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"Emerging issues of access to justice for vulnerable groups, in particular:
- migrants and asylum seekers;
- children, including children perpetrators of crime"

Report presented by the Minister of Justice of Italy

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There is no doubt that since the beginning of the 1990s, for Italy in particular because of its geographical position, the huge influx of migrants and asylum-seekers, many of whom are minors, has been a hotly debated issue giving rise to a mixture of different feelings and reactions. Accordingly, Italy, faced with these new and complex problems, has sought to address them by placing an emphasis on protecting and upholding the rights of the men, women and children among these specific and vulnerable groups.

In this context, we feel it might be helpful to give an overview of what the Italian authorities have done to adapt the regulatory and judicial system to the new requirements of these particularly vulnerable individuals. Bearing in mind the complexity of the matter, we shall focus primarily on the problems relating to access to justice by aliens unlawfully in the country, given that for foreigners legally resident and working in Italy (ie having the necessary and mandatory authorisation and permits) the range of rights to which they are entitled is virtually identical to those applying to nationals, with no particular differences regarding rights and obligations in the field of justice.

In general terms, it is interesting to note that Article 696 of the Code of Criminal Procedure stipulates that as regards extradition and enforcement of foreign judgments, where there is a conflict between domestic law and international law or treaties, international law takes precedence, which means that the European Convention on Human Rights, the anti-torture convention and the convention on the right of asylum have supremacy in the hierarchy of regulatory sources. Accordingly, not only does the domestic system (see Article 143, Code of Criminal Procedure) conform to Article 6.3 of the Convention[1], but in addition, national provisions are systematically brought into line with European case-law by means of compatible interpretations by the competent national courts: for example, a recent judgment by the Constitutional Court (No. 654 of 6 July 2007) confirmed that a foreigner in receipt of free legal aid was also entitled to appoint and be assisted by an interpreter of his or her choice, the cost being borne by the state.

It should also be noted that any administrative measure concerning a foreign national[2], regarding an order to leave the country (by refoulement), a deportation order issued as a result of being in an unlawful situation, or regarding the granting of asylum or refugee status[3], may be challenged before the courts. Aliens may appeal against such decisions. Any administrative decision concerning an alien regarding residence permits, deportation for reasons of security or public order and extradition can be challenged before the administrative courts (Administrative Court at first instance and then the Consiglio di Stato). In this way and in order to afford greater protection against arbitrary violations by the public authorities of the rights guaranteed by the Convention, aliens, represented by themselves or their counsel, may submit the reasons they believe argue against the adoption of the measure[4], the enforcement of which may be temporarily suspended, at the request of the individual involved, pending a decision[5].

[1] Article 6.3 of the Convention provides that everyone charged with a criminal offence has the right to be informed promptly, in a language which they understand and in detail, of the nature and cause of the accusation against them and the right to have the free assistance of an interpreter if they cannot understand or speak the language used in court.

[2] Any administrative measure relating to a foreigner must, amongst other things, be translated into his or her language.

[3] The terms “asylum” and “refugee” are often used interchangeably in regulatory texts and conventions. Case-law has made a distinction between the nature of “refugee”, which presupposes the fear of being persecuted in the country of origin (Court of Cassation, I^ civil, 9 April 2002 No. 5055), and that of “asylum-seeker”, which requires the absence of democratic freedoms in the country of origin (Administrative Tribunal, Friuli Venezia Giulia, 18 December 1991 No.. 531; 23 January 1992 No. 15). Accordingly, refugee is deemed to be a species of the asylum genus (Consiglio di Stato, IV^, 11 July 2002 No. 3874).

[4] Including the risk of persecution in the country to which they are to be sent or the fact of being a minor, both of which according to Article 19 of Legislative decree 286/98, prohibit refoulement or deportation.

[5] See, in particular, the provisions of Laws Nos. 286/98, 189/02 and 271/04.

Only a deportation order by the Minister of the Interior, provided for by the Anti-terrorism Act (Decree-Law No. 144 of 27 July 2005, which became Law No. 155 of 31 July 2005) cannot be suspended in the event of appeal. However this rule is in keeping with Article 1.2 of Protocol No. 7 to the European Convention, which provides that minimum procedural guarantees are required unless there is a serious threat to national security or public order.

As a result of migration developments in the 1990s, the Italian parliament adopted in 1998 a Consolidated text of Immigration Legislation (Legislative Decree No. 286 of 25 July 1998), one of the first complete regulatory texts in this field to appear in Europe. The aim of the consolidated text was to stipulate regulations governing the situation of three categories of foreigners: a) foreigners living in Italy, often for many years, but without the mandatory residence and work permits; b) foreigners, perhaps themselves guilty of criminal offences, who in turn have become the victims of violence and sexual exploitation or abuse by criminal organisations; c) immigrants caught illegally entering the country, by air, land or sea.

This consolidated text, still in force with a few amendments necessitated by recent events, has always sought to find lasting solutions to the difficulties encountered by these vulnerable people. Access to justice is indeed one of these difficulties. It may be useful to look at some of the provisions at this point:

1) Article 17 provides that a foreign national who is the accused or injured party in a criminal trial has the right to re-enter Italy for the time strictly necessary to appear in court and exercise his or her rights of defence.

2) Article 18 provides for the possibility of issuing a six-month residence permit to foreigners unlawfully residing in Italy, occasionally guilty of criminal offences, but who are at the same time victims of violence and sexual exploitation or abuse. This residence permit enables such foreigners to remain in Italy and to take advantage of a medical and social assistance programme, offering the right of access to courses or employment, to assist with their integration into society and remove them from the threats and pressures of organised crime. What is special about this provision is that it is totally independent of any collaboration by the foreigner with the police or courts. The issue of this residence permit is not even conditional on an undertaking by or intention of the foreigner to disclose any illegal acts or denounce those responsible for the violence suffered. The only condition for being issued the residence permit is that the foreigner must be a victim (and as such might be too traumatised or afraid to collaborate). Accordingly, the first thing to do is to remove the foreigner from the violence and exploitation of which he or she is the victim as in this way it is possible to save a human being and deprive criminal organisations of some of their resources. The residence permit may be extended on the grounds of justice requirements, studies or employment and can therefore help with the naturalisation of the foreigner. It may also be issued to foreigners who have completed a sentence for a crime committed when a minor, where they have taken part in prison in a social integration and assistance programme.

   The principle underlying these provisions is one of facilitating access to justice for victims, while avoiding subjecting them to a trial for any offences committed (for example in the field of immigration) or exerting constraints or conditions to turn them into unwilling accusers: if foreigners report an offence they do this because they are fully convinced of the need to do so and not because they have been obliged to take this step. So, by breaking the victim-witness link, the foreigner can become a conscious player in the judicial proceedings and not be subjected to administrative procedures and constraints, which would be tantamount to making them victims all over again.

3) Where foreigners complain of discrimination by the administration or a private individual, on the grounds of race, ethnic origin, nationality or religion, Articles 43 and 44 provide for special action before the courts, designed to bring the discriminatory behaviour to an end and remove any of the effects of such conduct.

Having spoken a little about how the Italian system has been adapted to meet the requirements to protect vulnerable groups, we now need to focus on the topics to be discussed in the future.

If we agree that it is essential to have a global approach to such clearly transnational questions relating to immigrants and asylum-seekers, we must nonetheless say that it would be better to have a world-wide rather than simply European approach.

First of all, nearly all immigrants and asylum seekers, including children, come from third world countries which are, as a result, necessarily involved as countries of destination as much in matters of refoulement, deportation and extradition as they are in everything relating to the instruments of protection against these measures, such as asylum, residence permits granted for humanitarian reasons, etc.

Second, a global approach to the problem of protecting vulnerable groups presupposes a harmonisation of international agreements in this sector, many of which have worldwide application as in the case of the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment (signed in New York on 10 December 1984) or the United Nations Convention relating to the status of refugees (signed in Geneva on 28 July 1951). Here it should be pointed out that the Convention against torture prohibits refoulement, deportation and extradition if there is a danger of torture in the country to which the individuals may be sent, but not of inhuman or degrading treatment (Article 3), while for the European Convention on Human Rights, the prohibition is absolute (*Chahal* judgment, 25 October 1996[6]); the Convention relating to the status of refugees, even where there is a risk in the country to which he or she is to be sent, makes no provision for granting refugee status or asylum if the seeker represents a danger for the security of the host state or if he or she has committed serious crimes (Article 33), whereas the European Convention on Human Rights stipulates that the interests of the applicant must take precedence over those of the host state (see the judgment cited). These are interesting questions in relation both to the current situation, when we are seeing an upsurge in international and cosmopolitan terrorism, and to the opportunity made possible by the European Union Schengen Agreement (signed on 19 June 1990) on the abolition of border controls, for dangerous foreigners, deportation of whom is forbidden for the reasons given, to move freely within Europe.

Lastly, a global approach has to take into account the contradiction which exists in practice but which has never been adequately clarified, between, on the one hand, the expediency of removing from their family children (as victims) exploited or compelled by threats or necessity to commit crimes and, on the other, their right, and that of their family, to family reunification.

[6] In the *Chahal* judgment, the Court concluded that foreigners who are undesirable in the host country for valid reasons cannot be deported regardless of their actions if they would be exposed to danger in the country to which they were to be deported.