legal status of migrants.

Where patrolling takes place on the high seas or on the boundaries of territorial waters of transit countries, the fundamental principles of international maritime law must be borne in mind. These principles can make it easier for potential asylum seekers to access the territory of a country that is a signatory to the Geneva Convention, unlike Libya, and that effectively implements its terms (unlike Tunisia or Algeria).

Bilateral readmission agreements, such as the measures adopted at European level, particularly by technical operation agencies such as FRONTEX, or by confidential coordination groups such as SCIFA (Strategic Committee for Immigration, Frontiers and Asylum), involving police forces or diplomatic representations, must not conflict with the universally recognised principles of international maritime law. Internal law on the legal status of foreigners, particularly relating to the fight against illegal immigration, must comply with the terms of international law.<sup>2</sup>

The **Montego Bay Convention** of 10 December 1982 (UNCLOS) is the primary source of the international law of the sea<sup>3</sup>. Article 311 in fact states that other international agreements shall prevail only if they are compatible with the Convention. Two or more States – continues article 311 of the Convention on Law of the Sea – may conclude agreements modifying or suspending the operation of provisions of the Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is **incompatible** with the effective execution of its object and purpose and, equally, provided that such agreements do not affect the application of the basic principles of the Convention and do not affect the enjoyment of rights or the performance of obligations by the other States under the terms of the Convention. This principle of compatibility does not apply in cases where the Montego Bay Convention itself refers to and expressly confirms existing

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2 G. Camarda, *Tutela della vita umana in mare e difesa degli interessi dello Stato : i tentativi di immigrazione clandestina* (Protection of human life at sea and protection of the interests of the State: attempts at illegal immigration), in *Rivista di diritto dell'economia, dei trasporti e dell'ambiente*, V, 2007, refers to “the text of our constitution to underscore, in support of the argument, the vital importance of the second and third paragraphs of the aforementioned article 10: The legal status of foreigners is governed by the law in accordance with international standards and treaties. Foreigners who are denied the right to exercise the democratic rights guaranteed by the Italian constitution in their own country are entitled to asylum in the territory of the Republic according to the terms of the law”.

3 See T. Scovazzi, *La tutela della vita umana in mare, con particolare riferimento agli immigrati clandestini diretti verso l'Italia* (Protection of human life at sea, with particular reference to illegal immigrants heading for Italy) in *Rivista di Diritto Internazionale*, 2005, p. 106.

international agreements and calls for them to be signed with regard to specific sectors<sup>4</sup>.

One of the provisions that cannot be waived by States, not even by means of agreements with other States, is article 98 of **UNCLOS**, because it applies the fundamental and elementary principle of solidarity. Each State – states article 98 – shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

- a) to render assistance to any person found at sea in danger of being lost;
- b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
- c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call. The second paragraph provides that coastal States shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

Various international conventions, all of which are in force in Italy in addition to UNCLOS, complement the international law of the sea framework. Firstly, article 10 of the 1989 Convention on Assistance at Sea **requires any ship master**, in so far as he can do so without serious danger to the ship or the people on board, to provide assistance to any person who may be in danger of disappearing at sea. States must take all necessary measures to ensure that this duty is observed.

The 1974 International Convention for the Safety of Life at Sea (**SOLAS Convention**) requires the master of a ship “*who is in a position to be able to provide assistance having received information from any source regarding the presence of people in danger at sea, to proceed with all possible speed to assist them, if possible informing the people concerned or the search and rescue service that the ship is carrying out this operation*”.

This third international convention that should be considered with regard to the search and rescue of people at sea is the **SAR Convention**, which is based on the principle of

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<sup>4</sup> See G. Camarda, *Tutela della vita umana in mare e difesa degli interessi dello Stato : i tentativi di immigrazione clandestina* (Protection of human life at sea and protection of the interests of the State: attempts at illegal immigration), in *Rivista di diritto dell'economia, dei trasporti e dell'ambiente*, V, 2007

international cooperation<sup>5</sup>. Search and rescue areas are established in agreement with the other States concerned. These areas do not necessarily correspond to the existing maritime frontiers. Signatory States are required to draw up operational plans that provide for various kinds of emergency and establish the responsibilities of the relevant centres.

The SAR Convention establishes a precise duty to provide assistance to any person at sea “*regardless of the nationality or status of such a person or the circumstances in which that person is found*”. In addition to the duty to provide initial assistance, it establishes the duty to land survivors in a “**place of safety**”.

Under the terms of all the conventions mentioned above, the powers and duties of the apparatus of each individual State to intervene and coordinate actions within its area of responsibility do not prevent naval units flying different flags from initiating the assistance if required by an imminent danger to human life. There must however be a guarantee that migrants are taken to a safe port after the rescue operations<sup>6</sup>.

Particularly in relations with Malta and Libya, rules of engagement for navy forces in the event of immigrants in difficulty being rescued have yet to be established, which can lead to considerable delays in rescue operations, as well as to the mass return of these people to ports of departure in countries that do not recognise (or, as in the case of Malta, are not actually in a position to be able to apply) the Geneva Convention or other international laws protecting human rights, particularly with regard to the most vulnerable people (such as women, children, torture victims).

In any case, the duty of co-operation placed on the State involved in providing assistance at sea includes the duty to land the survivors in a “place of safety”, according to the judgement of the master of the unit carrying out the rescue operation, **regardless** of the powers of the State itself to prosecute the alleged abettors (master and crew) or to take

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5 As regards the relationship between the rescue duties imposed by international law and internal law, we refer you to T. Scovazzi, *La lotta all'immigrazione clandestina alla luce del diritto internazionale del mare* (Combating illegal immigration in light of the international law of the sea), in *Diritto, Immigrazione e Cittadinanza*, 2003, fasc.4, p.48

6 As regards the concept of safe landing, G. Camarda, op. loc. cit., comments that “Specific consideration must be given to the issue of what should be understood as conveying the rescued person to a *place of safety*. This is because international (and national) obligations relating to rescue operations cease as of the time of arrival at the place of safety, but these obligations cannot be fully satisfied merely by providing initial medical care and fulfilling other immediate needs (food, etc.). The amendments to the Annex of the SAR Convention 1979 and the SOLAS Convention 1974 (and subsequent protocols), which came into force in July 2006, and the guidelines adopted by the International Maritime Organization (IMO) on the same day as the approval of the amendments to the conventions and protocols, shed greater clarity on the concept of a “place of safety” and on the fact that the rescue ship is merely a provisional place of rescue, the reaching of which does not mark the end of rescue operations. It is worth noting that the “guidelines” stress the active role that coastal countries must play in relieving the rescue ship from the not insignificant burden of having to care for the rescued people on board.”

measures against illegal immigrants to have them expelled or returned according to legal provisions once they have landed (while ensuring their safety).

Specific consideration should be given to the issue of what is meant by taking the rescued person to a “place of safety”. This is because international (and national) obligations relating to rescue operations cease as of the time of arrival at the place of safety, but these obligations cannot be fully satisfied merely by providing initial medical care and fulfilling other immediate needs (food, etc.). The amendments to the Annex of the SAR Convention 1979 and the SOLAS Convention 1974 (and subsequent protocols), which came into force in July 2006, and the guidelines adopted by the International Maritime Organization (IMO) on the same day as the approval of the amendments to the conventions and protocols, shed greater clarity on the concept of a “place of safety” and on the fact that the rescue ship is merely a provisional place of rescue, the reaching of which **does not mark the end of rescue operations**.

According to one of the most recent amendments to the SOLAS and SAR Conventions, “any operation and procedure, such as the identification and definition of the status of people assisted, that goes beyond the provision of assistance to people in danger, should not be allowed if it hinders the provision of this assistance or excessively delays disembarkation” (paragraph 6.20)

The **IMO**’s guidelines particularly stress the active role that coastal countries must play in relieving the rescue ship from the not insignificant burden of having to care for the rescued people on board. According to the guidelines on the treatment of people rescued at sea adopted in May 2004 by the Maritime Safety Committee, which amend the SAR and SOLAS conventions, “*the government responsible for the SAR region in which the survivors have been recovered is responsible for providing a place of safety or for ensuring that such a place is provided*”. According to the same guidelines “a place of safety is a location where the assistance operations are considered complete and where the safety of survivors or their life are no longer threatened, primary human needs (such as food, housing and medical care) can be fulfilled, and the transport of survivors to the nearby or final destination can be organised. Some States have not however signed up to these additional protocols **and the operational procedures of Frontex missions do not guarantee effective fulfilment of the primary duty to safeguard human life at sea**, because they allow migrants to be collectively returned to their ports of departure, **without an examination of the individual people being possible**, particularly in order to verify that the ban on reprisals established by article 33 of the Geneva

Convention is being respected.

In 2007, the UNHCR asked the Maltese government to ratify the recent amendments to the maritime conventions – the 1979 Convention on Search and Rescue at Sea (SAR) and the International Convention for the Safety of Life at Sea (SOLAS) – which are intended to underline the duty of States to co-operate in search operations and that of masters of vessels to provide assistance at sea. In particular, it is stressed that “*the landing of asylum seekers and refugees recovered at sea in territories in which their life and freedom would be threatened should be avoided*”, adding finally that “any operation and procedure, such as the identification and definition of the status of people assisted, that goes beyond the provision of assistance to people in danger, should not be allowed if it hinders the provision of this assistance or excessively delays disembarkation”<sup>7</sup>.

(3) Which, if any, existing notions and procedural devices should be reconsidered?

**ASGI** believes that the notion of “place of safety should be clarified, particularly with regard to correct application of the notion of “*third safe country*”.

One initial consideration relates to **application of the notion of a place of safety in the case of mixed migratory flows**, which therefore include both economic migrants and asylum seekers. There is no doubt that the term “place of safety” should identify a place that can provide survivors with material and medical first aid, as well as a place that is duty bound not to send survivors to places where their life and freedom may be threatened in cases, for example, where asylum seekers may be present on board. Determining the presence among survivors of potential asylum seekers requires **the status of each individual foreigner** to be assessed under conditions that comply with international standards. This means that there are

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<sup>7</sup> In a communication issued in June 2007, the United Nations High Commission for Refugees (UNHCR) “expresses grave concern about the lack of a strong and uniform commitment by coastal states of the Mediterranean with regard to search and rescue at sea and to allowing the immediate landing of people rescued from vessels involved in fishing activities. Because of this, in recent weeks, many precarious or drifting vessels carrying a high number of people attempting to reach Europe have been ignored or left at the mercy of the waves, and some ships’ masters have failed to honour both their obligations under maritime law and the ancient tradition of rescuing people in distress at sea. The UNHCR is aware of the difficulties faced by various Mediterranean countries in dealing with repeated arrivals of mixed groups of migrants, asylum seekers and refugees, but underlines that the principle of assistance to people in danger at sea should always be a priority”.

no circumstances in which the vessel should be immediately conveyed back to a port in the country of (often presumed) origin, even if the port in question is deemed to be a place of safety in terms of material and medical assistance.

Any objection that potential asylum seekers may come from a third country that could be considered safe is of no relevance. Clarity needs to be established on the following three conditions of applicability of the notion of safe third country as provided for in article 36 of Council Directive 2005/85/EC on procedures regarding asylum:

- In order to be considered a safe third country, the State in question must in all cases fulfil the requirements of article 36, paragraph 2, letters a), b) and c). In addition to ratification of the Geneva Convention, these requirements include the very stringent one of having ratified the European Convention for the Protection of Human Rights (article 36, paragraph 2, letter c)).
- The Directive specifies clearly that the safe third country notion shall apply **only** to a list of countries drawn up and approved at Community level, according to the procedures set out in paragraph 3 of article 36. Until the adoption of this common list, the same Directive allows Member States to apply the notion of safe third country defined by the Directive **only** to countries that were already included in a national list of safe countries drawn up by national legislation before 1.12.05 (article 36, paragraph 7)<sup>8</sup>.
- The Directive specifies finally that States shall lay down in national law the modalities for implementing the provisions relating to so-called safe third countries. The Directive states very clearly that if a State intends to avail itself of this power it must inform the applicant and provide him/her with a document stating that he/she is an asylum seeker whose application has not been examined in substance. Finally, States must **actually verify** that the applicant has been admitted to the asylum procedure in the third country, because if this has not taken place the responsibility for examining the application falls on the State which the applicant approached (article 36, paragraphs 4 and 5).

The picture that emerges from an examination of the Directive is therefore very clear indeed. Extremely rigorous requirements must be fulfilled for a State to be considered a safe third country, including the requirement that **the individual legal status of each foreigner is**

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<sup>8</sup> Maintaining a country on the list of safe countries will however be unlawful if it has not fulfilled the requirements of the aforementioned article 36, paragraph 2, letters a), b) and c).

**ascertained.** To conclude our examination of this point, it is therefore extremely important for the European asylum system that EU countries which border the Mediterranean and are most exposed to arrivals by sea (Spain, Greece, Italy) do not return potential asylum seekers to third countries (possibly based on an unlawful application of the notion of safe third country) at least until each individual migrant **has had the opportunity to access the asylum procedure** within its territory.

**ASGI** notes that in the current state of Community legislation on asylum and humanitarian protection there is a **lack of procedural standards** allowing adequate information to be provided **at sea, land or air borders** on the rights of people applying for asylum and humanitarian protection, and no concrete definition (in the internal laws of various States) of the *non-refoulement* principle, which is often diluted by mandatory provisions based on generic moral imperatives. The risk of *refoulement* at the border is heightened by the following factors, which are a feature of almost all European Union countries:

1. At the border, foreigners come into contact with police officers only. There is only a sporadic presence at border crossings of bodies other than the police, such as protection organisations and associations. Where they exist, these bodies are not able to operate with complete independence because the service they offer is only available insofar as it is accepted by the police authority. This applies in particular to initial contact with foreigners, with airport transit areas or docked ships being physically closed to access by third party organisations for all kinds of reasons (security, extra-territorial nature of the area, etc.). The absence of an effective third party **makes it exceedingly difficult to verify any unlawful behaviour** on the part of the Authority, as well as making it difficult to document any violations of the *non-refoulement* principle;
2. Legal protection against *refoulement* is **completely ineffective** both because foreigners lack the knowledge required to obtain it and because the measure is enforced immediately and is not subject to any prior verification measure, however cursory it may be.

The above issues must be taken into very serious consideration by the European Commission. In fact, both the presence at border crossings of a third party other than the police authority and the effectiveness of legal protection appear to be issues that cannot continue to be ignored. **ASGI** believes that **the establishment of binding Community-wide provisions that allow effective implementation of the principle of *non-refoulement* to be implemented at the borders of the European Union** is a crucially important and urgent matter.

The possible measures on which the Commission could launch an in-depth study include the following:

- a) the establishment in each Member State of an **independent** national public authority to control the state of borders;
- b) the establishment of a **general right of access** to border areas by bodies or associations that fulfil the necessary requirements of competence, also establishing the duty for government authorities to give concrete reasons, within specific period of time, for any denial of access to border areas to recognised NGOs and associations (overturning the logic on the basis of which these bodies must obtain “accreditation” in advance);
- c) the establishment in European Union countries, under the terms of **appropriate primary legislation**, of “Border Services” consisting not only of police officers but also representatives appointed by protection bodies to be identified by means of procedures established by national legislation;

**ASGI** notes that, in various European countries, asylum seekers are expelled following the first rejection of a request for recognition of their status, thus denying them the opportunity to exercise their right of defence and their right to a fair trial and effective appeal as required by articles 6 and 13 of the European Convention for the Protection of Human Rights (ECHR).

A generalised provision must therefore be introduced that imposes an automatic suspension of *refoulement* (providing for legal protection to be implemented within a short and strictly defined period of time), giving judges the power to examine the appeal in substance at

least in cases where the foreigner objecting to the *refoulement* intends to request the application of a form of international protection defined by Directive 2005/85/EC on minimum procedures regarding asylum.

Specific consideration should be given to the appropriateness of more careful **monitoring at Community level of the actual application of the Dublin Convention at the internal borders** of the Union. The Convention is imperative in requiring foreigners to be admitted to the asylum procedure in the territory of the Member State and in requiring the competence to examine the application for asylum to be determined in compliance with the criteria established by the Convention itself. Even in cases where this competence may appear to be determined immediately, because the foreigner applying for asylum is seized on arrival from another Member State, the immediate return of the foreigner by the border police to the country presumed to be competent for the asylum application violates the Dublin Convention because the foreigner is being returned to the Member State not as an asylum seeker but as a foreign non-EU citizen who has been refused entry at an internal border. The situation regarding *refoulement* to Greece from Italian ports on the Adriatic Sea is particularly alarming. ASGI has direct evidence, based on a number of known cases and on meetings with police forces guarding the maritime borders, of the fact that a constant flow of foreigners requiring international protection is being returned to Greece without the so-called “Dublin procedure” being implemented.<sup>9</sup> A worrying factor is that this practice also affects minors, whether accompanied or unaccompanied. The Italian government has been informed of this situation on several occasions by means of specific reports submitted by various different organisations.

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<sup>9</sup> The following is an extract from a press release issued on 20 September 2007 by CIR (Consiglio Italiano Rifugiati): “The practice has assumed alarming proportions in recent weeks: in the month of August alone, 190 people were returned from the port of Bari, 153 from the port of Ancona, 17 from the port of Brindisi and 2 from the port of Venice, a total of 362 people, 200 of whom were Iraqis and 30 Afghans. Only yesterday, a further 17 people were returned from the port of Ancona, including an Iraqi family with 4 children as well as Somalian, Eritrean, Albanian and Chinese citizens. The scenario is always the same: during checks carried out at the port, foreign citizens hidden in articulated lorries are tracked down and immediately “entrusted” to the captain of the same vessel that brought them to Italy from Greece.”

*(9) Should the grounds for detention, in compliance with the jurisprudence of the European Court of Human Rights, be clarified and the related conditions and its length be more precisely regulated?*

In the opinion of **ASGI**, it is considerably uncertain whether many of the provisions regarding the length and conditions of detention of asylum seekers contained in various pieces of national legislation comply with the provisions contained in Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in Member States.

Article 7 of the aforesaid directive establishes, in paragraph 1, the general principle according to which *“asylum seekers may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive”*. This general principle may only be tempered by specific control measures or restrictions on freedom if there are valid reasons, which must be defined in national law. Paragraph 2 of the same article of the directive in fact provides that *“Member States may decide on the residence of the asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application”*. Finally, in paragraph 3, the directive provides that only *“when it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.”*

The principle of free movement of asylum seekers within the State in which they have submitted their application is not always respected by individual national legislations, thus distorting the rationale of the aforesaid Directive, the principle of free movement turning from a general provision that should be applicable to the majority of asylum seeker situations into a rule to be applied only in cases where detention (which has become the general rule) is not applied.

The provisions introduced into Italian legislation by Law 189/02 are a clear example of this

complete overturning of the provisions contained in Council Directive 2003/9/EC of 27 January 2003.

In providing for the establishment of two procedures to examine asylum applications, one so-called “simplified” procedure and another “ordinary” procedure, Italian legislators have provided for the introduction of restrictions on the free movement of asylum seekers, providing for the establishment of specific *centri di identificazione* or “identification centres” (known by the acronym CID) to which asylum seekers are sent. They have also provided for asylum seekers to be sent, in some cases, to centres created for the expulsion of illegal migrants called *centri di temporanea permanenza ed assistenza* or “temporary stay and assistance centres” (known by the acronym CPTA).

The following practices have developed in Italy since April 2005:

- a) asylum seekers who are subject to regulations providing for detention only during the initial stage of submission of the asylum application, “*the time strictly required to draw up the authorisations needed to remain within the territory of the State based on the Italian consolidation act of provisions regarding the management of immigration and rules regarding the status of foreigners referred to in Legislative Decree no. 286 of 25 July 1998*”<sup>10</sup>, are actually being held in CID centres even after the identification work has been completed, while awaiting examination of the application.
- b) the provision stating that asylum seekers who are “*apprehended for having evaded or attempted to evade border controls or immediately afterwards, or who are in any case staying in the country illegally*”<sup>11</sup> must always be detained in a CID centre has been applied in practice to all asylum seekers arriving in Italy following rescue at sea. The application of this provision is considerably perplexing, given that the definition of a person who is guilty of an omission or intent on evading controls would not seem to apply to rescued asylum seekers.
- c) a number of asylum seekers have been detained in the “temporary stay and assistance centres” or CPTAs set up by Legislative Decree no. 286/98 in order to implement measures aimed at expelling from the country any foreigners staying illegally, under the terms of the rule that provides for this detention (which effectively

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10 Article 1-ii, paragraph 1, Law 39/90, as introduced by law no. 189/2002

11 Article 1-ii, paragraph 2, letter a), Law 39/90, as introduced by Law no. 189/2002

constitutes a restriction on personal freedom) “*following the submission of an asylum application by a foreigner who is already the subject of an expulsion or refoulement order*”<sup>12</sup>

An authoritative Commission set up by the Italian Ministry of the Interior, chaired by UN Ambassador Staffan De Mistura and charged with surveying all Italian centres for foreigners (including asylum seeker centres), revealed a number of very worrying shortcomings<sup>13</sup>.

While recommending that the text of the report be read in full, we feel it would be useful to highlight here that the Commission uncovered a number of serious shortcomings in relation to CID centres:

*On the basis of the data received and the visits carried out in Identification Centres, the Commission feels it should highlight the following problems:*

- *the detention of asylum seekers in CID centres (and the application of the simplified procedure) was conceived of as an exceptional measure to be applied only in very precise circumstances. In reality – as time has passed – **detention has been used in an increasingly generalised way.***
- *With the exception of the Foggia – Borgo Mezzanone centre, asylum seekers are to all intents and purposes detained within the facilities, with little opportunity to leave during the day, as demonstrated by the very low number of authorisations granted to leave the centres. This raises concerns because asylum seekers appear to be deprived of their freedom in a way that is not subject to judiciary control.*
- *The fact that centres having a wide diversity of different purposes exist within the same area (Crotona and Caltanissetta– CPTA/CDA and CID under construction; Milan - CID/CPTA; a CID centre is being built beside the Gradisca CPTA) creates a climate of assimilation. Where multifunctional facilities exist (initial reception and asylum seeker protection centres alongside centres intended for expulsion operations) **there is a real risk of assimilation between asylum seeker centres and CPTA centres.***
- ***Guidance and legal assistance for asylum seekers appeared to be extremely inadequate in all CID centres.** We did find – in some locations – the positive establishment of guidance and protection services for asylum seekers within the centres, association with protection organisations and local authorities. However, these programmes are currently very limited in scope and access by protection organisations to CID centres is not always permitted. In summary, **we believe that asylum seekers held in CID centres have less access to protection services than asylum seekers whose application is examined by means of an ordinary procedure.***

The Commission also underlined the following:

*“Because of the concentration of arrivals during certain periods of the year, as well as the existence of a limited number of CPAs, we have found that foreigners are held at existing reception centres for considerably long periods of time of between 15 days and two months (the average stay is between 20 and 30 days), **without this de facto limitation on their personal freedom being subject to any judiciary***

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12 Article 1-ii, paragraph 2, letter b), Law 39/90, as introduced by Law no. 189/2002

13 The Commission consisted of officials appointed by the Minister of the Interior and external experts.

*control.”*

Finally, with regard to detention in CPTA centres, the Commission highlighted that:

*The presence in CPTA centres of foreigners who are exclusively the subject of an expulsion order together with foreigners who, albeit expelled, were awaiting examination of their asylum application, was particularly critical. During its visits, the Commission found that asylum seekers lacked adequate access to guidance, information and protection services. **The structure of services dedicated to asylum applicants in CPTA centres was found to be inadequate and in some cases entirely non-existent.***

In a detailed report on the right of asylum in Italy, ICS (Italian Consortium of Solidarity – Consorzio Italiano di Solidarietà), one of Italy’s leading protection organisations, pointed out that between 70 and 80% of asylum applicants have been detained (de iure or de facto) during the two years of implementation of the new legislation (April 2005 to April 2007)<sup>14</sup>

In the opinion of **ASGI**, what has happened in Italy is not an isolated case but reflects a strong tendency on the part of all EU countries to adopt rules on the administrative detention of asylum seekers that evade the provisions of article 7 of Directive 2003/9/EC. The wording of paragraphs 2 and 3 of the aforesaid article 7 in fact appears to **excessively vague** and open to insufficiently rigorous application, thus making it even more difficult to identify any infringements. It is therefore extremely important for action to be taken at Community level to establish a more rigorous legal basis, conditions, procedures and maximum lengths of time for the detention of asylum seekers, so as to prevent the widespread and generalised application of detention.

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<sup>14</sup> ICS, *L'Utopia dell'Asilo - Il diritto d'asilo in Italia nel 2006* (The Utopia of Asylum – The right of asylum in Italy in 2006), Edizioni Gruppo Abele, Turin 2006.

(28) *How might the EU best support third countries to deal with asylum and refugees issues more effectively?*

(29) *How might the Community's overall strategies vis-à-vis third countries be made more consistent in the fields of refugee assistance and be enhanced?*

(33) *What further measures could be taken to ensure that protection obligations arising out of the EU acquis and international refugee and human rights law form an integral part of external border management? In particular, what further measures could be taken to ensure that the implementation in practice of measures aimed at combating illegal migration does not affect the access of asylum seekers to protection?*

(34) *How might national capacities to establish effective protection-sensitive entry management systems be increased, in particular in cases of mass arrivals at the borders?*

After the timid openings of the Barcelona Process, launched in 1995, and the hopes raised by the Tampere documents in 1999, from one European Council to another, particularly since 11 September 2001, border closure and militarisation policies have guided the decisions of Community organisations regarding immigration and asylum. **Asylum seekers have often been viewed in the same light as illegal immigrants** and the same measures have been taken against them as those established for the “war” against illegal immigration. In the meantime, there has definitely been no reduction in illegal immigration, which is a structural phenomenon resulting from a global liberal economy characterised by the international relocation of production activities and by the existence of a substantially large parallel illegal labour market. Entry opportunities, and often escape routes, were drastically reduced for millions of asylum seekers, and even the European Union adopted directives that effectively led to a substantial **reduction** in the number of refugees, despite the increase in the number of migrants forced to leave their country due to wars or the “side-effects” of political and social, as well as physical, desertification, created by the clash between old and new economic powers for the control of world resources. The European Union has been unsuccessful in adopting a directive on entry for work purposes and the various directives adopted on asylum and humanitarian protection still allow very different situations to arise from one country to another, as well as administrative practices that generally prevent effective access to the asylum procedure.

The European Union is close to approving a directive on forced repatriation which might act as a further encouragement to many countries to introduce even harsher measures

and practices regarding *refoulement*, expulsion and administrative detention, to the point of establishing a maximum period of detention in expulsion centres of eighteen months for illegal immigrants. A **pause for reflection** is called for in this process, which began by fragmenting the status of refugees and the procedures aimed at asylum seekers and is now attempting to remove important procedural guarantees by means of the repatriation directive which the Council is close to approving.

Faced by the overall failure of expulsion policies implemented at national level, which have reduced administrative detention centres to places used for the selection and expulsion of surplus labour, or for the extension of imprisonment, rather than places for the actual removal of illegal immigrants living in the territory, the main European countries have rediscovered “international co-operation” and European neighbourhood policies (ENP). In the absence of appropriate operational tools with which to show solidarity towards the inhabitants of the poorest countries, through initiatives entrusted to local authorities and non-governmental organisations, attempts have been made at imposing co-operation agreements on the governments of transit countries, particularly North-African countries, based on the financing of policies for the arrest, detention and expulsion of illegal immigrants before they attempt that final leap, the crossing to Europe. The most striking examples of this policy are provided by Italy and Spain in their relations respectively with Libya and Morocco, with whom they have signed bilateral agreements and/or understandings between police forces that have allowed migrants (often including potential asylum seekers and unaccompanied minors) to be stopped and arrested, even if they originate from third countries, in exchange for preferential treatment in trade relations with European Union countries. Greece has instead distinguished itself with a policy of repatriating thousands of potential Iraqi and Afghan asylum seekers, including unaccompanied minors, despite a resolution of the European Parliament banning forced repatriations to Iraq. However, the most worrying aspect of EU policies regarding immigration and asylum remains **the signing of co-operation agreements in the “fight” against illegal immigration**, most recently with transit countries like Mauritania and Ghana. The approach used is that of “*migration conditionality*”: in exchange for economic assistance and limited opportunities for legal entry offered to citizens of these countries, a greater commitment is obtained from them to arrest and subsequently expel or return migrants in transit towards other countries, although many of these may have travelled long distances and may be potential asylum seekers.

If the current practices were to become established, the European Union would be

definitively closing the door to asylum seekers. It seems obvious that the outsourcing of border controls can only have catastrophic consequences on the opportunities for potential asylum seekers to reach Europe, abandoning tens of thousands of men, women and children to the discretion of police forces in transit countries, and reinforcing the widespread criminal system that exploits migrant traffic in transit countries, with the complicity of the highest institutional representatives.

**ASGI** is therefore of the opinion that the following needs to be done:

1. **replace** Regulation no. 343 of 2003 with mechanisms for dealing with asylum applicants and status holders that truly implement the principle of “solidarity”, not only between European States, but also towards countries of origin and transit. Amendments to the Dublin Convention, introducing more frequent references to opt-out clauses for humanitarian reasons, may have a positive effect on the management of southern maritime borders, particularly in the SAR areas that are the responsibility of Malta and Cyprus, countries which are not otherwise able to “support” the application of Regulation no. 343 of 2003.
2. make provision in Community legislation for a **justification** in favour of anyone who may carry out rescue operations at sea, so as to avoid civilian vessels ignoring requests for assistance from migrants at sea for fear of potential criminal sanctions.
3. **carry out greater monitoring of the risks of potential collective *refoulement* operations** at sea adopted by a number of countries, including Italy (based on the interministerial decree of 14 July 2003, implementing the Bossi Fini law). These actions arise from decisions taken by political authorities and they overlap with humanitarian and rescue operations, conflicting with the international law of the sea and increasing the risk of new disasters, seriously diminishing the right of asylum that is recognised internationally and by the Italian Constitution. The interministerial Decree of 14 July 2003 and article 12 of the Italian consolidation act on immigration should be reworded to spell out the duty to rescue people, as well as the rights of potential asylum seekers, by removing the opportunity they provide to send people back to their ports of

origin, including in the light of the ban on *refoulement* established in favour of particularly vulnerable people by article 19 of the Italian consolidation act on immigration no. 286 of 1998. In this context, as **ASGI** has been pointing out since August 2006, the involvement with FRONTEX patrols of the naval units of countries that do not respect the rights of asylum seekers, such as Malta, Tunisia and Libya, may create a premise for serious violations of fundamental human rights.

4. increase support for all positive actions implemented by local authorities and NGOs and aimed, both nationally and internationally, at protecting asylum seekers and providing humanitarian protection. A situation in which the involvement of the IOM and the UNHCR in repatriation operations becomes yet another alibi for blocking potential asylum seekers must be avoided. Economic co-operation agreements must therefore restore a planning role to non-governmental organisations and local authorities for purposes which include distributing correct information on the prospects for asylum seekers in Europe and providing support for families.
  
5. **establish a new procedure for legal entries** to Europe, widening the channels for legal entry by labour migrants, who represent the majority of migrants. Innovating the approach in this respect means abandoning the unrealistic expectation of being able to determine the legality of entries by foreigners for work purposes by means of a single system of planned entries, and instead ensuring the legal recognition of a multiplicity of different forms of entry for work. While allowing entry based on calls for specific people or numbers of people by employers, and on other ways of obtaining legal residence, the provisions must deal with the management of the so-called “migration chain” which, if ignored or totally resisted, is inevitably drawn towards illegality. **ASGI** believes that much of the debate there has been in EU countries about the “instrumental use” of asylum applications has taken place in a context of strong ideologies which have ignored the fact that abuse of the asylum application system is strongly linked to the presence or absence of regular channels of entry for reasons other than protection. The absence or excessive scarcity of such channels leads migrants to use the asylum procedure as a last resort.

To conclude, **ASGI** believes that a **wholesale review** is needed of the European Union's approach to immigration and asylum policies towards **East European** countries bordering with the enlarged European Union, which have become strategic transit areas for refugees. The overall situation in countries that now lie to the east of the Union's borders is characterised by the following 6 fundamental features:

- a) they are territories characterised by a high, and above all increasing, number of arrivals of refugees and other migrants fleeing from situations of political and social instability and lesser or greater conflicts;
- b) the great majority of refugees, for many completely understandable reasons, do not intend to remain in the countries in which they first arrive but intend to reach the countries of the "old" Europe;
- c) many migrants, who are de facto refugees, but have not applied for asylum, are intercepted when illegally crossing the border into the EU, or soon afterwards, and are sent back. In most cases, the refugee status of these foreigners does emerge even at this stage. They are treated as illegal migrants and as such are subject to the risk of being deported back to their country of origin;
- d) for many reasons associated with economics and a fairly recent immigration history, in all the countries considered (Moldova, Ukraine, Balkan countries) there is a clear lack of information, legal protection and reception services for refugees. These shortcomings encourage refugees to attempt to continue their journey to the West at all costs, stopping over in these countries in the meantime and living illegally for varying lengths of time;
- e) an extraordinarily low rate of approval of asylum applications.

The consequences of the situation described above increase the need for neighbouring countries to establish a uniform system at European level as regards both the right of asylum and humanitarian protection, replacing the Dublin Regulation no. 343 of 2003, because practical experience in the implementation of this regulation has shown that it is used to turn people back in international waters by countries, like Malta, which cannot or are unwilling to implement it fully. In Ukraine, in particular, there is a large population of foreigners who could be benefiting from international protection but have **no access to protection** (neither refugee status nor subsidiary protection) and live in a situation of total illegality and serious social marginalisation. In an attempt to escape their condition, they end up **fuelling** the traffic

of organised crime, which increasingly profits from attempts made by these de facto refugees to emigrate to the West.

Action by the European Union regarding its neighbours to the east must not be limited to establishing police control systems at the external borders of the Union. Control may be necessary in order to fight trafficking by organised crime, but if it becomes the only measure seriously pursued, or is in any case totally predominant over concrete measures to protect refugees, **it becomes not only ineffective but actually negative** because it inevitably ends up damaging the legal foundation of the right of asylum.

The above situation should therefore be dealt with by the EU, together with the countries involved, along the following lines:

- 1. serious strengthening of refugee **protection and reception programmes**, both in countries that have recently acceded to the EU and in their neighbouring countries;
- 2. strengthening of the operations of **independent protection bodies** and associations,
- 3. strengthening of **training programmes** for public administration staff and the judiciary;
- 4. encouragement to introduce regulations that conform to international law (specific attention needs to be paid **to the absence in the legislation of some countries of the notion of subsidiary protection**).
- 5. adoption of **resettlement programmes** at Community level for certain numbers of particularly vulnerable refugees who have been received and recognised in countries bordering with the EU. These resettlement programmes would not only provide essential assistance to these countries but would also contribute to making the prospect of applying for asylum in the country they have reached viable in the eyes of refugees.

Turin, 30 September 2007