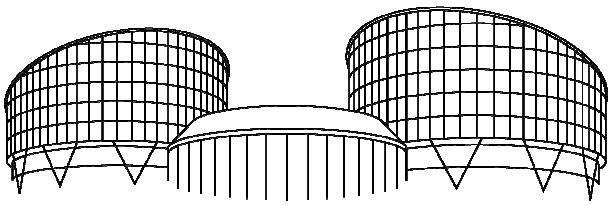

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF HIRSI JAMAA AND OTHERS V. ITALY

(Application no. 27765/09)

Judgment

Strasbourg

23 February 2012

This judgment is final but may be subject to editorial revision.

In the case of Hirsi Jamaa and Others v. Italy,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President,*
Jean-Paul Costa,
Françoise Tulkens,
Josep Casadevall,
Nina Vajić,
Dean Spielmann,
Peer Lorenzen,
Ljiljana Mijović,
Dragoljub Popović,
Giorgio Malinverni,
Mirjana Lazarova Trajkovska,
Nona Tsotsoria,
Işıl Karakaş,
Kristina Pardalos,
Guido Raimondi,
Vincent A. de Gaetano,
Paulo Pinto de Albuquerque, *judges,*
and Michael O'Boyle, *Deputy Registrar,*

Having deliberated in private on 22 June 2011 and on 19 January 2012,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 27765/09) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by eleven Somali nationals and thirteen Eritrean nationals ("the applicants") whose names and dates of birth are shown on the list appended to this judgment, on 26 May 2009.

2. The applicants were represented by Mr A.G. Lana and Mr A. Saccucci, lawyers practising in Rome. The Italian Government ("the Government") were represented by their Agent, Mrs E. Spatafora, and by their co-Agent, Mrs S. Coppari.

3. The applicants alleged, in particular, that their transfer to Libya by the Italian authorities had violated Article 3 of the Convention and Article 4 of Protocol No. 4. They also complained of the lack of a remedy satisfying the requirements of Article 13 of the Convention, which would have enabled them to have the aforementioned complaints examined.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 17 November 2009 a Chamber of that Section decided to communicate the application to the Italian Government. On 15 February 2011 the Chamber, composed of the following judges: Françoise Tulkens, President, Ireneu Cabral Barreto, Dragoljub Popović, Nona Tsotsoria, Isil Karakas, Kristina Pardalos, Guido Raimondi, and also of Stanley Naismith, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court.

6. It was decided that the Grand Chamber would rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

7. The applicants and the Government each filed written observations on the merits. The parties replied to each other's observations at the hearing (Rule 44 § 5). Written observations were also received from the United Nations High Commissioner for Refugees (the "UNHCR"), Human Rights Watch, the Columbia Law School Human Rights Clinic, the Centre for Advice on Individual Rights in Europe (the "Aire Centre"), Amnesty International and the International Federation for Human Rights ("FIDH"), acting collectively, which had been given leave to intervene by the President of the Chamber (Article 36 § 2 of the Convention). Observations were also received from the United Nations High Commissioner for Human Rights (the "UNHCHR"), which had been given leave to intervene by the President of the Court. The UNHCR was also given leave to participate in the oral proceedings.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 22 June 2011 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mrs S. COPPARI, *co-Agent*,
Mr G. ALBENZIO, *Avvocato dello Stato*;

(b) *for the applicants*
Mr A.G. LANA,
Mr A. SACCUCCI, *Counsel*,
Mrs A. SIRONI, *Assistant*;

(c) *for the United Nations High Commissioner for Refugees, third-party intervener*
Mrs M. GARLICK, Head of Unit, Policy and Legal Support, Europe Office, *Counsel*,
Mr C. WOUTERS, Principal Adviser on Refugee Law, National Protection Division,
Mr S. BOUTRUCHE, legal adviser for the Policy and Legal Support Unit, Europe Office *Advisers.*

The Court heard addresses by Mrs Coppari, Mr Albenzio, Mr Lana, Mr Saccucci and Mrs Garlick and their replies to judges' questions.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Interception and push-back of the applicants to Libya

9. The applicants, eleven Somali nationals and thirteen Eritrean nationals, were part of a group of about two hundred individuals who left Libya aboard three vessels with the aim of reaching the Italian coast.

10. On 6 May 2009, when the vessels were 35 nautical miles south of Lampedusa (Agrigento), that is, within the Maltese Search and Rescue Region of responsibility, they were intercepted by three ships from the Italian Revenue Police (*Guardia di finanza*) and the Coastguard.

11. The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli. The applicants alleged that during that voyage the Italian authorities did not inform them of their real destination and took no steps to identify them.

All their personal effects, including documents confirming their identity, were confiscated by the military personnel.

12. On arrival in the Port of Tripoli, following a ten-hour voyage, the migrants were handed over to the Libyan authorities. According to the applicants' version of events, they objected to being handed over to the Libyan authorities but were forced to leave the Italian ships.

13. At a press conference held on 7 May 2009 the Italian Minister of the Interior stated that the operation to intercept the vessels on the high seas and to push the migrants back to Libya was the consequence of the entry into force on 4 February 2009 of bilateral agreements concluded with Libya, and represented an important turning point in the fight against clandestine

immigration. In a speech to the Senate on 25 May 2009 the Minister stated that between 6 and 10 May 2009, more than 471 irregular migrants had been intercepted on the high seas and transferred to Libya in accordance with those bilateral agreements. After having explained that the operations had been carried out in application of the principle of cooperation between States, the Minister stated that the push-back policy was very effective in combating illegal immigration. According to the Minister of the Interior, that policy discouraged criminal gangs involved in people smuggling and trafficking, helped save lives at sea and substantially reduced landings of irregular migrants along the Italian coast, which had decreased fivefold in May 2009 as compared with May 2008.

14. During the course of 2009 Italy conducted nine operations on the high seas to intercept irregular migrants, in conformity with the bilateral agreements concluded with Libya.

B. The applicants' fate and their contacts with their representatives

15. According to the information submitted to the Court by the applicants' representatives, two of the applicants, Mr Mohamed Abukar Mohamed and Mr Hasan Shariff Abbirahman (nos. 10 and 11 respectively on the list appended to this judgment), died in unknown circumstances after the events in question.

16. After the application was lodged, the lawyers were able to maintain contact with the other applicants, who could be contacted by telephone and e-mail.

Fourteen of the applicants (appearing on the list) were granted refugees status by the office of the UNHCR in Tripoli between June and October 2009.

17. Following the revolution which broke out in Libya in February 2011 forcing a large number of people to flee the country, the quality of contact between the applicants and their representatives deteriorated. The lawyers are currently in contact with six of the applicants:

(i) Mr Ermias Berhane (no. 20 on the list) managed to land, unlawfully, on the Italian coast. On 21 June 2011 the Crotone Refugee Status Board granted him refugee status;

(ii) Mr Habtom Tsegay (no. 19 on the list) is currently at Chucha camp in Tunisia. He plans to return to Italy;

(iii) Mr Kiflom Tesfazion Kidan (no. 24 on the list) is resident in Malta;

(iv) Mr Hayelom Mogos Kidane and Mr Waldu Habtemchael (nos. 23 and 13 on the list respectively) are resident in Switzerland, where they are awaiting a response to their request for international protection;

(v) Mr Roberl Abzighi Yohannes (no. 21 on the list) is resident in Benin.

II. RELEVANT DOMESTIC LAW

A. The Italian Navigation Code

18. Article 4 of the Navigation Code of 30 March 1942, as amended in 2002, provides as follows:

> "Italian vessels on the high seas and aircraft in airspace not subject to the sovereignty of a State are considered to be Italian territory".

B. Bilateral agreements between Italy and Libya

19. On 29 December 2007 Italy and Libya signed a bilateral cooperation agreement in Tripoli on the fight against clandestine immigration. On the same date the two countries signed an additional Protocol setting out the operational and technical arrangements for implementation of the said Agreement. Under Article 2 of the Agreement:

[Registry translation]

> "Italy and the "Great Socialist People's Libyan Arab Jamahiriya" undertake to organise maritime patrols using six ships made available on a temporary basis by Italy. Mixed crews shall be present on ships, made up of Libyan personnel and Italian police officers, who shall provide training, guidance and technical assistance on the use and handling of the ships. Surveillance, search and rescue operations shall be conducted in the departure and transit areas of vessels used to transport clandestine immigrants, both in Libyan territorial waters and in international waters, in compliance with the international conventions in force and in accordance with the operational arrangements to be decided by the two countries."

Furthermore, Italy undertook to cede to Libya, for a period of three years, three unmarked ships (Article 3 of the Agreement) and to encourage the bodies of the European Union (EU) to conclude a framework agreement between the EU and Libya (Article 4 of the Agreement).

Finally, under Article 7 of the bilateral agreement, Libya undertook to "coordinate its actions with those of the countries of origin in order to reduce clandestine immigration and ensure the repatriation of immigrants".

On 4 February 2009 Italy and Libya signed an Additional Protocol in Tripoli, intended to strengthen bilateral cooperation in the fight against clandestine immigration. That Protocol partially amended the agreement of 29 December 2007, in particular through the inclusion of a new Article, which stated:

"The two countries undertake to organise maritime patrols with joint crews, made up of equal numbers of Italian and Libyan personnel having equivalent experience and skills. The patrols shall be conducted in Libyan and international waters under the supervision of Libyan personnel and with participation by Italian crew members, and in Italian and international waters under the supervision of Italian personnel and with participation by the Libyan crew members.

Ownership of the ships offered by Italy, within the meaning of Article 3 of the Agreement of 29 December 2007, shall be definitively ceded to Libya.

The two countries undertake to repatriate clandestine immigrants and to conclude agreements with the countries of origin in order to limit clandestine immigration."

20. On 30 August 2008 in Benghazi, Italy and Libya signed the Treaty on Friendship, Partnership and Cooperation, Article 19 of which makes provision for efforts to prevent clandestine immigration in the countries of origin of migratory flows. Under Article 6 of that Treaty, Italy and Libya undertook to act in accordance with the principles of the United Nations Charter and the Universal Declaration of Human Rights.

21. According to a statement by the Italian Minister of Defence, the agreements between Italy and Libya were suspended following the events of 2011.

III. RELEVANT ASPECTS OF INTERNATIONAL AND EUROPEAN LAW

A. 1951 Geneva Convention relating to the Status of Refugees

22. Italy has ratified the 1951 Geneva Convention relating to the Status of Refugees ("the Geneva Convention"), which defines the situations in which a State must grant refugee status to persons who apply for it, and the rights and responsibilities of those persons. Articles 1 and 33 § 1 of the Convention provide:

Article 1

"For the purposes of the present Convention, the term 'refugee' shall apply to any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Article 33 § 1

"1. No Contracting State shall expel or return ('*refouler*') a refugee 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."

23. In its Note on International Protection of 13 September 2001 (A/AC.96/951, § 16), the UNHCR, which has the task of monitoring the manner in which the States Parties apply the Geneva Convention, indicated that the principle of "*non-refoulement*" laid down in Article 33, was:

"... a cardinal protection principle enshrined in the Convention, to which no reservations are permitted. In many ways, the principle is the logical complement to the right to seek asylum recognized in the Universal Declaration of Human Rights. It has come to be considered a rule of customary international law binding on all States. In addition, international human rights law has established *non-refoulement* as a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment. The duty not to *refoule* is also recognized as applying to refugees irrespective of their formal recognition, thus obviously including asylum-seekers whose status has not yet been determined. It encompasses any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution. This includes rejection at the frontier, interception and indirect *refoulement*, whether of an individual seeking asylum or in situations of mass influx."

B. 1982 United Nations Convention on the Law of the Sea ("the Montego Bay Convention")

24. The relevant Articles of the Montego Bay Convention provide:

Article 92
Status of Ships

"1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in this Convention, shall be subject to its exclusive jurisdiction on the high seas ..."

Article 94
Duties of the Flag State

"1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

..."

Article 98
Duty to render assistance

"1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

a) to render assistance to any person found at sea in danger of being lost;

b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;

..."

C. 1979 International Convention on Maritime Search and Rescue ("SAR Convention") (amended in 2004)

25. Sub-paragraph 3.1.9 of the SAR Convention provides:

"Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ship's intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization (International Maritime Organisation). In those cases, the relevant parties shall arrange for such disembarkation to be effected as soon as reasonably practicable."

D. Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime ("the Palermo Protocol") (2000)

26. Article 19 § 1 of the Palermo Protocol provides:

"1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein."

E. Resolution 1821 (2011) of the Parliamentary Assembly of the Council of Europe

27. On 21 June 2011 the Parliamentary Assembly of the Council of Europe adopted the Resolution on the interception and rescue at sea of asylum seekers, refugees and irregular migrants, which provides as follows:

> "1. The surveillance of Europe's southern borders has become a regional priority. The European continent is having to cope with the relatively large-scale arrival of migratory flows by sea from Africa, reaching Europe mainly through Italy, Malta, Spain, Greece and Cyprus.
>
> 2. Migrants, refugees, asylum seekers and others risk their lives to reach Europe's southern borders, mostly in unseaworthy vessels. These journeys, always undertaken illicitly, mostly on board flagless vessels, putting them at risk of falling into the hands of migrant smuggling and trafficking rings, reflect the desperation of the passengers, who have no legal means and, above all, no safer means of reaching Europe.
>
> 3. Although the number of arrivals by sea has fallen drastically in recent years, resulting in a shift of migratory routes (particularly towards the land border between Turkey and Greece), the Parliamentary Assembly, recalling, *inter alia*, its Resolution 1637 (2008) on Europe's boat people: mixed migration flows by sea into southern Europe, once again expresses its deep concern over the measures taken to deal with the arrival by sea of these mixed migratory flows. Many people in distress at sea have been rescued and many attempting to reach Europe have been pushed back, but the list of fatal incidents – as predictable as they are tragic – is a long one and it is currently getting longer on an almost daily basis.
>
> 4. Furthermore, recent arrivals in Italy and Malta following the turmoil in North Africa confirm that Europe must always be ready to face the possible large-scale arrival of irregular migrants, asylum seekers and refugees on its southern shores.
>
> 5. The Assembly notes that measures to manage these maritime arrivals raise numerous problems, of which five are particularly worrying:
>
> 5.1. despite several relevant international instruments which are applicable in this area and which satisfactorily set out the rights and obligations of states and individuals applicable in this area, interpretations of their content appear to differ. Some states do not agree on the nature and extent of their responsibilities in specific situations and some states also call into question the application of the principle of *non-refoulement* on the high seas;
>
> 5.2. while the absolute priority in the event of interception at sea is the swift disembarkation of those rescued to a "place of safety", the notion of "place of safety" does not appear to be interpreted in the same way by all member states. Yet it is clear that the notion of "place of safety" should not be restricted solely to the physical protection of people, but necessarily also entails respect for their fundamental rights;
>
> 5.3. divergences of this kind directly endanger the lives of the people to be rescued, in particular by delaying or preventing rescue measures, and they are likely to dissuade seafarers from rescuing people in distress at sea. Furthermore, they

could result in a violation of the principle of *non-refoulement* in respect of a number of persons, including some in need of international protection;

5.4. although the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) plays an ever increasing role in interception at sea, there are inadequate guarantees of respect for human rights and obligations arising under international and European Union law, in the context of the joint operations it co-ordinates;

5.5. finally, these sea arrivals place a disproportionate burden on the states located on the southern borders of the European Union. The goal of responsibilities being shared more fairly and greater solidarity in the migration sphere between European states is far from being attained.

6. The situation is rendered more complex by the fact that these migratory flows are of a mixed nature and therefore call for specialised and tailored protection-sensitive responses in keeping with the status of those rescued. To respond to sea arrivals adequately and in line with the relevant international standards, the states must take account of this aspect in their migration management policies and activities.

7. The Assembly reminds member states of their obligations under international law, including the European Convention on Human Rights (ETS No. 5), the United Nations Convention on the Law of the Sea of 1982 and the 1951 Geneva Convention relating to the Status of Refugees, and particularly reminds them of the principle of *non-refoulement* and the right to seek asylum. The Assembly also reiterates the obligations of the states parties to the 1974 International Convention for the Safety of Life at Sea and the 1979 International Convention on Maritime Search and Rescue.

8. Finally and above all, the Assembly reminds member states that they have both a moral and legal obligation to save persons in distress at sea without the slightest delay, and unequivocally reiterates the interpretation given by the Office of the United Nations High Commissioner for Refugees (UNHCR), which states that the principle of *non-refoulement* is equally applicable on the high seas. The high seas are not an area where states are exempt from their legal obligations, including those emerging from international human rights law and international refugee law.

9. Accordingly, the Assembly calls on member states, when conducting maritime border surveillance operations, whether in the context of preventing smuggling and trafficking in human beings or in connection with border management, be it in the exercise of *de jure* or *de facto* jurisdiction, to:

9.1. fulfil without exception and without delay their obligation to save people in distress at sea;

9.2. ensure that their border management policies and activities, including interception measures, recognise the mixed make-up of flows of individuals attempting to cross maritime borders;

9.3. guarantee for all intercepted persons humane treatment and systematic respect for their human rights, including the principle of *non-refoulement*, regardless of whether interception measures are implemented within their own territorial waters, those of another state on the basis of an ad hoc bilateral agreement, or on the high seas;

9.4. refrain from any practices that might be tantamount to direct or indirect refoulement, including on the high seas, in keeping with the UNHCR's interpretation of the extraterritorial application of that principle and with the relevant judgments of the European Court of Human Rights;

9.5. carry out as a priority action the swift disembarkation of rescued persons to a "place of safety" and interpret a "place of safety" as meaning a place which can meet the immediate needs of those disembarked and in no way jeopardises their fundamental rights, since the notion of "safety" extends beyond mere protection from physical danger and must also take into account the fundamental rights dimension of the proposed place of disembarkation;

9.6. guarantee access to a fair and effective asylum procedure for those intercepted who are in need of international protection;

9.7. guarantee access to protection and assistance, including to asylum procedures, for those intercepted who are victims of human trafficking or at risk of being trafficked;

9.8. ensure that the placement in a detention facility of those intercepted – always excluding minors and vulnerable categories – regardless of their status, is authorised by the judicial authorities and occurs only where necessary and on grounds prescribed by law, that there is no other suitable alternative and that such placement conforms to the minimum standards and principles set forth in Assembly Resolution 1707 (2010) on the detention of asylum seekers and irregular migrants in Europe;

9.9. suspend any bilateral agreements they may have concluded with third states if the human rights of those intercepted are not appropriately guaranteed therein, particularly the right of access to an asylum procedure, and wherever these might be tantamount to a violation of the principle of non-refoulement, and conclude new bilateral agreements specifically containing such human rights guarantees and measures for their regular and effective monitoring;

9.10. sign and ratify, if they have not already done so, the aforementioned relevant international instruments and take account of the International Maritime Organization (IMO) Guidelines on the Treatment of Persons Rescued at Sea;

9.11. sign and ratify, if they have not already done so, the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) and the so-called "Palermo Protocols" to the United Nations Convention against Transnational Organized Crime (2000);

9.12. ensure that maritime border surveillance operations and border control measures do not affect the specific protection afforded under international law to vulnerable categories such as refugees, stateless persons, women and unaccompanied children, migrants, victims of trafficking or at risk of being trafficked, or victims of torture and trauma.

10. The Assembly is concerned about the lack of clarity regarding the respective responsibilities of European Union states and Frontex and the absence of adequate guarantees for the respect of fundamental rights and international standards in the framework of joint operations co-ordinated by that agency. While the Assembly

welcomes the proposals presented by the European Commission to amend the rules governing that agency, with a view to strengthening guarantees of full respect for fundamental rights, it considers them inadequate and would like the European Parliament to be entrusted with the democratic supervision of the agency's activities, particularly where respect for fundamental rights is concerned.

11. The Assembly also considers it essential that efforts be made to remedy the prime causes prompting desperate individuals to risk their lives by boarding boats bound for Europe. The Assembly calls on all member states to step up their efforts to promote peace, the rule of law and prosperity in the countries of origin of potential immigrants and asylum seekers.

12. Finally, in view of the serious challenges posed to coastal states by the irregular arrival by sea of mixed flows of individuals, the Assembly calls on the international community, particularly the IMO, the UNHCR, the International Organization for Migration (IOM), the Council of Europe and the European Union (including Frontex and the European Asylum Support Office) to:

12.1. provide any assistance required to those states in a spirit of solidarity and sharing of responsibilities;

12.2. under the auspices of the IMO, make concerted efforts to ensure a consistent and harmonised approach to international maritime law through, *inter alia*, agreement on the definition and content of the key terms and norms;

12.3. establish an inter-agency group with the aim of studying and resolving the main problems in the area of maritime interception, including the five problems identified in the present resolution, setting clear policy priorities, providing guidance to states and other relevant actors, and monitoring and evaluating the use of maritime interception measures. The group should be made up of members of the IMO, the UNHCR, the IOM, the Council of Europe, Frontex and the European Asylum Support Office."

F. European Union law

1. Charter of Fundamental Rights of the European Union (2000)

28. Article 19 of the Charter of Fundamental Rights of the European Union provides:

Protection in the event of removal, expulsion or extradition

"1. Collective expulsions are prohibited.

2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

2. 1985 Schengen Agreement

29. Article 17 of the Schengen Agreement provides:

"In regard to the movement of persons, the Parties shall endeavour to abolish the controls at the common frontiers and transfer them to their external frontiers. To that end, they shall endeavour to harmonise in advance, where necessary, the laws and administrative provisions concerning the prohibitions and restrictions which form the basis for the controls and to take complementary measures to safeguard security and combat illegal immigration by nationals of States that are not members of the European Communities."

3. Council Regulation (EC) no. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Coordination at the External Borders of the Member States of the European Union (FRONTEX)

30. Regulation (EC) No. 2007/2004 contains the following provisions:

"(1) Community policy in the field of the EU external borders aims at an integrated management ensuring a uniform and high level of control and surveillance, which is a necessary corollary to the free movement of persons within the European Union and a fundamental component of an area of freedom, security and justice. To this end, the establishment of common rules on standards and procedures for the control of external borders is foreseen.

(2) The efficient implementation of the common rules calls for increased coordination of the operational cooperation between the Member States.

(3) Taking into account the experiences of the External Borders Practitioners' Common Unit, acting within the Council, a specialised expert body tasked with improving the coordination of operational cooperation between Member States in the field of external border management should therefore be established in the shape of a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (hereinafter referred to as the Agency).

(4) The responsibility for the control and surveillance of external borders lies with the Member States. The Agency should facilitate the application of existing and future Community measures relating to the management of external borders by ensuring the coordination of Member States' actions in the implementation of those measures.

(5) Effective control and surveillance of external borders is a matter of the utmost importance to Member States regardless of their geographical position. Accordingly, there is a need for promoting solidarity between Member States in the field of external border management. The establishment of the Agency, assisting Member States with implementing the operational aspects of external border management, including return of third-country nationals illegally present in the Member States, constitutes an important step in this direction."

4. Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)

31. Article 3 of Regulation (EC) No. 562/2006 provides:

"This Regulation shall apply to any person crossing the internal or external borders of Member States, without prejudice to:

(a) the rights of persons enjoying the Community right of free movement;

(b) the rights of refugees and persons requesting international protection, in particular as regards non-refoulement."

5. Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external 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 (2010/252/EU)

32. The Annex to the Council Decision of 26 April 2010 states:

"Rules for sea border operations coordinated by the Agency [FRONTEX]

1. General principles

1.1. Measures taken for the purpose of the surveillance operation shall be conducted in accordance with fundamental rights and in a way that does not put at risk the safety of the persons intercepted or rescued as well as of the participating units.

1.2. No person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of non-refoulement, or from which there is a risk of expulsion or return to another country in contravention of that principle. Without prejudice to paragraph 1.1, the persons intercepted or rescued shall be informed in an appropriate way so that they can express any reasons for believing that disembarkation in the proposed place would be in breach of the principle of non-refoulement.

1.3. The special needs of children, victims of trafficking, persons in need of urgent medical assistance, persons in need of international protection and other persons in a particularly vulnerable situation shall be considered throughout all the operation.

1.4. Member States shall ensure that border guards participating in the surveillance operation are trained with regard to relevant provisions of human rights and refugee law, and are familiar with the international regime on search and rescue."

IV. INTERNATIONAL MATERIAL CONCERNING INTERCEPTIONS ON THE HIGH SEAS CARRIED OUT BY ITALY AND THE SITUATION IN LIBYA

A. Press Release of the United Nations High Commissioner for Refugees

33. On 7 May 2009 the UNHCR published the following press release:

> "UNHCR expressed deep concern Thursday over the fate of some 230 people who were rescued Wednesday by Italian patrol boats in the Maltese Search and Rescue Region (SAR) of responsibility and sent back to Libya without proper assessment of their possible protection needs. The rescue took place about 35 nautical miles south-east of the Italian island of Lampedusa, but within the Maltese SAR zone.
>
> The diversion to Libya followed a day of heated discussions between Maltese and Italian authorities about who was responsible for the rescue and disembarkation of the people on the three boats, which were in distress. Although closer to Lampedusa, the vessels were in the Maltese search and rescue area of responsibility.
>
> While no information is available on the nationalities of those aboard the vessels, it is likely that among them are people in need of international protection. In 2008, an estimated 75 percent of sea arrivals in Italy applied for asylum and 50 percent of them were granted some form of protection.
>
> "I appeal to the Italian and Maltese authorities to continue to ensure that people rescued at sea and in need of international protection receive full access to territory and asylum procedures," UN High Commissioner for Refugees António Guterres said.
>
> The incident marks a significant shift in policies by the Italian government and is a source of very serious concern. UNHCR deeply regrets the lack of transparency which surrounded the event.
>
> "We have been working closely with the Italian authorities in Lampedusa and elsewhere to ensure that people fleeing war and persecution are protected in line with the 1951 Geneva Convention," said Laurens Jolles, UNHCR's Rome-based representative. "It is of fundamental importance that the international principle of *non-refoulement* continues to be fully respected."
>
> In addition, Libya has not signed the 1951 UN Refugee Convention, and does not have a functioning national asylum system. UNHCR urges Italian authorities to reconsider their decision and to avoid repeating such measures."

B. Letter of 15 July 2009 from Mr Jacques Barrot, Vice-President of the European Commission

34. On 15 July 2009 Mr Jacques Barrot wrote to the President of the European Parliament Committee on Civil Liberties, Justice and Home

Affairs in response to a request for a legal opinion on the "return to Libya by sea of various groups of migrants by the Italian authorities". In that letter, the Vice-President of the European Commission expressed himself as follows:

> "According to information available to the Commission, the migrants concerned were intercepted on the high seas.
>
> Two sets of Community rules must be examined concerning the situation of nationals of third countries or stateless persons attempting to enter, unlawfully, the territory of Member States, some of whom might be in need of international protection.
>
> Firstly, the Community *acquis* in the field of asylum is intended to safeguard the right of asylum, as set forth in Article 18 of the Charter of Fundamental Rights of the European Union, and in accordance with the 1951 Geneva Convention relating to the Status of Refugees and with other relevant treaties. However, that *acquis*, including the 2005 Asylum Procedures Directive, applies only to asylum applications made on the territory of Member States, which includes the borders, transit areas and, in the context of maritime borders, territorial waters of Member States. Consequently, it is clear from a legal standpoint that the Community *acquis* in the field of asylum does not apply to situations on the high seas.
>
> Secondly, the Schengen Borders Code (SBC) requires that Member States conduct border surveillance to prevent, *inter alia*, unauthorised border crossings (Article 12 of EC Regulation No. 562/2006 (SBC)). However, that Community obligation must be fulfilled in compliance with the principle of *non-refoulement* and without prejudice to the rights of refugees and other people requesting international protection.
>
> The Commission is of the opinion that border surveillance activities conducted at sea, whether in territorial waters, the contiguous zone, the exclusive economic zone or on the high seas, fall within the scope of application of the SBC. In that connection, our preliminary legal analysis would suggest that the activities of the Italian border guards correspond to the notion of "border surveillance" as set forth in Article 12 of the SBC, because they prevented the unauthorised crossing of an external sea border by the persons concerned and resulted in them being returned to the third country of departure. According to the case-law of the European Court of Justice, Community obligations must be applied in strict compliance with the fundamental rights forming part of the general principles of Community law. The Court has also clarified that the scope of application of those rights in the Community legal system must be determined taking account of the case-law of the European Court of Human Rights (ECHR).
>
> The principle of *non-refoulement*, as interpreted by the ECHR, essentially means that States must refrain from returning a person (directly or indirectly) to a place where he or she could face a real risk of being subjected to torture or to inhuman or degrading treatment. Furthermore, States may not send refugees back to territories where their life or freedom would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion. That obligation must be fulfilled when carrying out any border control in accordance with the SBC, including border surveillance activities on the high seas. The case-law of the ECHR provides that acts carried out on the high seas by a State vessel constitute cases

of extraterritorial jurisdiction and may engage the responsibility of the State concerned.

Having regard to the foregoing concerning the scope of Community jurisdiction, the Commission has invited the Italian authorities to provide it with additional information concerning the actual circumstances of the return of the persons concerned to Libya and the provisions put in place to ensure compliance with the principle of *non-refoulement* when implementing the bilateral agreement between the two countries."

C. Report of the Council of Europe's Committee for the Prevention of Torture

35. From 27 to 31 July 2009 a delegation from the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited Italy. During that visit the delegation looked into various issues arising from the new governmental policy of intercepting at sea, and returning to Libya, migrants approaching Italy's southern maritime border. In particular, the delegation focused on the system of safeguards in place to ensure that no one was sent to a country where there were substantial grounds for believing that he or she would run a real risk of being subjected to torture or ill-treatment.

36. In its report, made public on 28 April 2010, the CPT expressed the opinion that Italy's policy of intercepting migrants at sea and obliging them to return to Libya or other non-European countries violated the principle of *non-refoulement*. The Committee emphasised that Italy was bound by the principle of *non-refoulement* wherever it exercised its jurisdiction, which included via its personnel and vessels engaged in border protection or rescue at sea, even when operating outside its territory. Moreover, all persons coming within Italy's jurisdiction should be afforded an appropriate opportunity and facilities to seek international protection. The information available to the CPT indicated that no such opportunity or facilities were afforded to the migrants intercepted at sea by the Italian authorities during the period examined. On the contrary, the persons who were pushed back to Libya in the operations carried out from May to July 2009 were denied the right to obtain an individual assessment of their case and effective access to the refugee protection system. In that connection, the CPT observed that persons surviving a sea voyage were particularly vulnerable and often not in a condition in which they should be expected to declare immediately their wish to apply for asylum.

According to the CPT report, Libya could not be considered a safe country in terms of human rights and refugee law; the situation of persons arrested and detained in Libya, including that of migrants – who were also exposed to being deported to other countries – indicated that the persons pushed back to Libya were at risk of ill-treatment.

D. The report by Human Rights Watch

37. In a lengthy report published on 21 September 2009 and entitled "*Pushed back, pushed around: Italy's Forced return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*", Human Rights Watch condemned the Italian practice of intercepting boats full of migrants on the high seas and pushing them back to Libya without the required screening. That report was also based on the results of research published in a 2006 report entitled "*Libya, Stemming the Flow. Abuses Against Migrants, Asylum Seekers and Refugees*".

38. According to Human Rights Watch, Italian patrol boats towed migrant boats from international waters without determining whether some might contain refugees, sick or injured persons, pregnant women, unaccompanied children, or victims of trafficking or other forms of violence. The Italian authorities forced the boat migrants onto Libyan vessels or took the migrants directly back to Libya, where the authorities immediately detained them. Some of the operations were coordinated by Frontex.

The report was based on interviews with 91 migrants, asylum seekers, and refugees in Italy and Malta, conducted mostly in May 2009, and one telephone interview with a migrant detainee in Libya. Representatives of Human Rights Watch visited Libya in April and met with government officials, but the Libyan authorities would not permit the organisation to interview migrants privately. Moreover, the authorities did not allow Human Rights Watch to visit any of the many migrant detention centres in Libya, despite repeated requests.

The UN High Commissioner for Refugees now has access to Misrata Prison, at which clandestine migrants are generally held, and Libyan organisations provide humanitarian services there. However, there is no formal agreement, and thus no guaranteed access. Furthermore, Libya has no asylum law. The authorities make no distinction between refugees, asylum seekers, and other clandestine migrants.

39. Human Rights Watch urged the Libyan government to improve the deplorable conditions of detention in Libya and to establish asylum procedures that conformed to international refugee standards. It also called on the Italian government, the European Union and Frontex to ensure access to asylum, including for those intercepted on the high seas, and to refrain from returning non-Libyans to Libya until [the latter's] treatment of migrants, asylum seekers, and refugees fully met international standards.

E. Amnesty International's visit

40. A team from Amnesty International carried out a fact-finding visit to Libya from 15 to 23 May 2009, the first such visit to the country by the organisation that the Libyan authorities had permitted since 2004.

During that visit, Amnesty International visited Misrata Detention Centre, some 200 kilometres from Tripoli, in which several hundred irregular migrants from other African countries were held in severely overcrowded conditions, and briefly interviewed several of those held there. Many had been detained since they were intercepted while seeking to make their way to Italy or other countries in southern Europe which look to Libya and other North African countries to staunch the flow of irregular migrants from sub-Saharan Africa to Europe.

41. Amnesty International considered it possible that detainees at Misrata might include refugees fleeing persecution and stressed that as Libya had no asylum procedure and was not a party to the Refugee Convention or its 1967 Protocol, foreigners, including those in need of international protection, might find themselves outside the protection of the law. There was also virtually no opportunity for detainees to lodge complaints of torture and other ill-treatment with the competent judicial authorities.

In its meetings with Libyan government officials, Amnesty International expressed concern about the detention and alleged ill-treatment of hundreds, possibly thousands, of foreign nationals whom the authorities assumed to be irregular migrants, and urged them to put in place proper procedures to identify asylum seekers and refugees and afford them appropriate protection. Amnesty International also urged the Libyan authorities to cease forcible returns of foreign nationals to countries in which they were at risk of serious human rights violations, and to find a better alternative to detention for those foreigners whom they were not able to return to their countries of origin for this reason. Some of the Eritrean nationals who comprised a sizeable proportion of the foreign nationals detained at Misrata told Amnesty International that they had been held there for two years.

V. OTHER INTERNATIONAL MATERIAL DESCRIBING THE SITUATION IN LIBYA

42. In addition to those cited above, numerous reports have been published by national and international organisations and by non-governmental organisations, condemning the conditions of detention and the living conditions of irregular migrants in Libya.

The principal reports are:

(i) Human Rights Watch, "Stemming the Flow: Abuses Against Migrants, Asylum Seekers and Refugees", September 2006;

(ii) United Nations Human Rights Committee, "Concluding Observations. Libyan Arab Jamahiriya", 15 November 2007;
(iii) Amnesty International, "Libya – Amnesty International Report 2008", 28 May 2008;
(iv) Human Rights Watch, "Libya Rights at Risk", 2 September 2008;
(v) US Department of State, "2010 Human Rights Report: Libya", 4 April 2010.

VI. INTERNATIONAL MATERIAL DESCRIBING THE SITUATION IN SOMALIA AND ERITREA

43. The main international documents concerning the situation in Somalia were submitted in the case of *Sufi and Elmi v. the United Kingdom* (nos. 8319/07 and 11449/07, §§ 80-195, 28 June 2011).

44. Various reports condemn human rights violations perpetrated in Eritrea. They detail serious human rights violations by the Eritrean government, namely arbitrary arrests, torture, inhuman conditions of detention, forced labour and serious restrictions on the freedom of movement, expression and religion. Those documents also analyse the difficult situation of Eritreans who manage to escape to other countries such as Libya, Sudan, Egypt and Italy and are subsequently forcibly repatriated.

The principal reports are:

(i) UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-seekers from Eritrea", April 2009;
(ii) Amnesty International, "Eritrea – Amnesty International Report 2009", 28 May 2009;
(iii) Human Rights Watch, "Service for Life, State Repression and Indefinite Conscription in Eritrea", April 2009;
(iv) Human Rights Watch, "Libya, Don't Send Eritreans Back to Risk of Torture", 15 January 2010;
(v) Human Rights Watch, "World Chapter Report", January 2010.

THE LAW

I. PRELIMINARY ISSUES RAISED BY THE GOVERNMENT

A. Validity of the powers of attorney and further consideration of the application

1. Issues raised by the Government

45. The Government challenged the validity in various respects of the powers of attorney provided by the applicants' representatives. Firstly, they alleged that the majority of the powers of attorney contained formal defects, namely:

(i) no particulars regarding date and place and, in some cases, the fact that the date and the place appeared to have been written by the same person;

(ii) no reference to the application number;

(iii) the fact that the applicants' identity was indicated solely by family name, first name, nationality, an illegible signature and a fingerprint, which was often partial or difficult to make out;

(iv) no details of the applicants' dates of birth.

46. The Government then submitted that the application contained no information as to the circumstances in which the powers of attorney had been drafted, thus casting doubt on their validity, nor any information concerning steps taken by the applicants' representatives to establish the identity of their clients. The Government also challenged the quality of existing contact between the applicants and their representatives. They alleged, in particular, that electronic messages sent by the applicants after their transfer to Libya did not bear signatures that could be compared against those appearing on the powers of attorney. In the Government's view, the problems encountered by the lawyers in establishing and maintaining contact with the applicants precluded an adversarial examination of the case.

47. That being the case, because it was impossible to identify the applicants and because the applicants were not "participating in the case in person", the Court should cease its examination of the case. Referring to the case of *Hussun and Others v. Italy* ((striking out), nos. 10171/05, 10601/05, 11593/05 and 17165/05, 19 January 2010), the Government requested that the Court strike the case out of the list.

2. The applicants' arguments

48. The applicants' representatives argued that the powers of attorney were valid. They asserted firstly that the formal defects alleged by the Government were not such as to render null and void the authority granted to them by their clients.

49. As regards the circumstances in which the powers of attorney had been drafted, they argued that the authorities had been drawn up by the applicants upon their arrival in Libya, with the assistance of members of humanitarian organisations operating in the various detention centres. The latter subsequently took care of contacting the applicants' representatives and forwarding the powers of attorney to them for them to sign and accept the authority granted.

50. They argued that the problems relating to identification of the parties concerned were the direct result of the subject-matter of the application, namely a collective push-back operation in which no steps had been taken beforehand to identify the clandestine migrants. Whatever the circumstances, the lawyers drew the Court's attention to the fact that a significant number of the applicants had been identified by the UNHCR office in Tripoli following their arrival in Libya.

51. Lastly, the lawyers stated that they had remained in contact with some of the applicants, who could be contacted by telephone and by e-mail. They pointed out the serious difficulties they faced in maintaining contact with the applicants, in particular because of the violence which had been rife in Libya since February 2011.

3. The Court's assessment

52. The Court reiterates at the outset that the representative of the applicant must produce a "power of attorney or a written authority to act" (Rule 45 § 3 of the Rules of Court). Therefore, a simple written authority would be valid for the purposes of the proceedings before the Court, in so far as it has not been shown that it was made without the applicant's understanding and consent (see *Velikova v. Bulgaria*, no. 41488/98, § 50, ECHR 2000-VI).

53. Furthermore, neither the Convention nor the Rules of Court impose any specific requirements on the manner in which the authority form must be drafted or require any form of certification of that document by any national authority. What is important for the Court is that the form of authority should clearly indicate that the applicant has entrusted his or her representation before the Court to a representative and that the representative has accepted that commission (see *Ryabov v. Russia*, no. 3896/04, §§ 40 and 43, 31 January 2008).

54. In the instant case, the Court observes that all the powers of attorney included in the case file are signed and bear fingerprints. Moreover, the

applicants' lawyers have provided detailed information throughout the proceedings concerning the facts and the fate of the applicants with whom they have been able to maintain contact. There is nothing in the case file that could call into question the lawyers' account or the exchange of information with the Court (see, conversely, *Hussun*, cited above, §§ 43-50).

55. In the circumstances, the Court has no reason to doubt the validity of the powers of attorney. Consequently, it rejects the Government's objection.

56. Furthermore, the Court notes that according to the information provided by the lawyers, two of the applicants, Mr Mohamed Abukar Mohamed and Mr Hasan Shariff Abbirahman (no. 10 and no. 11 on the list respectively) died shortly after the application was lodged (see paragraph 15 above).

57. It points out that the practice of the Court is to strike applications out of the list when an applicant dies during the course of the proceedings and no heir or close relative wishes to pursue the case (see, among other authorities, *Scherer v. Switzerland*, 25 March 1994, §§ 31-32, Series A no. 287; *Öhlinger v. Austria*, no. 21444/93, Commission Report of 14 January 1997, § 15; *Thévenon v. France* (dec.), no. 2476/02, ECHR 2006-III; and *Léger v. France* (striking out) [GC], no. 19324/02, § 44, 30 March 2009).

58. In the light of the circumstances of the case, the Court considers that it is no longer justified to continue the examination of the application as regards the deceased (Article 31 § 1 (c) of the Convention). Furthermore, it points out that the complaints initially lodged by Mr Mohamed Abukar Mohamed and Mr Hasan Shariff Abbirahman are identical to those submitted by the other applicants, on which it will express its opinion below. In those circumstances, the Court sees no grounds relating to respect for human rights secured by the Convention and its Protocols which, in accordance with Article 37 § 1 *in fine*, would require continuation of the examination of the deceased applicants' application.

59. In conclusion, the Court decides to strike the case out of the list in so far as it concerns Mohamed Abukar Mohamed and Hasan Shariff Abbirahman, and to pursue the examination of the remainder of the application.

B. Exhaustion of domestic remedies

60. At the hearing before the Grand Chamber, the Government submitted that the application was inadmissible because domestic remedies had not been exhausted. They claimed that the applicants had failed to apply to the Italian courts to seek acknowledgment of and compensation for the alleged violations of the Convention.

61. In the Government's view, the applicants, now free to move around and in a position to contact their lawyers in the context of the proceedings before the Court, should have lodged proceedings with the Italian criminal courts to complain of violations of domestic and international law by the military personnel involved in their removal. Criminal proceedings were currently under way in similar cases and that type of remedy was "effective".

62. The Court notes that the applicants also complained that they were not afforded a remedy satisfying the requirements of Article 13 of the Convention. It considers that there is a close connection between the Government's argument on this point and the merits of the complaints made by the applicants under Article 13 of the Convention. It therefore takes the view that it is necessary to join this objection to the merits of the complaints lodged under Article 13 of the Convention and to examine the application in this context (see paragraph 207 below).

II. THE ISSUE OF JURISDICTION UNDER ARTICLE I OF THE CONVENTION

63. Article 1 of the Convention provides:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

1. The parties' submissions

(a) The Government

64. The respondent Government acknowledged that the events in question had taken place on board Italian military ships. However, they denied that the Italian authorities had exercised "absolute and exclusive control" over the applicants.

65. They submitted that the vessels carrying the applicants had been intercepted in the context of the rescue on the high seas of persons in distress – which is an obligation imposed by international law, namely, the United Nations Convention on the Law of the Sea ("the Montego Bay Convention") – and could in no circumstances be described as a maritime police operation.

The Italian ships had confined themselves to intervening to assist the three vessels in distress and ensuring the safety of the persons on board. They had then accompanied the intercepted migrants to Libya in accordance with the bilateral agreements of 2007 and 2009. The Government argued that the obligation to save human lives on the high seas, as required under the Montego Bay Convention, did not in itself create a link between the State and the persons concerned establishing the State's jurisdiction.

66. As regards the applicants' "rescue", which in total had lasted no more than ten hours, the authorities had provided the parties concerned with the necessary humanitarian and medical assistance and had in no circumstances used violence; they had not boarded the boats and had not used weapons. The Government concluded that the instant application differed from the case of *Medvedyev and Others v. France* ([GC], no. 3394/03, 29 March 2010), in which the Court had affirmed that the applicants fell under French jurisdiction having regard to the full and exclusive nature of the control exercised by France over a vessel on the high seas and over its crew.

(b) The applicants

67. The applicants submitted that there was no question, in the instant case, but that Italy had jurisdiction. As soon as they had boarded the Italian ships, they had been under the exclusive control of Italy, which had therefore been bound to fulfil all the obligations arising out of the Convention and the Protocols thereto.

They pointed out that Article 4 of the Italian Navigation Code expressly provided that vessels flying the Italian flag fell within Italian jurisdiction even when sailing outside territorial waters.

(c) Third party interveners

68. The third party interveners considered that, in accordance with the principles of customary international law and the Court's case-law, the obligation on States not to return asylum seekers, even "potential" asylum seekers, and to ensure that they had access to a fair hearing were extra-territorial in their scope.

69. Under international law concerning the protection of refugees, the decisive test in establishing the responsibility of a State was not whether the person being returned was on the territory of a State but whether that person fell under the effective control and authority of that State.

The third party interveners referred to the Court's case-law concerning Article 1 of the Convention and the extra-territorial scope of the notion of "jurisdiction", and to the conclusions of other international authorities. They stressed the importance of avoiding double standards in the field of safeguarding human rights and ensuring that a State was not authorised to commit acts outside its territory which would never be accepted within that territory.

2. The Court's assessment

(a) General principles governing jurisdiction within the meaning of Article 1 of the Convention

70. Under Article 1 of the Convention, the undertaking of the Contracting States is to "secure" (in French "*reconnaître*") to everyone within their "jurisdiction" the rights and freedoms defined in Section I (see *Soering v. the United Kingdom*, 7 July 1989, § 86, Series A no. 161, and *Banković and Others v. Belgium and 16 Other Contracting States* (dec.), [GC], no. 52207/99, § 66, ECHR 2001-XII). The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004-VII).

71. The jurisdiction of a State, within the meaning of Article 1, is essentially territorial (see *Banković*, decision cited above, §§ 61 and 67, and *Ilaşcu*, cited above, § 312). It is presumed to be exercised normally throughout the State's territory (see *Ilaşcu and Others*, cited above, § 312, and *Assanidze v. Georgia* [GC], no. 71503/01, § 139, ECHR 2004-II).

72. In keeping with the essentially territorial notion of jurisdiction, 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 (see *Drozd and Janousek v. France and Spain*, 26 June 1992, § 91, Series A no. 240; *Bankoviç*, decision cited above, § 67; and *Ilaşcu and Others*, cited above, § 314).

73. In its first judgment in the case of *Loizidou* (preliminary objections), the Court ruled that bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory (see *Loizidou v. Turkey* (preliminary objections) [GC], 23 March 1995, § 62, Series A no. 310), which is however ruled out when, as in *Banković*, only an instantaneous extra-territorial act is at issue, since the wording of Article 1 does not accommodate such an approach to "jurisdiction" (see the decision cited above, § 75). In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extra-territorially must be determined with reference to the particular facts, for example full and exclusive control over a prison or a ship (see *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 132 and 136, 7 July 201; *Medvedyev and Others*, cited above, § 67).

74. Whenever the 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. In this sense, therefore, the Court has now accepted that Convention rights can be "divided and tailored" (see *Al-Skeini*, cited above, § 136 and 137; compare *Banković*, cited above, § 75).

75. There are other instances in the Court's case-law of the extra-territorial exercise of jurisdiction by a State in cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, the Court, basing itself on customary international law and treaty provisions, has recognised the extra-territorial exercise of jurisdiction by the relevant State (see *Banković*, decision cited above, § 73, and *Medvedyev and Others*, cited above, § 65).

(b) Application to the instant case

76. It is not disputed before the Court that the events at issue occurred on the high seas, on board military ships flying the Italian flag. The respondent Government acknowledge, furthermore, that the Revenue Police and Coastguard ships onto which the applicants were embarked were fully within Italian jurisdiction.

77. The Court observes that by virtue of the relevant provisions of the law of the sea, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying. This principle of international law has led the Court to recognise, in cases concerning acts carried out on board vessels flying a State's flag, in the same way as registered aircraft, cases of extra-territorial exercise of the jurisdiction of that State (see paragraph 75 above). Where there is control over another, this is *de jure* control exercised by the State in question over the individuals concerned.

78. The Court observes, furthermore, that the aforementioned principle is enshrined in domestic law in Article 4 of the Italian Navigation Code, and is not disputed by the respondent Government (see paragraph 18 above). It 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.

79. Moreover, Italy cannot circumvent its "jurisdiction" under the Convention by describing the events at issue as rescue operations on the high seas. In particular, the Court cannot subscribe to the Government's argument that Italy was not responsible for the fate of the applicants on account of the allegedly minimal control exercised by the authorities over the parties concerned at the material time.

80. In that connection, it is sufficient to observe that in the case of *Medvedyev and Others*, cited above, the events at issue took place on board the *Winner*, a vessel flying the flag of a third State but whose crew had been placed under the control of French military personnel. In the particular circumstances of that case, the Court examined the nature and scope of the actions carried out by the French officials in order to ascertain whether there was at least *de facto* continued and uninterrupted control exercised by France over the *Winner* and its crew (ibid, §§ 66 and 67).

81. The Court observes that in the instant case 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.

82. Accordingly, the events giving rise to the alleged violations fall within Italy's "jurisdiction" within the meaning of Article 1 of the Convention.

III. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

83. The applicants complained that they had been exposed to the risk of torture or inhuman or degrading treatment in Libya and in their respective countries of origin, namely, Eritrea and Somalia, as a result of having been returned. They relied on Article 3 of the Convention which provides:

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

84. The Court observes that two different aspects of Article 3 of the Convention are at issue and must be examined separately: firstly, the risk that the applicants would suffer inhuman and degrading treatment in Libya and secondly, the danger of being returned to their respective countries of origin.

A. Alleged violation of Article 3 of the Convention on account of the applicants having been exposed to the risk of inhuman and degrading treatment in Libya

1. The parties' submissions

(a) The applicants

85. The applicants alleged that they had been the victims of an arbitrary *refoulement*, in violation of the Convention. They stated that they had not been afforded the opportunity to challenge their return to Libya and to request international protection from the Italian authorities.

86. Having been given no information concerning their true destination, the applicants had been convinced, throughout the voyage aboard the Italian ships, that they were being taken to Italy. They claimed to have been the victims of a real "deception" in that regard on the part of the Italian authorities.

87. No procedure to identify the intercepted migrants and to gather information as to their personal circumstances had been possible aboard the ships. In those circumstances, no formal request for asylum could have been made. Nevertheless, upon approaching the Libyan coast, the applicants and a substantial number of other migrants had asked the Italian military personnel not to disembark them at the Port of Tripoli, from where they had just fled, and to take them to Italy.

The applicants affirmed that they had quite clearly expressed their wish not to be handed over to the Libyan authorities. They challenged the Government's contention that such a request could not be considered to be a request for international protection.

88. The applicants then argued that they had been returned to a country where there were sufficient reasons to believe that they would be subjected to treatment in breach of the Convention. Many international sources had reported the inhuman and degrading conditions in which irregular migrants, notably of Somali and Eritrean origin, were held in Libya and the precarious living conditions experienced by clandestine migrants in that country.

In that connection, the applicants referred to the CPT report of April 2010 and the texts and documents produced by the third parties concerning the situation in Libya.

89. In their view, Italy could not have been unaware of that increasingly worsening situation when it signed the bilateral agreements with Libya and carried out the push-back operations at issue.

90. Furthermore, the applicants' fears and concerns had proved to be well-founded. They had all reported inhuman and degrading conditions of detention and, following their release, precarious living conditions associated with their status as illegal immigrants.

91. The applicants argued that the decision to push back to Libya clandestine migrants intercepted on the high seas was a genuine political choice on the part of Italy, aimed at giving the police the main responsibility for controlling illegal immigration, in disregard of the protection of the fundamental rights of the people concerned.

(b) The Government

92. The Government argued firstly that the applicants had not adequately proved that they had been subjected to treatment allegedly in contravention of the Convention. They could not therefore be considered to be "victims" within the meaning of Article 34 of the Convention.

93. They went on to argue that the applicants had been transferred to Libya in accordance with the bilateral agreements signed by Italy and Libya in 2007 and 2009. Those bilateral agreements were a response to increasing migratory flows between Africa and Europe and had been signed in a spirit of cooperation between two countries engaged in combating clandestine immigration.

94. The bodies of the European Union had, on numerous occasions, encouraged cooperation between Mediterranean countries in controlling migration and combating crimes associated with clandestine immigration. The Government referred, in particular, to European Parliament Resolution No. 2006/2250 and to the European Pact on Immigration and Asylum adopted by the Council of the European Union on 24 September 2008, which affirmed the need for EU states to cooperate and establish partnerships with countries of origin and transit in order to strengthen control of the EU's external borders and to combat illegal immigration.

95. The Government submitted that the events of 6 May 2009, which gave rise to this application, had been conducted in the context of a rescue operation on the high seas in accordance with international law. They stated that Italian military ships had intervened in a manner consistent with the Montego Bay Convention and the International Convention on Maritime Search and Rescue ("the SAR Convention") to deal with the situation of immediate danger that the vessels had been in and to save the lives of the applicants and the other migrants.

In the Government's view, the legal system prevailing on the high seas was characterised by the principle of freedom of navigation. In that context, it was not necessary to identify the parties concerned. The Italian authorities had merely provided the necessary humanitarian assistance. Identity checks of the applicants had been kept to a minimum because no maritime police operation on board the ships had been envisaged.

96. At no time during their transfer to Libya had the applicants expressed their intention to apply for political asylum or any other form of international protection. The Government argued that a request made by the

applicants not to be handed over to the Libyan authorities could not be interpreted as a request for asylum.

In that regard, they stated that had the parties concerned asked for asylum, they would have been taken to Italian territory, as had been the case in other high seas operations conducted in 2009.

97. The Government also argued that Libya was a safe host country. In support of that statement, they referred to the fact that Libya had ratified the United Nations International Covenant on Civil and Political Rights, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the African Union Refugee Convention, and to Libya's membership of the International Organization for Migration (IOM).

Though not a party to the United Nations Convention relating to the Status of Refugees, Libya had nevertheless authorised the UNHCR and the IOM to open offices in Tripoli, thus allowing numerous applicants to be granted refugee status and guaranteed international protection.

98. The Government drew the Court's attention to the fact that when Libya ratified the 2008 Friendship Treaty, it expressly undertook to comply with the principles of the United Nations Charter and the Universal Declaration of Human Rights. Italy had had no reason to believe that Libya would evade its commitments.

That circumstance, and the fact that the UNHCR and IOM offices were present and active in Tripoli, fully justified Italy's conviction that Libya was a safe host country for migrants intercepted on the high seas. Moreover, the Government were of the view that recognition of the refugee status granted by the UNHCR to numerous applicants, including some of the applicants in this case, was unequivocal proof that the situation in Libya at the material time was in compliance with international human rights standards.

99. The Government acknowledged that the situation in Libya had deteriorated after April 2010, when the authorities closed the UNHCR office in Tripoli, and had definitively broken down following the events at the beginning of 2011, but they asserted that Italy had immediately ceased pushing back migrants to Libya and had changed the arrangements for the rescue of migrants on the high seas by henceforth authorising entry onto Italian territory.

100. The Government disputed the existence of a "Government practice" which consisted, according to the applicants, of effecting arbitrary transfers to Libya. In that connection, they described the application as a "political and ideological diatribe" against the action of the Italian Government. The Government requested the Court to examine only the events of 6 May 2009 and not call into question Italy's powers as regards immigration control, an area which they considered to be extremely sensitive and complex.

(c) Third party interveners

101. Relying on the statements of numerous direct witnesses, Human Rights Watch and the UNHCR condemned Italy's forced return of irregular migrants to Libya. During 2009 Italy had carried out nine operations on the high seas, returning 834 Somali, Eritrean and Nigerian nationals to Libya.

102. Human Rights Watch had denounced the situation in Libya on several occasions, notably in its reports of 2006 and 2009. The organisation stated that because there was no national asylum system in Libya, irregular migrants were systematically arrested and often subjected to torture and physical violence, including rape. In breach of United Nations guidelines on detention, migrants were often detained indefinitely and with no judicial supervision. Furthermore, conditions of detention were inhuman. Migrants were tortured and no medical assistance was provided in the various camps throughout the country. They might at any time be returned to their countries of origin or abandoned in the desert, where certain death awaited them.

103. The Aire Centre, Amnesty International and the FIDH observed that reports from reliable sources over several years had continued to demonstrate that the human rights situation in Libya was disastrous, notably for refugees, asylum seekers and migrants, and especially for those from particular regions of Africa, such as Eritrea and Somalia.

The three intervening parties were of the view that there was a "duty to investigate" where there was credible information from reliable sources that detention or living conditions in the receiving State were incompatible with Article 3.

In accordance with the principle of *pacta sunt servanda*, a State could not evade its obligations under the Convention by relying on commitments arising out of bilateral or multilateral agreements concerning the fight against clandestine immigration.

104. The UNHCR stated that while the Italian authorities had not provided detailed information concerning the push-back operations, several witnesses interviewed by the High Commissioner had given an account similar to that of the applicants. In particular, they had reported that in order to encourage people to board the Italian ships, Italian military personnel had led them to believe that they were being taken to Italy. Various witnesses stated that they had been handcuffed and had been subjected to violence during their transfer to Libyan territory and on arrival at the detention centre at which they were to be held. Furthermore, the Italian authorities had confiscated the migrants' personal effects, including the UNHCR certificates attesting to their status as refugees. Various witnesses had also confirmed that they had asked for protection and that they had specifically informed the Italian authorities of that fact during the operations.

105. The UNHCR affirmed that at least five of the migrants returned to Libya who had subsequently managed to return to Italy, including

Mr Ermias Berhane, had been granted refugee status in Italy. Moreover, in 2009 the UNHCR office in Tripoli had granted refugee status to seventy-three people returned by Italy, including fourteen of the applicants. That proved that the operations conducted by Italy on the high seas involved a genuine risk of the arbitrary return of persons in need of international protection.

106. The UNHCR then submitted that none of Italy's arguments justifying the returns was acceptable. Neither the principle of cooperation between States to combat illegal trafficking in migrants, nor the provisions of international law of the sea concerning the safety of human life at sea, exempted States from their obligation to comply with the principles of international law.

107. Libya, a transit and receiving State for migratory flows from Asia and Africa, provided asylum seekers with no form of protection. Though signatory to certain international human rights instruments, it barely complied with its obligations. In the absence of any national asylum law system, activities in that area had been conducted exclusively by the UNHCR and its partners. Nevertheless, the activities of the High Commissioner had never been officially recognised by the Libyan government, which, in April 2010, had ordered the UNHCR to close its Tripoli office and cease those activities.

Given the circumstances, the Libyan government had never granted any formal status to persons registered by the UNHCR as refugees and they were guaranteed no form of protection.

108. Until the events of 2011, anyone considered to be an illegal immigrant had been held in a "detention centre", the majority of which had been visited by the UNHCR. The living conditions in those centres had been mediocre and characterised by overcrowding and inadequate sanitary facilities. That situation had been aggravated by the push-back operations, which had exacerbated overcrowding and led to further deterioration in the sanitary conditions. That had led to a significantly greater need for basic assistance just to keep those individuals alive.

109. According to the Columbia Law School Human Rights Clinic, while clandestine immigration by sea was not a new phenomenon, the international community had increasingly recognised the need to restrict immigration control practices, including interception at sea, which could hinder migrants' access to protection and thus expose them to the risk of torture.

1. The Court's assessment

(a) Admissibility

110. The Government submitted that the applicants could not claim to be "victims", within the meaning of Article 34 of the Convention, of the events

of which they complained. They disputed the existence of a genuine risk that the applicants would be subjected to inhuman and degrading treatment as a result of their return to Libya. That danger had to be assessed on the basis of substantial grounds relating to the circumstances of each applicant. The information provided by the parties concerned was vague and insufficient.

111. The Court notes that the issue raised by this preliminary objection is closely bound up with those it will have to consider when examining the complaints under Article 3 of the Convention. That provision requires that the Court establish whether or not there are substantial grounds for believing that the parties concerned ran a real risk of being subjected to torture or inhuman or degrading treatment after having been pushed back. This issue should therefore be joined to examination on the merits.

112. The Court considers that this part of the application raises complex issues of law and fact which cannot be determined without an examination on the merits. It follows that it is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

(b) The merits

(i) General principles

(α) Responsibility of Contracting States in cases of expulsion

113. According to the Court's established case-law, Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94, and *Boujlifa v. France*, 21 October 1997, § 42, *Reports of Judgments and Decisions* 1997-VI). The Court also notes that the right to political asylum is not contained in either the Convention or its Protocols (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 102, Series A no. 215, and *Ahmed v. Austria*, 17 December 1996, § 38, *Reports* 1996-VI).

114. However, expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3, and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown 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. In such circumstances, Article 3 implies an obligation not to expel the individual to that country (see *Soering*, cited above, §§ 90-91; *Vilvarajah and Others*, cited above, § 103; *Ahmed*, cited above, § 39; *H.L.R. v. France*, 29 April 1997, § 34, *Reports* 1997-III; *Jabari*

v. Turkey, no. 40035/98, § 38, ECHR 2000-VIII; and *Salah Sheekh v. the Netherlands*, no. 1948/04, § 135, 11 January 2007).

115. In this type of case, the Court is therefore called upon to assess the situation in the receiving country in the light of the requirements of Article 3. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State, by reason of its having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment (see *Saadi v. Italy* [GC], no. 37201/06, § 126, 28 February 2008).

(β) Factors used to assess the risk of being subjected to treatment in breach of Article 3 of the Convention

116. In determining whether it has been shown that the applicant runs a real risk of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it, or, if necessary, material obtained *proprio motu* (see *H.L.R. v. France*, cited above, § 37, and *Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II). In cases such as the present the Court's examination of the existence of a real risk of ill-treatment must necessarily be a rigorous one (see *Chahal v. the United Kingdom*, 15 November 1996, § 96, Reports 1996-V).

117. In order to ascertain whether or not there was a risk of ill-treatment, the Court must examine the foreseeable consequences of the removal of an applicant to the receiving country in the light of the general situation there as well as his or her personal circumstances (see *Vilvarajah and Others*, cited above, § 108 *in fine*).

118. To that end, as regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources (see, for example, *Chahal*, cited above, §§ 99-100; *Müslim v. Turkey*, no. 53566/99, § 67, 26 April 2005; *Said v. the Netherlands*, no. 2345/02, § 54, ECHR 2005-VI; *Al-Moayad v. Germany* (dec.), no.35865/03, §§ 65-66, 20 February 2007; and *Saadi*, cited above, §131).

119. In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the sources mentioned in the previous paragraph, that there are substantial grounds for believing in the existence of the practice in question and his or her membership of the group concerned (see, *mutatis mutandis*, *Salah Sheekh*, cited above, §§ 138-49).

120. Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who

are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (see *H.L.R. v. France*, cited above, § 40).

121. With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of removal.

(ii) Application to the instant case

122. The Court has already had occasion to note that the States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum seekers. It does not underestimate the burden and pressure this situation places on the States concerned, which are all the greater in the present context of economic crisis (see *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 223, 21 January 2011). It is particularly aware of the difficulties related to the phenomenon of migration by sea, involving for States additional complications in controlling the borders in southern Europe.

However, having regard to the absolute character of the rights secured by Article 3, that cannot absolve a State of its obligations under that provision.

123. The Court reiterates that protection against the treatment prohibited by Article 3 imposes on States the obligation not to remove any person who, in the receiving country, would run the real risk of being subjected to such treatment.

It notes that the numerous reports by international bodies and non-governmental organisations paint a disturbing picture of the treatment meted out to clandestine immigrants in Libya at the material time. The conclusions of those documents are moreover corroborated by the CPT report of 28 April 2010 (see paragraph 35 above).

124. The Court observes in passing that the situation in Libya worsened after the closure of the UNHCR office in Tripoli in April 2010 and the subsequent popular revolution which broke out in the country in February 2011. However, for the purposes of examining this case, the Court will refer to the situation prevailing in Libya at the material time.

125. According to the various reports mentioned above, during the period in question no rule governing the protection of refugees was complied with by Libya. Any person entering the country by illegal means was deemed to be clandestine and no distinction was made between irregular migrants and asylum seekers. Consequently, those persons were systematically arrested and detained in conditions that outside visitors, such as delegations from the UNHCR, Human Rights Watch and Amnesty International, could only describe as inhuman. Many cases of torture, poor hygiene conditions and lack of appropriate medical care were denounced by all the observers. Clandestine migrants were at risk of being returned to

their countries of origin at any time and, if they managed to regain their freedom, were subjected to particularly precarious living conditions as a result of their irregular situation. Irregular immigrants, such as the applicants, were destined to occupy a marginal and isolated position in Libyan society, rendering them extremely vulnerable to xenophobic and racist acts (see paragraphs 35-41 above).

126. Those same reports clearly show that clandestine migrants disembarked in Libya following their interception by Italy on the high seas, such as the applicants, were exposed to those risks.

127. Confronted with the disturbing picture painted by the various international organisations, the respondent Government argued that Libya was, at the material time, a "safe" destination for migrants intercepted on the high seas.

They based that belief on the presumption that Libya had complied with its international commitments as regards asylum and the protection of refugees, including the principle of *non-refoulement*. They claimed that the Italian-Libyan Friendship Treaty of 2008, in accordance with which clandestine migrants were returned to Libya, made specific reference to compliance with the provisions of international human rights law and other international conventions to which Libya was party.

128. In that regard, the Court observes that Libya's failure to comply with its international obligations was one of the facts denounced in the international reports on that country. In any event, the Court is bound to observe that the existence of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention (see *M.S.S.*, cited above, § 353, and, *mutatis mutandis*, *Saadi*, cited above, § 147).

129. Furthermore, the Court observes that Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya. Even if it were to be assumed that those agreements made express provision for the return to Libya of migrants intercepted on the high seas, the Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States (see *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 47, ECHR 2001-VIII, and *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 128, 2 March 2010).

130. With regard to the Government's argument based on the presence of a UNHCR office in Tripoli, it must be noted that the activity of the Office of the High Commissioner, even before it was finally closed in April 2010, was never recognised in any way by the Libyan government. The

documents examined by the Court show that the refugee status granted by the UNHCR did not guarantee the persons concerned any kind of protection in Libya.

131. The Court notes again that that situation was well-known and easy to verify on the basis of multiple sources. It therefore considers that when the applicants were removed, the Italian authorities 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.

132. The Government submitted that the applicants had failed to sufficiently describe the risks in Libya because they had not applied to the Italian authorities for asylum. The mere fact that the applicants had opposed their disembarkation in Libya could not, according to the Government, be considered to be a request for protection, imposing on Italy an obligation under Article 3 of the Convention.

133. The Court observes firstly that that fact was disputed by the applicants, who stated that they had informed the Italian military personnel of their intention to request international protection. Furthermore, the applicants' version is corroborated by the numerous witness statements gathered by the UNHCR and Human Rights Watch. In any event, the Court considers that it was for the national authorities, faced with a situation in which human rights were being systematically violated, as described above, to find out about the treatment to which the applicants would be exposed after their return (see, *mutatis mutandis*, *Chahal*, cited above, §§ 104 and 105; *Jabari*, cited above, §§ 40 and 41; and *M.S.S.*, cited above, § 359). Having regard to the circumstances of the case, the fact that the parties concerned had failed to expressly request asylum did not exempt Italy from fulfilling its obligations under Article 3.

134. In that connection, the Court notes that none of the provisions of international law cited by the Government justified the applicants being pushed back to Libya, in so far as the rules for the rescue of persons at sea and those governing the fight against people trafficking impose on States the obligation to fulfil the obligations arising out of international refugee law, including the "*non-refoulement*" principle (see paragraph 23 above).

135. That *non-refoulement* principle is also enshrined in Article 19 of the Charter of Fundamental Rights of the European Union. In that connection, the Court attaches particular weight to the content of a letter written on 15 May 2009 by Mr Jacques Barrot, Vice-President of the European Commission, in which he stressed the importance of compliance with the principle of *non-refoulement* in the context of operations carried out on the high seas by Member States of the European Union (see paragraph 34 above).

136. Having regard to the foregoing, the Court considers that in the present case substantial grounds have been shown for believing that there

was a real risk that the applicants would be subjected to treatment in Libya contrary to Article 3. The fact that a large number of irregular immigrants in Libya found themselves in the same situation as the applicants does not make the risk concerned any less individual where it is sufficiently real and probable (see, *mutatis mutandis*, *Saadi*, cited above, § 132).

137. Relying on these conclusions and the obligations on States under Article 3, the Court considers that by transferring the applicants to Libya, the Italian authorities, in full knowledge of the facts, exposed them to treatment proscribed by the Convention.

138. Accordingly, the Government's objection concerning the applicants' lack of victim status must be rejected and it must be concluded that there has been a violation of Article 3 of the Convention.

B. Alleged violation of Article 3 of the Convention on account of the fact that the applicants were exposed to the risk of arbitrary repatriation to Eritrea and Somalia

1. The parties' submissions

(a) The applicants

139. The applicants alleged that their transfer to Libya, where refugees and asylum seekers were granted no form of protection, exposed them to the risk of being returned to their respective countries of origin: Somalia and Eritrea. They claimed that various reports by international sources attested to the existence of conditions in both those countries which breached human rights.

140. The applicants, who had fled their respective countries, argued that they had not been afforded any opportunity to secure international protection. The fact that most of them had obtained refugee status after their arrival in Libya confirmed that their fears of being subjected to ill-treatment were well-founded. They submitted that although the Libyan authorities did not recognise the refugee status granted by the UNHCR office in Tripoli, the granting of that status demonstrated that the group of migrants to which they belonged was in need of international protection.

(b) The Government

141. The Government pointed out that Libya was a signatory to various international instruments concerning the protection of human rights and observed that, by ratifying the 2008 Friendship Treaty, it had expressly undertaken to comply with the principles contained in the United Nations Charter and in the Universal Declaration of Human Rights.

142. They reaffirmed that the presence of the UNHCR in Libya constituted an assurance that no one entitled to asylum or any other form of international protection would be arbitrarily expelled. They claimed that a significant number of applicants had been granted refugee status in Libya, which would rule out their repatriation.

(c) Third party interveners

143. The UNHCR stated that Libya frequently conducted collective expulsions of refugees and asylum seekers to their countries of origin, where they could be subjected to torture and other ill-treatment. It denounced the absence of a system for international protection in Libya, which led to a very high risk of "chain *refoulements*" of persons in need of protection.

The United Nations High Commissioner, Human Rights Watch and Amnesty International noted the risk, for individuals forcibly repatriated to Eritrea and Somalia, of being subjected to torture and inhuman or degrading treatment and of being exposed to extremely precarious living conditions.

144. The Aire Centre, Amnesty International and the FIDH submitted that, having regard to the particular vulnerability of asylum seekers and persons intercepted on the high seas and the lack of adequate guarantees or procedures on board vessels allowing for push-backs to be challenged, it was even more vital for the Contracting Parties involved in the return operations to ascertain the actual situation in the receiving States, including as regards the risk of any subsequent return.

2. The Court's assessment

(a) Admissibility

145. The Court considers that this complaint raises issues of law and fact which cannot be determined without an examination on the merits. It follows that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

(b) Merits

146. The Court reiterates the principle according to which indirect removal of an alien leaves the responsibility of the Contracting State intact, and that State is required, in accordance with the well-established case-law, to ensure that the person in question would not face a real risk of being subjected to treatment contrary to Article 3 in the event of repatriation (see, *mutatis mutandis*, *T.I. v. the United Kingdom* (dec.), no. 43844/98, ECHR 2000-III, and *M.S.S.*, cited above, § 342).

147. It is a matter for the State carrying out the return to ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his country of origin without an assessment of the risks faced. The Court observes that that obligation is all the more important when, as in the instant case, the intermediary country is not a State party to the Convention.

148. In the instant case, the Court's task is not to rule on the violation of the Convention in the event of repatriation of the applicants, but to ascertain whether there were sufficient guarantees that the parties concerned would not be arbitrarily returned to their countries of origin, where they had an arguable claim that their repatriation would breach Article 3 of the Convention.

149. The Court has a certain amount of information on the general situation in Eritrea and Somalia, the applicants' countries of origin, submitted by the parties concerned and by the third party interveners (see paragraphs 43 and 44 above).

150. It observes that, according to the UNHCR and Human Rights Watch, individuals forcibly repatriated to Eritrea face being tortured and detained in inhuman conditions merely for having left the country irregularly. As regards Somalia, in the recent case of *Sufi and Elmi* (cited above), the Court noted the serious levels of violence in Mogadishu and the increased risk to persons returned to that country of being forced either to transit through areas affected by the armed conflict or to seek refuge in camps for displaced persons or refugees, where living conditions were appalling.

151. The Court considers that all the information in its possession shows *prima facie* that the situation in Somalia and Eritrea posed and continues to pose widespread serious problems of insecurity. That finding, moreover, has not been disputed before the Court.

152. Consequently, the applicants could arguably claim that their repatriation would breach Article 3 of the Convention. The Court must now ascertain whether the Italian authorities could reasonably expect Libya to offer sufficient guarantees against arbitrary repatriation.

153. The Court observes firstly that Libya has not ratified the Geneva Convention on Refugee Status. Furthermore, international observers note the absence of any form of asylum and protection procedure for refugees in Libya. In that connection, the Court has already had occasion to note that the presence of the UNHCR in Tripoli hardly constituted a guarantee of protection for asylum seekers on account of the negative attitude of the Libyan authorities, which did not recognise any value in the status of refugee (see paragraph 130 above).

154. In those circumstances, the Court cannot subscribe to the Government's argument that the activities of the UNHCR represented a guarantee against arbitrary repatriation. Moreover, Human Rights Watch

and the UNHCR had denounced several earlier forced returns of irregular migrants, including asylum seekers and refugees, to high-risk countries.

155. Therefore, the fact that some of the applicants have obtained refugee status does not reassure the Court as regards the risk of arbitrary return. On the contrary, the Court shares the applicants' view that that constitutes additional evidence of the vulnerability of the parties concerned.

156. In view of the foregoing, the Court considers that when the applicants were transferred to Libya, the Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin, having regard in particular to the lack of any asylum procedure and the impossibility of making the Libyan authorities recognise the refugee status granted by the UNHCR.

157. Furthermore, the Court reaffirms that Italy is not exempt from complying with its obligations under Article 3 of the Convention because the applicants failed to ask for asylum or to describe the risks faced as a result of the lack of an asylum system in Libya. It reiterates that the Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees.

158. It follows that the transfer of the applicants to Libya also violated Article 3 of the Convention because it exposed the applicants to the risk of arbitrary repatriation.

IV. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 4

159. The applicants stated that they had been the subject of a collective expulsion having no basis in law. They relied on Article 4 of Protocol No. 4, which provides:

> "Collective expulsion of aliens is prohibited."

1. The parties' submissions

(a) The Government

160. The Government submitted that Article 4 of Protocol No. 4 was not applicable in the instant case. They argued that the guarantee provided by that provision came into play only in the event of the expulsion of persons on the territory of a State or who had crossed the national border illegally. In the instant case, the measure at issue was a refusal to authorise entry into national territory rather than "expulsion".

(b) The applicants

161. While acknowledging that the word "expulsion" might seemingly constitute an obstacle to the applicability of Article 4 of Protocol No. 4, the

applicants submitted that an evolutive approach should lead the Court to recognise the applicability of Article 4 of Protocol No. 4 in the present case.

162. In particular, the applicants sought a functional and teleological interpretation of that provision. In their view, the primary purpose of prohibiting collective expulsions was to prevent States from forcibly transferring groups of aliens to other States without examining their individual circumstances, even summarily. Such a prohibition should also apply to measures to push back migrants on the high seas, carried out without any preliminary formal decision, in so far as such measures could constitute "hidden expulsions". A teleological and "extra-territorial" interpretation of that provision would render it concrete and effective rather than theoretical and illusory.

163. According to the applicants, even if the Court were to decide to make the prohibition established by Article 4 of Protocol No. 4 strictly territorial in scope, their return to Libya would in any case fall within the scope of application of that Article because it had occurred on a vessel flying the Italian flag, which, under Article 4 of the Italian Navigation Code, was considered to be "Italian territory".

Their return to Libya, carried out with no prior identification and no examination of the personal circumstances of each applicant, had constituted a removal measure that was, in substance, "collective".

(c) Third party interveners

164. The United Nations High Commissioner for Human Rights (UNHCHR), whose submissions were shared by the United Nations High Commissioner for Refugees (UNHCR) (see paragraph 7 above), argued that Article 4 of Protocol No. 4 was applicable in the instant case. They submitted that the issue was of key importance, having regard to the potentially significant effects of a broad interpretation of that provision in the field of international migration.

After having pointed out that collective expulsions of aliens, including those in an irregular situation, were generally prohibited by international and Community law, the UNHCHR argued that persons intercepted on the high seas should be able to benefit from protection against that kind of expulsion, even though they had not been able to reach a State's border.

Collective expulsions on the high seas were prohibited having regard to the principle of good faith, in the light of which the Convention provisions must be interpreted. To allow States to push back migrants intercepted on the high seas without complying with the guarantee enshrined in Article 4 of Protocol No. 4 would amount to accepting that States were able to evade their obligations under the Convention by advancing their border control operations.

Moreover, recognition of the extra-territorial exercise of a Contracting State's jurisdiction over actions having taken place on the high seas would,

according to the UNHCHR, entail a presumption that all the rights guaranteed by the Convention and its Protocols would be applicable.

165. The Columbia Law School Human Rights Clinic pointed out the importance of procedural guarantees in the area of protection of the human rights of refugees. States were bound to examine the situation of each individual on a case-by-case basis, in order to guarantee effective protection of the fundamental rights of the parties concerned and to avoid removing them while there was a risk of harm.

The Columbia Law School Human Rights Clinic submitted that clandestine immigration by sea was not a new phenomenon but that the international community had increasingly recognised the need to identify constraints on State immigration control practices, including interception at sea. The principle of *non-refoulement* required States to refrain from removing individuals without having assessed their circumstances on a case-by-case basis.

Various bodies of the United Nations, such as the Committee Against Torture, had clearly stated that such practices risked breaching international human rights standards and had emphasised the importance of individual identification and assessment to prevent people being returned to situations where they would be at risk. The Inter-American Commission for Human Rights had recognised the importance of these procedural guarantees in the case of *The Haitian Center for Human Rights et al. v. United States* (case no. 10 675, report no. 51/96, § 163), in which it had expressed the opinion that the United States had impermissibly returned interdicted Haitian migrants without making an adequate determination of their status, and without granting them a hearing to ascertain whether they qualified as refugees. That decision was of particular significance as it contradicted the earlier position of the Supreme Court of the United States in the case of *Sale v. Haitian Centers Council* (113 S. Ct., 2549, 1993).

2. The Court's assessment

(a) Admissibility

166. The Court must first examine the question of the applicability of Article 4 of Protocol No. 4. In the case of *Henning Becker v. Denmark* (no. 7011/75, decision of 3 October 1975) concerning the repatriation of a group of approximately two hundred Vietnamese children by the Danish authorities, the Commission defined, for the first time, the "collective expulsion of aliens" as being "any measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group".

167. That definition was used subsequently by the Convention bodies in other cases concerning Article 4 of Protocol No. 4. The Court observes that

the majority of such cases involved persons who were on the territory at issue (see *K.G. v. the F.R.G.*, no. 7704/76, Commission Decision of 1 March 1977; *O. and Others v. Luxembourg*, no. 7757/77, Commission Decision of 3 March 1978; *A. and Others v. the Netherlands*, no. 14209/88, Commission Decision of 16 December 1988; *Andric v. Sweden* (dec), no. 45917/99, 23 February 1999; *Čonka v. Belgium*, no. 51564/99, ECHR 2002-I; *Davydov v. Estonia* (dec), no. 16387/03, 31 May 2005; *Berisha and Haljiti v. "the former Yugoslav Republic of Macedonia"*, no. 18670/03, decision of 16 June 2005; *Sultani v. France*, no. 45223/05, ECHR 2007-X; *Ghulami v. France* (dec), no. 45302/05, 7 April 2009; and *Dritsas v. Italy* (dec), no. 2344/02, 1 February 2011).

168. The case of *Xhavara and Others v. Italy and Albania* ((dec), no. 39473/98, 11 January 2001), however, concerned Albanian nationals who had attempted to enter Italy illegally on board an Albanian vessel and who had been intercepted by an Italian warship approximately 35 nautical miles off the Italian coast. The Italian ship had attempted to prevent the parties concerned from disembarking on national territory, leading to the death of fifty-eight people, including the applicants' parents, as a result of a collision. In that case, the applicants complained in particular of Legislative Decree no. 60 of 1997, which provided for the immediate expulsion of irregular aliens, a measure subject only to appeal without suspensive effect. They considered that that constituted a breach of the guarantee afforded by Article 4 of Protocol No. 4. The Court rejected the complaint on the ground of incompatibility *ratione personae*, as the provision in question had not been applied to their case, and did not rule on the applicability of Article 4 of Protocol No. 4 to the case at issue.

169. Therefore, in the instant case, the Court must, for the first time, examine whether Article 4 of Protocol No. 4 applies to a case involving the removal of aliens to a third State carried out outside national territory. It must ascertain whether the transfer of the applicants to Libya constituted a "collective expulsion of aliens" within the meaning of the provision at issue.

170. In interpreting the provisions of the Convention, the Court draws on Articles 31 to 33 of the Vienna Convention on the Law of Treaties (see, for example, *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18; *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 65, 12 November 2008; and *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, 29 January 2008).

171. Pursuant to the Vienna Convention on the Law of Treaties, the Court must establish the ordinary meaning to be given to the terms in their context and in the light of the object and purpose of the provision from which they are taken. It must take account of the fact 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 (see *Stec and Others v. the United Kingdom* (dec) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X). The Court must also take account of any relevant rules and principles of international law applicable in the relations between the Contracting Parties (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI, and *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland* [GC], no. 45036/98, § 150, ECHR 2005-VI; see also Article 31 § 3(c) of the Vienna Convention). The Court may also have recourse to supplementary means of interpretation, notably the *travaux préparatoires* of the Convention, either to confirm the meaning determined in accordance with the methods referred to above, or to clarify the meaning when it would otherwise be ambiguous, obscure or manifestly absurd and unreasonable (see Article 32 of the Vienna Convention).

172. The Government submitted that there was a logical obstacle to the applicability of Article 4 of Protocol No. 4 in the instant case, namely the fact that the applicants were not on Italian territory at the time of their transfer to Libya so that measure, in the Government's view, could not be considered to be an "expulsion" within the ordinary meaning of the term.

173. The Court does not share the Government's opinion on this point. It notes firstly that while the cases thus far examined have concerned individuals who were already, in various forms, on the territory of the country concerned, the wording of Article 4 of Protocol No. 4 does not in itself pose an obstacle to its extra-territorial application. It must be noted that Article 4 of Protocol No. 4 contains no reference to the notion of "territory", whereas the wording of Article 3 of the same Protocol, on the contrary, specifically refers to the territorial scope of the prohibition on the expulsion of nationals. Likewise, Article 1 of Protocol No. 7 explicitly refers to the notion of territory regarding procedural safeguards relating to the expulsion of aliens lawfully resident in the territory of a State. In the Court's view, that wording cannot be ignored.

174. The *travaux préparatoires* are not explicit as regards the scope of application and ambit of Article 4 of Protocol No. 4. In any event, the Explanatory Report to Protocol No. 4, drawn up in 1963, reveals that as far as the Committee of Experts was concerned, the purpose of Article 4 was to formally prohibit "collective expulsions of aliens of the kind which was a matter of recent history". Thus, it was "agreed that the adoption of this Article [Article 4] and paragraph 1 of Article 3 could in no way be interpreted as in any way justifying measures of collective expulsion which may have been taken in the past". The commentary on the draft reveals that, according to the Committee of Experts, the aliens to whom the Article refers are not only those lawfully resident on the territory but "all those who have no actual right to nationality in a State, whether they are passing through a country or reside or are domiciled in it, whether they are refugees or entered the country on their own initiative, or whether they are stateless or possess

another nationality" (Article 4 of the final Committee draft, p. 505, § 34). Lastly, according to the drafters of Protocol No. 4, the word "expulsion" should be interpreted "in the generic meaning, in current use (to drive away from a place)". While that last definition is contained in the section relating to Article 3 of the Protocol, the Court considers that it can also be applied to Article 4 of the same Protocol. It follows that the *travaux préparatoires* do not preclude extra-territorial application of Article 4 of Protocol No. 4.

175. It remains to be seen, however, whether such an application is justified. To reply to that question, account must be taken of the purpose and meaning of the provision at issue, which must themselves be analysed in the light of the principle, firmly rooted in the Court's case-law, that the Convention is a living instrument which must be interpreted in the light of present-day conditions (see, for example, *Soering*, cited above, § 102; *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *X, Y and Z v. the United Kingdom*, 22 April 1997, *Reports* 1997-II; *V. v. the United Kingdom* [GC], no. 24888/94, § 72, ECHR 1999-IX; and *Matthews v. the United Kingdom* [GC], no. 24833/94, § 39, ECHR 1999-I). Furthermore, it is essential that the Convention is interpreted and applied in a manner which renders the guarantees concrete and effective and not theoretical and illusory (see *Marckx v. Belgium*, 13 June 1979, § 41, Series A no. 31; *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32; *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I; and *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 136, ECHR 2005-XI).

176. A long time has passed since Protocol No. 4 was drafted. Since that time, migratory flows in Europe have continued to intensify, with increasing use being made of the sea, although the interception of migrants on the high seas and their removal to countries of transit or origin are now a means of migratory control, in so far as they constitute tools for States to combat irregular immigration.

The economic crisis and recent social and political changes have had a particular impact on certain regions of Africa and the Middle East, throwing up new challenges for European States in terms of immigration control.

177. The Court has already found that, according to the established case-law of the Commission and of the Court, the purpose of Article 4 of Protocol No. 4 is to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority. If, therefore, Article 4 of Protocol No. 4 were to apply only to collective expulsions from the national territory of the States Parties to the Convention, 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. Article 4 would thus be ineffective in practice with regard to such situations, which, however, are on the increase. The consequence of that would be that migrants having taken to the sea, often risking their lives, and not having managed to reach the borders of a State, would not be entitled to an examination of their personal circumstances before being expelled, unlike those travelling by land.

178. It is therefore clear that, while the notion of "jurisdiction" is principally territorial and is presumed to be exercised on the national territory of States (see paragraph 71 above), the notion of expulsion is also principally territorial, in the sense that expulsions are most often conducted from national territory. Where, however, as in the instant case, the Court has found that a Contracting State has, exceptionally, exercised its jurisdiction outside its national territory, it does not see any obstacle to accepting that the exercise of extraterritorial jurisdiction by that State took the form of collective expulsion. To conclude otherwise, and to afford that last notion a strictly territorial scope, would result in a discrepancy between the scope of application of the Convention as such and that of Article 4 of Protocol No. 4, which would go against the principle that the Convention must be interpreted as a whole. Furthermore, as regards the exercise by a State of its jurisdiction on the high seas, the Court has already stated 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 which the States have undertaken to secure to everyone within their jurisdiction (see *Medvedyev and Others*, cited above, § 81).

179. The above considerations do not call into question the right of States to establish their own immigration policies. It must be pointed out, however, that problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State's obligations under the Convention. The Court reiterates in that connection that the provisions of treaties must be interpreted in good faith in the light of the object and purpose of the treaty and in accordance with the principle of effectiveness (see *Mamatkulov and Askarov*, cited above, § 123).

180. 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 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.

181. In the instant case, the Court considers that the operation resulting in the transfer of the applicants to Libya was carried out by the Italian authorities with the intention of preventing the irregular migrants

disembarking on Italian soil. In that connection, it attaches particular weight to the statements given after the events to the Italian press and the State Senate by the Minister of the Interior, in which he explained the importance of the push-back operations on the high seas in combating clandestine immigration and stressed the significant decrease in disembarkations as a result of the operations carried out in May 2009 (see paragraph 13 above).

182. Accordingly, the Court rejects the Government's objection and considers that Article 4 of Protocol No. 4 is applicable in the instant case.

(b) The merits

183. The Court observes that, to date, the *Čonka* case (see judgment cited above) is the only one in which it has found a violation of Article 4 of Protocol No. 4. When examining that case, in order to assess whether or not there had been a collective expulsion, it examined the circumstances of the case and ascertained whether the deportation decisions had taken account of the particular circumstances of the individuals concerned. The Court then stated (§§ 61-63):

> "The Court notes, however, that the detention and deportation orders in issue were made to enforce an order to leave the territory dated 29 September 1999; that order was made solely on the basis of section 7, first paragraph, point (2), of the Aliens Act, and the only reference to the personal circumstances of the applicants was to the fact that their stay in Belgium had exceeded three months. In particular, the document made no reference to their application for asylum or to the decisions of 3 March and 18 June 1999. Admittedly, those decisions had also been accompanied by an order to leave the territory, but by itself, that order did not permit the applicants' arrest. The applicants' arrest was therefore ordered for the first time in a decision of 29 September 1999 on a legal basis unrelated to their requests for asylum, but nonetheless sufficient to entail the implementation of the impugned measures. In those circumstances and in view of the large number of persons of the same origin who suffered the same fate as the applicants, the Court considers that the procedure followed does not enable it to eliminate all doubt that the expulsion might have been collective.
>
> That doubt is reinforced by a series of factors: firstly, prior to the applicants' deportation, the political authorities concerned had announced that there would be operations of that kind and given instructions to the relevant authority for their implementation ...; secondly, all the aliens concerned had been required to attend the police station at the same time; thirdly, the orders served on them requiring them to leave the territory and for their arrest were couched in identical terms; fourthly, it was very difficult for the aliens to contact a lawyer; lastly, the asylum procedure had not been completed.
>
> In short, at no stage in the period between the service of the notice on the aliens to attend the police station and their expulsion did the procedure afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account."

184. In their case-law, the bodies of the Convention have furthermore indicated that the fact that a number of aliens are subject to similar decisions

does not in itself lead to the conclusion that there is a collective expulsion if each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis (see *K.G. v. F.R.G.*, decision cited above; *Andric*, decision cited above; and *Sultani*, cited above, § 81). Lastly, the Court has ruled that there is no violation of Article 4 of Protocol No. 4 if the lack of an expulsion decision made on an individual basis is the consequence of the [applicants'] own culpable conduct (see *Berisha and Haljiti*, decision cited above, and *Dritsas*, decision cited above).

185. In the instant case, the Court can only find that the transfer of the applicants to Libya was carried out without any form of examination of each applicant's individual situation. It has not been disputed that the applicants were not subjected to any identification procedure by the Italian authorities, which restricted themselves to embarking all the intercepted migrants onto military ships and disembarking them on Libyan soil. Moreover, the Court notes that the personnel aboard the military ships were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers.

That is 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.

186. Having regard to the above, the Court concludes that the removal of the applicants was of a collective nature, in breach of Article 4 of Protocol No. 4. Accordingly, there has been a violation of that Article.

VI. ALLEGED VIOLATION OF ARTICLE 13 TAKEN TOGETHER WITH ARTICLE 3 OF THE CONVENTION AND ARTICLE 4 OF PROTOCOL No. 4

187. The applicants complained that they were not afforded an effective remedy under Italian law by which to lodge their complaints under Article 3 of the Convention and Article 4 of Protocol No. 4. They relied on Article 13 of the Convention, which provides:

> "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."

1. The parties' submissions

(a) The applicants

188. The applicants submitted that Italy's interceptions of persons on the high seas were not in accordance with the law and were not subject to a review of their lawfulness by a national authority. For that reason, the

applicants had been deprived of any opportunity of lodging an appeal against their return to Libya and alleging a violation of Article 3 of the Convention and Article 4 of Protocol No. 4.

189. The applicants argued that none of the requirements of the effectiveness of remedies provided for in the Court's case-law had been met by the Italian authorities, which had not even identified the intercepted migrants and had ignored their requests for protection. Furthermore, even if it were to be assumed that they had had the opportunity to voice their request for asylum to the military personnel, they could not have been afforded the procedural guarantees provided by Italian law, such as access to a court, for the simple reason that they were on board ships.

190. The applicants considered that the exercise of territorial sovereignty in connection with immigration policy should in no circumstances give rise to failure to comply with the obligations imposed on States by the Convention, including the obligation to guarantee the right to an effective remedy before a national court to any person falling within their jurisdiction.

(b) The Government

191. The Government submitted that because the events in the instant case had taken place on board ships, it had been impossible to guarantee the applicants the right of access to a national court.

192. At the hearing before the Grand Chamber, they argued that the applicants should have applied to the national courts to obtain recognition and, as the case may be, compensation for the alleged violations of the Convention. According to the Government, the Italian judicial system would have enabled any responsibility on the part of the military personnel who had rescued the applicants to be established both under national and international law.

The Government contended that the applicants to whom the UNHCR had granted refugee status were able to enter Italian territory at any time and to exercise their Convention rights, including the right to apply to the judicial authorities.

(c) Third party interveners

193. The UNHCR stated that the principle of *non-refoulement* involved procedural obligations for States. Furthermore, the right of access to an effective asylum procedure conducted by a competent authority was all the more vital when it involved "mixed" migratory flows, in the framework of which potential asylum seekers must be singled out and distinguished from the other migrants.

194. The Centre for Advice on Individual Rights in Europe (the "Aire Centre"), Amnesty International and the International Federation for Human Rights ("FIDH") considered that the individuals pushed back as a result of

the interception on the high seas did not have access to any remedy in the Contracting State responsible for the operations, much less a remedy capable of meeting the requirements of Article 13. The applicants had neither an adequate opportunity nor the necessary support, notably the assistance of an interpreter, to enable them to set out the reasons militating against their return, not to mention an examination, the rigour of which met the requirements of the Convention. The interveners argued that, when the Contracting Parties to the Convention were involved in interceptions at sea resulting in a push-back, it was their responsibility to ensure that each of the persons concerned had an effective opportunity to challenge his or her return in the light of the rights guaranteed by the Convention and to obtain an examination of his or her application before the return was effected.

The interveners considered that the lack of a remedy allowing for identification of the applicants and an individual assessment of their requests for protection and their needs constituted a serious omission, as did the lack of any follow-up investigation to ascertain the fate of the persons returned.

195. The Columbia Law School Human Rights Clinic asserted that international human rights and refugee law required firstly that a State advise migrants of their right to access protection. Such advice was critical to effecting the State's duty to identify those in need of international protection among interdicted persons. That requirement was heightened for those interdicted at sea because they were particularly unlikely to be familiar with local law and often lacked access to an interpreter or legal advice. Then, each person should be interviewed by the national authorities to obtain an individual decision on his or her application.

2. The Court's assessment

(a) Admissibility

196. The Court reiterates that it joined the Government's objection of failure to exhaust domestic remedies raised at the hearing before the Grand Chamber (see paragraph 62 above) to the examination on the merits of the complaints under Article 13. Furthermore, the Court considers that this part of the application raises complex issues of law and fact which cannot be determined without an examination of the merits. It follows that it is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

(b) Merits

(i) General principles

197. Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured. The effect of that provision is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint. However, the remedy required by Article 13 must be "effective" in practice as well as in law. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI).

198. It results from the Court's case-law that an applicant's complaint alleging that his or her removal to a third State would expose him or her to treatment prohibited under Article 3 of the Convention "must imperatively be subject to close scrutiny by a 'national authority'" (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 448, ECHR 2005-III; see also *Jabari*, cited above, § 39). That principle has led the Court to rule that the notion of "effective remedy" within the meaning of Article 13 taken together with Article 3 requires firstly "independent and rigorous scrutiny" of any complaint made by a person in such a situation, where "there exist substantial grounds for fearing a real risk of treatment contrary to Article 3" and secondly, "the possibility of suspending the implementation of the measure impugned" (see above-cited judgments, § 460 and § 50 respectively).

199. Moreover, in the *Čonka* judgment (cited above, §§ 79 et seq.) the Court stated, in relation to Article 13 taken together with Article 4 of Protocol No. 4, that a remedy did not meet the requirements of the former if it did not have suspensive effect. It pointed out in particular (§ 79):

> "The Court considers that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible ... Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although

> Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision ... .”

200. In view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the Court has ruled that the suspensive effect should also apply to cases in which a State Party decides to remove an alien to a country where there are substantial grounds for believing that he or she faces a risk of that nature (see *Gebremedhin [Geberamadhien] v. France*, no. 25389/05, § 66, ECHR 2007-II, and *M.S.S.*, cited above, § 293).

(ii) Application to the instant case

201. The Court has already concluded that the return of the applicants to Libya amounted to a violation of Article 3 of the Convention and Article 4 of Protocol No. 4. The complaints lodged by the applicants on these points are therefore “arguable” for the purposes of Article 13.

202. The Court has 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). The Government acknowledged that no provision was made for such procedures aboard the military ships onto which the applicants were made to embark. There were neither interpreters nor legal advisers among the personnel on board.

203. The Court observes that the applicants alleged that they were given no information by the Italian military personnel, who had led them to believe that they were being taken to Italy and who had not informed them as to the procedure to be followed to avoid being returned to Libya.

In so far as that circumstance is disputed by the Government, the Court attaches more weight to the applicants’ version because it is corroborated by a very large number of witness statements gathered by the UNHCR, the CPT and Human Rights Watch.

204. The Court has previously found that the lack of access to information is a major obstacle in accessing asylum procedures (see *M.S.S.*, cited above, § 304). It reiterates here the importance of guaranteeing anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints.

205. Having regard to the circumstances of the instant case, the Court considers that the applicants were 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.

206. As regards the Government's argument that the applicants should have availed themselves of the opportunity of applying to the Italian criminal courts upon their arrival in Libya, the Court can only note that, even if such a remedy were accessible in practice, the requirements of Article 13 of the Convention are clearly not met by criminal proceedings brought against military personnel on board the army's ships, in so far as that does not satisfy the criterion of suspensive effect enshrined in the above-cited *Čonka* judgment. The Court reiterates that the requirement flowing from Article 13 that execution of the impugned measure be stayed cannot be considered as a subsidiary measure (see *M.S.S.*, cited above, § 388).

207. The Court concludes that there has been a violation of Article 13 taken together with Article 3 of the Convention and Article 4 of Protocol No. 4. It follows that the applicants cannot be criticised for not having properly exhausted domestic remedies and that the Government's preliminary objection (see paragraph 62 above) must be dismissed.

VII. ARTICLES 46 AND 41 OF THE CONVENTION

A. Article 46 of the Convention

208. Article 46 provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

209. Under Article 46 of the Convention, the High Contracting Parties undertake to abide by the final judgment of the Court in the cases to which they are parties, the Committee of Ministers being responsible for supervising the execution of the judgments. This means that when the Court finds a violation, the respondent State is legally bound not only to pay the interested parties the sums awarded in just satisfaction under Article 41, but also to adopt the necessary general and/or, where applicable, individual measures. As the Court's judgments are essentially declaratory in nature, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in order to discharge its legal obligation under Article 46 of the Convention, provided that those means are compatible with the conclusions contained in the Court's judgment. In certain particular situations, however, the Court may find it useful to indicate to the respondent State the type of measures that might be taken in order to put an end to the – often systemic – situation that gave rise to the finding of a violation (see, for example, *Öcalan v. Turkey* [GC],

no. 46221/99, § 210, ECHR 2005-IV, and *Popov v Russia*, no. 26853/04, § 263, 13 July 2006). Sometimes the nature of the violation found may be such as to leave no real choice as to the measures required (see *Assanidze*, cited above, § 198; *Aleksanyan v. Russia*, no. 46468/06, § 239, 22 December 2008; and *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [GC], no. 32772/02, §§ 85 and 88, 30 June 2009).

210. In the instant case the Court considers it necessary to indicate the individual measures required for the execution of the present judgment, without prejudice to the general measures required to prevent other similar violations in the future (see M.S.S., cited above, § 400).

211. The Court has found, *inter alia*, that the transfer of the applicants exposed them to the risk of being subjected to ill-treatment in Libya and of being arbitrarily repatriated to Somalia and Eritrea. Having regard to the circumstances of the case, the Court considers that the Italian Government must take all possible steps to obtains assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with Article 3 of the Convention or arbitrarily repatriated.

B. Article 41 of the Convention

212. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

213. The applicants each claimed 15,000 euros (EUR) for the non-pecuniary damage allegedly suffered.

214. The Government opposed that claim, pointing out that the applicants' lives had been saved by virtue of the intervention of the Italian authorities.

215. The Court considers that the applicants must have experienced certain distress for which the Court's findings of violations alone cannot constitute just satisfaction. Having regard to the nature of the violations found in the instant case, the Court considers it equitable to uphold the applicants' claim and awards each of them EUR 15,000 in respect of non-pecuniary damage, to be held by the representatives in trust for the applicants.

C. Costs and expenses

216. The applicants also claimed EUR 1,575.74 for costs and expenses incurred before the Court.

217. The Government challenged that claim.

218. According to the Court's established case-law, an award can be made in respect of costs and expenses only in so far as they have been actually and necessarily incurred by the applicant and are reasonable as to quantum. In the instant case, and having regard to the documents available to it and to its case-law, the Court considers the total amount claimed in respect of the proceedings before the Court to be reasonable and awards that amount to the applicants.

D. Default interest

219. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Decides*, by thirteen votes to four, to strike the application out of its list in so far as it concerns Mr Mohamed Abukar Mohamed and Mr Hasan Shariff Abbirahman;

2. *Decides*, unanimously, not to strike the application out of its list in so far as it concerns the others applicants;

3. *Holds*, unanimously, that the applicants were within the jurisdiction of Italy for the purposes of Article 1 of the Convention;

4. *Joins to the merits*, unanimously, the preliminary objections raised by the Government concerning the non-exhaustion of domestic remedies and the applicants' lack of victim status;

5. *Declares admissible*, unanimously, the complaints under Article 3;

6. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention on account of the fact that the applicants were exposed to the risk of being subjected to ill-treatment in Libya and *rejects* the Government's preliminary objection concerning the applicants' lack of victim status;

7. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention on account of the fact that the applicants were exposed to the risk of being repatriated to Somalia and Eritrea;

8. *Declares admissible*, unanimously, the complaint under Article 4 of Protocol No. 4;

9. *Holds*, unanimously, that there has been a violation of Article 4 of Protocol No. 4;

10. *Declares admissible*, unanimously, the complaint under Article 13 taken together with Article 3 of the Convention and Article 4 of Protocol No. 4;

11. *Holds*, unanimously, that there has been a violation of Article 13 taken together with Article 3 of the Convention and of Article 13 taken together with Article 4 of Protocol No. 4 and *rejects* the Government's preliminary objection concerning the non-exhaustion of domestic remedies;

12. *Holds* unanimously

(a) that the respondent State is to pay the applicants, within three months, the following amounts:

(i) EUR 15,000 (fifteen thousand euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage, which sums are to be held by the representatives in trust for the applicants;

(ii) EUR 1,575.74 (one thousand, five hundred and seventy-five euros and seventy-four cents) in total, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 February 2012 pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'Boyle	Nicolas Bratza
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Pinto de Albuquerque is annexed to this judgment.

N.B.
M.O.B.

LIST OF APPLICANTS

	Name of applicant	Place and date of birth	Applicant's current situation
1.	JAMAA Hirsi Sadik	Somalia, 30 May 1984	Refugee status granted on 25 June 2009 (N. 507-09C00279)
2.	SHEIKH ALI Mohamed	Somalia, 22 January 1979	Refugee status granted on 13 August 2009 (N. 229-09C0002)
3.	HASSAN Moh'b Ali	Somalia, 10 September 1982	Refugee status granted on 25 June 2009 (N. 229-09C00008)
4.	SHEIKH Omar Ahmed	Somalia, 1 January 1993	Refugee status granted on 13 August 2009 (N. 229-09C00010)
5.	ALI Elyas Awes	Somalia, 6 June 1983	Refugee status granted on 13 August 2009 (N. 229-09C00001)
6.	KADIYE Mohammed Abdi	Somalia, 28 March 1988	Refugee status granted on 25 June 2009 (N. 229-09C00011)
7.	HASAN Qadar Abfillzhi	Somalia, 8 July 1978	Refugee status granted on 26 July 2009 (N. 229-09C00003)
8.	SIYAD Abduqadir Ismail	Somalia, 20 July 1976	Refugee status granted on 13 August 2009 (N. 229-09C00006)
9.	ALI Abdigani Abdillahi	Somalia, 1 January 1986	Refugee status granted on 25 June 2009 (N. 229-09C00007)
10.	MOHAMED Mohamed Abukar	Somalia, 27 February 1984	Died on unknown date
11.	ABBIRAHMAN Hasan Shariff	Somalia, date unknown	Died in November 2009
12.	TESRAY Samsom Mlash	Eritrea, date unknown	Whereabouts unknown

13.	HABTEMCHAEL Waldu	Eritrea, 1 January 1971	Refugee status granted on 25 June 2009 (N. 229-08C00311); resident in Switzerland
14.	ZEWEIDI Biniam	Eritrea, 24 April 1973	Resident in Libya
15.	GEBRAY Aman Tsyehansi	Eritrea, 25 June 1978	Resident in Libya
16.	NASRB Mifta	Eritrea, 3 July 1989	Resident in Libya
17.	SALIH Said	Eritrea, 1 January 1977	Resident in Libya
18.	ADMASU Estifanos	Eritrea, date unknown	Whereabouts unknown
19.	TSEGAY Habtom	Eritrea, date unknown	Held at Chucha Detention Camp, Tunisia
20.	BERHANE Ermias	Eritrea, 1 August 1984	Refugee status granted on 25 May 2011; resident in Italy
21.	YOHANNES Roberl Abzighi	Eritrea, 24 February 1985	Refugee status granted on 8 October 2009 (N. 507-09C001346); resident in Benin
22.	KERI Telahun Meherte	Eritrea, date unknown	Whereabouts unknown
23.	KIDANE Hayelom Mogos	Eritrea, 24 February 1974	Refugee status granted on 25 June 2009 (N. 229-09C00015); resident in Switzerland
24.	KIDAN Kiflom Tesfazion	Eritrea, 29 June 1978	Refugee status granted on 25 June 2009 (N. 229-09C00012); resident in Malta

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

The *Hirsi* case is about the international protection of refugees, on the one hand, and the compatibility of immigration and border control policies with international law, on the other hand. The ultimate question in this case is how Europe should recognise that refugees have "the right to have rights", to quote Hannah Arendt[1]. The answer to these extremely sensitive political problems lies in the intersection between international human rights law and international refugee law. Although I agree with the Grand Chamber's judgment, I would like to analyse the present case in the context of a principled and comprehensive approach to these problems which takes account of the intrinsic link between those two fields of international law.

The prohibition of *refoulement* of refugees

Provision is made in international refugee law for the prohibition of *refoulement* of refugees (Article 33 of the 1951 United Nations Convention relating to the Status of Refugees and Article 2 § 3 of the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems), as well as in universal human rights law (Article 3 of the 1984 UN Convention Against Torture and Article 16 § 1 of the 2006 UN International Convention for the Protection of All Persons from Enforced Disappearance) and regional human rights law (Article 22 § 8 of the 1969 American Convention on Human Rights, Article 12 § 3 of the 1981 African Charter of Human Rights and People's Rights, Article 13 § 4 of the 1985 Inter-American Convention to Prevent and Punish Torture and Article 19 § 2 of the 2000 Charter of Fundamental Rights of the European Union). There is no such explicit prohibition in the European Convention on Human Rights, but the principle has been acknowledged by the Court as extending beyond the similar guarantee under international refugee law.

Under the European Convention, a refugee cannot be subjected to *refoulement* to his or her country of origin or any other country where he or

[1]. Hannah Arendt described, like no one else, the mass movement of refugees in the twentieth century, made up of ordinary men and women who fled persecution for religious reasons. "A refugee used to be a person driven to seek refuge because of some act committed or some political opinion held. Well, it is true we have had to seek refuge; but we committed no acts and most of us never dreamt of having radical opinions. With us the meaning of the term "refugee" has changed. Now "refugees" are those of us who have been so unfortunate as to arrive in a new country without means and have to be helped by Refugee Committees." (Hannah Arendt, We Refugees, in The Menorah Journal, 1943, republished in Marc Robinson (ed.), Altogether Elsewhere, Writers on exile, Boston, Faber and Faber, 1994).

she risks incurring serious harm caused by any identified or unidentified person or public or private entity. The act of *refoulement* may consist in expulsion, extradition, deportation, removal, informal transfer, "rendition", rejection, refusal of admission or any other measure which would result in compelling the person to remain in the country of origin. The risk of serious harm may result from foreign aggression, internal armed conflict, extrajudicial death, enforced disappearance, death penalty, torture, inhuman or degrading treatment, forced labour, trafficking in human beings, persecution, trial based on a retroactive penal law or on evidence obtained by torture or inhuman and degrading treatment, or a "flagrant violation" of the essence of any Convention right in the receiving State (direct *refoulement*) or from further delivery of that person by the receiving State to a third State where there is such a risk (indirect *refoulement*)[2].

In fact, the *non-refoulement* obligation can be triggered by a breach or the risk of a breach of the essence of any European Convention right, such as the right to life, the right to physical integrity and the corresponding prohibition of torture and ill-treatment[3] or the "flagrant violation" of the right to fair trial[4], the right to liberty[5], the right to privacy[6] or of any other Convention right[7].

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[2]. The extension of the prohibition to indirect or "chain" *refoulement* has been acknowledged in European human rights law (see *T.I. v. the United Kingdom* (dec.), no. 43844/98, ECHR 2000-III; *Müslim v. Turkey*, no. 53566/99, §§ 72-76, 26 April 2005; and *M.S.S. v. Belgium and Greece*, no. 30696/09, § 286, 21 January 2011), in universal human rights law (see UN Human Rights Committee General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add. 13, para. 12, and Committee Against Torture General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22, 21 November 1997, A/53/44, Annex IX, para. 2, and Korban v. Sweden, Communication No. 88/1997, 16 November 1998, UN doc. CAT/C/21/D/88/1997) and in international refugee law (UN doc. E/1618, E/AC.32/5: the *Ad Hoc* committee reported that the draft article referred "not only to the country of origin but also to other countries where the life or freedom of the refugee would be threatened", and UN doc. A/CONF.2/SR.16 (summary report of the 16th meeting of the conference of plenipotentiaries, 11 July 1951): *refoulement* includes subsequent forcible return from the receiving country to another country where there would be a danger to life and liberty of the refugee, according to a Swedish proposal, which was later withdrawn by the Swedish representative, "stressing, however, that, as the President had also observed, the text of the article should be interpreted as covering at least some of the situations envisaged in that part of the amendment"), and UNHCR, Note on *Non-Refoulement* (EC/SCP/2), 1977, para. 4.

[3]. *Soering v. the United Kingdom*, 7 July 1989, § 88, Series A no. 161, and *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, §. 103, Series A no. 215. This ill-treatment may even include appalling living conditions in the receiving State (*M.S.S. v. Belgium and Greece*, cited above, §§ 366-67).

[4]. *Soering*, cited above, § 113, *Einhorn v. France*, no. 71555/01, § 32, ECHR 2001-XI, and *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 149, ECHR 2010.

[5]. *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, § 233, 7 January 2012, not yet final.

The same standard applies to universal human rights law in the light of the Convention Against Torture[8], the Convention on the Rights of Children[9] and the International Covenant on Civil and Political Rights[10]. In line with this standard, the United Nations General Assembly has already declared that "no one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution"[11], and "No state shall expel, return (*refouler*) or extradite a person to another state where there are

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6. *Bensaid v. the United Kingdom*, no. 44599/98, § 46, ECHR 2001-I; *Boultif v. Switzerland*, no. 54273/00, § 39, ECHR 2001-IX; and *Mawaka v. the Netherlands*, no. 29031/04, § 58, 1 June 2010.

7. See the correct interpretation of the Court's jurisprudence made by the House of Lords in Regina v. Special Adjudicator (Respondent) ex parte Ullah (FC) (Appellant) Do (FC) (Appellant) v. Secretary of State for the Home Department (Respondent), paras. 24 and 69, and, among legal scholars, Jane McAdam, Complementary protection in international refugee law, Oxford, 2007, pp. 171-72, and Goodwin-Gill and McAdam, The refugee in international law, third edition, Oxford, 2007, p. 315.

8. As applied by the UN Committee Against Torture in Balabou Mutombo v. Switzerland, Communication No. 13/1993, 27 April 1994, and Tahir Hussain Khan v. Canada, Communication No. 15/1994, 18 November 1994, and Conclusions and Recommendations: Canada, CAT/C/CR/34/CAN, 7 July 2005, para. 4.a), that criticised "the failure of the Supreme Court of Canada, in Suresh v. Minister of Citizenship and Immigration, to recognize at the level of domestic law the absolute nature of the protection of Article 3 of the Convention, which is not subject to any exception whatsoever".

9. As interpreted by the UN Committee on the Rights of Children in its General Comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, UN doc. CRC/GC/2005/6, 1 September 2005, para. 27: "States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under Articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed…"

10. As applied by the UN Human Rights Committee in ARJ v Australia, Communication No. 692/1996, 11 August 1997, para. 6.9 ("If a state party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that state party itself may be in violation of the Covenant"), confirmed by Judge v. Canada, Communication No. 829/1998, 5 August 2003, paras. 10.4-10.6, regarding the risk of being submitted to the death penalty in the receiving State. On another occasion, the same body concluded that "in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise" (UN Human Rights Committee General Comment No. 15 (1986), para. 5, reiterated in General Comment No. 19, 1990, para. 5, with regard to family life, and in General Comment No. 20, 1992, para. 9, with regard to torture or cruel, inhuman or degrading treatment or punishment.

11. Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions, ESC resolution 1989/65, 24 May 1989, endorsed by the UNGA resolution 44/162, 15 December 1989, para. 5.

substantial grounds to believe that he would be in danger of enforced disappearance"[12].

Although the concept of refugee contained in Article 33 of the United Nations Refugee Convention is less extensive than the one under international human rights law, international refugee law has evolved by assimilating the broader human rights standard and thus enlarging the Convention concept of refugee (incorrectly called *de jure* refugees) to other individuals who are in need of complementary international protection (incorrectly called *de facto* refugees). The best examples are Article I § 2 of the Organisation of African Union Convention, Article III § 3 of the 1984 Cartagena Declaration, Article 15 of the Council of the European Union Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted and the Recommendation (2001) 18 of the Committee of Ministers of the Council of Europe on subsidiary protection.

In any case, neither international refugee law nor international human rights law distinguishes the regime applicable to refugees from the one applicable to individuals benefiting from complementary protection. The content of international protection, including the guarantee of *non-refoulement*, is strictly identical for both categories of persons[13]. There is no legitimate reason to protect "*de jure* refugees" better than "*de facto* refugees", since they all share the same need for international protection. Any difference of treatment would result in the creation of a second class of refugees, subject to a discriminatory regime. The same conclusion applies to situations of mass influx of refugees. Groups of refugees cannot be subject to a diminished status based on an "inherent" mass-influx exception to "genuine" refugee status. To provide reduced, subsidiary protection (for example, with less extensive entitlements regarding access to residence permits, employment, social welfare and health care) for people who arrive as part of a mass influx would be unjustified discrimination.

A person does not become a refugee because of recognition, but is recognised because he or she is a refugee[14]. As the determination of refugee

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[12]. Declaration on the Protection of All Persons from Enforced Disappearance, UNGA resolution 47/133, 18 December 1992, Article 8 (1).

[13]. See, for instance, Article VIII (2) of the OAU Convention, conclusions III (3) and (8) of the 1984 Cartagena Declaration on Refugees, OAS/Ser.L/V/II.66, doc.10, rev.1, pp. 190-93, and para. 5 of the Recommendation (2001) 18 of the Committee of Ministers of the Council of Europe. The different approach of the Directive 2004/83/EC is highly problematic for the reasons stated in the above text.

[14]. See Recommendation Rec No. R (84) 1 of the Committee of Ministers of the Council of Europe on the protection of persons satisfying the criteria in the Geneva Convention who

status is merely declaratory, the principle of *non-refoulement* applies to those who have not yet had their status declared (asylum seekers) and even to those who have not expressed their wish to be protected. Consequently, neither the absence of an explicit request for asylum nor the lack of substantiation of the asylum application with sufficient evidence may absolve the State concerned of the *non-refoulement* obligation in regard to any alien in need of international protection[15]. No automatic negative conclusions can be drawn from the lack of an asylum application or the lack of sufficient evidence supporting the asylum application, since the State has a duty to investigate, of its own motion, any situation of need for international protection, especially when, as the Court has stressed, the facts which constitute the risk to the applicant "were well known before the transfer of the applicant and were freely ascertainable from a wide number of sources".

Although the obligation in the UN Refugee Convention is subject to exceptions on national security and public safety grounds, no such exceptions can be found in European human rights law[16], nor in universal human rights law[17]: there is no personal, time or space limit to its application. Thus, it applies even in exceptional circumstances, including in a declared state of emergency.

Since refugee status determination is instrumental in protecting primary human rights, the nature of the prohibition of *refoulement* depends on the nature of the human right being protected by it. When there is a risk of serious harm as a result of foreign aggression, internal armed conflict, extrajudicial death, forced disappearance, death penalty, torture, inhuman or degrading treatment, forced labour, trafficking in human beings, persecution, or trial based on a retroactive penal law or on evidence gathered by torture or inhuman and degrading treatment in the receiving

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are not formally recognized as refugees, and UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, 1979, re-edited 1992, para. 28.

15. *M.S.S. v. Belgium and Greece*, cited above, § 366.

16. *Chahal v. the United Kingdom*, 15 November 1996, §§ 79-80, *Reports of Judgments and Decisions* 1996-V, and in proceedings for the expulsion of a refugee, *Ahmed v. Austria*, 17 December 1996, §§ 40-41, *Reports* 1996-VI.

17. UN Committee Against Torture, Tapia Paez v. Sweden, Communication No. 39/1996, 28 April 1997, CAT/C/18/D/39/1996, para. 14.5, and MBB v. Sweden, Communication No. 104/1998, 5 May 1999, CAT/C/22/D/104/1998, para. 6.4, and UN Human Rights Committee General Comment No. 20: Replaces General Comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7), 10 March 1992, paras. 3 and 9, and General Comment No. 29 on States of Emergency (Article 4), UN doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11, Considerations of reports: Concluding Observations on Canada, UN doc. CCPR/C/79/Add.105, 7 April 1999, para. 13, and Concluding Observations on Canada, UN doc. CCPR/C/CAN/CO/5, 20 April 2006, para. 15.

State, the obligation of *non-refoulement* is an absolute obligation of all States. When there is a risk of a violation of any European Convention right (other than the right to life and physical integrity and the principle of legality in criminal law) in the receiving State, the State may derogate from its duty to provide for international protection, depending on the assessment of the proportionality of the competing values involved. There is an exception to this proportionality test: when the risk of a violation of any European Convention right (other than the right to life and physical integrity and the principle of legality in criminal law) in the receiving State is "flagrant" and the very essence of that right is at stake, the State is unavoidably bound by the obligation of *non-refoulement*.

With this extension and content, the prohibition of *refoulement* is a principle of customary international law, binding on all States, even those not parties to the UN Refugee Convention or any other treaty for the protection of refugees. In addition, it is a rule of *jus cogens*, on account of the fact that no derogation is permitted and of its peremptory nature, since no reservations to it are admitted (Article 53 of the Vienna Convention on the Law of Treaties and Article 42 § 1 of the Refugee Convention and Article VII § 1 of the 1967 Protocol).

This is now the prevailing position in international refugee law as well[18].

Thus, the exceptions provided for in Article 33 § 2 of the UN Refugee Convention cannot be invoked in respect of primary human rights from which no derogation is permitted (right to life and physical integrity and the principle of legality in criminal law). Furthermore, an individual who comes

[18]. See the fundamental Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, UN doc. HCR/MMSP/2001/9, 16 January 2002, para. 4, which noted that "the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law", and UNHCR, "The Principle of *Non-Refoulement* as a Norm of Customary International Law", Response to the Questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, and even more categorical, the 5th conclusion of the 1984 Cartagena Declaration on Refugees, OAS/Ser.L/V/II.66, doc.10, rev.1, pp. 190-93, which affirms that "This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*", reiterated by the 2004 Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America, and, among legal scholars, Lauterpacht and Bethlehem, "The scope and content of the principle of *non-refoulement*: Opinion", in Refugee Protection in International Law, UNHCR's Global Consultation on International Protection, Cambridge, 2003, pp. 87 and 149, Goodwin-Gill and McAdam, cited above, p. 248, Caroline Lantero, Le droit des refugiés entre droits de l'Homme et gestion de l' immigration, Bruxelles, 2010, p. 78, and Kälin/Caroni/Heim, Article 33, para. 1, marginal notes 26-34, in Andreas Zimmermann (ed.), The 1951 Convention relating to the Status of Refugees and its Protocol, A Commentary, Oxford, 2011, pp. 1343-46.

under the ambit of Article 33 § 2 of the Refugee Convention will nevertheless benefit from the protection provided by more generous international human rights law, such as the European Convention on Human Rights. Those exceptions can be applied only with regard to primary human rights, from which derogation is permitted, by those States parties to the Refugee Convention which have not ratified any more generous treaty. Even in that case, the exceptions must be interpreted restrictively and applied only when the particular circumstances of the case and the individual characteristics of the person show that he or she represents a danger to the community or national security[19].

The prohibition of *refoulement* is not limited to the territory of a State, but also applies to extra-territorial State action, including action occurring on the high seas. This is true under international refugee law, as interpreted by the Inter-American Commission on Human Rights[20], the United Nations High Commissioner for Refugees[21], the United Nations General Assembly[22], and the House of Lords[23], and under universal human rights

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[19]. Committee of Ministers of the Council of Europe Recommendation Rec (2005) 6 on exclusion from refugee status in the context of article 1 F of the Convention relating to the Status of Refugees of 28 July 1951. For instance, conclusive (or non-rebuttable) presumptions of dangerousness of a person drawn from the nature of the crimes committed or the gravity of the penalty imposed are arbitrary.

[20]. Haitian Centre for Human Rights et al. US, case 10.675, report No. 51/96, OEA/Ser.L./V/II.95, doc. 7 rev., 13 March 1997, para. 157, stating that there are "no geographical limitations" to *non-refoulement* obligations resulting from Article 33 of the UN Refugee Convention. In para. 163, the Inter-American Commission also concluded that the push-back actions of the US breached Article XXVII of the American Declaration of Human Rights.

[21]. 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, para. 24, and "Background note on the protection of asylum-seekers and refugees at sea", 18 March 2002, para. 18, UN High Commissioner for Refugees responds to US Supreme Court Decision in Sale v. Haitian Centers Council, in International Legal Materials, 32, 1993, p. 1215, and "Brief Amicus Curiae: The Haitian Interdiction case 1993", in International Journal of Refugee Law, 6, 1994, pp. 85-102.

[22]. Declaration on Territorial Asylum, adopted on 14 December 1967, UNGA resolution 2312 (XXII), A/RES/2312(XXII), according to which "No person referred to in article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution."

[23]. Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants), 9 December 2004, para. 26: "There would appear to be general acceptance of the principle that a person who leaves the state of his nationality and applies to the authorities of another state for asylum, whether at the frontier of the second state or from within it, should not be rejected or returned to the first state without appropriate enquiry into the persecution of which he claims to have a well-founded fear." In para. 21, Lord Bingham of Cornhill clearly indicated that he followed the Inter-American Commission's ruling in the Haiti case ("The appellants'

law, as applied by the United Nations Committee Against Torture[24] and the United Nations Human Rights Committee[25].

Renowned international law scholars have followed this approach[26].

The fact that some supreme courts, such as the United States Supreme Court[27] and the High Court of Australia[28], have reached different conclusions is not decisive.

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position differs by an order of magnitude from that of the Haitians, whose plight was considered in *Sale*, above, and whose treatment by the United States authorities was understandably held by the Inter-American Commission of Human Rights (Report No. 51/96, 13 March 1997, para 171) to breach their right to life, liberty and security of their persons as well as the right to asylum protected by article XXVII of the American Declaration of the Rights and Duties of Man, of which the Commission found the United States to be in breach in para 163.", with my underlining).

[24]. Conclusions and Recommendations of the CAT concerning the second report of the USA, CAT/C/USA/CO/2, 2006, paras. 15 and 20, affirming that the state must ensure that the *non-refoulement* obligation is "fully enjoyed by all persons under (its effective control)…wherever located in the world", and in J.H.A. v. Spain, CAT/C/41/D/323/2007 (2008), which found Spain's responsibility engaged with regard to *non-refoulement* obligations where it interdicted sea migrants and conducted extra-territorial refugee status determination.

[25]. General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 2004, para. 12, underlining that a State must respect the principle of *non-refoulement* "for all persons in their territory and all persons under their control", Concluding Observations of the Human Rights Comm.: USA, CCPR/79/Add.50, 1995, para. 284, and Kindler v. Canada, Commentary No. 470/1991, 30 July 1993, para. 6.2, and ARJ v. Australia, Commentary No. 692/1996, 11 August 1997, para. 6.8.

[26]. See, among others, Guy Goodwin-Gill, "The right to seek asylum: interception at sea and the principle of *non-refoulement*", Inaugural Lecture at the Palais des Académies, Brussels, 16 February 2011, p. 2, and The Refugee in International law, Cambridge, 2007, p. 248, Bank, Introduction to Article 11, marginal notes 57-82, in Andreas Zimmermann (ed.), The 1951 Convention relating to the Status of Refugees and its Protocol, A Commentary, Oxford, 2011, pp. 832-41, and in the same book, Kälin/Caroni/Heim on Article 33, marginal notes 86-91, pp. 1361-63, Frelick, "Abundantly clear": *Refoulement*, in Georgetown Immigration Law Journal, 19, 2005, pp. 252 and 253, Hathaway, The Rights of Refugees under International Law, Cambridge, 2005, p. 339, Lauterpacht and Bethlehem, cited above, p. 113, Pallis, "Obligations of the states towards asylum seekers at sea: interactions and conflicts between legal regimes", in International Journal of Refugee Law, 14, 2002, pp. 346-47, Meron, "Extraterritoriality of Human Rights Treaties", in American Journal of International Law, 89, 1995, p. 82, Koht, "The 'Haiti Paradigm' in United States Human Rights Policy", in The Yale Law Journal, vol. 103, 1994, p. 2415, and Helton, "The United States Government Program of Interception and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects", in New York School Journal of Human Rights, vol. 10, 1993, p. 339.

[27]. Sale v. Haitian Centers Council, 509/US 155, 1993, with a powerful dissenting opinion of Justice Blackmun.

It is true that the statement of the Swiss delegate to the conference of plenipotentiaries that the prohibition of *refoulement* did not apply to refugees arriving at the border was supported by other delegates, including the Dutch delegate, who noted that the conference was in agreement with this interpretation[29]. It is also true that Article 33 § 2 of the UN Refugee Convention exempts from the prohibition of *refoulement* a refugee who constitutes a danger to the security of a country "in which he is" and refugees on the high seas are in no country. One might be tempted to construe Article 33 § 1 as containing a similar territorial restriction. If the prohibition of *refoulement* were to apply on the high seas, it would create a special regime for dangerous aliens on the high seas, who would benefit from the prohibition, while dangerous aliens residing in the country would not.

With all due respect, the United States Supreme Court's interpretation contradicts the literal and ordinary meaning of the language of Article 33 of the UN Refugee Convention and departs from the common rules of treaty interpretation. According to Article 31 § 1 of the Vienna Convention on the Law of Treaties, a treaty provision should be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. When the meaning of a treaty is clear from its text when read in the light of its letter, object and purpose, supplementary sources, such as the preparatory works, are unnecessary[30]. The historical supplementary source is even less necessary when it is itself not clear, as in this case, since the *Ad Hoc* Committee responsible for the drafting of the Convention defended the view that the obligation of *non-refoulement* includes refugees who have not yet entered the territory[31], the US representative affirmed during the drafting of Article 33 that it should not matter if the refugee had crossed the border or not[32], the Dutch representative formulated his reservation only in respect of "large groups of

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[28]. Minister for Immigration and Multicultural Affairs v Haji Ibrahim, [2000] HCA 55, 26 October 2000, S157/1999, para. 136, and Minister for Immigration and Multicultural Affairs v Khawar, [2002] HCA 14, 11 April 2002, S128/2001, para. 42.

[29]. See, for the same argument, Robinson, Convention relating to the Status of Refugees: its history, contents and interpretation – A Commentary, New York, 1953, p. 163, and Grahl-Madsen, Commentary on the Refugee Convention 1951 Articles 2-11, 13-37, Geneva, p. 135.

[30]. PCIJ, Interpretation of Article 3 § 2 of the Treaty of Lausanne (Frontier between Turkey and Iraq), Advisory opinion No. 12, 21 November 1925, p. 22, and the Lotus case, 7 September 1927, p. 16, and the ICJ, Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 3 March 1950 – General List No. 9, p. 8.

[31]. UN Doc. E/AC.32/SR.21, paras. 13-26.

[32]. UN Doc.E/AC.32/SR.20, paras. 54-56.

refugees seeking access to its territory" and the president of the conference of plenipotentiaries merely "ruled that the interpretation given by the Netherlands representative should be placed on record", that is, that the possibility of mass migrations across frontiers was considered by the Netherlands not to be covered by Article 33[33].

Unlike other provisions of the UN Refugee Convention, the applicability of Article 33 § 1 does not depend on the presence of a refugee in the territory of a State. The only geographical restriction in Article 33 § 1 refers to the country to which a refugee may be sent, not the place where he or she is sent from. In addition, the French term of *refoulement* includes the removal, transfer, rejection or refusal of admission of a person[34]. The deliberate insertion of the French word in the English version has no other possible meaning than to stress the linguistic equivalence between the verb return and the verb *refouler*. Furthermore, the preamble of the Convention states that it endeavours to "assure refugees the widest possible exercise of these fundamental rights and freedoms" and this purpose is reflected in the text of Article 33 itself through the clear expression "in any manner whatsoever" (*de quelque manière que ce soit*), including all types of State actions to expel, extradite or remove an alien in need of international protection. Lastly, no argument can be drawn from the territorial reference in Article 33 § 2 ("the country in which he is") in support of rejecting the extra-territorial application of Article 33 § 1, because Article 33 § 2 merely provides for an exception to the rule formulated in Article 33 § 1. The scope of application of a rule beneficial to refugees should not be limited by a territorial reference foreseen in the exception to the rule. Such a "spill-over effect" of the detrimental exception to a favourable rule is unacceptable.

According to Article 31 § 1 of the Vienna Convention on the Law of Treaties, a treaty provision should be interpreted in good faith. It is accepted that good faith is not in itself a source of obligations where none would otherwise exist[35], but it does provide an important tool for defining the extension of existing obligations, especially in the face of State actions and omissions which have the effect of circumventing treaty obligations[36]. A State lacks good faith in the implementation of a treaty not only when it infringes, by action or omission, the obligations resulting from the treaty,

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33. UN doc. A/CONF.2/SR.35.

34. Alland and Teitgen-Colly, Traité du droit d'asile, Paris, 2002, p. 229: "L'expression française de 'refoulement' vise à la fois l'éloignement du territoire et la non-admission à l'entrée".

35. ICJ, In re Border and Transborder Armed Actions (Nicaragua v. Honduras), judgment of 22 December 1988, para. 94.

36. See, for example, the reasoning of the Human Rights Committee, in Judge v. Canada, Comm. No. 829/1998, 5 August 2003, para.10.4.

but also when it frustrates the obligations which it has accepted, by obstructing the normal functioning of the treaty guarantee. The forcible impediment of the triggering mechanism of application of a treaty obligation constitutes an obstruction to the treaty itself, contrary to the principle of good faith (the obstruction test). A State also lacks good faith when it engages in conduct outside its territory which would be unacceptable inside in view of its treaty obligations (the double standard test). A double standard policy based on the place where it is executed infringes the treaty obligation, which is binding on the State in question. The application of both tests leads to the conclusion that "push-back" operations performed on high seas, without any assessment of the individual needs for international protection, are unacceptable[37].

One last obstacle to the prohibition of *refoulement* lies in the territory of origin of the asylum seeker. The UN Refugee Convention requires that the individual be outside his or her country of origin, which seems to be incompatible with diplomatic asylum, at least when this concept is interpreted in accordance with the International Court of Justice conservative reasoning in the Asylum case[38]. But the right to seek asylum requires the complementary right to leave one's country to seek asylum. States cannot therefore restrict the right to leave a country and find effective protection outside it[39]. Although no State has a duty to grant diplomatic asylum, the need for international protection is even more pressing in the

[37]. This conclusion is, in fact, in accordance with American policy prior to the 1992 presidential order, since the USA considered the prohibition of *refoulement* applicable to actions undertaken on the high seas (Legomsky, "The USA and the Caribbean Interdiction Programme, in International Journal of Refugee Law, 18, 2006, p. 679). This conclusion also corresponds to actual American policy, since the USA have not only abandoned the said policy of summarily returning sea migrants to Haiti without any individual evaluation of the situation of the asylum seekers, but have themselves criticised that same policy in the "Trafficking in Persons 2010 Report" of the State Department when referring negatively to the Italian push-back practices in the Mediterranean ("Further, the Italian government implemented an accord with the Government of Libya during the reporting period that allowed for Italian authorities to interdict, forcibly return and re-route boat migrants to Libya. According to Amnesty International and Human Rights Watch the government failed to conduct even a cursory screening among these migrants for indications of trafficking").

[38]. The Asylum case (Colombia v Perú), judgment of 20 November 1950 (General List No. 7, 1949–1950): "Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case".

[39]. See Article 17 of the 1889 Treaty on International Penal Law (Treaty of Montevideu), Article 2 of the 1928 Convention fixing the rules to be observed for the granting of asylum (Havana Convention) and Articles 5 and 12 of the 1954 Caracas Convention on Diplomatic Asylum, and, for a comprehensive study, Question of Diplomatic Asylum: Report of the Secretary-General, 22 September 1975, UN doc. A/10139 (Part II), and Denza, Diplomatic Asylum, in Andreas Zimmermann (ed.), The 1951 Convention relating to the Status of Refugees and its Protocol, A Commentary, Oxford, 2011, pp. 1425-40.

case of an asylum seeker who is still in the country where his or her life, physical integrity and liberty are under threat. Proximity to the sources of risk makes it even more necessary to protect those at risk in their own countries. If not international refugee law, at least international human rights law imposes on States a duty to protect in these circumstances and failure to take adequate positive measures of protection will constitute a breach of that law. States cannot turn a blind eye to an evident need for protection. For instance, if a person in danger of being tortured in his or her country asks for asylum in an embassy of a State bound by the European Convention on Human Rights, a visa to enter the territory of that State has to be granted, in order to allow the launching of a proper asylum procedure in the receiving State. This will not be a merely humanitarian response, deriving from the good will and discretion of the State. A positive duty to protect will then arise under Article 3. In other words, a country's visa policy is subject to its obligations under international human rights law. Significant statements to this effect have been made by the Parliamentary Assembly of the Council of Europe[40], the European Committee for the Prevention of Torture[41] and the United Nations High Commissioner for Refugees[42].

This conclusion is also borne out by European history. In fact, there were several remarkable episodes relating to protective visas in Europe during the Second World War. The efforts of the Swedish diplomat Wallenberg and

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[40]. Parliamentary Assembly Recommendation 1236 (1994) on the right of asylum, which does "insist that asylum procedures and visa policies, in particular ones recently changed through national laws or on the basis of European Union treaties, continue to be based on the 1951 Geneva Convention and the Convention for the Protection of Human Rights and Fundamental Freedoms - remembering that the latter also implies obligations vis-à-vis persons who are not necessarily refugees in the sense of the 1951 Geneva Convention - and allow no infringements to be made, especially not of the generally accepted principle of *non-refoulement*, and the prohibition of rejection of asylum seekers at the border".

[41]. 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, para. 29: "The prohibition of *refoulement* extends to all persons who may be within a State's territory or otherwise subject to its jurisdiction. The European Court of Human Rights has recognised a number of specific situations which may give rise to an extraterritorial application of ECHR obligations and engage a State's responsibility in this respect. A State's extraterritorial jurisdiction may be based, in particular, on (a) the activities of the State's diplomatic or consular agents abroad…"

[42]. The UNHCR accepted the applicability of the *non-refoulement* obligation on the territory of another State in its 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, para. 24 ("UNHCR is of the view that the purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be [at] risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State").

others in Budapest and of the Portuguese diplomat Sousa Mendes in Bordeaux and Bayonne are well-known examples and have recently been mentioned as a valid precedent for the establishment of a formal protected entry procedure through diplomatic missions of European Union Member States[43].

It is worth recalling the latter episode: after the invasion of France by Nazi Germany and the surrender of Belgium, thousands of people fled to the south of France and particularly to Bordeaux and Bayonne. Touched by the despair of these people, the Portuguese consul of Bordeaux, Aristides de Sousa Mendes, found himself in a painful dilemma: should he comply with the clear orders of a 1939 governmental circular to refuse any visa to stateless persons, "persons with Nansen passports", "Russians", "Jews expelled from their countries of citizenship or residence" or all those "who were not in a condition to return freely to their countries of origin" or should he follow his conscience and international law, disobey the government's orders and grant these visas. He chose to follow his conscience and international law and granted visas to more than 30,000 people persecuted on grounds of their nationality, religious belief or political affiliation. For that act of disobedience, the consul paid a high price: after being expelled from his diplomatic career, he died alone and in misery and his entire family had to leave Portugal[44].

Had this episode taken place today, the Portuguese diplomat would have acted in full accordance with the standard of protection of the European Convention on Human Rights. Indeed, his action would have been the only acceptable response to those in need of international protection.

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[43]. See the Study on the feasibility of processing asylum claims outside the EU against the background of the common European asylum system and the goal of a common asylum procedure, of the Danish Centre for Human Rights on behalf of the European Commission, 2002, p. 24, Communication from the Commission to the Council and the European Parliament on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin "improving access to durable solutions", Com(2004) 410 final; Comments of the European Council on Refugees and Exiles on the Communication from the Commission to the Council and the European Parliament on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin 'Improving Access to Durable Solutions', CO2/09/2004/ext/PC, and UNHCR Observations on the European Commission Communication "On the Managed Entry in the EU of Persons in Need of International Protection and Enhancement of the Protection Capacity of the Regions of Origin: Improving Access to Durable Solutions", 30 August 2004.

[44]. See, among others, Entry on Aristides de Sousa Mendes, in Encyclopaedia of the Holocaust, Macmillan, New York, 1990, Wheeler, And who is my neighbour? A world war II hero or conscience for Portugal, in Luzo-brasilian Review, vol. 26, 1989, pp. 119-39, Fralon, Aristides de Sousa Mendes – Le Juste de Bordeaux, éd. Mollat, Bordeaux, 1998, and Afonso, "Le "Wallenberg portugais": Aristides de Sousa Mendes, in the *Revue d'histoire de la Shoah*, Le monde juif, No. 165, 1999, pp. 6-28.

The prohibition of collective expulsion

The *non-refoulement* obligation has two procedural consequences: the duty to advise an alien of his or her rights to obtain international protection and the duty to provide for an individual, fair and effective refugee status determination and assessment procedure. Discharging the *non-refoulement* obligation requires an evaluation of the personal risk of harm, which can only take place if aliens have access to a fair and effective procedure by which their cases are considered individually. The two aspects are so intertwined that one could say they are two sides of the same coin. Thus, the collective expulsion of aliens is unacceptable.

The prohibition of collective expulsion of aliens is foreseen in Article 4 of Protocol No. 4 to the European Convention on Human Rights, Article 19 (1) of the Charter of Fundamental Rights of the European Union, Article 12 (5) of the African Charter on Human and People's Rights, Article 22 (9) of the American Convention on Human Rights, Article 26 (2) of the Arab Charter on Human Rights, Article 25 (4) of the Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms and Article 22 (1) of the International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families.

For the refugee status determination procedure to be individual, fair and effective, it must necessarily have at least the following features: (1) a reasonable time-limit in which to submit the asylum application, (2) a personal interview with the asylum applicant before the decision on the application is taken, (3) the opportunity to submit evidence in support of the application and dispute evidence submitted against the application, (4) a fully reasoned written decision by an independent first-instance body, based on the asylum seeker's individual situation and not solely on a general evaluation of his or her country of origin, the asylum seeker having the right to rebut the presumption of safety of any country in his or her regard, (5) a reasonable time-limit in which to appeal against the decision and automatic suspensive effect of an appeal against the first-instance decision, (6) full and speedy judicial review of both the factual and legal grounds of the first-instance decision, and (7) free legal advice and representation and, if necessary, free linguistic assistance at both first and second instance, and unrestricted access to the UNCHR or any other organisation working on behalf of the UNHCR[45].

[45]. See, for the standard of international human rights and refugee law, *Andric v. Sweden*, decision of 23 February 1999, no. 45917/99; *Čonka v. Belgium*, no. 51564/99, §§ 81-83, ECHR 2002-I; *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, §§ 66-67, ECHR 2007-II; *M.S.S. v. Belgium and Greece*, cited above,§§ 301-302 and 388-389; and

These procedural guarantees apply to all asylum seekers regardless of their legal and factual status, as has been recognised in international refugee law[46], universal human rights law[47] and regional human rights law[48].

I.M. v. France, no. 9152/09, § 154, 2 February 2012; 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, para. 27; Recommendation Rec (2003)5 of the Committee of Ministers of the Council of Europe on measures of detention of asylum seekers, Recommendation No. R (98) 13 of the Committee of Ministers on the right of rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Article 3 of the European Convention on Human Rights, Recommendation Rec (81)16 on the harmonisation of national procedures relating to asylum; Recommendation 1327 (1997) of the Parliamentary Assembly of the Council of Europe on the "Protection and reinforcement of the human rights of refugees and asylum seekers in Europe"; Guidelines on human rights protection in the context of accelerated asylum procedures adopted by the Committee of Ministers on 1 July 2009, and Improving Asylum Procedures: Comparative analysis and Recommendations for Law and Practice, Key Findings and Recommendations, A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States, March 2010, and UNHCR Provisional Comments on the Proposal for a Council Directive for Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, 9 November 2004), 10 February 2005; European Council on Refugees and Exiles, Information note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status, IN1/10/2006/EXT/JJ; International Law Commission, sixty-second session, Geneva, 3 May-4 June and 5 July-6 August 2010, Sixth report on expulsion of aliens submitted by Maurice Kamto, Special Rapporteur, Addendum A/CN.4/625/Add.1, and Report of the International Law Commission, sixty-second session, 3 May-4 June and 5 July-6 August 2010, General Assembly, Official Documents, sixty-fifth session, Supplement No. 10 (A/65/10)A/65/10), paras. 135-83; and House of Lords European Union Committee, Handling EU Asylum Claims: New Approaches examined, HL Paper 74, 11th Report of Session 2003-04, and Minimum Standards in Asylum Procedures, HL Paper 59, 11th Report of Session 2000-01.

[46]. Executive Committee of UNHCR Conclusion No. 82 (1997), para. d(iii) and Executive Committee Conclusion No. 85 (1998), para. q); UNHCR, Handbook on Procedures and Criteria of Determining Refugee Status, HCR/IP/4/Eng/Rev.1, 1992, paras. 189-223, and International Law Association, Resolution 6/2002 on Refugee Procedures (Declaration on International Minimum Standards for Refugee Protection), 2002, paras. 1, 5 and 8.

[47]. See the judgment of the International Court of Justice of 30 November 2010 in the Ahmadou Sadio Diallo case, A/CN.4/625, para. 82, in the light of Article 13 of the International Covenant on Civil and Political Rights and Article 12 (4) of the African Charter on Human and People's Rights; UN Committee Against Torture, SH v. Norway, Communication No. 121/1998, 19 April 2000, CAT/C/23/D/121/1998 (2000), para. 7.4, and Falcon Rios v. Canada, Communication No. 133/1999, 17 December 2004, CAT/C/33/D/133/1999, para 7.3, Conclusions and Recommendations: France, CAT/C/FRA/CO/3, 3 April 2006, para. 6, Conclusions and Recommendations: Canada, CAT/C/CR/34/CAN, 7 July 2005, para. 4 (c) and (d), Consideration of Reports Submitted by states Parties under article 19 of the Convention, China, CAT/C/CHN/CO/4, 21 November 2008, para. 18 (D); UN Human Rights Committee, General Comment No. 15: The position of Aliens under the Covenant, 1986, para. 10; UN Committee on the

This conclusion is not prejudiced by the fact that the Court has decided that Article 6 of the European Convention is not applicable to expulsion or asylum procedures[49]. Neither is it prejudiced by the fact that some procedural guarantees in respect of expelled aliens can be found in Article 1 of Protocol No. 7, Article 4 of Protocol 4 and Article 1 of Protocol No. 7 are of the same nature: both are due procedure provisions, but they have substantially different personal scope. The due procedure provision of Article 4 of Protocol No. 4 is of much broader personal scope than the one provided for in Article 1 of Protocol No. 7, since the former includes all aliens regardless of their legal and factual status and the latter includes only aliens lawfully resident in the expelling State[50].

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elimination of racial discrimination, General rec. 30, Discrimination against Non-Citizens, CERD/C/64/Misc.11/rev.3, 2004, para. 26; UN Special Rapporteur on the prevention of discrimination, final report of Mr. David Weissbrodt, E/CN4/Sub2/, 2003, 23, para. 11; and UN Special Rapporteur on the Human Rights of Migrants Mr Jorge Bustamante, Annual report, Doc. A/HRC/7/12, 25 February 2008, para. 64.

[48]. Inter-American Commission, Haitian Centre for Human Rights et al. v. US, case 10.675, para. 163, in view of Article XXVII of the American Declaration of Human Rights, and the judgment of the Court of Justice of the European Union of 28 July 2011, in the Brahim Samba Diouf case (C-69-10), in the light of Article 39 of the Directive 2005/85/CE.

[49]. With regard to the expulsion procedure, see *Maaouia v. France* ([GC], no. 39652/98, ECHR 2000-X), and to the asylum procedure see *Katani v. Germany* ((dec), no. 67679/01, 31 May 2001). Like Judges Loucaides and Traja, I also have serious doubts about the proposition that, on account of the alleged discretionary and public-order element of the decisions taken in these procedures, they are not to be seen as determining the civil rights of the person concerned. I have two major reasons: first, these decisions will necessarily have major repercussions on the alien's private and professional and social life. Second, these decisions are not discretionary at all and do have to comply with international obligations, such as those resulting from the prohibition of *refoulement*. Anyway, the guarantees of the asylum procedure can also be derived from Article 4 of Protocol No. 4 and even from the Convention itself. In fact, the Court has already based its assessment of the fairness of an asylum procedure on Article 3 of the Convention (*Jabari v. Turkey*, no. 40035/98, §§ 39-40, ECHR 2000-VIII,). In addition, the Court has used Article 13 of the Convention to censure the lack of an effective remedy against the rejection of an asylum application (*Chahal*, cited above, § 153, and *Gebremedhin [Gabermadhien]*, cited above, § 66). In other words, the content of the procedural guarantees of the prohibition of *refoulement* derives, ultimately, from those Convention Articles which protect human rights from which no derogation is permitted (such as, for example, Article 3), in conjunction with Article 13, as well as from Article 4 of Protocol No. 4.

[50]. *Čonka*, cited above, where the applicants had at the time of the expulsion already lost their permission to remain and were under an order to leave the country. See also, for the applicability of other regional conventions to aliens not lawfully on the territory, Inter-American Court of Human Rights, Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Dominican Republic, case of Haitian and Haitian-Origin Dominican Persons in the Dominican Republic, order of the court of 18 August 2000, and African Commission on Human and People's Rights, Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia, communication No. 71/92, October 1996, para. 23, and Union Inter-Africaine des Droits de l'Homme et al. v. Angola, communication No. 159/96, 11 November 1997, para. 20.

Having accepted the application of the *non-refoulement* principle to any State action conducted beyond State borders, one must logically go on to conclude that the procedural guarantee of individual evaluation of asylum claims and the ensuing prohibition of collective expulsion are not limited to the land and maritime territory of a State but also apply on the high seas[51].

In fact, neither the letter nor the spirit of Article 4 of Protocol No. 4 indicates that the provision is not applicable extra-territorially. The letter of the provision has no territorial limitation. In addition the provision refers very broadly to aliens, and not to residents, nor even to migrants. The purpose of the provision is to guarantee the right to lodge a claim for asylum which will be individually evaluated, regardless of how the asylum seeker reached the country concerned, be it by land, sea or air, be it legally or illegally. Thus, the spirit of the provision requires a similarly broad interpretation of the notion of collective expulsion which includes any collective operation of extradition, removal, informal transfer, "rendition", rejection, refusal of admission and any other collective measure which would have the effect of compelling an asylum seeker to remain in the country of origin, wherever that operation takes place. The purpose of the provision would be easily frustrated if a State could place a warship on the high seas or at the limit of national territorial waters and proceed to apply a collective and blanket refusal of any refugee claim or even omit any assessment of refugee status. The interpretation of the provision should therefore be consistent with the aim of protecting aliens from being collectively expelled.

In conclusion, the extra-territoriality of the procedural guarantee of Article 4 of Protocol No. 4 of the European Convention on Human Rights is in full accordance with the extra-territorial extension of the same guarantee in international refugee law and universal human rights law.

State liability for human rights breaches during immigration and border control

Immigration and border control is a primary State function and all forms of this control result in the exercise of the State's jurisdiction. Thus, all forms of immigration and border control of a State party to the European Convention on Human Rights are subject to the human rights standard established in it and the scrutiny of the Court[52], regardless of which

[51]. To this effect, see also the Parliamentary Assembly of the Council of Europe Resolution 1821 (2011) 1 on the interception and rescue at sea of asylum seekers, refugees and irregular migrants, paras. 9.3-9.6.

[52]. See the leading judgment of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 59, Series A no. 94.

personnel are used to perform the operations and the place where they take place.

Immigration and border control is usually performed by State officials placed along the border of a country, especially in places of transit of people and goods, such as ports and airports. But it can also be performed by other professionals in other places. In fact, the formal capacity of the State official performing the border control or the fact that he or she carries arms are irrelevant. All representatives, officials, delegates, public employees, police officers, law-enforcement agents, servicemen/women or temporarily contracted civil staff or any member of a private undertaking acting pursuant to statutory authority who perform the function of border control on behalf of a Contracting Party are bound by the Convention standard[53].

It is also immaterial whether the immigration or border control takes place on the land or maritime territory of a State, its diplomatic missions, warships, ships registered in the State or under its effective control, a navy of another State or a facility placed on the territory of another State or a territory leased from another State, as long as the border control is performed on behalf of the Contracting Party[54]. A State cannot evade its treaty obligations in respect of refugees by using the device of changing the place of determination of their status. *A fortiori*, "excision" of a part of the territory of a State from the migration zone in order to avoid the application of general legal guarantees to people arriving at that part of "excised" territory represents a blatant circumvention of a State's obligations under international law[55].

Thus the full range of conceivable immigration and border policies, including denial of entry to territorial waters, denial of visa, denial of pre-clearance embarkation or provision of funds, equipment or staff to immigration control operations performed by other States or international organisations on behalf of the Contracting Party, remain subject to the Convention standard. They all constitute forms of exercise of the State

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[53]. Lauterpacht and Bethlehem, cited above, § 61, and Goodwin and McAdam, cited above, p. 384.

[54]. Lauterpacht and Bethlehem, cited above, para. 67, and Goodwin-Gill, "The right to seek asylum: interception at sea and the principle of *non-refoulement*", Inaugural Lecture at the Palais des Académies, Brussels, 16 February 2011, p. 5, and Goodwin and McAdam, cited above, p. 246.

[55]. See Bernard Ryan, "Extraterritorial immigration control, what role for legal guarantees?", in Bernard Ryan and Valsamis Mitsilegas (eds), Extraterritorial immigration control, legal challenges, Leiden, 2010, pp. 28-30.

function of border control and a manifestation of State jurisdiction, wherever they take place and whoever carries them out[56].

State jurisdiction over immigration and border control naturally implies State liability for any human rights violations occurring during the performance of this control. The applicable rules on international liability for human rights violations are those established in the Articles on State Responsibility for internationally Wrongful Acts, annexed and endorsed by the UNGA Resolution 56/83, 2001[57]. The Contracting Party remains bound by the Convention standard and its responsibility is not diminished by the fact that a non-Contracting Party is also responsible for the same act. For instance, the presence of an agent from a non-Contracting Party on board a warship of a Contracting Party or a navy under the effective control of a Contracting Party does not release the latter from its Convention obligations (Article 8 of the Articles on State Responsibility). On the other hand, the presence of an agent from a Contracting Party on board a warship of a non-contracting party or a navy under the effective control of a non-Contracting Party makes the cooperating Contracting Party responsible for any breaches of the Convention standard (Article 16 of the Articles on State Responsibility).

The violation of the Convention standard by the Italian State

According to the aforementioned principles, the Italian border control operation of "push-back" on the high seas, coupled with the absence of an individual, fair and effective procedure to screen asylum seekers, constitutes

[56]. In para 45 of the case of Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants), the House of Lords recognised that pre-clearance operations actually "purport to exercise governmental authority" over those targeted. Nonetheless, the Lords were not ready to consider the denial of boarding a plane at a foreign airport as an act of *refoulement* in the context of the UN Refugee Convention.

[57]. Nowadays these rules constitute customary international law (ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Serbia and Montenegro, judgment of 26 February 2007, para. 419, and, among legal scholars, McCorquodale and Simons, "Responsibility Beyond Borders: State responsibility for extraterritorial violations by corporations of international human rights law", Modern Law Review, 70, 2007, p. 601, Lauterpacht and Bethlehem, cited above, p. 108, and Crawford and Olleson, "The continuing debate on a UN Convention on State Responsibility", International and Comparative Law Quarterly, 54, 2005, p. 959) and are applicable to human rights violations (Crawford, The International Law Commission's articles on state responsibility: Introduction, text and commentaries, Cambridge, 2002, p. 25 and Gammeltoft-Hansen, "The externalisation of European migration control and the reach of international refugee law", in European Journal of Migration and Law, 2010, p. 8).

a serious breach of the prohibition of collective expulsion of aliens and consequently of the principle of *non-refoulement*[58].

The contested "push-back" action involved the removal of the applicants on board a military vessel of the Italian navy. Traditionally, ships on the high seas are viewed as an extension of the territory of the flag state[59]. This is an irrefutable assertion of international law, which has been enshrined in Article 92 (1) of the United Nations Convention on the Law of the Sea (UNCLOS). This assertion is even more valid in the case of a warship, which is considered, to quote Malcolm Shaw, "a direct arm of the sovereign of the flag State"[60]. Article 4 of the Italian Navigation Code contains that very principle when it states that "Italian vessels on the high seas in places or areas which are not covered by the sovereignty of a State are deemed to be Italian territory". 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.

The respondent Government argued that the push-back actions on the high seas were justified by the law of the seas. Four grounds of justification could be considered: the first one, based on Article 110(1)(d) of the UNCLOS, in conjunction with Article 91, which permits the boarding of vessels without a flag state, like those which commonly transport illegal migrants across the Mediterranean ocean; the second one based on Article 110 (1) (b) of the UNCLOS, which allows ships to board vessels on the high seas if there is a reasonable ground for suspecting that the ship is engaged in the slave trade, this ground being extendable to victims of trafficking, in view of the analogy between these forms of trade[61]; the third one, based on Article 8 (2) and (7) of the Protocol against Smuggling of Migrants by land, sea and air, Supplementing the United Nations Convention against

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58. The same conclusion was reached by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), in its Report to the Italian Government on the visit to Italy from 27 to 31 July 2009, para. 48.

59. See the Permanent Court of International Justice Lotus judgment (France v. Turkey), judgment of 27 September 1927, para. 65, were the Court clearly stated: "A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority, upon it, and no other State may do so…It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies.".

60. Shaw, International Law, Fifth Edition, Cambridge, p. 495.

61. Report of the working group on contemporary forms of slavery, UN Doc E/CN.4/Sub.2/1998/14, 6 July 1998, rec. 97, and Report of the working group on contemporary forms of slavery, UN Doc E/CN.4/Sub.2/2004/36, 20 July 2004, rec. 19-31.

Transnational Organized Crime, which allows States to intercept and take appropriate measures against vessels reasonably suspected of migrant smuggling; and the fourth one founded on the duty to render assistance to persons in danger or in distress on the high seas foreseen in Article 98 of the UNCLOS. In all these circumstances States are simultaneously subject to the prohibition of *refoulement*. None of these provisions can reasonably be invoked in order to justify an exception to the *non-refoulement* obligation and, consequently, to the prohibition of collective expulsion. Only a misconstruction of these norms, which aim to secure the protection of especially vulnerable persons (victims of trafficking, illegal migrants, persons in danger or in distress on the high seas) could justify the exposure of these persons to an additional risk of ill-treatment by delivering them to those countries from where they have fled. As the French representative, Mr Juvigny, said at the *Ad Hoc* Committee while discussing the draft of the Refugee Convention, "There was no worse catastrophe for an individual who had succeeded after many vicissitudes in leaving a country where he was being persecuted than to be returned to that country, quite apart from the reprisals awaiting him there"[62].

If there were ever a case where concrete measures for execution should be set by the Court, this is one. The Court considers that the Italian Government must take steps to obtain assurances from the Libyan Government that the applicants will not be subjected to treatment incompatible with the Convention, including indirect *refoulement*. This is not enough. The Italian Government also have a positive obligation to provide the applicants with practical and effective access to an asylum procedure in Italy.

The words of Justice Blackmun are so inspiring that they should not be forgotten. Refugees attempting to escape Africa do not claim a right of admission to Europe. They demand only that Europe, the cradle of human rights idealism and the birthplace of the rule of law, cease closing its doors to people in despair who have fled from arbitrariness and brutality. That is a very modest plea, vindicated by the European Convention on Human Rights. "We should not close our ears to it."

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[62]. UN doc. E/AC.32/SR.40