



*Working Paper*

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# *Hirsi Jamaa and Others v Italy:*

Implications for Intervention  
on the High Seas

*Where does Malta stand?*





## **About The People for Change Foundation**

The People for Change Foundation is a Malta-based human rights organization specializing in research, lobbying and capacity-building. Set up in 2007, the Foundation aims to provide high level research and analysis and to contribute to policy making within its scope of interest. Our vision is of a just, fair and inclusive society all members of which may reach their full potential unhindered by factors such as age, race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The People for Change Foundation's mission is to undertake research, advocacy and proactive action to promote social cohesion, respect for Human Rights and empowerment.

Our overarching philosophy is that of the *Human Rights Based Approach*. A Human Rights Based Approach goes beyond a commitment to a concept - it is a strategic mainstreaming process intended to permeate all levels of a structure for it to be configured within a human rights framework, in all its internal as well as external dealings.

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## **The Project: Access to Asylum: A Human Right**

Access to Asylum: A human Right is a project funded by the EPIM Programme. It is coordinated by the Italian Refugee Council. The overall objective of the project is to bring national and EU policies and practices in line with the obligations set out by the European instruments on Human Rights and in particular by the Strasbourg Court in the Hirsi case, as far as the access to the territory and to protection is concerned. The core activities include research on the compatibility of national and EU instruments, policies, practices and monitoring mechanisms with human rights and refugee law obligations, and the preparation of finding, policy proposals and recommendations. The People for Change Foundation is the National Partner for Malta.

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# *Hirsi Jamaa and Others v Italy: Implications for Intervention on the High Seas*

## Where does Malta stand?

Patricia Mallia<sup>1</sup>

### Introduction

The unanimous decision delivered by the Grand Chamber of the European Court of Human Rights (ECtHR)<sup>2</sup> in early 2012 is a landmark judgment on many fronts. It represents a notable victory not only for the rights of migrants but for human rights more generally and has once again presented the ECtHR as a catalyst for change in the way States must understand and implement their human rights obligations. Through this decision, the status of interceptions and push-backs without a fair and effective screening procedure has been put beyond doubt: such operations constitute a serious breach of the European Convention on Human Rights (ECHR) and of the principle of *non refoulement* which is imbued in its terms.

This paper outlines the key arguments dealt with by the Court and their implications to Malta. It starts by providing a brief overview of the facts of the case and then goes on to point out the salient legal principles of the judgment. The repercussions on Malta – indeed any State involved in intervention on the high seas – are not insignificant. The main thrust of the judgment however focusses on the recognition of human rights as a central obligation in any such intervention, forming part of the actual framework of intervention on the seas.

### Brief Overview of the Facts

Central to the decision of the Court was the legitimacy or otherwise of the Italian 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. The event giving rise to the complaint is one which has become all too commonplace within the field of irregular maritime migration where groups of individuals take to the sea in a perilous journey to reach European shores and escape hardship or indeed persecution in the countries they leave behind.

The circumstances of the case are reported in detail in the judgment;<sup>3</sup> they will be summed up 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,<sup>4</sup> they were intercepted by three Italian official vessels. The migrants were then transferred to the Italian vessels, all

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

<sup>3</sup> Paras 9-14

<sup>4</sup> 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.' Chap. 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.

personal effects were confiscated and no indication of their destination was given nor was 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.<sup>5</sup>

### **Alleged Legal Basis for Action: Italy-Libya Bilateral Agreements**

The forcible return to Libyan shores was carried out in the context of bilateral arrangements between Italy and Libya. 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.<sup>6</sup> The Agreement, which included a provision for the payment by Italy to Libya of \$5 billion in compensation for colonial occupation, paved the way for Libya's implementation of the provisions of an earlier agreement signed in December 2007. The 'implementation protocol' of 2009 was aimed at strengthening the bilateral cooperation and it also partially amended the 2007 agreement, particularly through the inclusion of a new article providing for maritime patrols with joint crew and repatriation of irregular immigrants.

The first push-back operations 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. The new strategy led to a great reduction in arrivals from Libya; the Italian news agency ANSA reported that Italy's push back policy resulted in a 96% drop in arrivals.<sup>7</sup> Although this approach was hailed as a great success in the fight against irregular migration,<sup>8</sup> these push-backs prompted widespread criticism as a clear violation of international law, and more specifically, of the *non-refoulement* obligation.<sup>9</sup>

Malta was an indirect "beneficiary" of this practice, perhaps being the reason why the practice was never officially condemned the State and indeed was arguably supported by both the Government and the Opposition.<sup>10</sup> After the judgment in *Hirsi* it was however surprising to note reported declarations by the then Foreign Minister, Dr Tonio Borg, stating that there was 'nothing wrong' if Malta shared Italy's policy to immediately repatriate migrants back to Libya.<sup>11</sup> His statements indicated support for the Italian policy, even though he emphatically stated any such participation by Malta in similar operations must 'respect domestic and international law.'<sup>12</sup> The judgment in *Hirsi* has made it quite clear: immediate repatriation breaches international law, embodied in the ECHR. Any of the Court's findings in this case may be applied to Malta

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<sup>5</sup> Para 12: according to the applicants' version of events, the migrants objected but they were forced off the Italian ships.

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> See para 13 referring to a speech to the Italian Senate by the Italian Minister of the Interior, on 25 May 2009.

<sup>9</sup> 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.

<sup>10</sup> K Sansone, 'A Case of Bad Judgment?' *Times of Malta*, 25 February 2012.

<sup>11</sup> 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.

<sup>12</sup> K Sansone, 'Sending migrants back is 'not wrong'' *Times of Malta*, 23 June 2012.

with ease if it ever opted to enter into any agreement with Italy or Libya to this end. Viewed in this light, as shall be seen throughout the following analysis of the Court's salient findings, would make it impossible for Malta to participate in any similar controversial operations and still 'respect ... international law.'

### **The Case before the Court: Major Legal Principles**

The case against Italy alleged a breach of Article 3 of the ECHR and Article 4 of Protocol No. 4 on account of their transfer to Libya. A violation of Article 13 was also alleged.<sup>13</sup>

### **JURISDICTION<sup>14</sup>**

Article 1 of the Convention which provides that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of [the] Convention.' Consideration of this point was especially interesting in view of the fact that the alleged 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.<sup>15</sup>

A number of important cases have come before the ECtHR in past years on the issue of the jurisdictional reach of the ECHR. Indeed, the Court's rulings on this issue form part of a wider scholarly debate relating to the extraterritorial application of human rights treaties.<sup>16</sup> While the Court has not always been consistent in its holdings on this subject, with *Bankovic*<sup>17</sup> often being cited as adding to the jurisdictional 'melting pot', the Court's treatment of the subject in the immediate case goes no small distance in providing greater clarity and predictability in this area.

One of Italy's main defences centred around the fact that since the actions on the high seas amounted to a rescue at sea operation, the intervention failed to trigger a link between the State and the rescuees sufficient to found jurisdiction for the purposes of Article 1. It proceeded to differentiate this case from that of *Medvedjev and Others v France*<sup>18</sup> where there was full and exclusive control exercised by France over a vessel and its crew.<sup>19</sup> The applicants on the other hand put forward the argument that jurisdiction did exist since as soon as the migrants boarded the Italian ships they were subject to the exclusive control of Italy. Furthermore, Article 4 of the Italian Navigation Code expressly provided that vessels flying the Italian flag fell within Italian jurisdiction when sailing outside territorial waters.<sup>20</sup>

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<sup>13</sup> Texts of articles reproduced below.

<sup>14</sup> The Court also addressed preliminary issues raised by Italy: the validity of the powers of attorney (paras 52-59) and exhaustion of local remedies (para 62).

<sup>15</sup> See 1982 United Nations Convention Law of the Sea, articles 87, 89 and 92.

<sup>16</sup> For an invaluable overview of this debate see: M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (OUP, Oxford, 2011).

<sup>17</sup> *Bankovic and Others v Beligum* Application No 52207/99, 19 December 2001.

<sup>18</sup> Application No 3394/03, 23 March 2010

<sup>19</sup> Paras 65 and 66

<sup>20</sup> Para 67. This was also the approach taken by the Third Party Interveners in the Case which brought out the important link between *non refoulement*, its extraterritorial application and the ECHR (paras 68 and 69).

The Court began its analysis by referring to *Bankovic and Others v Belgium*<sup>21</sup> and the general principle that jurisdiction is essentially territorial. In keeping with this notion, the Court ‘has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention.’<sup>22</sup> One of these exceptions was stated by the Court to be:

Whenever a State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.<sup>23</sup>

A basic summary of the instances of extraterritorial jurisdiction which trigger the application of the Convention may be conveniently presented thus:

- i. Effective control over an area outside national territory (usually in the scenario of military occupation)<sup>24</sup>
- ii. Control and Authority over an individual abroad<sup>25</sup>
- iii. Other instances involving the activities of diplomatic agents and other officials on board craft and vessels registered in, or flying the flag of the State concerned.<sup>26</sup>

Reference to the general principles of flag State exclusivity on the high seas led the ECtHR to pronounce that ‘[w]here there is control over another, this is *de jure* control exercised by the State in question over the individuals concerned’.<sup>27</sup> The Court then goes on to state that this principle is enshrined in Article 4 of the Italian Navigation Code and concludes that ‘the instant case does indeed constitute a case of extra-territorial exercise of jurisdiction by Italy capable of engaging that State’s responsibility under the Convention.’<sup>28</sup>

Article 4 in fact provides that ‘Italian vessels on the high seas and aircraft in airspace not subject to the sovereignty of a State are considered to be *Italian territory*.’ [Emphasis added] In point of fact this does not necessarily embody the principle of flag State exclusivity although the effect of the provision leads to this. More specifically, it claims that the vessel constitutes the ‘territory’ of Italy. On this reading, an Italian vessel part is of Italian territory and jurisdiction could have been founded on this basis. However, the Court chose to delve deeper and looked at the extraterritorial nature of such operations, possibly due to its awareness

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<sup>21</sup> In *Bankovic* the Court stopped short of accepting an instantaneous extraterritorial act as triggering the application of the Convention, as the wording of Article 1 cannot accommodate such an approach to jurisdiction (see page 75 of *Bankovic*). *Bankovic* is to be contrasted to instances of ‘full and exclusive control’ as existed over a prison as in *Al-Skeini and Others v The United Kingdom* (Application No 55721/07, 7 July 2011) or a ship as in *Medvedjev and Others v France* Application No 3394/03, 23 March 2010.

<sup>22</sup> Para 72

<sup>23</sup> Para 74

<sup>24</sup> Eg: *Loizidou v Turkey* (Preliminary Objections) Application No 15318/89, 23 February 1995 and *Cyprus v Turkey* Application No 25781/94, 10 May 2001.

<sup>25</sup> Eg: *Ocalan v Turkey*, Application No 46221/99, 12 May 2005 and *Issa and Others v Turkey*, Application No 31821/96, 16 November 2004.

<sup>26</sup> See Para 75. Within the latter subheading one notes flag State jurisdiction as a ground providing a valid link for the exercise of extraterritorial jurisdiction. This was already affirmed in *Bankovic* and later, in two instances specifically relating to vessels and flag State jurisdiction, in *Xhavara v 12 Others v Italy*, Application No 39473/98, Admissibility decision, 11 January 2001, and *Medvedjev and Others v France* (2008).

<sup>27</sup> Para 77

<sup>28</sup> Para 78

that not all States embrace the territorial principle for vessels and use the active nationality principle instead. Indeed, this is reminiscent of Judge Pinto de Albuquerque's thoughts in his Concurring Opinion:

In conclusion, when the applicants boarded the Italian vessels on the high seas, they entered Italian territory, figuratively speaking, *ipso facto* benefiting from all the applicable obligations incumbent on a Contracting Party to the European Convention on Human Rights and the United Nations Refugee Convention.<sup>29</sup>

In sum, the Court found that the events did indeed fall within Italy's jurisdiction within the meaning of Article 1 ECHR:

... the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel. In the Court's opinion, in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities. Speculation as to the nature and purpose of the intervention of the Italian ships on the high seas would not lead the Court to any other conclusion.<sup>30</sup>

Two points are worth noting here:

### **1. Classification of act on the part of Italy is immaterial.**

Interception and rescue at sea both necessitate respect for human rights. Indeed, 'Italy cannot circumvent its jurisdiction by describing the events as rescue operations on the high seas.'<sup>31</sup>

Although no definition of 'interception' exists at law, the UNHCR has highlighted the role of interception in relation to maritime migration.<sup>32</sup> In this light, 'interception' involves any measure applied in order to exert control over vessels, which can amount to an exercise of enforcement jurisdiction should certain action be taken. Indeed, the scenario depicted in an interception is that where 'mandated authorities representing a State locate a boat, prevent its onward movement, and either take the passengers and crew onto their own vessel, accompany the vessel to port, or force an alteration in its course.'<sup>33</sup>

While it is true that interception and rescue missions refer to different processes, in this context their subject remains the same: individuals on board unseaworthy vessels who require assistance to varying degrees. Due to this human factor, humanitarian and human rights considerations must shape any exercise concerning these vessels and therefore, any border control exercise, rescue mission or decision to disembark individuals to a place of safety must be imbued with human rights safeguards.

### **2 The Court does not go into the issue of control – or *de facto* jurisdiction over the vessel save to counter Italy's argument.**

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<sup>29</sup> Concurring Opinion page 81

<sup>30</sup> Para 81

<sup>31</sup> Para 79

<sup>32</sup> UNHCR EXCOM Conclusion No 97 (LIV) 'Conclusion on Protection Safeguards in Interception Measures' (2003).

<sup>33</sup> J van Selm and B Cooper, 'The New Boat People: Ensuring Safety and Determining Status' (MPI, Report) (January 2006), page 5.

In this regard, where the Court states that it cannot subscribe to the Government's argument that Italy was not responsible on account of the 'allegedly minimal control exercised by the authorities over the parties concerned at the material time.'<sup>34</sup>

The Court simply states that 'in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities.'<sup>35</sup>

This has led authors such as V Moreno Lax to assert that '[t]he point seems to be that where there is a legal basis under which a State may exercise *de jure* authority abroad, the *Bankovic* exception regarding 'cause-and-effect' jurisdiction is neutralized ... It therefore seems that the higher the level of *de jure* authority exercised by a Contracting Party abroad, the lesser the need to prove detailed *de facto* control.'<sup>36</sup> (page 8, 9 and 25.; see further page 25):

The sensibility of this argument is clear: where a *de jure* ground for jurisdiction exists, then the issue of the extent of *de facto* control loses its significance. However, the question then arises when no *de jure* jurisdiction can be established. It is submitted that any interception or rescue exercise carried out by an official vessel would involve an sufficient amount of *de facto* control as to trigger the application of the Convention. Control and authority over migrants on unseaworthy vessels may be exercised in a number of ways: stopping the vessel, boarding the unseaworthy vessel, bringing the individuals on board the rescuing / intercepting vessel, towing the vessel away from its intended destination. It is submitted that these acts of control and authority, hence jurisdiction (see para 74) are sufficient to trigger the application of the Convention.<sup>37</sup> Indeed, it is not difficult to differentiate such acts of control to the instantaneous acts committed in *Bankovic*.

The approach taken by the Grand Chamber regarding the issue of extraterritoriality or otherwise of the ECHR is a welcome judicial affirmation of the inherent nature of human rights. Indeed, a dangerous signal would have been sent if the Court had determined any other way: core principles such as that relating to *non refoulement* have also been argued to apply extraterritorially wherever a State exercises jurisdiction,<sup>38</sup> and a finding of the Court in *Hirsi* that Article 1 cannot apply to high seas actions would have had damaging ramifications on the interpretation and application of the *non refoulement* principle as well, mostly based on the understanding of the interplay between human rights law and refugee law.

## ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

Moving on to the alleged violations, applicants alleged that they had been exposed to the risk torture, inhuman or degrading treatment in Libya and in their respective countries of origin, that is, Eritrea and

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<sup>34</sup> Para 79

<sup>35</sup> Para 81

<sup>36</sup> V Moreno-Lax, '*Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?*' *Human Rights Law Review* (2012) 12(3) 574-598.

<sup>37</sup> See also para 180, quote below, where the Court mentions interceptions on the high seas which have the effect of preventing migrants from reaching the border of the State or even to push them back to another State. This act is stated to 'constitute an exercise of jurisdiction within the meaning of Article 1.'

<sup>38</sup> See for example: 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.

Somalia, as a result of having been returned to Libya. There are therefore two aspects of Article 3 to be examined:

1. The risk that the applicants would suffer inhuman and degrading treatment in Libya;
2. Danger of being returned to their respective countries of origin (chain refoulement)

### **Risk of Inhuman and Degrading Treatment in Libya**

The applicants claimed they were victims of arbitrary *refoulement* in that they were not afforded the opportunity to challenge their return to Libya and to request international protection from the authorities.<sup>39</sup> The Court found that by transferring the applicants to Libya, the Italian authorities, in full knowledge of the facts, did in fact expose the applicants to treatment proscribed by the Convention.<sup>40</sup> In doing so it drew a number of significant conclusions which augur well for the future of human rights:

1. **The responsibility of Contracting States under Article 3.** Article 3 provides that ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’ However, the Court noted that this provision also implies an obligation not to expel the individual to a country in the case where substantial grounds exist for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.<sup>41</sup> Consequently, the meaning of Article 3 in the present scenario amounts to: ‘the obligation not to remove any person who, in the receiving country, would run the real risk of being subjected to such treatment.’<sup>42</sup>
2. **Burden of Proof.** In order to ascertain this risk, the Court must examine the foreseeable consequences of the removal of an alien to the receiving country in the light of the general situation there and also his or her personal circumstances.<sup>43</sup> Through this approach it can be seen that the burden of proof has been lowered somewhat (reminiscent of *MSS v Belgium and Greece*), with the Court failing to require proof of an individualized threat but focusing on country reports from independent sources, as are referred to in paras 125 and 126 of the judgment.
3. **Absolute character of Article 3.** Although one notes a recognition by the Court of the pressure placed on States at the external borders of the EU,<sup>44</sup> due to the absolute character of Article 3<sup>45</sup> this cannot absolve States from the obligations under Article 3.<sup>46</sup>

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<sup>39</sup> Paras 85 – 91. This was reinforced by the Third Party Interveners, as is seen through the reference to Human Rights Watch, Amnesty International and the Aire Centre in paras 101-109 of the judgment to the effect that the human rights situation in Libya was ‘disastrous,’ with no national asylum system existing therein, where irregular migrants were systematically arrested and often subjected to torture and physical violence, including rape. They were often detained indefinitely and with no judicial supervision and in inhuman conditions. Migrants were tortured and no medical assistance was given in the various camps. They could be returned to their countries of origin at any time or abandoned in the desert.

<sup>40</sup> Para 137

<sup>41</sup> Para 35. Note also *Soering v UK*, Application No 14038/88, 7 July 1989

<sup>42</sup> Para 123

<sup>43</sup> Para 117

<sup>44</sup> Also noted in ‘Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009’ (CPT Report) 28 April 2010, para 51.

<sup>45</sup> Also noted in *inter alia Saadi v Italy*, Application No 37201/06, 28 February 2008.

<sup>46</sup> Para 122

4. **Determination of a Safe Host Country.** Italy had argued that Libya was a safe host country, that it complied with its international commitments as regards asylum was concerned, including the principle of *non refoulement*. Furthermore, the 2008 Italy-Libya Friendship Treaty expressly referred to provisions of human rights law.<sup>47</sup> However, the Court noted that such determination cannot depend solely on the existence of domestic law and ratification of international treaties on the part of the receiving State especially when faced with independent reports which evidence the opposite.<sup>48</sup>
5. **Proactive Obligation incumbent on Contracting States.** Italy 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.<sup>49</sup> Furthermore, the Government maintained that in the context of a rescue at sea operation, it was not necessary to conduct a formal identification process of the parties concerned.<sup>50</sup> The Court not only disagreed with this but stated that:

[I]t was for the national authorities, faced with a situation in which human rights were being systematically violated ... to find out about the treatment to which the applicants would be exposed after their return ... the fact that the parties concerned had failed to expressly request asylum did not exempt Italy from fulfilling its obligations under the Article.<sup>51</sup>

Article 3 therefore imposes a proactive obligation on the part of the Contracting State to examine the situation in the receiving State and arrive at its own conclusions regarding the situation pertaining on the ground there and the consequent risks which the individuals would be exposed to should they be returned. It is for this reason that the Court stated that Italy 'knew or should have known' that, as irregular migrants, they 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.<sup>52</sup>

The ramifications of this finding to interception and rescue at sea operations on the high seas are not insignificant. An individual status determination procedure remains necessary to identify potential refugees however a determination of the human rights situation in receiving country is necessary anyway – despite the fact that no asylum claims may be made.<sup>53</sup> In a nutshell, it seems that the obligation of *non refoulement* is therefore triggered even in the absence of a request for asylum or assistance. The obligations on the intercepting or rescuing State are clear: any asylum claims made on board the vessels are to be respected and a proper status determination procedure must be carried out (ideally on land)<sup>54</sup> together with a conscientious assessment as to the situation existing in

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<sup>47</sup> Paras 97-100; see also CPT Report, para 45.

<sup>48</sup> Para 128

<sup>49</sup> 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.

<sup>50</sup> Para 95

<sup>51</sup> Para 133. See also Concurring Opinion page 64.

<sup>52</sup> See paras 131, 137 and 156.

<sup>53</sup> Note in this regard para 144.

<sup>54</sup> UNHCR, 'Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea' (18 March 2002), para. 18 (final version as discussed at the expert roundtable *Rescue-at-Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees*, held in Lisbon, Portugal on 25–26 March 2002) paras 23-24

the receiving country with attention being given to any independent reports that may exist in this regard. In this way therefore, the State's duties under the *non refoulement* obligation are triggered irrespective of any asylum claim being made and this *inter alia* involves an assessment of the human rights situation existing in the receiving State.

6. **Non Refoulement**<sup>55</sup> Central to the Court's judgment is the obligation of *non refoulement*. Its classical exposition is found in Article 33(1) of the Convention relating to the Status of Refugees (Refugee Convention) and relates to the prohibition of expulsion or return ('*refouler*') of a refugee (or asylum-seeker)<sup>56</sup> 'in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.

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.'<sup>57</sup>

The significance of the ECtHR's affirmation of the extraterritorial applicability of this obligation – which has been described in the concurring opinion of Judge Albuquerque as a norm of *jus cogens*<sup>58</sup> – cannot be underestimated. It has finally been put beyond doubt that the physical act of interception and/or rescue by a State engages its protection obligations vis-à-vis persons on board, irrespective of the location of that interception. Therefore, the exercise of State action is the determining factor in whether or not the *non-refoulement* obligation is triggered in extraterritorial areas. Of course, an underlying motivation for such a holding surely lies in the fact that 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.<sup>59</sup> This leaves open the consideration of the pertaining position when a vessel is acting within the territorial waters of a third country.<sup>60</sup> It is

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<sup>55</sup> There are a number of international instruments which provide for protection against torture or inhuman or degrading treatment or punishment, or actually reflect the substance of the terms of Art. 33 of the Refugee Convention. See Principles Concerning Treatment of Refugees (1966), Art. III(3); Declaration on Territorial Asylum (1967), Art. 3; Organisation of African Unity Convention concerning the Specific Aspects of Refugee Problems in Africa (1969), Art. II(3); American Convention on Human Rights (also known as the Pact of San Jose) (1969), Art. 22(8); Cartagena Declaration on Refugees (1984) Section III, para. 5; Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (1984), Art. 3; International Covenant on Civil and Political Rights (1966), Art. 7; European Convention on Extradition (1957), Art. 3(2); Inter-American Convention on Extradition (1981), Art. 4(5).

<sup>56</sup> This guarantee of protection does not refer solely to 'declared' refugees. Art 1A (2) of the Refugee Convention as amended by Art I(2) of the 1967 Protocol defines a refugee, significantly omitting any reference to formal recognition of refugees. In this way, *non-refoulement* obligations fall upon a State once an asylum claim is made, irrespective of whether or not the person seeking asylum has been declared a refugee. See in this regard UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees* HCR/IP/4/Eng/REV.1 (UNHCR 1979; re-edited, Geneva, January 1992), para. 28; EXCOM Conclusions: No. 6 (XXVIII) – 1977, para. (c); No. 79 (XLVII) – 1996, para. (j); No. 81 (XLVIII) – 1997, para. (j); UNGA Resolutions: UNGA, A/RES/52/103 (9 February 1998), para. 5; UNGA A/RES/53/125 (12 February 1999), para. 5; UNGA A/RES/55/74 (12 February 2001), paras 6, 10; G Gilbert, 'Is Europe living up to its Obligations to Refugees?' (2004) 15 *EJIL*, 966.

<sup>57</sup> 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.

<sup>58</sup> Concurring Opinion page 65

<sup>59</sup> In this regard see for example: paras 69, 178; Concurring Opinion page 77 and *Issa and Others v Turkey* (2004) para 71.

<sup>60</sup> In such instance, an agree

submitted that the applicable duties remain unchanged and that one may arguably extend the *Hirsi* reasoning to such operations, as the Committee against Torture indicated in *Sonko v Spain*.<sup>61</sup>

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, does not suffer from the limitations of article 33 of the Refugee Convention and may indeed prove to be a more effective means of protection for asylum seekers.

Through the Court's findings, the obligation of *non refoulement* has been further elevated, arguably some maintain, to the status of a norm of *jus cogens*. This is a point that the UNHCR Executive Committee (ExCom) had raised when stating that the principle is progressively acquiring the status of a peremptory norm of international law.<sup>62</sup> Indeed, the obligation has a rather ubiquitous nature, finding mention in a number of international instruments, part and parcel of Refugee Law and yet often mentioned specifically, over and above the reference to general refugee protection law as embodied in the Refugee Convention itself.<sup>63</sup> (eg in the Migrant Smuggling Protocol). Such inclusion serves to underscore the importance of this principle as an integral part of international law in areas not strictly delineated as Refugee Law *per se*, such as indeed, article 3, which is not tied to asylum but to ill-treatment generally.

#### **Risk of Arbitrary Repatriation to Eritrea and Somalia**

The risk of arbitrary repatriation to Eritrea and Somalia from Libya, lacking in any system of international protection was a real risk and the Court found that Article 3 had also been violated in this respect by Italy.<sup>64</sup> Indeed, the indirect removal of an alien leaves the responsibility of the Contracting State intact. Once again, the obligation is placed on the State carrying out the return to ensure that sufficient guarantees are in place in the intermediate country to protect against chain *refoulement*, especially when this State is not a Party to the Refugee Convention.<sup>65</sup> A proactive *approach* is again dictated in that the Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees.<sup>66</sup>

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<sup>61</sup> Communication No 368/2008, 25 November 2011

<sup>62</sup> Conclusion No. 25 (XXXIII) – 1982, para. (b).

<sup>63</sup> See for example, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, article 19.

<sup>64</sup> Para 158

<sup>65</sup> Paras 146 -147

<sup>66</sup> Para 157

## ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL NO 4

The definition of collective expulsions was first formulated in the 1975 case of *Henning Becker v. Denmark*<sup>67</sup> and was used in subsequent cases on the collective prohibition of aliens. However, the majority of these involved persons who were on the territory at issue<sup>68</sup> and this was the first time the Court had to examine whether Article 4 of Protocol No 4 applied to a case involving the removal of aliens from outside national territory.<sup>69</sup>

The applicants maintained that their transfer to Libya constituted a “collective expulsion of aliens” within the meaning of the provision at issue. They advocated an evolutive approach to the provision, which was both functional and teleological and which also encompassed what was termed ‘hidden expulsions.’<sup>70</sup> They consequently supported an extraterritorial interpretation of the provision in order to make it ‘practical and effective.’<sup>71</sup> If this was not accepted however, applicants argued that even on a territorial reading of the Article in question, the return to Libya would nonetheless fall within the scope of application of this provision owing to the fact that the operation had occurred on a vessel flying the Italian flag, which, according to Article 4 of the Italian Navigation Code, was considered to be Italian ‘territory.’<sup>72</sup>

The Court referred *inter alia* to the Vienna Convention of the Law of Treaties as also to the *travaux préparatoires* of the Protocol.<sup>73</sup> Noteworthy is the emphasis on the ‘object and purpose’ of the Convention being that ‘the provision at issue forms part of a treaty for the effective protection of human rights and that the Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions.’<sup>74</sup> The Court’s readiness to treat the ECHR as a ‘living instrument which must be interpreted in the light of present-day conditions’ once again bodes well for the protection of fundamental human rights under the Convention.<sup>75</sup>

The Court recognized that just as ‘jurisdiction’ was essentially territorial but can exceptionally be exercised extraterritorially, this must also be the case for collective expulsions. Therefore, in the instant case, the Court saw no obstacle in recognizing that the exercise of extraterritorial jurisdiction took the form of a collective expulsion.<sup>76</sup> Indeed, this was necessary for a coherent interpretation of the Convention. Consequently:

Having regard to the foregoing, the Court considers that the removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of

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<sup>67</sup> Application No 7011/75, 3 October 1975.

<sup>68</sup> Paras 166-167

<sup>69</sup> Note that in the case of *Xhavara and Others v. Italy and Albania* (2001), the Court did not rule on the applicability of Article 4 of Protocol No. 4 to the case at issue on the grounds of incompatibility *rationae personae* of the complaint.

<sup>70</sup> Para 162

<sup>71</sup> Paras 161-162

<sup>72</sup> Para 163; see also Concurring Opinion page 81.

<sup>73</sup> Paras 169-176

<sup>74</sup> Para 171

<sup>75</sup> Para 175

<sup>76</sup> Para 178

jurisdiction within the meaning of Article 1 of the Convention which engages the responsibility of the State in question under Article 4 of Protocol No. 4.<sup>77</sup>

The necessity of a status determination procedure being carried out is clear. In the absence of any form of examination of each applicant's individual situation in the case at hand, the Court found that this was this was 'sufficient for the Court to rule out the existence of sufficient guarantees ensuring that the individual circumstances of each of those concerned were actually the subject of a detailed examination.'<sup>78</sup>

Aside from the praiseworthy interpretative approach adopted by the Court in this part of the judgment as well, this area ties in perfectly with the *non refoulement* obligation mentioned above and contributes to further fleshing out this obligation.<sup>79</sup> 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.<sup>80</sup>

#### **ALLEGED VIOLATION OF ARTICLE 13 TAKEN TOGETHER WITH ARTICLE 3 ECHR AND ARTICLE 4 OF PROTOCOL NO 4<sup>81</sup>**

The applicants contended that Italy's interceptions of persons were not subject to a review of their lawfulness by a national authority. For this reason, the applicants were denied any opportunity of lodging an appeal against their return to Libya and alleging a violation of Article 3 ECHR or Article 4 of Protocol No. 4. 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 pushbacks to ensure that each person had an 'effective opportunity to challenge his or her return.'<sup>82</sup>

In both instances of violations (ie Article 3 ECHR and Article 4 Protocol No 4) the importance of the suspensive effect of the remedy was emphasized.<sup>83</sup> The Court found that the applicants had no access to a procedure to identify them and to assess their personal circumstances before they were returned to Libya (see paragraph 185 above). Consequently, the applicants were found to be deprived of any remedy which would have enabled them to lodge their complaints under Article 3 of the Convention and Article 4 of Protocol No. 4 with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced.<sup>84</sup>

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<sup>77</sup> Para 180

<sup>78</sup> Para 185

<sup>79</sup> 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.

<sup>80</sup> Concurring Opinion page 75, where the qualities of an effective refugee status determination procedure are also outlined.

<sup>81</sup> 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.'

<sup>82</sup> Paras 193-194

<sup>83</sup> Paras 198-200

<sup>84</sup> Paras 202, 205

## Unanimous Decision of the Court

The Court in *Hirsi* found a violation of Articles 3 and 13 ECHR and Article 4 of Protocol No 4. The Court awarded EUR 15,000 in respect of non-pecuniary damage to each applicant and the amount claimed (EUR 1,575.74) for costs and expenses incurred before the Court.<sup>85</sup> It is only at the point of reparation that the Court fails to impress. By indicating a general obligation on the part of Italy to 'take all possible steps to obtain assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with Article 3 of the Convention of arbitrarily repatriated'<sup>86</sup> the Court passes up on an opportunity to delineate effective grounds of remedy in such cases. Indeed, seeking assurances from Libya seems dangerously ineffective, especially in the light of the Court's observation that adoption of domestic law and ratification of international conventions embodying human rights principles are not *per se* sufficient to guarantee these essential rights. Judge Pinto de Albuquerque asserts that this is simply 'not enough' and that the Italian Government also has a positive obligation to provide the applicants with practical and effective access to an asylum procedure in Italy.<sup>87</sup>

## Conclusion: Aftermath and Implications

Subsequent to the *Hirsi* judgment, following a four-day visit to Italy in July 2012, the Council of Europe Human Rights Commissioner welcomed 'recent declarations at the highest political level that the "push-back" policy will no longer be applied, in the light of the *Hirsi Jamaa* judgment of the Strasbourg Court.'<sup>88</sup> Still, Italy and Libya concluded an agreement on 3 April 2012 concerning cooperation in stemming flows of so-called 'illegal' immigrants to Italy which leaked and published by *La Stampa* on 18 June 2012.<sup>89</sup> While the text mentions respect for human rights and international law, it has been criticized by Amnesty International.<sup>90</sup> No mention is made of push-backs but there is room for interpretation and assurance of international protection for those who may need it is not mentioned. After all, the previous agreement, stated to be violative of the ECHR, also contained references to human rights and the pre-existing problem areas still existed: Libya had not become a party to the Refugee Convention for example and the UNHCR still has no agreement with Libya. Nonetheless, the Italian government continues to look to cooperation with Libya and to renegotiating its arrangement on immigration with the new Libyan government. Assurances have been given that that the focus is on full respect by both countries of international standards and in human rights and freedoms.<sup>91</sup> As has been seen however, simple assurances are clearly not enough.

The UN *Rapporteur* on the Human Rights of Migrants, Francois Crepeau, who conducted a visit to Italy (from 30 September to 8 October 2012) warned Italy to respect human rights in any cooperation with Libya. Indeed, Italy-Libya cooperation was reinforced in a 2012 *processo verbale* which political framework

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<sup>85</sup> Paras 215, 218.

<sup>86</sup> Para 211

<sup>87</sup> Page 82; and see also: M Dembour, 'Hirsi (Part II): Another Side to the Judgment' 2 March 2012. Available online: <http://strasbourgobservers.com/2012/03/02/hirsi-part-ii-another-side-to-the-judgment/>

<sup>88</sup> Council of Europe, 'For Human Rights Protection, Italy needs a clear break with Past Practices' 9 July 2012.

<sup>89</sup> See Statewatch, 'Documents unveil post-Gaddafi cooperation agreement on immigration' 5 September 2012.

<sup>90</sup> Amnesty International, 'Italy must Sink Agreements with Libya on Migration Control' 20 June 2012.

<sup>91</sup> M Micallef, 'Italy renegotiates migrant arrangement with Libya' 13 September 2012.

‘contains very little concrete information on strengthening Libya’s normative framework and institutional capacities regarding human rights of migrants.’<sup>92</sup>

The *Hirsi* judgment has done much to flesh out the practical ramifications of the *non refoulement* obligation. As a State with an immense SAR area, Malta must take heed of these implications – both procedural and substantive. Aside from the undisputed extraterritoriality of the obligation, the Concurring Opinion picks up on the significant procedural aspect of the obligation. The duty to advise an alien of his right to obtain international protection, effectively asserting a right to seek asylum is part and parcel of the *non refoulement* obligation, as is the duty to conduct an assessment of any relevant receiving country to ensure that *even if asylum claims are not made* any persons returned are not at risk of torture or inhuman treatment. The fair and effective status determination procedure is harder to put into practice simply because this is not recognised to be effectively carried out on board a vessel. Such procedures are preferably carried out on land,<sup>93</sup> which requires disembarkation. This once again opens the Pandora’s box of pinpointing the State of disembarkation and relevant obligations of all the State concerned.

It seems that only time will tell if *Hirsi Jamaa v Italy* signaled a light at the end of the tunnel. What remains beyond doubt however is the importance of the ECtHR as the catalyst in ensuring an effective interpretation of the ECHR against the backdrop of the exigencies of the 21<sup>st</sup> century. The unanimous decision of the Grand Chamber of the Court, sealing the legal status of the push-backs and further elevating the principle of *non refoulement*, provides a yardstick for future operations on the high seas where protection of individual rights are paramount, forming part of a core strategy rather than as a mere ‘add-on’ to the plethora of existing norms operating on the oceans.

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<sup>92</sup> OHCHR, UN Special Rapporteur on the Human Rights of Migrants concludes his third country visit in his regional study on the human rights of migrants at the borders of the European Union: Italy. (Rome, 8 October 2012).

<sup>93</sup> UNHCR, ‘Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea’ (18 March 2002), para. 18 (final version as discussed at the expert roundtable *Rescue-at-Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees*, held in Lisbon, Portugal on 25–26 March 2002) paras 23-24



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