

Access to Protection: *A Human Right*

NATIONAL REPORT - MALTA



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Access to Protection: A Human Right NATIONAL REPORT – MALTA



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About the Project

The main objective of the project “Access to Protection: a human right”, financed by the Network of European Foundations in the frame of the European Programme for Integration and Migration (EPIM), is to bring national and European policies and practices in line with the obligations set out by the European instruments on Human Rights. In particular, it focuses on the access to the territory and to protection and the standards outlined by the European Court of Human Rights in the *Hirsi* case.

The project is implemented by the *Consiglio Italiano Per I Rifugiati* (lead partner), the Hungarian Helsinki Committee (Hungary), Pro-Asyl Foundation (Germany), The People for Change Foundation (Malta), the Greek Council for Refugees (Greece), and the Spanish Commission for Refugee Aid - CEAR (Spain) and The Portuguese Council for Refugees. The partnership has also benefitted from the valuable support of the Bureau for Europe - Division International Protection of the UNHCR, the Commission for Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe, and the lawyers of the Forensic Union for the Protection of Human Rights, who filed the complaint concerning the *Hirsi* case before the European Court of Human Rights.

The project aims at attaining a “cultural change;” a shift from a perspective that focuses mainly on security and on combatting irregular immigration flows to an approach which balances these exigencies with respect for human rights. In particular, we highlight the principle of non-*refoulement* and the access to protection, through the adoption, if it is necessary, of specific amendments to national and European legislation policies and practices. The project intends to promote an enhancement of practices at the borders and more systematic training on human rights and refugee law, addressed to authorities, in particular border guards. Moreover, the project has the purpose of fostering the full access of the UNHCR and other organizations to potential international protection seekers.

The project began in September 2012 and will end in February 2014. To date, the project partners have engaged in desk-research, legal analysis, as well as discussions with relevant stakeholders.

Executive Summary

This report presents the final results of the 'Access to Asylum: A Human Right' Project in Malta. It builds on the research carried out by the People for Change Foundation over the course of the past 12 months including legal analysis, desk research and a round table discussion with various stakeholders held in May 2013. The research comes at a time when issues of access to the territory and to protection could not be more prominent, especially when one notes the incidents that took place over the summer of 2013.

The primary argument throughout this report is that the principle of *non-refoulment* applies irrespective of the classification of the act in question, including whether it is an interception or a rescue operation, and whether it is carried out by official vessels or by private vessels coordinated by the State. An analysis of the *Salamis* incident clearly highlights that Malta (and Italy in this case) cannot evade their *non-refoulement* obligations by instructing rescuing vessels to return rescuees to places of disembarkation to which their own official vessels are precluded from disembarking. Any such actions would amount to *de facto refoulement* and would be in violation of their obligations under International Law.

The report also identifies a number of challenges in the international law framework surrounding maritime migration. Most notably, it highlights that while it is clear that priority must at all times be given to disembarkation, the SAR Convention regime does not effectively designate a default State of disembarkation. These challenges cannot, however, justify the return of individuals to countries where they face persecution or any form of inhuman or degrading treatment or punishment.

This report is organized as follows: Chapter 2 presents the salient legal principles from the *Hirsi* judgment including its direct relevance for Malta. Chapter 3 applies these principles to the Maltese context. First, it presents Malta's legal framework and context in this regard. It then moves on to present some of the more important cases in which Malta has been involved including the return of Eritreans in 2002, returns to Libya in 2004 and the incidents from summer 2013. Chapter 4 discusses some of the obligations relating to the principle of *non-refoulement* including the right to be informed of the right to seek asylum and to be assisted by a lawyer. Chapter 5 delves into some of the legal issues arising from the *MV Salamis* incident, discussing these within the context of the

Hirsi judgment and international law more broadly. Chapter 6 concludes by making a number of recommendations. It calls on the Maltese Government to:

1. Consistently respect the principle of *non-refoulement*, as applicable regardless of the classification of the particular act, in line with Malta's international legal obligations.
2. Ensure that the saving of lives at sea is always the first and main priority of any interception or rescue mission, and that persons rescued are not returned to a place where they might face human rights violations including torture and cruel and inhumane treatment and punishment.
3. Clarify that 'a place of safety' refers not only to the physical safety of the individual but must also be such a place where his/her human rights are protected and there is an effective opportunity to seek international protection.
4. Raise awareness amongst its various branches, including those directly involved in immigration control of the various legal and policy implications of the *Hirsi* judgments including the positive obligations it identifies.
5. Ensure that respect for human rights, including the rights of non-nationals, is a priority in its negotiations with the Libyan government and authorities.

Furthermore, we call on the European Union to:

1. Ensure any designation of a specific place of safety as the location of disembarkation be coupled with solidarity measures in place in order to assist the State of disembarkation in the attendant responsibilities which consequently become incumbent upon it.
2. Ensure that any legal and policy developments at the European level abide by the principles set out in the *Hirsi* judgment and fully respect human rights.
3. Ensure that its own agencies, including Frontex, do not engage in actions in violation of the principle of *non-refoulement*, and that European Union funds are not utilized to support measures that contravene States' obligations in this regard.
4. Encourage the development of solidarity arrangements between various EU Member States in terms of the disembarkation of persons rescued at sea.
5. Ensure that human rights considerations are a primary focus of any negotiations with third countries in the context of migration management.

Table of Contents

About the <i>Access to Protection: A Human Right</i> Project	2
Executive Summary	3
Foreword	6
Chapter 1: Introduction	8
Chapter 2: The <i>Hirsi</i> Judgment and its Direct Impact on Malta	10
Chapter 3: Malta and <i>Non-Refoulement</i>	19
Chapter 4: Rights relating to access to protection and procedural guarantees	30
Chapter 5: The <i>MV Salamis</i> Incident: Some legal considerations	36
Chapter 6: Conclusions and Recommendations	46

Foreword

Asylum is about security and safety. However in seeking such a safe place, asylum seekers face barriers; material and virtual borders. The situation of persons in need of protection has become increasingly challenging since crossing European borders has been made more difficult, almost impossible. This is due to efforts such as the Schengen System which has erected an insurmountable wall around the external borders of the European Union. The declared reasons for erecting such a “wall” are the political, economic and social necessities of stopping uncontrolled migration. From the point of view of international law, States are entitled to determine who is allowed to enter their territories, with an exception for their own citizens, who always have the right to return to their country. They are also bound by other international agreements to which they become party and to general principles of international law, including human rights law.

States may establish rules and conditions regarding entering their territory, for instance through the requirement of and conditions for entry visas. Member States of the European Union, through the 2009 Schengen Visa Code and building on policies that have developed over the last two decades, have delegated powers to the EU institutions to establish those rules, sharing part of their national sovereignty. At the same time, States have adopted a wide range of measures to ensure that those rules are respected, as well as to prevent non-authorised persons from crossing their borders. Such measures do not only concern the control of physical frontiers and the surveillance of territorial and international waters, but also interventions in third countries—those of origin or of transit of migrants and refugees. Such measures include, but are not limited to the provision of technical assistance at departure airports, seaports and maritime zones. Such an “externalization” system of controls has been developed, in particular, during the last decade.

Efforts to close borders and stop irregular migration are also restricted by and subject to international and European law on the protection of refugees, in particular by the principle of *non-refoulement*, as well as by general human rights, *in primis* by the right of the person to not be exposed to the risk of torture, inhuman or degrading treatment or punishment. The obligation of a State to respect these rights may actually result in the obligation to admit people, at least temporarily, to its territory even when they do not meet the requirements for crossing its borders.

The historic judgment of the European Court of Human Rights in the case *Hirsi v. Italy*, of February 2012, not only condemned Italy for having pushed back migrants, intercepted on the high seas, to Libya in 2009, but also set out guiding principles regarding control and surveillance of borders. These principles must be observed to ensure strict compliance with the rules laid down in the European Convention of Human Rights to which European Union Member States are party. These principles have also found some resonance in the EU Recast Directive on the procedure for the recognition of international protection, adopted in June 2013 as well as in the amendment to the Regulation governing the European Agency Frontex and in the amendment to the Schengen Border Code.

The primary objective of the project “Access to protection: a human right” is to assess how the principles established by the Strasbourg Court and the EU legislation are being implemented in the participating countries and to identify recommendations on the way forward.

Christopher Hein

Director, *Consiglio Italiano Per I Rifugiati* (Lead Partner)

Chapter 1:

Introduction

This report presents the final results of the *Access to Asylum: A Human Right* Project in Malta. It builds on the research carried out by the People for Change Foundation over the course of the past 12 months including legal analysis, desk research and a round table discussion with various stakeholders held in May 2013.

This project starts from the premise that the European Court of Human Rights judgment in *Hirsi Jamaa v. Italy* is a historic decision that will inform future developments. The case promises to shape debates and legal developments for the years to come, not least because the court has gone into painstaking detail to ensure that it covers a variety of issues and scenarios.

This research comes at a time when issues of access to the territory and to protection could not be more prominent. The summer of 2013 saw hundreds of persons lose their lives in the Mediterranean sea during attempts to reach protection in Europe. It also saw two instances where the principles of non-*refoulement* were at risk in Malta. First, in July 2013, the Maltese government considered returning a group of migrants to Libya, a move that was stopped by an interim measure of the European Court of Human Rights. Second, in September 2013, a vessel that rescued migrants from distress was instructed by the Italian and Maltese authorities to return the rescued migrants to Libya. The master of the vessel refused and eventually the migrants were disembarked in Italy. Both these cases receive particular attention in this report. The latter incident raises a number of interesting legal questions which are addressed in depth later in the report.

This analysis is particularly relevant for a country like Malta, where the vast majority of asylum seekers arrive irregularly via the maritime border. Statistics from the Office of the Refugee Commissioner indicate that between 2008 and 2013¹ over 92% of asylum applicants (10,372 applicants compared to 995 who had arrived via different channels) reached Malta by boat. This must also be considered whilst bearing in mind that over 65% of decisions made by the Office of the Refugee Commissioner since 2002 have found for the eligibility of some form of international

¹ The numbers for 2013 are provisional as not all applications have been inputted yet.

protection. It is clear therefore that a large part of migrants arriving via the sea border are persons in need of international protection.

This report is organized as follows. Chapter 2 presents the salient legal principles from the *Hirsi* judgment including its direct relevance for Malta. Chapter 3 applies these principles to the Maltese context. First it presents Malta's legal framework in this regard. It then moves on to present some of the more important cases in which Malta has been involved including the return of Eritreans in 2002, returns to Libya in 2004 and the incidents from summer 2013. Chapter 4 discusses some of the obligations relating to the principle of non-*refoulement*, including the right to be informed of the right to seek asylum and to be assisted by a lawyer. Chapter 5 delves into some of the legal issues arising from the *MV Salamis* incident, discussing these within the context of the *Hirsi* judgment and international law more broadly. Chapter 6 concludes by making a number of recommendations.

Chapter 2:

The *Hirsi* Judgment and its Direct Impact on Malta

The facts in the *Hirsi* case² stemmed from an interception exercise and subsequent push-back³ carried out by Italian official personnel on the basis of a series of bilateral agreements between Italy and Libya in 2009. Indeed, central to the decision of the Court was the legitimacy or otherwise of this push-back practice, as it came to be referred to, in the context of interception of migrant vessels on the high seas and their forcible return to Libya in the context of bilateral arrangements between Italy and Libya.⁴

The circumstances of the case are reported in detail in the judgment;⁵ they are briefly recalled here. The applicants (11 Somali nationals and 13 Eritrean nationals) formed part of a group of *circa*, 200 individuals leaving Libya on 3 vessels and intending to reach Italian shores. When the vessels were situated 35 nautical miles (nm) south of Lampedusa and within the Maltese Search and Rescue (SAR) area,⁶ they were intercepted by three Italian official vessels. The migrants were then transferred to the Italian vessels, all personal effects were confiscated and no indication of their destination was given nor any formal identification process carried out. After a 10 hour voyage, on reaching the port of Tripoli, the migrants were handed over to Libyan authorities despite their unwillingness to do so.⁷

² *Hirsi Jamaa and Others v Italy* (Application No 27765/09), 23 February 2012.

³ M Den Heijer states that the term 'push-back' was probably coined by the UNHCR. See: M Den Heijer, 'Reflections on *Refoulement* and Collective Expulsion in the *Hirsi* Case' 25 *International Journal of Refugee Law* 2, 269; UNCHR Briefing Note 14 July 2009, 'UNHCR interview asylum seekers pushed back to Libya' available online: <http://www.unhcr.org/4a5c638b6.html>.

⁴ A Treaty of Friendship, Partnership and Cooperation was concluded in August 2008 with an Implementing Protocol (the contents of which are not publicly available) being concluded in February 2009. See further: N Ronzitti, 'The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?' 1 *Bulletin of Italian Politics* 1 (2009) pp. 125-133. See also, for history of the Agreement: UNHCR, 'UNHCR's Third Party Submission to the ECHR in the case of *Hirsi and Others v Italy*' (Application No. 27765/09), page 2.

⁵ Paras 9-14.

⁶ A SAR region is defined in the Annex to the Convention as an 'area of defined dimensions associated with a rescue co-ordination centre within which search and rescue services are provided.' Chapter 1, para. 1.3.4. Malta has a vast SAR area, spanning more than 250,000 square kilometres, an area linked to its flight information region.

⁷ Para.12: according to the applicants' version of events, the migrants objected but they were forced off the Italian ships.

The first push-back operations by Italy began in May 2009 whereby Italian coastal authorities began intercepting migrants in international waters off the coast of Lampedusa and summarily returning them to Libya. While the new strategy led to a great reduction in arrivals from Libya (with the Italian news agency ANSA reporting that Italy's push-back policy resulted in a 96% drop in arrivals),⁸ these push-backs prompted widespread criticism as a clear violation of international law, and more specifically, of the *non-refoulement* obligation.⁹

Malta was an indirect 'beneficiary' of this practice. Perhaps this is the reason why the State never officially condemned the push-backs which indeed were arguably supported by both the Government and the Opposition.¹⁰ While the *Hirsi* case arose from an **interception exercise**, the Malta is primarily involved in **rescue operations**. Nonetheless, a number of cardinal principles identified by the judgment apply equally to actions post-rescue at sea (as shall be noted below). Furthermore, the obligation of *non-refoulement* was held to apply equally to interception exercises and to rescue operations at sea.

A number of issues demand further consideration. First, this Report offers a synthesis of the main findings of the Grand Chamber of the European Court of Human Rights (ECtHR) in the *Hirsi* case and an examination of how far these apply to the Maltese State. Following this, the Report will consider two major incidents which occurred in the latter part of 2013 in relation to irregular maritime migration and State obligations in this regard. This portion of the National Report will apply the main findings in the *Hirsi* Case to actions of the Maltese State in the summer of 2013.

⁸ ANSA, '96% drop in migrant arrivals after accord with Libya' (Rome, 16 April 2010); see also: H Grech, 'Push-back' behind steep decline in immigrant arrivals' *Sunday Times of Malta*, 15 November 2009, reporting a 50% decline in migrant arrivals compared to the previous year.

⁹ See for example: Human Rights Watch, 'Pushed Back-Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers' (Report) 2009; Human Rights Watch, 'World Report 2010', page 405; Jesuit Refugee Service, 'Removal of 227 migrants to Libya directly contravenes international laws' 7 May 2009; Migreurop, 'Illegal Refoulement of 500 migrants to Libya: the EU must condemn Italian Authorities' 11 May 2009; UNHCR, 'Follow-up from UNHCR on Italy's Push-Backs' (Briefing Notes) 12 May 2009; Council of Europe, Committee on Migration, Refugees and Population, Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants, asylum seekers and refugees on Europe's southern shores, Report on the visit to Lampedusa (Italy), 23-24 May 2011, AS/MIG/AHLARG (2011) 03 REV. 2, 30 September 2011.

¹⁰ K Sansone, 'A Case of Bad Judgment?' *Times of Malta*, 25 February 2012; K Sansone, 'Sending migrants back is 'not wrong'' *Times of Malta*, 23 June 2012; K Sansone, 'Watchdog surprised by Malta's support for migrant pushbacks' *Times of Malta*, 30 June 2012.

2.1 Effect of ECtHR Decisions on Malta

As a preliminary point, judgments of the ECtHR are binding on the parties to the particular case, as per Article 53(1) of the Convention on Human Rights and Fundamental Freedoms (ECHR) providing that the ‘High Contracting Parties undertake to abide by the final judgment of the Court in a case to which they are parties.’¹¹ This position is reminiscent of the reigning position in other international courts and tribunals such as for example, the International Court of Justice.¹² In the same way as other international judicial fora, the ECtHR strives to maintain judicial consistency to ensure stability in its decisions, evidenced also by the reference to other earlier judgments. The Court therefore maintains a level of stability in interpreting the provisions of the ECHR which are binding on the Member States of the Council of Europe. Thus, it is safe to maintain that the member States are bound by the provisions of the ECHR as interpreted by the Court. It is clear that the Court has adopted a broad conception of its role within the European Convention regime in that it interprets obligations in a way that its decisions have effect beyond the immediate judgment.¹³ As was aptly noted in *Ireland v United Kingdom*:

The Court’s judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.¹⁴

The Parliamentary Assembly of the Council of Europe (PACE) also conceives of the role of the Court in a similarly broad manner, stating that ‘the case law of the [Court] forms part of the Convention, thus extending the legally binding force of the Convention *erga omnes* (to all other parties)’.¹⁵

¹¹ Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950, entered into force 3 September 1953) CETS No 005; 213 UNTS 221.

¹² See Article 59 Statute of the International Court of Justice.

¹³ LR Helfer and E Voeten, ‘Do European Court of Human Rights Judgments Promote Legal and Policy Change?’ (draft, available online, page 5).

¹⁴ 25 Eur. Ct. H. R. at para. 154 (ser. A) (1978)

¹⁵ Resolution 1226, PACE, Execution of Judgments of the European Court of Human Rights (2000) at para. 3.

2.2 Salient Legal Considerations

The relevant legal regime in maritime migration scenarios is characterized by the interplay of various – and sometimes conflicting – branches of international law. The United Nations Convention on the Law of the Sea (LOSC)¹⁶ provides States with jurisdictional powers in the respective maritime zones adjacent to their coasts, together with the obligation to rescue those in distress at sea. Furthermore, humanitarian principles of protection, involving human rights considerations and also the protection granted to asylum-seekers by refugee law, are crucial in such situations. Against this, there is the backdrop of the law seeking to repress the smuggling of migrants, recognized at International Law to be a type of transnational organized crime, as provided for in the Migrant Smuggling Protocol.¹⁷

The *Hirsi* push-backs occurred in the context of an interdiction¹⁸ exercise by Italian authorities on the basis of accords entered into with Libya. Interception is the primary tool employed by States in reducing boat arrivals at their shores. Rescue at sea is to be differentiated to the act of maritime enforcement amounting to interception, differing in both intention and purpose. However, while interception is an exercise reserved to State authorities and forms part of a programme of maritime enforcement, the two sometimes overlap, and an interception exercise may pre-empt the need for a rescue.¹⁹ This notwithstanding, States cannot classify border patrols and interception exercises as rescue at sea operations in order to circumvent any protection duties that may arise from such intervention.²⁰

Italy had attempted this argument before the ECtHR (paras 65 – 66) arguing that because the particular push-back occurred in the context of a rescue operation, the level of intervention was

¹⁶ Montego Bay, 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3; 21 ILM 1261

¹⁷ Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime (Palermo, 15 November 2000, entered into force 28 January 2004) 40 ILM 384

¹⁸ The terms interdiction and interceptions are to be read as being synonymous. See with regard to the definition of ‘interdiction’ Guilfoyle’s two-stage description of the act at D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, UK, 2009) 4-5.

¹⁹ To this end, note the Legislative Guide which states that Articles 7 and 8 based on enforcement and suppression of a criminal activity should not prevent consideration of rescue at sea. Page 388 para. 100. See further, P Mallia, *Migrant Smuggling by Sea* (Martinus Nijhoff, The Netherlands, 2010) 99.

²⁰ See for example: Council of Europe, Response of the Italian Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Italy from 27 to 31 July 2009, CPT/INF (2010) 15, Strasbourg, 28 April 2010.

not sufficient to trigger a link between the State and the rescuees sufficient to found jurisdiction under Article 1 of the Convention on Human Rights and Fundamental Freedoms (ECHR).²¹ The Grand Chamber rejected this argument. It maintained that a State cannot circumvent any duties under a relevant Convention (in this case the ECHR) by classifying the events as a rescue operation on the high seas. Thus, whatever the classification of the act, coming into contact with migrants on board a vessel calls for respect for human rights. Precisely due to this human factor, humanitarian and human rights considerations must shape any exercise concerning these vessels and, any border control exercise, rescue mission or decision to disembark individuals must be imbued with human rights safeguards.

It emerges therefore that obligations such as *non-refoulement* are activated irrespective of the classification of the particular act and apply to States in both interception and rescue at sea scenarios.²² In this way, ‘Italy cannot circumvent its jurisdiction by describing the events as rescue operations on the high seas’ (para. 79).

Jurisdiction

The finding of the Grand Chamber regarding the jurisdictional reach of the Convention indicates that where State agents operate outside the territory, and at the very least, when they exercise control and authority over the individual, the State has jurisdiction and is under an obligation to secure to the individual the right concerned (para. 74).

The Court rejected Italy’s argument above-mentioned that there was no State jurisdiction over a ‘rescue operation in the high seas’ and that Italy was not responsible for the fate of the applicants on account of the minimal control exercised by the authorities over the parties concerned (para. 79). Indeed, since ‘the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities’, the nature and the purpose of the intervention were irrelevant (para. 81).²³

²¹ Article 1 of the Convention provides that ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’

²² Note that the Commission Proposal (12.4.2013 COM(2013) 197 final, referred to below) acknowledges this fact.

²³ Note also: *Medvedjev et al v France* 29 March 2010, Grand Chamber, Application No 3394/03, para. 67.

This finding was occasioned by the fact that the enforcement actions occurred on the high seas, a maritime zone which is open to all States, whether coastal or land-locked, and where ships are only subject to the jurisdiction of the State whose flag they fly.²⁴ It was pointed out that the ‘special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention’ (para. 178). The high seas are not a lawless area where States may commit acts with impunity which, if committed elsewhere, would have engaged their international responsibility.²⁵

The Grand Chamber unequivocally established that, post-rescue, people are not to be pushed back to a country where they risk being treated in violation of Article 3 ECHR which protects against inhuman and degrading treatment or punishment.²⁶ This cardinal protection principle of international refugee law has found its way into the law of human rights whereby *inter alia*, ‘within Europe, the European Court of Human Rights has, through its case law on Article 3 of the ECHR, extended the principle of *non-refoulement* to all persons who may be exposed to a real risk of torture, inhuman or degrading treatment or punishment should they be returned to a particular country.’²⁷ To this extent, it has been described as possessing *jus cogens* status.²⁸ Human Rights law provides a wider net of protection than Refugee Law – not only in the persons it addresses but also the scope of its protection. Article 3, providing protection from return to a country where the individual may be subjected to torture, inhuman or degrading treatment or punishment, therefore provides an extension of the protection provided by refugee law and may indeed prove to be a more effective means of protection for asylum seekers.

The obligation of *non-refoulement* is not limited territorially but operates wherever a State acts – even on the high seas and indeed, wherever a State exercises effective control over a vessel.²⁹ It

²⁴ See LOSC Articles 87, 89 and 92.

²⁵ In this regard see for example: paras 69, 178; Concurring Opinion page 77 and *Issa and Others v Turkey* (2004) para. 71.

²⁶ Regarding the violations with regard to which *non-refoulement* is applicable see: HRC, General Comment (GC) No 31, (CCPR/C/21/Rev.1/Add.13, 26/05/2004) §12; *GT v Australia*, CCPR/C/61/D/706/1996, 4 December 1997, §8.7.

²⁷ Ref: CPT Report, para. 26. See also: Concurring Opinion pages 62-63 and UNHCR, ‘Note on International Protection’ 13 September 2001 (A/AC.96/951) para. 16.

²⁸ Concurring Opinion of Judge Albuquerque, page 65. See also: Conclusion No. 25 (XXXIII) – 1982, para. (b).

²⁹ See also: UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (26 January 2007) 10, at <http://www.refworld.org/pdfid/45f17a1a4.pdf>; *Haitian Centre for Human Rights v. United States*, Case No. 10.675,

has finally been established that the exercise of jurisdiction by a State engages that State's protection obligations vis-à-vis persons on board, irrespective of the location of that interception. It is therefore the exercise of State action which is the determining factor in whether or not the *non-refoulement* obligation is triggered in extraterritorial areas.

Refoulement with respect to Article 3 ECHR³⁰ existed with regards to two aspects in the case. It was established that there was a direct risk that the applicants would suffer inhuman and degrading treatment in Libya. Further, there was also the danger of secondary *refoulement* by Libya to their respective countries of origin, namely Somalia and Eritrea where, the Court noted, there existed 'widespread serious problems of insecurity' (para. 151).

A crucial feature of the judgment, relevant to any State's actions in the application of *non-refoulement*, is the proactive obligation on the part of the Member State. It will be recalled that Italy had contended that at no time had the applicants expressed their intention to request asylum and that a request not to be handed over to Libyan authorities could not be interpreted as such.³¹ Furthermore, due to the fact that, as Italy maintained, the intervention was carried out in the context of a rescue at sea operation, it was not necessary to conduct a formal identification process of the parties concerned.³² The Court however maintained that it was up to the 'national authorities .. to find out about the treatment to which the applicants would be exposed after their return [and] .. the fact that the parties concerned had failed to expressly request asylum did not exempt Italy from fulfilling its obligations under the Article.'³³ The 'knew or should have known' obligation is predominant since the irregular migrants would be exposed in Libya to treatment in breach of the Convention and that they would not be given any kind of protection in that country.³⁴ The obligation of *non-refoulement* is thus triggered even in the absence of a request for asylum or assistance.

Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser.L/V/II.95 Doc. 7 rev, at 550, ¶ 157 (1997); Submission by the Office of the United Nations High Commissioner for Refugees in the Case of *Hirsi and Others v Italy*, App. No. 27765/09 (Eur. Ct. H.R. Feb. 23, 2012), para. 24 available at <http://www.unhcr.org/refworld/pdfid/4d92d2c2.pdf>.

³⁰ Article 3 ECHR provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

³¹ Para.96; and see also: Response of the Italian Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Italy from 27 to 31 July 2009, 28 April 2010, Para.D, pages 9-11.

³² Para.95

³³ Para.133. See also Concurring Opinion page 64.

³⁴ See paras 131, 133, 137, 156 and 157.

The positive duty on the part of the State had also been highlighted in *MSS v Belgium and Greece*³⁵ to the effect that a State's duty at International Law *does* entail a positive duty to examine what treatment individuals would be exposed to following their return. *MSS v Belgium and Greece* maintained that this positive obligation overrides the dictates even of the Dublin Regulation. In short, laws cannot be automatically applied without reference to the subsequent treatment of individuals.³⁶

The finding of the Grand Chamber insofar as concerns collective expulsions³⁷ dovetails nicely with the obligation of *non-refoulement*.³⁸ This was explained by Judge Albuquerque to the effect that the *non-refoulement* obligation has two procedural consequences: the duty to advise an alien of his rights to obtain international protection and the duty to provide for an individual, fair and effective refugee status determination and assessment procedure.³⁹ The effect of this where push-backs are concerned is that they constitute violations of the prohibition of collective expulsion and seriously risk breaching the *non-refoulement* obligation.

Insofar as concerns the effective remedy stipulated in Article 13 ECHR,⁴⁰ this must be effective in practice as well as in law. Once again, this ties in with the concept of *non-refoulement* since the principle involved procedural obligations for States and that it was the responsibility of Contracting States in cases of interception resulting in push-backs to ensure that each person had an 'effective opportunity to challenge his or her return.'⁴¹ The Grand Chamber attached great importance to the

³⁵ ECtHR, *M.S.S. v Belgium and Greece* (Judgment), (2011) Application No. 30696/09.

³⁶ See further, P. Mallia, 'Case of *M.S.S. v Belgium and Greece*: A Catalyst in the Re-thinking of the Dublin II Regulation' 30 *Refugee Survey Quarterly* 3, 107 (2011).

³⁷ For the first time, the Grand Chamber ruled that extraterritorial actions may violate Article 4 of Protocol No 4. The removal of aliens to a third State carried out extraterritorially violated the purpose of the provision being 'to prevent States being able to remove certain aliens without examining their personal circumstances (para. 177)' The Court noted that, should the provision only apply to collective expulsions from the territory of the State Party, 'a significant component of contemporary migratory patterns would not fall within the ambit of that provision, notwithstanding the fact that the conduct it is intended to prohibit can occur outside national territory and in particular, as in the instant case, on the high seas' (para. 177).

³⁸ The link was brought out by the Columbia Law School Human Rights Clinic, in para. 165, wherein one reads that the principle of *non-refoulement* required States to refrain from removing individuals without having assessed their circumstances on a case-by-case basis.

³⁹ Concurring Opinion page 75, where the qualities of an effective refugee status determination procedure are also outlined.

⁴⁰ Article 13 states 'Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

⁴¹ Paras 193-194

absence of basic procedural guarantees on board the Italian vessels, without which compliance with *non-refoulement* cannot be guaranteed (para. 202). Further, the complaints relating to Article 3 ECHR and Article 4 of Protocol No 4 must be subject to independent and rigorous scrutiny by a competent authority and the remedy available must have a suspensive effect. In this way, the possibility of criminal proceedings instituted in Italy after their arrival in Libya against the involved military personnel, even it was possible in practice, would not satisfy the necessity of a remedy with a suspensive effect.⁴²

The *Hirsi* judgment has done much to flesh out the practical ramifications of the *non-refoulement* obligation. Aside from the undisputed extraterritoriality of the obligation, the Concurring Opinion picks up on the significant procedural aspect of the obligation. This clarifies the duty to advise an alien of his right to obtain international protection and the duty to conduct an assessment of any relevant receiving country in order to ensure that *even if asylum claims are not made* any persons returned are not at risk of torture or inhuman treatment.

⁴² Reference was made to *Čonka v. Belgium*, no. 51564/99, ECHR 2002–I.

Chapter 3:

Malta and *Non-Refoulement*

This chapter deals with the principle and practice of *non-refoulement* in Malta. It starts with a brief overview of the context before moving on to discuss the most pertinent legal provisions under national law and judicial interpretations of the same. In the third part it presents key situations arising over the past 11 years of *refoulement* and places particular emphasis on the incidents of summer 2013. This also informs the discussion undertaken in Chapter 5 on the implications of the non-refoulement principles in situations such as the *MV Salamis*.

While in the Maltese context issues relating to *refoulement* are most commonly centered around scenarios out at sea, it must be stressed at the outset that individuals are at risk of *refoulement* from other points of entry (eg airports and seaports) as well as from the territory itself. Applicants for asylum in Malta can be broadly divided into the following groups:

1. People arriving on boats from Libya. This group by far makes up the majority of asylum seeker numbers.
2. People who apply for asylum directly to the relevant authority. This group includes people who would have entered legally but then overstay their permitted time in Malta.
3. People referred to the Refugee Commission (REFCOM) by the Immigration Authorities, although these are of a limited number. This latter group is not large – c 20-25 per annum.
4. Stowaways. While the International Maritime Organization is the competent organization in this area and the issue of stowaways is regulated by IMO Guidelines, issues related to *non-refoulement* are still applicable in this area.

The issue of maritime migration is particularly important. Between 2002 and 2013 over 16,800 potential asylum seekers arrived in Malta on boats fleeing from Libya. Statistics from the Office of the Refugee Commissioner indicate that between 2008 and 2013⁴³ over 92% of asylum applicants (10,372 applicants compared to 995 who had arrived via different channels) reached Malta by boat. The attention to the maritime border is also warranted by the extent of Malta's search and rescue region and its ensuing responsibilities at a minimum to coordinate the search and rescue of persons in distress at sea.

⁴³ The numbers for 2013 are provisional as not all applications have been inputted yet.

It ought to be clarified at this stage that Immigration Control responsibilities are vested in the Malta Police Force; indeed, the Commissioner of Police is the Principal Immigration Officer. At sea, these powers are vested in the Armed Forces of Malta, by virtue of Legal Notice 66 of 1980.⁴⁴ Article 2 of the Regulations provides that:

In the performance of patrol, guard or security duties or of duties in connection with criminal offences, assigned to him by a Commander of the Armed Forces of Malta, whether such duties are performed on land, sea or air, a member of the Armed Forces of Malta shall be empowered to exercise all such functions, powers and duties as are by law vested in an officer of the Customs or in a member of the Malta Police Force

3.1 The Legal Framework

This section seeks to provide a general overview of the national legal framework on non-*refoulement* and related issues. Malta is a Party to the Convention relating to the Status of Refugees (Refugee Convention),⁴⁵ the ECHR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention).⁴⁶ Inhuman or degrading treatment or punishment is prohibited under Article 36(1) of the Maltese Constitution.⁴⁷

This is further supported the European Convention Act⁴⁸ which was enacted in 1987 to make provision for the substantive articles of the ECHR to become and be enforceable as part of the Laws of Malta. Article 3 of the First Schedule replicates the corresponding article in the Convention in providing that:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

⁴⁴ Legal Notice 66 of 1980, as amended. Laws of Malta

⁴⁵ Geneva, 28 July 1951, entered into force 22 April 1954, 189 UNTS 137 (Refugee Convention)

⁴⁶ New York, 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85

⁴⁷ Chapter 1, Laws of Malta.

⁴⁸ Chapter 319, Laws of Malta

The obligation of *non-refoulement*, as presented in Article 33 of the Refugee Convention and Article 21 of the Qualification Directive⁴⁹ is also enshrined in Article 14 of the Refugee Act which provides that:

A person shall not be expelled from Malta or returned in any manner whatsoever to the frontiers of territories where the life or freedom of that person would be threatened on account of his race, religion, nationality, membership or a particular social group or political opinion.⁵⁰

Under the Common Standards and Procedures for Returning Illegally Staying Third Country Nationals Regulations,⁵¹ adopted to transpose the Returns Directive⁵² into Maltese law, the Principal Immigration Officer is obliged to postpone a removal if it, *inter alia*, violates the principle of *non-refoulement* or when an appeal against such removal has been made with the Immigration Appeals Board. This postponement is for an ‘appropriate period’ decided according to the circumstances of the particular case. The regulations do not define the term *refoulement* and can therefore be taken to refer to the broader meaning of the term under human rights law (rather than the ‘convention-ground-specific’ meaning under the Geneva Refugee Convention).

Further Relevant Legislation

The Immigration Act⁵³ provides that any person who does not have a right of entry into Malta may be refused entry and if he lands or is in Malta without leave to enter he is to be considered a prohibited migrant.⁵⁴ Under Article 14 of the same Act, the Principal Immigration Officer may issue a removal order against such person⁵⁵ whilst the person remains under an obligation to leave Malta voluntarily without delay. The act clarifies that return may be either to the country of origin or to

⁴⁹ Council Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) OJ L337/9

⁵⁰ Chapter 420, Laws of Malta. Article 14(2) runs as follows: The provisions of subarticle (1) shall not apply to a refugee or a person enjoying subsidiary protection in respect of whom there are reasonable grounds for regarding him as a danger to the security of Malta, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community.

⁵¹ Legal Notice 81 of 2011, Laws of Malta

⁵² Council Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98

⁵³ Chapter 217 of the Laws of Malta

⁵⁴ Article 5 of the Immigration Act, Chapter 217 of the Laws of Malta

⁵⁵ Article 14

such other country to which he may be permitted entry.⁵⁶ This must however be in accordance to international obligations to which Malta may be party⁵⁷ and the right to order the removal of an individual is without prejudice to the application of Maltese law on the right to asylum, the rights of refugees and Malta's international obligations in this regard.⁵⁸

A removal order may be appealed to the Immigration Appeals Board within 3 days of the order being issued.⁵⁹ A statement to this effect is also included on the copy of the removal order given to the individual. Under Article 22 the Minister responsible for migration may issue deportation orders 'if he deems it to be conducive to the public good'.⁶⁰ By virtue of Article 17 of the Immigration Act a warrant issued by the Maltese Courts under the Code of Organization and Civil Procedure, including therefore warrants of prohibitory injunction, are unable to obstruct or delay a deportation and this is why, in the case of July 2013 (which will be presented later) an interim measure by the ECtHR was required.

The details of such removals and a number of important safeguards have now been promulgated through the Returns Regulations to which reference has been made above. Under Article 11(1) of the same regulations however, a number of the procedural safeguards, including regarding the form that the removal order must take and the restrictions on the duration of detention do not apply to persons who are intercepted whilst trying to irregularly cross the maritime or air border and who have not subsequently obtained an authorisation or a right to stay in Malta.

The Maltese legal framework also provides for information to be given to asylum applicants and for the right to be assisted by a lawyer. These relevant legal provisions are elaborated in the relevant sections of this report.

Case Law

Maltese jurisprudence on the issue of *non-refoulement* is limited. Two Constitutional Court decisions in 2013 reflect the Court's position. Neither of these cases revolved around push-backs

⁵⁶ Article 14(4)

⁵⁷ Ibid

⁵⁸ Article 14(5)

⁵⁹ Article 25A(7)

⁶⁰ Article 22(1)

occurring on the high seas but rather dealt with cases of returns from the territory. They made, however, a number of observations and findings which are of direct relevance, including for instance, the obligation of the Government to ensure it has information about the situation to which an applicant is to be returned. The two judgements also reflect the reliance of the Maltese Courts on the findings of the ECtHR.

The case of *Hassan Abdulle Abdul Hakim Et vs. Ministru Tal Gustizzja U Intern Et*⁶¹ was first filed in 2007 (Citazzjoni Numru 56/2007) and decided by the First Hall of the Civil Court on 29th November 2011 (i.e. before the *Hirsi* Judgment). The appeal (Appell Civil Number 56/2007/1) was determined by the Constitutional Court on 28 June 2013, after the ECHR judgment in *Hirsi*, and in fact the Constitutional Court refers to the *Hirsi* judgment in its determinations. The case involved two Somali applicants who were returned to Libya without being given the opportunity to seek international protection.

The Constitutional Court noted that a return of an individual would be in violation of Article 3 of the ECHR when it can be shown that there were substantial reasons for believing that the person, if returned, faces a real risk of being subjected to treatment contrary to Article 3. This treatment must meet a minimum threshold of severity and must be assessed with regards to the information available about the situation in the applicant's position in the country to which the return is proposed. The relevant time for the assessment should be on the date of the removal.

The Court sought to determine not only whether the applicants were in fact tortured, but also whether the Maltese authorities knew, or should have known of the likelihood of this treatment. On this point the Court, having assessed a significant number of sources presented to it, concluded that the return happened at a time when the Maltese government ought to have known that they faced a risk of torture or inhuman or degrading treatment, as well as the possibility of chain *refoulement* to Somalia. This is an important finding regarding the situation in Libya, which has not improved in any meaningful way since the return had actually happened. The Court in this instance noted that, considering the nature of the alleged violation, the Government was expected to make

⁶¹ *Abdul Hakim Hassan Abdulle u b'nota tal-15 ta' Novembru 2007 Dr. Michael Camilleri assumu l-atti tal-kawża f'isem l-istess Abdul Hakim Hassan Abdulle u Kasim Ibrahim Nur u b'digriet tal-21 ta' Diċembru 2011 tal-Prim'Awla tal-Qorti Ċivili għe korrett għal Kasim Ibrahim Nur u b'nota tat-12 ta' Marzu 2012 l-istess Dr. Michael Camilleri assumu l-atti tal-kawża f'isem l-istess Kasim Ibrahim Nur v. Ministru tal-Gustizzja u l-Intern; Kummissarju tal-Pulizija fil-kapaċita' tiegħu bħala Principal Immigration Officer*. (Citazzjoni Numru 56/2007) (Appell Civil Number 56/2007/1)

all the necessary checks in order to determine the situation in the country to which the applicants were to be returned, to acquire the necessary assurances about their treatment in Libya, as well as to make arrangements to ensure that the Government could monitor what happens to the applicants after their return. In view of the failure of the authorities to undertake any of these measures, the Court found that the Maltese Government should have known about the risks faced in Libya. The Court therefore placed an expectation on the authorities to take proactive measures to ensure that they are well aware of the situation to which the individual is to be returned. This also reflects the positive legal obligations emanating from the *Hirsi* judgment to which reference has already been made above.

Another issue addressed by the Court in this case is whether there had been an effective remedy available to the applicant. The first Court had found that the applicants had not been given an adequate opportunity to seek asylum. The Constitutional Court did not confirm this finding.⁶² The Court did, however still find a violation of Article 13, most notably by reference to the lack of legal assistance. The Court noted that when the applicant objected to being returned to Libya, he was not provided with legal assistance or any other opportunity to contest his return. The Court found a violation of Article 13 even though the applicant had never raised torture or chain *refoulement* as the reason why he did not wish to return. The Court found that it could not be excluded that, had he been given the right legal assistance, he would have had an arguable claim under Article 3. This, the Court found, amounted to a violation of Article 13.

Procedurally, the Constitutional Court ruled that the Commissioner of Police, in his capacity as Principal Immigration Officer, was the right representative of the Government for the purpose of the case, and therefore allowed the appeal by the Minister for Justice and Home Affairs that the Minister ought not to be a party to the judgment. This was determined in accordance with Article 181B of the Code of Organization and Civil Procedure. In making this finding, the Court reversed the decision of the First Hall which held that the Minister was a relevant party to the case as a result of the critical role that the Ministry plays in migration management and specifically in the determination of asylum claims.

⁶² Para. 80

The Court further concluded against the suggestion of the Government that a finding of a human rights violation was alone sufficient remedy, and ordered the payment of damages of 6000 Euros to one party and 10, 000 to the other, the former being a reduction from 10,000 Euros ordered by the First Hall of the Civil Court.

In 2013, the Constitutional Court also heard another case wherein violations of Article 3 and 8 were argued. This time, the applicants were Turkish nationals of Kurdish origin who had been through the asylum process but whose claim was denied.⁶³ The Court in that case noted that while the ECHR did not include a right to asylum, it did protect, within the context of Article 3, from the return to a country where one faces a serious risk of torture and other cruel and inhumane treatment. The Court in this case found that the risk of an Article 3 violation can emanate from non-state actors, but in such cases it is up to the applicant to prove that there is a real risk and that the State is unable or unwilling to offer protection. The possibility of harsh treatment because of the general instability in the country does not, alone, merit a finding of an Article 3 violation. The Court however did find a possible violation of Article 3 when considering the specific facts of the case including the applicant and his family's involvement in Kurdish political groups. Of particular relevance is the finding of the Court that Turkey's status as a Party to the ECHR was irrelevant to the determination in that whilst it was under an obligation to ensure that treatment contrary to Article 3 did not occur, the evidence indicated a real risk of such treatment upon return.⁶⁴

3.2 Refoulment from Malta?

Malta has, so far, never been involved in push-back measures of the nature described in the *Hirsi* case. However the issue of *refoulement* has arisen on a number of occasions since 2002 and these are briefly presented here.

Returns to Eritrea – 2002

In 2002 Malta deported some 230 individuals to Eritrea. International human rights organization Amnesty International collected stories from the deportees. It found that many of them had been rounded up, imprisoned and tortured at the hands of the Eritrean authorities upon their return. One escaped detainee said: "There were interrogation rooms and we were being called one at a

⁶³ Dilek Sahan, Serif Ali Sahan, Serdar Sahan v. Ministru tal-Ġustizzja u l-Intern, l-Uffiċjal Għoli tal- Immigrazzjoni (Appell Civili Numru. 6/2008/1)

⁶⁴ Para.39

time, with two guards, one asking the questions, the other doing the beating.”⁶⁵ Many of the returnees were reportedly held incommunicado for years after the return. Indeed the fate suffered by the individuals deported from Malta was of such gravity that their stories, as recounted by Amnesty International and others, were used to argue against the deportation of asylum seekers to Eritrea not only from Malta but also from other countries.⁶⁶

Returns to Libya – 2004

This incident is the one subject to the Constitutional Court decision to which reference has been made above. A group of 24 migrants arrived in Malta in 2004 after a Maltese patrol boat intercepted the boat on which they were travelling together with another 24 individuals. 6 members of the group were returned to Libya after 20 days of being detained at the Police headquarters. During that time they were not given the opportunity to apply for asylum or to speak to a representative of the UNHCR. Their complaints about being returned to Libya were not heeded and they were not given access to legal assistance. There is no information as to why these 6 members of the group were identified for return.

The Court heard accounts by the applicants of torture and ill treatment in Libya, including beatings and torture, being hit repeatedly and being electrocuted. After an initial period of this, they were imprisoned for a year after what appears to have been a quick and procedurally unsound trial. In prison they again faced beatings and torture. The conditions in the prison were inhumane, including having a single toilet and shower for 50 persons, lack of windows and an infestation of insects. In November 2005, they were driven out to the desert and left there. Some of the people who were with them succumbed to the conditions in the desert but the applicants managed to survive after they were assisted by some local people. Two members of the group got to Tripoli and made their way back to Malta in June 2006.

Rescue at Sea - 2010

These incidents all involved individuals who were brought to the territory and then returned to another country after their disembarkation. The only case where *refoulement* arose as an issue

⁶⁵ Amnesty International ‘ERITREA: ‘You have no right to ask’ – Government resists scrutiny on human rights’ AI Index: AFR 64/003/2004 available online at: <http://www.amnesty.org/en/library/info/AFR64/003/2004>

⁶⁶ See for instance: *SE (Deportation - Malta - 2002 - General Risk) Eritrea v. Secretary of State for the Home Department*, CG [2004] UKIAT 00295, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 29 October 2004

from activities carried out at sea concerned a group of 55 Somalis who had left Libya and were rescued at sea from a vessel in distress by Maltese and Libyan authorities. A group of the rescues were immediately returned to Libya, while 28 others were taken to Malta. Information about this case is unclear; however, the decision as to who would be disembarked where appears to have been *ad hoc* and arbitrary. It is uncertain what criteria, if any, were used to decide who would be returned to which country.⁶⁷ The Fundamental Rights Agency reports how the migrants thought that the second vessel was Italian and were later prevented from leaving the rescuing Libyan vessel and return to their own boat. FRA reports how the Maltese authorities denied that any deception was involved in the incident, noting that despite it being dark, the Libyan flag was visible. It also quotes a Somali migrant who was on the boat recounting how those on the boat were tricked into believing that the Libyan vessel was actually an Italian vessel. The final result was that some of the migrants were brought to Malta whilst others were returned to Libya.⁶⁸

9 July 2013

Insofar as concerns the push-backs which were the subject of the *Hirsi* judgment (although, as noted above, Malta had never formally endorsed the push-back system), political statements following *Hirsi* indicated that even though return to Libya was not ideal, it was actually possible.⁶⁹ However, the summer of 2013 brought with it an event which tested Malta's interpretation of current obligations of *non-refoulement* and called for an application of the *Hirsi* judgment as it concerned the same articles (Articles 3, 13 and Article 4 of Protocol No 4 to the ECHR). The difference was that in this case, the migrants were already on Maltese territory.⁷⁰

⁶⁷ See further: European Agency for Fundamental Rights, 'Fundamental Rights at Europe's Southern Sea Borders' (March 2013) 48, available online: <http://fra.europa.eu/en/publication/2013/fundamental-rights-europes-southern-sea-borders>; 'Amnesty International, 'Seeking Safety, Finding Fear: Refugees, Asylum-Seekers and Migrants in Libya and Malta' (December 2010) available online:

<http://www.amnesty.org/en/library/asset/REG01/004/2010/en/d0e71b60-71ec-4c4b-8b2f-d03a881b90f6/reg010042010en.pdf>

⁶⁸ Ibid p.48

⁶⁹ Ref: K Sansone, 'Sending migrants back is 'not wrong'' *Times of Malta*, 23 June 2012; K Sansone, 'Watchdog surprised by Malta's support for migrant pushbacks' *Times of Malta*, 30 June 2012.

⁷⁰ Amnesty International, 'Malta: Collective Expulsions, Push-backs and Violating the Non-Refoulement Principle are Never an Option' AI index: EUR 33/001/2013, 12 July 2013; available online: <http://amnesty.org/en/library/asset/EUR33/001/2013/en/94da229b-24d2-409c-83ca-22bd42aaadef/eur330012013en.pdf>.

On 9th July, 102 Somali migrants were intercepted by the Armed Forces of Malta and brought to Malta. The UNHCR and various NGOs were denied access to the migrants who were kept at Police Headquarters, with the women and children later being transferred to a detention centre. Following reports that a number of male migrants were to be transported to Libya that same evening on two flights (departing at midnight and 4 am), the People for Change Foundation and the Jesuit Refugee Service, supported by a number of Maltese NGOs, filed a request with the ECtHR for an interim measure under Article 39 of the ECHR. It argued for the Court to order Malta to refrain from deporting the individuals as this would result in a breach of Articles 3 and 13 of the ECHR and of Article 4 of Protocol 4 to the ECHR.⁷¹ 69 lawyers also filed a national judicial protest seeking to halt the push-back. The request before the ECtHR relied heavily on the judgment in *Hirsi*, as well as on the Maltese Constitutional court decision discussed above.

The Court accepted the request and issued the interim measure preventing the deportation.⁷² The EU Home Affairs Commissioner, Cecilia Malmström, was also clear on the fact that any return operation has to protect against *non-refoulement* and acknowledge that anyone arriving in an EU territory may file an asylum request and have a proper assessment of their situation.⁷³ Indeed, the Maltese Government stated that it would respect the Court's decision and, in answer to questions raised by the ECHR, it stated that no final decision had been taken regarding repatriation of the Somali migrants at the time the Court had issued its order.⁷⁴ A follow-up case has been filed with the European Court of Human Rights and has been communicated to the parties.⁷⁵

The *MV Salamis* Incident – 2013

On 4th August 2013, a Liberian-registered tanker, the *MV Salamis*, received instructions from the Maritime Rescue Coordination Centre (MRCC) Rome to respond to a distress situation within the Libyan Search and Rescue (SAR) Area, circa 46 nautical miles (nm) from Libya and 140 nm from Malta. Subsequently, with 102 migrants on board, including 4 pregnant women, a five-month-old

⁷¹ See further, Amnesty International, 'Malta: Collective expulsions, push-backs and violating the *non-refoulement* principle are never an option' EUR 33/001/2013, 12 July 2013.

⁷² *X and Others v. Malta*, Application no. 43985/13

⁷³ 9th July MEMO Ref: MEMO/13/676 'Malta considering Push-Backs: Statement by Home Affairs Commissioner, Cecilia Malmstrom' Ref: http://europa.eu/rapid/press-release_MEMO-13-676_en.htm.

⁷⁴ 'Migrant Pushbacks: 'No final decision was taken', Malta tells Strasbourg Court' *Malta Today* 31 July 2013 <http://www.maltatoday.com.mt/en/newsdetails/news/national/Migrants-pushback-No-final-decision-was-taken-Malta-tells-Strasbourg-court-20130731#LETTER>

⁷⁵ Abdi Ahmed and others against Malta, lodged on 9 July 2013, Application no. 43985/13.

baby and an injured woman, Rome MRCC instructed the Master to return to Khoms in Libya, as the nearest port of safety. However, the Master failed to heed Italy's instructions and proceeded on the vessel's initial route towards Malta. On approaching Malta, the Master was prevented entry in order to disembark the rescued migrants, and was blockaded just outside the Island's contiguous zone. The migrants on board received food and water supplies from the Armed Forces of Malta (AFM), as well as medical aid. Members of the AFM boarded the *MT Salamis*; no evacuations were considered necessary. A not-uncommon stalemate between Italy and Malta followed, until the announcement on 7th August, by the Maltese Government that Italy had agreed to provide for the disembarkation of the migrants and that the tanker was headed toward Syracuse, in Sicily, for disembarkation of the rescues.⁷⁶

⁷⁶ See for more details: <http://www.pfcmalta.org/migrant-arrivals-2013.html>

Chapter 4:

Rights relating to access to protection and procedural guarantees

As noted elsewhere in this report, the ECtHR went further than merely re-affirming the prohibition of *refoulement* in its judgment. It also identified a number of positive obligations that emanate from the prohibition. These include the duty on the State to provide information about the possibility of seeking international protection, the provision of legal assistance and language interpretation, as well as the duty to ensure that there are effective remedies to challenge the return of individuals to countries where they risk facing human rights violations. This chapter briefly explores how these obligations are addressed in Maltese law and practice.

4.1 Duty to provide information

The right to obtain information about the asylum process is well established in Maltese law. The Application for a Declaration Regulations⁷⁷ provide that a person seeking asylum in Malta shall be interviewed by an immigration officer as soon as practicable after he has made an initial request, verbally or in writing, to apply for asylum in Malta.⁷⁸ This immigration officer shall inform the asylum seeker, where possible in a language that the person understands, or, where necessary, with the assistance of an interpreter, that he may apply for a declaration for refugee status.

The regulations also elucidate further information that must be provided including the confidentiality of information provided, the right to be assisted by a lawyer throughout the asylum procedures, the right to contact UNHCR and the right to present his/her case fully and to make any submissions to the Refugee Commissioner.⁷⁹ Information should also be provided regarding the applicant's obligation to fully co-operate with the status determination processes and to furnish any information relevant to his application; and that an unjustified refusal on his part to furnish any information requested by the Refugee Commissioner or to co-operate fully with the authorities may lead to the suspension or termination of the asylum procedures with regards to both his application and, where applicable, to that of any dependent member of his family.⁸⁰

⁷⁷ Legal Notice 253 of 2001, Laws of Malta

⁷⁸ Article 3(1)

⁷⁹ Article 3(2)

⁸⁰ Article 4

Beyond the provision of information, the said immigration officer is required by the regulations to assist the applicant in filling the prescribed application form for a declaration, where necessary with the assistance of an interpreter.⁸¹ Copies of the form and any written statements linked thereto are to be sent to the Refugee Commissioner, the applicant and the UNHCR.

According to the Procedural Standards Regulations,⁸² the applicant shall be informed in a language which he may reasonably be supposed to understand of the procedure to be followed and of his rights and obligations during the procedure; about the possible consequences of not complying with his obligations and not cooperating with the authorities; of the timeframe as well as the means at his disposal for fulfilling the obligation to submit the elements required; of his right to consult the High Commissioner and to have legal assistance during all the phases of the asylum procedure. This information is to be given in sufficient time to enable the applicant to exercise the rights guaranteed and to comply with the obligations prescribed by law. Applicants are also to be advised on how and where he may make an application for protection as well as to be provided with assistance, where necessary, in the forwarding of the application to the Refugee Commissioner.⁸³

The information given by the Immigration Police is communicated through a booklet available only in English. The booklet contains information about the rights and obligations of asylum seekers and is provided immediately upon arrival in Malta (or upon disembarkation). The Office of the Refugee Commissioner has also been actively engaged with the provision of information about the process. Representatives of the office communicate information usually within days of arrival through visits in detention centers. They primarily deliver information about the asylum procedure. A brief introduction by a representative of the office, assisted by a translator, is followed by an audio-visual presentation available in the 11 most commonly-used languages by asylum seekers in Malta. A transcript of the presentation, also in the 11 languages is also provided. Informal sources of information also exist including via access to UNHCR and NGO representatives.

As highlighted, the giving of information to those migrants within the territory is now well established in national law. However, in practice the situation regarding the provision of information at the maritime border is less clear. Participants in the stakeholder roundtable

⁸¹ Article 4

⁸² Legal Notice 243 of 2008, Laws of Malta

⁸³ Article 4

organized within the context of this project remarked upon the practical challenges that the provision of information within the context of a rescue or interception operation would entail.⁸⁴ A corollary to the right of the individual to be informed of his right to seek asylum is the obligation on the part of officials involved in possible removal to be informed about the situation in the country to which returns are to be affected. In practice, the giving of information as required by the ECtHR in *Hirsi* and by the procedural standards regulations assumes the disembarkation of individuals within the territory.

4.2 Duty to provide interpreting services and legal advisers

Maltese law provides for the right to be informed about the set rights and entitlements in a language that the applicant is likely to understand and to apply for asylum through a form that, as far as possible, shall all be in a language which the applicant understands. Whilst these safeguards appear to focus on the point when the applicant is already in the process of applying, they also extend to such time as the individual is being informed of his right to seek asylum. The Procedural Standards Regulations⁸⁵ provide that asylum seekers are to be granted the services of an interpreter for submitting his case to the competent authorities whenever necessary.

As noted above, the information provided by the Office of the Refugee Commissioner is provided in multiple languages, whilst however, the information distributed by the Immigration Police is only provided in English. The removal order, which also briefly outlines the right to appeal from the same, is only provided in the English language, an issue of particular concern when one notes that the time to appeal the order is limited to 3 days.

According to the Procedural Standards Regulations, an applicant for asylum may be assisted by a legal representative at all stages of his asylum process. At first instance, this is at the applicant's own expense whilst at appeal legal aid is available on the same conditions as Maltese nationals.⁸⁶ Access to legal aid at the preliminary stages of one's asylum claim is difficult considering that most migrants rescued and intercepted at sea are detained immediately upon arrival in Malta. Some NGOs offer legal assistance to detainees, at least through the provision for further information.

⁸⁴ For more information about the roundtable see: <http://www.pfcmalta.org/access-to-protection-a-human-right.html>

⁸⁵ Legal Notice 243 of 2008

⁸⁶ Article 4(2)(iv)

As with the above, it is practically implausible to expect that interpretation services and legal assistance can be made available on an intercepting or rescuing vessel. This further encourages an interpretation of the judgment as *de facto* requiring disembarkation on the territory of the State. Indeed the legislation and case law as discussed throughout this report all appear to assume the presence of the asylum applicant on the territory. This, coupled with the prohibition of *refoulement*, clearly implies the need to allow disembarkation.⁸⁷

4.3 Duty to train the personnel

Training of border guards in Malta is undertaken within the context of the regular training undertaken by the Malta Police Force and the Armed Forces of Malta. The Police Force has a police academy charged with providing education and training to the police, both before and during active service. Information from the academy lists police responsibilities in the area of asylum as one of the main areas of study at the academy, whilst it provides international courses on border control and security.⁸⁸

The Fundamental Rights Agency found that no particular specialized course for border management appears to exist in Malta and reports how in Malta, front-line border guards can, at least in principle, be deployed on border control duties immediately after finishing their general training and without having received any specialised training. According to the FRA, the Malta Police Force had undertaken implementation of the Common Core Curriculum but the Armed Forces of Malta had not. The report also highlights that the basic human rights training focuses on regular police tasks rather than on specific issues relating to the rights of migrants. Law professors typically deliver the training that appears to be practically-oriented.⁸⁹ Participants at the national

⁸⁷ It is generally recommended that status determination procedures are best determined by the appropriate authorities on land where access to interpreters and legal counsel may be assured. This is the position taken by the UNHCR, although it does not exclude the possibility of onboard processing in certain limited circumstances. Ref: UNHCR, 'Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea' Geneva, 2002, paras 23–24. The IMO also advocates this; see: IMO, 'Principles relating to Administrative Procedures for Disembarking Persons Rescued at Sea,' FAL.3/Circ.194 (22 January 2009). In this regard, see further T.A. Aleinikoff and V. Chetail (eds), *Migration and International Legal Norms* (The Hague, TMC Asser Press, 2003), 143–144.

⁸⁸ See in this regard: <https://www.cepol.europa.eu/index.php?id=malta>

⁸⁹ See further: European Agency for Fundamental Rights, 'Fundamental Rights at Europe's Southern Sea Borders' (March 2013) 48, available online: <http://fra.europa.eu/en/publication/2013/fundamental-rights-europes-southern-sea-borders>

roundtable organized within the context of this project noted the involvement of the Office of the Refugee Commissioner in the training of immigration police.

4.4 Effective remedies

In theory, a number of remedies exist in the case of return. However, again, it is difficult to see how any of these can be made available in the context of interventions at sea without first ensuring disembarkation in the territory. A removal order may be appealed with the Immigration Appeals Board while individuals fearing persecution upon return may apply for international protection. The Maltese Constitutional Court in its decision discussed above, was informed by the ECtHR decision in *Hirsi* when making its own determinations on the issue of effective remedies. The Court noted, *inter alia*, that the obligations vary depending on the nature of the claim; however, the remedy must necessarily be effective in practice and not only at law. The authority to which the right refers does not necessarily need to be a judicial authority and the remedy may be rendered effective by the ensemble of possible remedies available under national law. The Constitutional Court noted that many of the individuals who had arrived with the applicants had sought asylum, whilst the applicants had not. The Court concluded, on the basis of available information that the group had been informed of their right to seek asylum in Malta and they had not done so. However, the Court also noted that when the applicant objected to his return to Libya whilst being taken to the airport he was not provided with legal assistance or an opportunity to contest the removal in front of a relevant authority. The Court noted that whilst the applicant had not raised the risk of torture or *refoulement* with the police officers, given the right legal assistance, and considering the situation in Libya, he would have had an arguable claim under Article 3 of the Convention. As such, the Court found that there had indeed been a violation of Article 13, not because the applicant was denied the possibility of seeking asylum whilst he was detained, but rather, because when he objected to his return he was not given legal assistance and an opportunity to challenge the return in front of a competent authority.⁹⁰

⁹⁰ Para.81

4.5 Obligations of the State when returning aliens

The various legal obligations of the State when returning foreigners have been outlined throughout this report. It is pertinent to note that the Visitors Board for Detained Persons⁹¹ is charged with monitoring the proceedings relating to the involuntary return of illegally-staying third country nationals in accordance with the provisions of the Immigration Act and of the Common Standards and Procedures for Returning Illegally Staying Third Country Nationals Regulations.

⁹¹ Legal Notice 81 of 2011, Laws of Malta

Chapter 5:

The *MV Salamis* Incident: Some legal considerations

The *MV Salamis* incident described above raises a number of interesting questions: is there an obligation on the Master of a rescuing vessel vis-à-vis the obligation of *non-refoulement*? What is the legal effect of Italy's, and subsequently, Malta's direction that the Master return to Libya? Was Malta in duty bound to allow disembarkation in a situation falling short of distress? Why did Italy, for the first time, appear to alter its interpretation of the State of disembarkation? These will be explored in greater depth in the next section.

5.1 Issues of Rescue

The *Salamis* incident presents a clearly different scenario to the push-backs which were the subject of the *Hirsi* case. Nevertheless, a number of considerations arise that benefit from the approach taken by the Grand Chamber in the *Hirsi* case which clearly established that the obligation of *non-refoulement* applies equally to interception and rescue operations.

It will be recalled that the concepts of rescue and interception are different. Interception exercises are carried out by designated State authorities while rescue is often carried out by private vessels. Still, as was noted above, interception exercises often pre-empt the need for a rescue. The problem of disembarkation is more marked in cases of rescue by private vessels, as was highlighted in the *Salamis* incident, since, when rescue is carried out by official vessels (although disputes arise between Italy and Malta), in case of an impasse, disembarkations happen in the home port of the official vessel.⁹²

⁹² Note however, the Commission Proposal COM (2013) 197 final which contains rules for disembarkation in cases of rescue and interception in article 10. Regarding Malta's stand on the Commission Proposal, especially the see Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Position on Articles 9 and 10. (Presented by the Greek, Spanish, French, Italian, Cyprus and Maltese delegations) 14612/13, 10 Oct 2013. See also Presidency Doc 14753/13, 17 October 2013.

There follows a brief outline of the pertinent issues at law: primarily, what constitutes distress and what is to happen post-rescue insofar as concerns delivery of the rescues to a place of safety? It will be seen that the legal regime is inadequate and that one of the only things beyond doubt is that the obligation of *non-refoulement* applies irrespective of the nature of the intervention at sea.

5.2 The Meaning of Distress

In order to necessitate a rescue, the vessel in question must be in a state of distress. A number of interpretations apply here.⁹³ The International Convention on Search and Rescue (SAR Convention),⁹⁴ in Chapter 1 of its Annex, para. 1.1.13, describes distress as a ‘situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance.’ This definition arguably corresponds to the definition of distress under customary international law.⁹⁵

An IMO Advisory Circular on ‘Interim Measures for Combating unsafe Practices associated with the Trafficking or Transport of Migrants by Sea’ defines so-called ‘unsafe practices’ in a way that could very well be tantamount to distress. Such practices relate to ‘any practice which involves operating a ship that is:

1. obviously in conditions which violate fundamental principles of safety at sea, in particular those of the SOLAS Convention; or
2. not properly manned, equipped or licensed for carrying passengers on international voyages, and thereby constitute a serious danger for the lives or the health of the persons on board, including the conditions for embarkation and disembarkation.’

This classification, limiting such situations to ‘unsafe practices’ and not necessarily as situations of distress *per se*, does not help in identifying the causes of distress and the need to address such

⁹³ Note the examples of early judgments such as: *Kate A. Hoff case (The Rebecca)* (1929) VI RIAA 444; *The Eleanor* (1809) Edw. 135

⁹⁴ Hamburg, 27 April 1979, entered into force 22 June 1985, 1405 UNTS 97

⁹⁵ See in this regard, P Mallia and D Attard, ‘Access to Ports for Ships in Distress: What of Disembarkation?’ 10 *Benedict’s Maritime Bulletin* 67, (Second /Third Quarter 2012).

situations without delay. Rather, it seems to accentuate the fact that, for a distress situation to occur, there must be imminent danger of loss of life.⁹⁶

One is therefore warranted in questioning whether the above definition of distress in the SAR Convention may be too narrow, especially considering overcrowded and unseaworthy vessels transporting irregular migrants across rough seas. Indicators of distress are usefully outlined in a 2012 Report drawn up by the Parliamentary Committee of the Council of Europe (PACE), implying that even though the engine of a boat may be running (which would be an indication that the boat was not in an immediate state of distress) other issues such as an overcrowded dinghy, located a long distance from shore, and people on board showing clear signs of distress should be taken into account in the determination of whether or not a distress situation exists.⁹⁷ To this end, Recommendation 13.3 of the PACE Report encourages the need to:

Avoid different interpretations of what constitutes a vessel in distress, in particular as concerns overloaded, unseaworthy boats, even if under propulsion, and render appropriate assistance to such vessels. Whenever safety requires that a vessel be assisted, this should lead to rescue actions.⁹⁸

To this end, the Commission proposal referred to above (COM(2013) 197 final) distinguishes between three separate stages⁹⁹ and provides a situation of distress ‘should not be exclusively dependent or determined by an actual request for assistance.’ In such cases where the ship is perceived to be in a distress situation but the persons on board refuse to accept assistance, the participating unit is *inter alia* to continue to ‘fulfill a duty of care by surveying the ship at a prudent distance and by taking any measure necessary for the safety of the persons concerned, while avoiding to take any action that might aggravate the situation or increase the chances of injury or loss of life.’¹⁰⁰

⁹⁶ See also: A Zimmermann (ed) The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary (OUP, Oxford, 2011) 829

⁹⁷ Council of Europe, ‘Lives lost in the Mediterranean Sea: Who is Responsible?’ 29 March 2012, available at: <http://www.unhcr.org/refworld/docid/4f7be86b2.html> (PACE Report), para.95

⁹⁸ This consideration is relevant in determining the consequent obligations of SAR States when faced with a vessel needing assistance.

⁹⁹ These are: Uncertainty, Article 9(3); Alert, Article 9(4) and Distress, Article 9(5).

¹⁰⁰ Article 9(8) COM (2013) 197 final

5.3 SAR Obligations and Disembarkation

The obligation to rescue those in distress at sea is enshrined *inter alia* in the LOSC and may be regarded as part of customary international law, binding all States.¹⁰¹ Aside from Article 98(1) LOSC however, there is a noticeable dearth of regulation in the LOSC relating to search and rescue operations. Further regulation has been fleshed out in two IMO Conventions, namely the SAR Convention and the International Convention on the Safety of Life at Sea (SOLAS).¹⁰²

A State's SAR obligations include the primary responsibility to coordinate all search and rescue operations within its SAR zone in order that survivors are disembarked and are taken to a place of safety, to ensure that all rescued persons are disembarked at a place of safety within a reasonable time and also to release shipmasters who have assisted persons in distress at sea from their obligations with minimum further deviation from the ship's voyage.¹⁰³

While Italy has accepted the 2004 amendments, Malta has formally objected to them and does not consider itself bound by the Circular of the IMO's Facilitation Committee (FAL) of January 2009 entitled 'Principles relating to Administrative Procedures for Disembarking Persons Rescued at Sea'.¹⁰⁴ Instead, Malta advocates the 'next port of call' rule which directs that disembarkation should occur at the nearest safe port to the site of the rescue, which in the Maltese SAR area¹⁰⁵ is often a port in Italy. Italy on the other hand, interprets the 2004 amendments to the effect that the State in whose SAR area the rescue is effected has the responsibility of disembarking the rescues on its territory.

¹⁰¹ Article 98(1) LOSC imposes a duty on shipmasters to render assistance to those in distress at sea, with the only permissible exception being that he must be able to conduct such rescue operation without 'serious danger to the ship, the crew or the passengers'. Article 98(2) LOSC imposes the obligation on every coastal State to establish an adequate and effective search and rescue service.

¹⁰² Note that it is only since 2004 that the act of disembarkation has been expressly stated to be part of the rescue operation, following amendments to the SAR Convention, which came into force on 1 July 2006. See para. 3.1.6.4, Chapter 3 of the Annex to the SAR Convention which provides that the coordinating State must 'make the necessary arrangements in cooperation with other RCCs to identify the most appropriate place(s) for disembarking persons found in distress at sea.'

¹⁰³ SAR Convention, Annex, para. 3.1.9. The SOLAS Convention, in Reg V/33.1.1 imposes the same obligation on Contracting Governments.

¹⁰⁴ FAL.3/Circ.194, 22 January 2009, para. 2.3. An IMO Circular is a document which although non-binding is influential on the State parties.

¹⁰⁵ A SAR region is defined as an 'area of defined dimensions associated with a rescue co-ordination centre within which search and rescue services are provided.' (SAR Convention, Annex, Chapter 1, para. 1.3.4.). Malta's SAR Area spans over 250, 000 square kilometres, spanning from Tunisia to Greece.

However, the SAR Convention only lays down an obligation of coordination and cooperation and does not necessarily entail an explicit duty to allow disembarkation in a particular port.¹⁰⁶

5.4 The ‘Place of Safety’

The place of safety gains central significance in the application of the principle of *non-refoulement*, as it describes the characteristic of the place where individuals are to be taken post-rescue. The 2004 Guidelines define a ‘place of safety’ as the location where the rescue operation is considered to terminate. It must be a place where the safety of life of the persons rescued is no longer under threat and where their basic human needs (such as those relating to food, shelter, and medical exigencies) may be met.¹⁰⁷ It also must amount to a place from which arrangements may be made for the rescuees’ transportation to the next or their final destination.¹⁰⁸ According to these same Guidelines, the rescuing vessel is not to be considered as a place of safety simply because the survivors are no longer in immediate danger. Even if the rescuing vessel may safely accommodate the survivors and thus be a temporary place of safety, it ought to be relieved of this responsibility as soon as practicable. Indeed, a rescue unit or other suitable vessel or facility at sea may only serve as a place of safety until the survivors are disembarked to their next destination. Thus, since status determination procedures are preferably carried out on land, disembarkation of all on board is necessary in order to validly and effectively carry out an identification process.

That the ‘place of safety’ also includes factors other than immediate physical needs and extends to protection of human rights is evident both in the Guidelines on the Treatment of Persons Rescued at Sea (see paras 5.1.6 and 6.17) and in the PACE Resolution 1821 (2011) which asserts that such place of safety must necessarily entail respect for fundamental rights and not only physical protection focused on the immediate alleviation of distress.¹⁰⁹ Similarly, the April 2013 EU Commission Proposal for a Regulation establishing rules for Border Surveillance in the context of Joint Operations at Sea coordinated by the EU Borders Agency¹¹⁰ includes, in Article 2(11) the ‘protection of their fundamental human rights’ as one of the characteristic features of a ‘place of

¹⁰⁶ See further: Guidelines on the Treatment of Persons Rescued at Sea, para. 2.5. This leads to conflicting positions and regimes, such as that arising with the *M/V Pinar-E* which was rescued off Lampedusa in April 2009.

¹⁰⁷ See further Guidelines, paras 6.12-6.14.

¹⁰⁸ Guidelines, Para 6.12

¹⁰⁹ See paras 5.2 and 9.5.

¹¹⁰ COM (2013) 197 final, 12.4.2013; See also art 10(4).

safety.’ It seems safe to hold therefore, considering the aforementioned issues, that a definition of a ‘place of safety’ would recognize that such place ‘should not be restricted solely to the physical protection of people, but necessarily also entails respect for their fundamental rights.’¹¹¹

5.5 What of responsibility?

It will be recalled that Italy, as the State initially coordinating the rescue, directed the Master of the rescuing vessel to return to the Libyan port from which it had departed. Maltese authorities also maintained that this was the proper approach to follow, insisting that the vessel return to its last port of call and site closest to the rescue in order to arrange for disembarkation there, and going as far as to assert that the Master thereby breached International Law by refusing to do so. The letter which the Maltese Attorney General sent to the *Salamis* via its Agent stated that:

Despite being provided with clear instructions by the Maritime Rescue Coordination Centres Rome and the Rescue Coordination Centre Malta to contact the Libyan SAR authorities ... the master of the vessel chose not to contact the said authority and ignored the instructions which he had been given ... The masters’ actions appear to have prioritized the commercial interests of the vessel and those of the owners/operators of the said vessel over international legal obligations.... Master’s persistent failure to comply with the international legal regime and with the instructions received.¹¹²

The general position taken by Malta was that the Master breached international obligations relating to the necessity of disembarkation at the closest safe port. This approach has highlighted a worrying interpretation of the ‘place of safety.’ Prior to this incident, it had been generally advocated, as discussed above, that the general description of a place of safety was not only a geographical location or one where immediate physical needs are met but also one where one’s rights human rights are respected.¹¹³ Libya is not a place of safety.¹¹⁴ Its readiness or otherwise to receive migrants cannot be taken as a fact aiding this determination – contrary to the Maltese authorities’ views, including the Prime Minister, Home Affairs Minister, Attorney General and AFM Commander.¹¹⁵

¹¹¹ PACE Report, para 5.2

¹¹² Letter available online:

<http://www.timesofmalta.com/articles/view/20130805/local/tanker-carrying-migrants.480832>

¹¹³ See for example: ‘Blocking *Salamis* is ‘point of principle’ for Maltese government’ *Malta Today*, 6 August 2013.

¹¹⁴ See also *X and Others v. Malta*, Application no. 43985/13.

¹¹⁵ ‘*Salamis* heads to Italy as Malta refuses access to rescued asylum seekers’ *Malta Today*, 7 August 2013

Despite this reality, however, returns to Libya continue. For instance, during the night of the 4th and 5th August, a Turkish vessel *Adakent*, conducted a rescue of 96 individuals in Libya's SAR area. It then followed Italy's instructions to disembark them in Tripoli.¹¹⁶ At law, this cannot be done. Return by official vessels or aircraft, or direction to private vessels to return individuals to a potential place of persecution amounts to push-back operations which are in violation of international legal norms.¹¹⁷ Indeed, by directing the Master of rescuing vessels to return to Libya post-rescue, a State would be engaging in a *de facto* push-back.

This leads to another question and that is whether or not the Master of the vessel would be bound not to return potential asylum seekers to a place of persecution. The obligation of a shipmaster is to proceed with haste to the rescue of those in distress at sea. The amendments of 2004 to the SAR and SOLAS Conventions imposed the corresponding obligation on contracting Governments to coordinate and cooperate in order to relieve the Master of his responsibility as soon as reasonably practicable. This approach therefore sought to strike a balance between the obligations of the Master to come to the assistance of persons in distress at sea and the obligations of Contracting States to permit and assist the Master in disembarking such persons to a place of safety within a reasonable time.

The *non-refoulement* obligation binds only States and does not, as a matter of law, bind the master of a rescuing vessel.¹¹⁸ However, the 2005 IMO Guidelines on the Treatment of Persons rescued at sea call on shipmasters *inter alia* to ensure 'that survivors are not disembarked to a place where their safety would be further jeopardized.'¹¹⁹ Furthermore, they are made aware of the need to avoid disembarkation in territories where the lives or freedoms of those alleging a well-founded fear of persecution would be threatened.¹²⁰ While these Guidelines remain non-binding, these criteria must be considered when determining the place of safety in the sense of the SAR

¹¹⁶ 'Government requires ship master to return to rescue location' *Times of Malta*, 5 August 2013.

¹¹⁷ See further N. Frentzen, 'Italy Conducted *De Facto* Push-Back of Migrants by Ordering Cargo Ship to Rescue and Transport Migrants to Libya'.

<http://migrantsatsea.wordpress.com/2013/08/13/italy-conducted-de-facto-push-back-of-migrants-by-ordering-cargo-ship-to-rescue-and-transport-migrants-to-libya/>

¹¹⁸ On the obligation of the Master generally, see P Mallia, *Migrant Smuggling by Sea* (Martinus Nijhoff, The Netherlands, 2010) 99 *et seq.*

¹¹⁹ MSC.167(78), 20 May 2004, Para.5.1.6.

¹²⁰ Para.6.17.

Convention (1.3.2 and 3.1.9) and the SOLAS Convention (Regulation 33, para. 1-1 of Chapter 5, Annex).¹²¹

The ship master's determination of a place of safety must therefore be informed by these considerations. Human rights are too fundamental to warrant a different threshold of protection depending on whether a rescue is effected by a private vessel or by an official vessel. Malta (and Italy in this case) cannot evade their responsibility towards potential asylum seekers by instructing rescuing vessels to return rescuees to places of disembarkation to which their own official vessels are precluded from disembarking. Any such actions would be in violation of their obligations at International Law.

Furthermore, it should also be noted that had the Master of the *Salamis* followed Malta's instructions and proceeded to disembark the migrants in Libya, Malta could be held liable for 'wrongful acts' committed by the shipmaster under Article 8 of the Draft Articles on State Responsibility.¹²² In relevant part, this provision states that '[t]he conduct of a person .. shall be considered an act of a State under international law if the person .. is in fact acting on the instructions of ... that State in carrying out the conduct.'

Aside from its insistence that the Master return the rescued individuals to Libya, Malta's responsibility, if any, would exist if it were under a legal obligation to admit the *Salamis* for disembarkation of the rescuees on its territory. A reading of the relevant official statements would *prima facie* indicate that Malta did indeed have such responsibility. The EU Commission stressed that the priority was to save lives and that any dispute regarding the responsible search and rescue authority, as well as the right location for disembarkation should be clarified later. While this statement is true, the Commission also maintained that Malta had a 'humanitarian duty' to permit disembarkation.¹²³ This approach was echoed by *inter alia* the European Council on Refugees and

¹²¹ Note the purpose of the Guidelines *inter alia*, 'to help Governments and masters better understand their obligations under international law and provide helpful guidance with regard to carrying out these obligations'. Ref: para. 1.2.

¹²² International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10 (2001).

¹²³ 'Commissioner Cecilia Malmström urges the Maltese authorities to take action' MEMO/13/739, 6 August 2013 http://europa.eu/rapid/press-release_MEMO-13-739_en.htm#PR_metaPressRelease_bottom

Exiles and Amnesty International.¹²⁴ It is however submitted that Malta would have been obliged to permit entry and disembarkation should the vessel have been in a state of distress. The *Salamis* was, at the relevant time, not in such a state and therefore as a strict matter of law was not legally obliged to permit entry to port and subsequent disembarkation. Indeed, this was the approach taken by the Maltese Minister for Home Affairs who justified the refusal to allow disembarkation on that basis that, in the absence of an ‘emergency’ on board the vessel, permitting entry into port would create a ‘dangerous precedent’.¹²⁵

Aside from the issue of distress however, Malta could arguably be held responsible for delaying the conclusion of the rescue operation by denying entry into port, precisely by permitting a delay in reaching a place of safety. The statements issued, some of which are referred to above, focused on this point: the priority that must be given to the disembarkation of the asylum-seekers on board the vessel. A counter-argument may hold that since this obligation is framed in Article 3.1.9 of the Annex to the SAR Convention, which amendment Malta is not party to, the State is not bound by this provision. It is submitted that this would be incorrect – the underlying purpose of the SAR Convention is rescue and delivery to a place of safety; such core obligations of a fundamental character cannot be evaded.¹²⁶

Another aspect of this incident is the prospect of a responsibility vacuum: the responsible SAR authority, Libya, did not act. Indeed, Rome MRCC declared that it was acting on behalf of the Libyan authorities. The current SAR regime leaves unresolved the situation where the SAR State does not act and remains unresponsive to distress calls, thereby failing to fulfil its duty to

¹²⁴ ‘ECRE calls for the safe disembarkation of persons on board MV *Salamis* in Malta’ <http://www.ecre.org/media/news/latest-news/breaking.html#ecre-statement>; Amnesty International, ‘Migrants rescued at sea after fleeing Libya must be allowed to disembarkation Malta’ 6 August 2013, ‘humanitarian duty’.

¹²⁵ ‘Blocking *Salamis* is ‘point of principle’ for Maltese government’ *Malta Today*, 6 August 2013.

¹²⁶ Regarding Italy’s initial position regarding responsibility was much the same as Malta’s, insofar as directing the Master to return the rescuees to Libya and postponing the termination of the rescue operation. That it bore the primary responsibility in coordinating the rescue is clear; indeed, it took on the role of the RCC coordinating the rescue. See in this regard: para. 6.7 of the Guidelines which explains that the RCC first contacted is ‘responsible for co-ordinating the case until the responsible RCC or other competent authority assumes responsibility.’ It is interesting however, that Italy’s consistent approach in disembarkation impasses has always been that the State in whose SAR area the rescue is conducted and which therefore, is conducting the rescue, is obliged at law, through the 2004 amendments, to disembark the rescuees in its territory. On this reasoning therefore, which Italy maintains is the correct interpretation of the SAR and SOLAR Conventions, Italy was obliged to disembark the individuals which the *Salamis* had rescued. Contrary to previous practice however, Italy advocated, for the first time, that the rescuees should be disembarked at the closest port.

coordinate search and rescue operations. The only regulation that exists is the general duty at international law obliging all States to cooperate and assist in a rescue operation, regardless of whether they bear the primary responsibility as SAR State, or whether they bear the general obligation of Article 98(2) LOSC. Such regulation may not seem effective enough especially when one considers the tragic consequences that may occur in the absence of timely assistance.¹²⁷

5.6 The Default State of Disembarkation

A critical *lacuna* in the current SAR regime remains, however: the lack of specification of a default State of disembarkation.¹²⁸ The *Salamis* incident has highlighted this to no uncertain degree.¹²⁹ While it is clear that priority must at all times be given to disembarkation, the SAR Convention regime does not effectively designate such a State.

Aside from the unacceptable consequences of delays in disembarkation, this uncertainty has major ramifications on the search and rescue regime and risks jeopardizing the entire system. Deadlocks such as those occurring with the *Salamis* rescuees further demonstrate the urgent need to designate a default State of disembarkation, or, as the UNHCR has noted, to develop a regional framework to strengthen cooperation and coordination among States and other implicated in rescue at sea operations.¹³⁰ An initiative directed towards remedying this unsatisfactory state of affairs is currently being attempted under the auspices of the IMO. The latest draft of the Regional Memorandum of Understanding on procedures relating to the disembarkation of persons rescued at sea provides a welcome initiative in the aim of introducing certainty into this area of the law and also, aims at catering to the exigencies of the particular States involved.¹³¹ Only until the legal regime specifies a State of disembarkation can the risk of delaying – or denying – safety to desperate individuals be averted.

¹²⁷ Reminiscent of the 'Left-to-Die' boat of 72 persons leaving Libya on 26 March 2011 and drifting back on to Libyan shores 15 days later with only 9 survivors. See: 'Lives lost in the Mediterranean Sea: Who is Responsible?' PACE Migration Committee, March 2012.

¹²⁸ Noted for example in: Commission (EC), 'Study on the International Law Instruments in Relation to Illegal Immigration by Sea' (Staff Working Document) SEC (2007) 691, 15 May 2007. See paras 2.3.2 and 2.3.4

¹²⁹ 'Maltese Migrant Dilemma points to urgent need for clearer disembarkation rules, say FRA' 6 August 2013

¹³⁰ 'UNHCR: Priority must be given to disembarkation of asylum-seekers onboard the M/V Salamis' 6 August 2013 <http://www.unhcr.org/mt/news-and-views/news/688-unhcr-priority-must-be-given-to-disembarkation-of-asylum-seekers-onboard-the-mv-salamis>

¹³¹ IMO, Circular Letter No. 3254 (12 March 2012). A previous meeting had been held in Rome, in 2011. Ref: IMO, Circular Letter No. 3203 (18 August 2011), Meeting on a Regional Memorandum of Understanding on concerted procedures relating to the disembarkation of persons rescued at sea, in Rome (Italy) on 12 October 2011.

Chapter 6:

Conclusions and Recommendations

This report has outlined some of the more salient legal obligations relating to the principle of *non-refoulement*, especially at the external sea borders. It identified a number of important principles. First, the principle of *non-refoulement* applies irrespective of the categorization of the intervention at sea. The obligations cannot be flouted simply by identifying an intervention as a rescue rather than an interception. Instructions to private vessels to return rescued persons to ports to which an official vessel is barred from returning them also contravenes the relevant legal obligations.

Second, Malta has a responsibility to ensure that it abides by the principle of *non-refoulement*, both in terms of not returning people in violation thereof and in providing for the positive obligations identified, inter alia, by the ECtHR. Public officials involved in the decisions regarding return, both from the high seas and from the territory, must be fully aware of the situation facing people returned to a particular country. This is a legal obligation identified by both the Strasbourg Court and the Maltese Constitutional Court. Moreover, efforts to provide information about the right to, and procedures for seeking asylum should be maintained and strengthened, whilst access to legal assistance should be improved. The effective implementation of these obligations in a way that ensures that human rights are safeguarded imply that those rescued or intercepted at sea should be brought to shore and provided access to an asylum process.

It is, moreover, critical to bear in mind that the principles in *Hirsi*, including with regards to *non-refoulement*, collective expulsions and general human rights are not restricted to asylum seekers but rather are based on the principles of human rights enshrined in the European Convention on Human Rights. As such, they apply to all persons equally, irrespective of their asylum seeking status. Individual assessments are required to ensure that the human rights of all persons are safeguarded.

Recommendations

The People for Change Foundation calls on the Maltese Government to:

1. Consistently respect the principle of *non-refoulement*, as applicable regardless of the classification of the particular act, in line with Malta's international legal obligations.
2. Ensure that the saving lives at sea is always the first and main priority of any interception or rescue mission, and that persons rescued are not returned to a place where they might face human rights violations including torture and cruel and inhumane treatment and punishment.
3. Clarify that 'a place of safety' refers not only to the physical safety of the individual but must also be such a place where his/her human rights are protected and there is an effective opportunity to seek international protection.
4. Raise awareness amongst its various branches, including those directly involved in immigration control of the various legal and policy implications of the *Hirsi* judgments including the positive obligations it identifies.
5. Ensure that respect for human rights, including the rights of non-nationals, is a priority in its negotiations with the Libyan government and authorities.

Furthermore, we call on the European Union to:

6. Ensure any designation of a specific place of safety as the location of disembarkation be coupled with solidarity measures in place in order to assist the State of disembarkation in the attendant responsibilities which consequently become incumbent upon it.
7. Ensure that any legal and policy developments at European level abide by the principles set out in the *Hirsi* judgment and fully respect human rights.
8. Ensure that its own agencies, including Frontex, do not engage in actions in violation of the principle of *non-refoulement*, and that European Union funds are not utilized to support measures that contravene States' obligations in this regard.
9. Encourage the development of solidarity arrangements between various EU Member States in terms of the disembarkation of persons rescued at sea.
10. Ensure that human rights considerations are a primary focus of any negotiations with third countries in the context of migration management.

The People for Change Foundation

1. Supports Malta's call for greater solidarity from the European Union and its Member States, both in dealing with migrant arrivals as well as in shaping a longer-term sustainable framework.
2. Is against any form of push-back that would constitute a breach of Malta's international legal obligations.
3. Calls on the Maltese government to ensure that each asylum seeker be given an effective opportunity to seek international protection and that each application be heard and considered individually, in line with Malta's legal obligations.
4. Remains committed to assisting the government, government agencies and NGOs in the development, implementation and evaluation of policies, measures and initiatives that safeguard the human rights and dignity of all.
5. Calls for restraint in the use of political discourse of crisis and panic, which intensifies xenophobia and racism.

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NATIONAL REPORT – MALTA



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