

Martin Pecina
Minister of Interior Affairs
President of the Justice and Home Affairs Council

Brussels, 29 May 2009
Our ref: B872

Dear Mr. Pecina,

Re: Justice and Home Affairs (JHA) Council discussion on Asylum Proposals and returns of third-country nationals intercepted or rescued at sea to Libya

At their meeting on 4 and 5 June 2009 JHA Ministers will have a political debate on the Asylum Proposals presented by the Commission in December 2008 and February 2009, as well as the recent developments with regard to the return to Libya of asylum-seekers, migrants and refugees intercepted or rescued at sea by the Italian authorities. Amnesty International would like to raise a number of concerns ahead of your discussions in the JHA Council with regard to both issues. The concerns with regard to the cooperation between the EU and its Member States and Libya in the area of migration and asylum are also informed by preliminary findings of a very recent Amnesty International mission in Libya, which looked *inter alia* into the situation of migrants, asylum-seekers and refugees in the country. Amnesty International believes that the recent return of third-country nationals to Libya once more illustrates the need for the Common European Asylum System (CEAS) to be based on high standards of protection in line with international refugee and human rights law.

Asylum Proposals

The political debate on the Commission proposals in the field of asylum is important in light of the ongoing legislative process as it will be the first time that the proposals will be discussed at the highest Council level.

Therefore, we would like to take this opportunity to reiterate our main concerns and observations with regard to some of the key issues in the Commission proposals on asylum that are currently under negotiation within the Council and on which the European Parliament adopted reports in plenary on 7 May 2009¹.

Amnesty International has consistently called upon all stakeholders to develop high standards of protection of asylum-seekers and refugees in the framework of the CEAS that comply with international refugee and human rights law and standards. The overall assessment of the first phase of harmonization has not been positive. While certain provisions in the EU asylum *acquis* are not in line with international refugee and human rights law, the level of protection laid down in the EU asylum instruments is generally low and allows considerable room for derogation from basic standards. In Amnesty International's view, the Commission proposals amending the existing EU asylum *acquis* presented so far contain a number of important improvements that will add crucial safeguards to ensure that the rights of those applying for asylum within the CEAS are effectively respected.

As far as the Dublin Regulation is concerned, this includes the introduction of strengthened guarantees with regard to the right of asylum-seekers to an effective remedy against Dublin transfers and the proposal to introduce a mechanism allowing for a temporary suspension of transfers of asylum-seekers to a Member State facing particular pressures, or which is not complying with its obligations under EU asylum legislation. Currently, the Dublin system functions on the basis of the assumption that protection standards in EU

¹ Amnesty International published in April 2009 detailed comments to the Commission recast proposals on the Dublin Regulation, the Reception Conditions Directive and the proposal for a Regulation establishing a European Asylum Support Office, available at www.amnesty-eu.org.

Member States are equal and that refugees will find protection in the EU regardless of the Member State in which they apply for asylum. This is clearly a myth as the widely diverging recognition rates for certain nationalities as well as widely diverging procedural guarantees for asylum-seekers across the EU indicate. As a result, the Dublin system continues to create unfair consequences for asylum-seekers and may potentially lead to serious violations of asylum-seekers' and refugees' rights, including indirect *refoulement*. In a recent case concerning the application of the Dublin Regulation the European Court of Justice emphasized the importance of a right to appeal with suspensive effect by stating that "Community legislature did not intend that the judicial protection guaranteed by the Member States whose courts may suspend the implementation of a transfer decision, thus enabling asylum-seekers duly to challenge a decision taken in respect of them, should be sacrificed to the requirement of expedition in processing asylum applications"². At the same time the European Court of Human Rights has consistently held that international agreements or arrangements between states party to the European Convention on Human Rights (ECHR) in certain fields of activities, such as the Dublin Regulation, can not absolve states from their responsibility under the Convention in relation to the field of activity covered by such attribution arrangements³. Amnesty International considers the right to an effective remedy against such a transfer decision an essential tool to better protect asylum-seekers from transfers that may result in violations of their human rights and calls on the Council to endorse the approach taken by the Commission and supported by the European Parliament in this respect.

Also the proposed mechanism to temporarily suspend transfers of asylum-seekers to Member States whose capacities to process or receive asylum-seekers properly or are not complying with their obligations under international or EU law towards persons in need of international protection is to be welcomed as a necessary tool to increase the protection of asylum-seekers within the CEAS. Asylum-seekers should never be sent to dysfunctional asylum systems and therefore Amnesty International believes that there is merit in the proposed mechanism to suspend transfers of asylum-seekers in such circumstances. Nevertheless, Amnesty International believes that the Commission should be strengthened by introducing a more efficient mechanism to assess and review progress made by the Member State concerned in order to avoid that Member States would *de facto* be rewarded for not complying with their obligations under EU asylum legislation or for not addressing particularly urgent situations effectively.

With regard to the proposal recasting the Reception Conditions Directive, Amnesty International in particular welcomes the provisions aiming at enhancing the safeguards for vulnerable asylum-seekers, the absolute prohibition to detain unaccompanied asylum-seeking children and the obligation to ensure access to the labour market no later than six months after the application for international protection was lodged.

Both the Commission proposal on the Dublin Regulation and on the Reception Condition Directive deal extensively and in detail with the issue of detention of asylum-seekers. Amnesty International is opposed to the detention of asylum-seekers apart from in the most exceptional circumstances as prescribed by international law and standards. Detention places undue hardship on asylum-seekers and in the great majority of cases can be replaced by less repressive alternatives. Therefore, it is of the utmost importance that second phase asylum legislation fully reflects international law principles that clearly restrict the use of detention of asylum-seekers. These include the principle that detention will only be lawful when the authorities can demonstrate in each individual case that it is necessary and proportionate to the objective to be achieved and that it is on the grounds prescribed by law. Detention should always be for the shortest possible time and any asylum-seeker held in detention must be promptly brought before a judicial authority and be provided with an effective opportunity to challenge the lawfulness of the decision to detain. While these principles are largely reflected in the Commission proposals, Amnesty International believes that in particular the proposed provisions on the grounds of detention in the proposal on reception conditions are reason for concern. As they are formulated now, these grounds risk being interpreted so broadly that they do not properly reflect the general presumption against detention of asylum-seekers under international law and instead risk encouraging the systematic detention of asylum-seekers.

Amnesty International calls on the Council to clearly confirm the exceptional nature of detention of asylum-seekers as a principle by restricting the grounds for detention of asylum-seekers and to consolidate the obligation to implement alternatives to detention first as required under international human rights law. The

² See European Court of Justice, Case C-19/08, *Migrationsverket v. Petrosian*, Judgment of 29 January 2009.

³ See European Court of Human Rights, *T.I. v. UK*, Decision of 7 March 2000 and *K.R.S. v. UK*, Decision of 2 December 2008.

recast Reception Conditions Directive and the recast Dublin Regulation must incorporate the necessary guarantees to ensure that detention of asylum-seekers always remains a measure of last resort and does not become an instrument of first response.

Amnesty International also believes that it is important to maintain a clear distinction between the detention of irregular migrants for the purpose of their removal, dealt with under the recently adopted Returns Directive, and detention of asylum-seekers pending the assessment of their application for international protection. While both should remain exceptional it should be noted that the use of detention of asylum-seekers is, as stated in UNHCR guidelines on detention of asylum-seekers, "inherently undesirable". This should always remain the starting point for any discussion on EU standards with regard to the detention of asylum-seekers.

Return of third-country nationals intercepted or rescued at sea to Libya

According to statements by the Italian government, between 7 and 11 May over 500 individuals were returned to Libya after having been rescued in the high seas, apparently in international waters south of Lampedusa. The individuals concerned were sent back to Libya without proper assessment of their protection needs, in breach of Italy's obligations under international and regional refugee and human rights law, such as the European Convention on Human Rights, the Geneva Refugee Convention, the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Included in these are the obligations not to return any individual, either directly or indirectly, to a country where he or she is at risk of persecution and the duty to allow access to a full, fair and satisfactory asylum procedure to assess his or her protection needs. These safeguards are also enshrined in the EU Asylum Procedures Directive and the EU Qualification Directive. It is unknown how many of those rescued had the intention of applying for asylum but according to UNHCR it appears that a number of the persons that were sent back to Libya "wish to seek international protection and may indeed qualify for such protection". Still according to UNHCR the persons returned include Somali and Eritrean nationals.

Even though the events occurred in the high seas, due to the existence of extra-territorial jurisdiction and the fact that individuals were under effective control of Italy, by taking them back to Libya, Italy can be considered to be in breach of the aforementioned obligations under international and regional law. Libya is not a signatory to the 1951 Geneva Refugee Convention and does not have a functioning asylum system in place. Although UNHCR is allowed to operate in Tripoli, Libya refuses to sign any agreement acknowledging a formal presence of UNHCR in the country. To date, there is still no procedure in place which would allow asylum-seekers to present an application for recognition of refugee status by the Libyan authorities. As a result anyone wishing to apply for asylum in Libya has limited opportunity to do so. It should also be noted that in October 2007, the UN Human Rights Committee raised concerns about reports that Libyan authorities regularly return refugees and asylum-seekers to countries where they may be at risk of torture and other ill-treatment, as well as concerns over persistent allegations that migrants, asylum-seekers and refugees arrested and detained in Libya are subjected to torture and cruel, inhuman and degrading treatment.

In May 2009, an Amnesty International delegation visited Libya and was allowed *inter alia* to visit the detention centre for migrants of Misrata about 200 km east of Tripoli. Amnesty International noted a serious problem of overcrowding in the centre as it was accommodating at the time of its visit between 600 and 700 persons, whereas, according to the director of the centre, it has a capacity of maximum 350 persons. While detainees are forced to sleep on the floor, sanitary facilities are insufficient and any form of privacy non-existent. According to a number of detainees Amnesty International was allowed to speak with, the conditions in Misrata were described as being better than in other centres in Libya where they were detained before arriving in Misrata. The large majority of those detained in Misrata are persons from Eritrea, while other nationalities included Somali, Sudanese, Nigerian and Malian.

In spite of repeated requests by Amnesty International, the situation of some of the migrants, asylum-seekers and refugees that were recently pushed back from Italy to Libya after being intercepted at the high seas remains unclear. Individuals are frequently moved from one detention centre to another while registration of the migrants, asylum-seekers and refugees held in detention is highly deficient, which makes monitoring of their situation very problematic. During its visit to Libya, Amnesty International also received

worrying reports of discriminatory and degrading treatment as well as reports of ill-treatment of migrants originating from Sub-Saharan African countries by Libyan nationals as well as members of Libyan police forces. Although a draft asylum law is currently under discussion, Libyan authorities have consistently denied the presence of refugees on its territory and indicated that it has no intention of becoming a party to the 1951 Geneva Refugee Convention, while UNHCR's official status in Libya remains unchanged. Amnesty International was unable to receive any information on the draft law under consideration.

Amnesty International is concerned that the measures implemented by the Italian authorities since 7 May set a very dangerous precedent with regard to how EU coastal Member States deal with migrants, asylum-seekers and refugees intercepted or rescued at sea as it breaches international refugee and human rights law and denies access to a fair and satisfactory asylum procedure. Amnesty International acknowledges the challenges EU Member States such as Malta and Italy are facing with regard to Mediterranean sea crossings and believes that steps need to be taken to ensure that solidarity between EU Member States is enhanced if they are committed to establishing a common immigration and asylum policy. However, the lack of such measures should never serve as an excuse for EU Member States to implement border control policies that are violating human rights of migrants, asylum-seekers and refugees, including by denying them *de facto* the possibility to seek asylum in the EU or find protection from persecution or other serious human rights violations in the EU.

In October 2008 European leaders solemnly committed in the European Pact on Immigration and Asylum to the construction of a Europe of Asylum and explicitly emphasized the need to ensure that "the necessary strengthening of European border controls should not prevent access to protection systems by those people entitled to benefit under them". Measures such as those implemented recently by the Italian government effectively undermine this important commitment as well as the international protection system and risk setting a deplorable example for other EU Member States as well as other regions in the world.

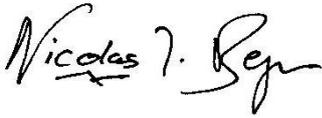
Therefore, Amnesty International calls upon the Justice and Home Affairs Council to strongly denounce any state practice resulting in violations of migrants', asylum-seekers' and refugees' fundamental rights under international and regional refugee and human rights law, including EU legislation. No policy of border controls should be implemented at the expense of basic human rights of those in distress at sea, including the right to seek asylum. In light of the upcoming discussions on the new multi-annual programme in the area of freedom, justice and security, a clear political signal is needed from JHA Ministers that the EU will fully assume its responsibilities towards persons in need of international protection and will not implement border control policies that *de facto* undermine the right to seek asylum.

Amnesty International calls upon the JHA Council to:

- endorse and enhance the provisions strengthening the right to an appeal with suspensive effect against Dublin transfers and the proposed temporary suspension mechanism in the Commission proposal on the Dublin Regulation;
- clearly consolidate in EU asylum legislation the presumption against detention of asylum-seekers as established in international human rights and refugee law by a restricting the grounds for detention and consolidating the obligation to implement alternatives to detention first;
- endorse the amendments in the recast proposal on Reception Conditions aiming at strengthening the safeguards for vulnerable asylum-seekers, imposing a ban on detention of unaccompanied asylum-seeking children and ensuring access to the labour market no later than six months after the asylum application was lodged; and,
- strongly denounce the practice of returning third-country nationals without a proper assessment of their protection needs to countries where they may be at risk of serious human rights violations.

We hope that these concerns will be taken into account during your discussions in Luxembourg.

Yours sincerely,



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