



**Submission by the Office of the United Nations High Commissioner for Refugees
in the Case of**

***Hirsi and Others v. Italy* (Application no. 27765/09)**

1. Introduction*

1.1 By letter of 21 December 2009, the European Court of Human Rights (“the Court”) granted the request of the Office of the United Nations High Commissioner for Refugees (“UNHCR”) to submit a written intervention as a third party in the case of *Hirsi and Others v. Italy* (Application no. 27765/09). UNHCR welcomes this opportunity, as the present case raises a number of legal issues relating to international protection.

1.2 UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problem of refugees.¹ Paragraph 8 of its Statute confers responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees,² whereas Article 35 of the 1951 Convention relating to the Status of Refugees (“the 1951 Convention”)³ obliges States Parties to cooperate with UNHCR in the exercise of its functions, including in particular to facilitate its duty of supervising the application of the provisions of the 1951 Convention.⁴

1.3 This paper addresses the practice and justification of “push-back” operations by the Italian government (part 2), the conditions for reception and seeking asylum in Libya (part 3) and the extra-territorial scope of the principle of *non-refoulement* and pursuant legal obligations concerning the rescue and interception of people at sea (part 4).

2. Interception and Return at Sea: “Push-back” Practices of Italy

2.1 Italy’s Justification and/or Legal Basis for its “Push-back” Operations

2.1.1 The terminology used by Italian Government officials to describe “push-back” operations has varied,⁵ different legal bases have been provided justifying this policy. In this context, the Italian Government has referred to the general principle of “co-operation between states,”⁶ underlining that all such operations have been carried out in co-operation with and upon request of the Libyan Government. In particular, reference was made to Article 7 of the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime,⁷ inviting States Parties to “co-operate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea in accordance with the international law of the sea”.⁸ Further reference was made by Italy⁹

* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoys under applicable international legal instruments and recognized principles of international law.

¹ *Statute of the Office of the United Nations High Commissioner for Refugees*, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, 1950, para. 1, <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

(unless otherwise indicated, all footnotes in this document were accessed on or after 22 January 2010).

² *Ibid.* para. 8(a).

³ The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, <http://www.unhcr.org/refworld/docid/3be01b964.html>.

⁴ *Ibid.*

⁵ The terms used to describe a “push-back” operation have included “*respingimento*” (non admission at the border) and “*riconsegna*” (handing back).

⁶ Oral information provided by the Minister of Interior, Senato della Repubblica, XVI Legislatura, 214^a seduta pubblica di lunedì 25 maggio 2009, Resoconto. Sommario & stenografico, pp. 1-24, <http://www.senato.it/service/PDF/PDFServer/BGT/00424000.pdf>.

⁷ UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, <http://www.unhcr.org/refworld/docid/479dee062.html>.

⁸ Undersecretary of the Ministry of Interior, Nitto Francesco Palma, at the Chamber of Deputies on 24.11.2009, http://www.interno.it/mininterno/export/sites/default/it/assets/files/17/00116_palma_Soro_n._1-00260.pdf.

⁹ Senato della Repubblica, op. Cit, f/n 6. Also, Undersecretary of the Ministry of Interior, Nitto Francesco Palma, at the Chamber of Deputies on 24.11.2009 http://www.interno.it/mininterno/export/sites/default/it/assets/files/17/00116_palma_Soro_n._1-00260.pdf.

to Article 8 of the above-mentioned Protocol allowing States Parties to board and search a vessel that is without nationality, where there are reasonable grounds to suspect that the vessel is engaged in the smuggling of migrants by sea.¹⁰ If evidence confirming the suspicion is found, appropriate measures may be taken in accordance with relevant domestic and international law.¹¹

2.1.2 Neither the general principle of “co-operation between states” nor the abovementioned Protocol against the Smuggling of Migrants by Land, Sea and Air exempt states from complying with other international standards or treaty obligations. In fact, the above-mentioned Protocol requires States Parties to act in accordance with international law, including human rights law, when boarding and searching vessels without a flag.¹² Moreover, regard must be given to the general “saving clause” contained in Article 19 of the Protocol in which explicit reference is made to the 1951 Convention/1967 Protocol and the principle of *non-refoulement* contained therein.¹³

2.1.3 As a further legal basis for this policy, the Italian government has invoked the Co-operation Protocol, signed with Libya on 29 December 2007 and its implementing protocol of 4 February 2009,¹⁴ as well as the Treaty on Friendship, Partnership and Co-operation with Libya of 30 August 2008 (ratified by Law n. 7 of 6 February 2009), which provides in Article 19 for an “intensification of the ongoing co-operation in the context of the fight against terrorism, organized crime, drug trafficking and clandestine migration”.¹⁵ The Treaty and Protocols do not define the categories of persons to be re-admitted or delineate the modalities of re-admission and lack specific safeguards for persons in need of international protection. Bilateral agreements between Italy and Libya do not take precedence over multilateral treaty obligations.

2.1.4 UNHCR cannot establish with certainty whether the “push-back” operations concerned the rescue of the persons in question, or whether they were intercepted, independently of any distress calls or rescue situation, for the purpose of opposing irregular migration.¹⁶

2.1.5 If the Italian “push-back” operations were carried out in the context of border surveillance activities, the Schengen Border Code (SBC) would be applicable. The SBC explicitly recalls states’ obligations under international law, in particular with reference to the principle of *non-refoulement*.¹⁷

2.2 Italy’s “Push-back” Operations

2.2.1 On 6 May 2009, the Italian government, in cooperation with the government of Libya, initiated the so-called “push-back policy” by intercepting people, including those who may be in need of international protection, on the high seas and returning them to Libya. This policy was a departure from the previous

¹⁰ Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, Article 8(7).

¹¹ *Ibid.*

¹² The principle of *non-refoulement* is also enshrined in art. 19, par. 1 of the Italian Immigration Consolidated Text/Testo unico immigrazione (Legislative Decree n. 286/98), which reads: “In no case expulsions or rejections may be ordered towards a country in which the foreigner could be subject to persecution for reasons of race, sex, language, citizenship, religion, political opinions, personal or social circumstances, or could risk being sent onwards to another country in which he or she would not be protected from persecution.”

¹³ “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.” UN General Assembly, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, <http://www.unhcr.org/refworld/docid/479dee062.html>.

¹⁴ Senato della Repubblica, XVI Legislatura, 214ª seduta pubblica di lunedì 25 maggio 2009, Resoconto. Sommario & stenografico, pages 1-24. Oral information provided by the Minister of Interior, available at: <http://www.senato.it/service/PDF/PDFServer/BGT/00424000.pdf>.

¹⁵ Senato della Repubblica, op.cit. f/n 6. This Treaty refers to the Co-operation Protocols of 29.12.2007. Reference is also made by Italian officials to the Additional Technical-Operational Protocol of 4.2.2009¹⁵ (which is not a publicly available document).

¹⁶ A decree of the Minister of Interior of 14 July 2003 containing provisions related to illegal immigration foresees the stopping of vessels suspected of being used in the transportation of irregular migrants, also in view of their possible diversion to the ports of departure (art. 7, par. 2), http://www.stranieriinitalia.it/brjguglio/immigrazione-e-asilo/2003/settembre/decreto-mininterno-14-7-03.html#_ftn1.

¹⁷ 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), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0001:0032:EN:PDF>.

practice where Italian naval forces had regularly disembarked such persons in Lampedusa or Sicily.¹⁸ Based on UNHCR's estimates, in 2008 some 75% of sea arrivals in Italy applied for asylum, and 50% of those who applied received some form of protection after their claims were assessed in the Italian asylum procedure.¹⁹

2.2.2 According to the Italian authorities,²⁰ from 6 May to 6 November 2009, a total of nine operations were carried out, returning a total of 834 persons to Libya.²¹ The precise modalities of the operations have not been made public and were not otherwise fully disclosed to UNHCR. However, Italian officials have provided some information to the media and in the Italian Parliament. Furthermore, UNHCR collected information by interviewing a number of witnesses to these "push-back" incidents.

2.2.3 Most of the "push-back" operations appear to have commenced in the Strait of Sicily, within Malta's area of responsibility for search and rescue. The "push-back" operations were carried out by Italian forces belonging to the *Guardia di Finanza* (Tax and Customs Police), the *Marina militare* (Navy) and the *Guardia Costiera* (Coast Guard). While such forces generally report to other Ministries for their main functions, for the purpose of these specific operations, they were coordinated by the Ministry of the Interior. Operational aspects were dealt with by the border unit within the Police Department, the *Polizia di Frontiera*. Based on information available to UNHCR,²² it appears that the Tax and Customs Police played a major role in the operations of 6 May, 18-19 June, 4 July, 29 July, 12-13 August and 30 August. The Italian Navy carried out the operations of 9-10 May (with the vessel "Spica") and 30 June-1 July (with the vessel "Orione"). Together with the Tax and Customs Police, the Italian Coast Guard was involved in the first "push-back" operation of 6 May and 4 July.

2.2.4 As stated by the Undersecretary of the Ministry of the Interior during an official hearing before a Parliamentary Committee,²³ neither an identification process nor an interview of the persons in question was carried out aboard the Italian vessels during the "push-back" operations. It is thus unlikely that any specific inquiry or individual assessment was made on whether such persons would be in need of international protection. While no official information is available from government sources on the nationalities or countries of origin of the persons returned to Libya, UNHCR collected relevant information from the testimonies of persons involved in the incidents, including from those persons taken to Italy or Malta for medical reasons prior to the "push-back". Based on such information, it appears that some "push-back" operations mainly concerned people originating from countries such as Somalia (the 12-13 August and 30 August operations) and Eritrea (the 30 June-1 July operation).²⁴ Other operations saw a prevalence of Nigerian citizens, or involved several nationalities. Children were also involved in some "push-back" operations.²⁵

¹⁸ Since 2006, UNHCR has implemented, together with other agencies, a project called "Praesidium", funded by the EU and the Italian Ministry of Interior, to provide information and assistance to sea arrivals. See *Refugee protection and international migration: a review of UNHCR's operational role in southern Italy – Pre-publication edition*, UNHCR, September 2009, <http://www.unhcr.org/4ac35c600.html>.

¹⁹ One of the declared aims of the "push-back" policy is to avoid tragedies at sea. On 20 August 2009, five persons of Eritrean nationality were rescued by the Italian authorities on a rubber dinghy that had left Libya with 77 others, all of whom remain missing to date. The survivors told UNHCR that they had been sighted by many vessels during their journey that reportedly lasted over twenty days (see *UNHCR shocked by accounts of survivors from boat tragedy in Mediterranean*, UNHCR Briefing Notes, 21 August 2009, <http://www.unhcr.org/4a8e963c9.html>). UNHCR has also observed that after the start of the "push-back" policy, migrants at sea appear to be more reluctant to call for rescue, for fear of being returned to Libya.

²⁰ Under-Secretary of the Ministry of Interior, Nitto Francesco Palma, at the Chamber of Deputies on 24 November 2009, [http://www.interno.it/mininterno/export/sites/default/it/assets/files/17/00116_palma_Soro_n.1-00260.pdf].

²¹ To the best of UNHCR's knowledge, the 9 "push-back" operations involving a total of 834 persons are the following: 6 May 2009 (231 persons), 8 May 2009 (77 persons), 9-10 May 2009 (163 persons), 18-19 June 2009 (72 persons), 30 June-1 July 2009 (82 persons), 4 July 2009 (40 persons), 29 July 2009 (14 persons), 12-13 August 2009 (80 persons), 30 August 2009 (75 persons).

²² This is based on the Italian news agencies (ANSA) reporting on the specific incidents.

²³ See transcript of the session of the *Comitato parlamentare di controllo sull'attuazione dell'accordo di Schengen, di vigilanza sull'attività di Europol, di controllo e vigilanza in materia d'immigrazione*, 22 September 2009, <http://www.camera.it/bicamerale/nychiosco.asp?pagina=/bicamerale/leg16/schengen/home.htm>.

²⁴ In 2007 and 2008, Eritreans and Somalis were among the main groups of persons seeking asylum in Italy. In 2008, of 1,867 decisions that year, 11% of Eritrean asylum-seekers were recognised as 1951 Convention refugees, while 79% were granted subsidiary protection. Concerning Somalis, of some 3,718 decisions in 2008, 9% of Somali asylum-seekers were recognised as 1951 Convention refugees while 87% were granted subsidiary protection. Recognition rates for both nationalities in 2008 were among the highest in Europe. See Total Population of concern to UNHCR: Refugees, asylum-seekers, IDPs, returnees, stateless persons, and others of concern to UNHCR by country/territory of asylum, end-2008, <http://www.unhcr.org/pages/4a0174156.html>.

²⁵ For example, on 30 June-1 July, when UNHCR saw at least six children who were the subject of "push-back" operations in a Libyan detention centre. UNHCR's database confirms that there were 3 Nigerian female unaccompanied minors among the push back cases.

2.2.5 The persons affected by the “push-back” operations were initially transferred from their unseaworthy boats onto the Italian vessels. In some cases they were taken to Libyan territory directly by the Italian authorities (6 May and 30 August 2009). During other operations, they were handed over by the Italian authorities to Libyan patrol boats, the latter operated by joint Libyan and Italian crews as foreseen by the operational Protocol between the two countries on joint patrolling.²⁶

2.2.6 Persons who had been pushed back and detained in Libyan centres or who had subsequently managed to reach Italian territory have reported to UNHCR further details of such operations. A witness told UNHCR that in order to transfer people to the Italian ship, everyone was led to believe they would be taken to Italy. A number of witnesses also told UNHCR that they were placed in handcuffs prior to the hand-over to the Libyan authorities. Witnesses of the 30 June to 1 July and 12-13 August 2009 operations alleged to UNHCR that excessive force was used during the transfers. According to these allegations, as a result of the 30 June-1 July operation, six people from Eritrea reportedly required medical attention once handed over to the Libyan authorities. During the same operation, witnesses further reported that their personal items (documents, money and mobile phones) were seized.²⁷ Eritrean and Somali witnesses reported to UNHCR that they attempted to express and explain to the Italian authorities their fear of returning to Libya, but were nevertheless handed over. Two witnesses of the August operations also reported that several people jumped into the water to escape the hand-over to the Libyan vessel, but that they were eventually recovered by Italian officers who forced them to board the Libyan ship.

3. The Situation and Legal Status of Asylum-seekers and Refugees in Libya: Access to Territory, Access to Procedures, Reception Conditions and Treatment of Children

3.1 Legal and Administrative Framework

3.1.1 Libya has ratified a number of international human rights instruments²⁸ and is party to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the African Charter on Human and Peoples’ Rights. Libya has not acceded to the 1951 Convention or the 1967 Protocol. The Basic People's Congresses, which exercise their authority based on the *Declaration on the Establishment of the Authority of the People of 1977*,²⁹ are designated with sole jurisdiction over the ratification process. Treaties to which Libya accedes, following ratification by the Basic People's Congresses, acquire binding force and take legal precedence over the provisions of domestic legislation. A number of Libya’s international human rights obligations are reflected in subsequently enacted domestic legislation, such as the *Great Green Charter of Human Rights in the Jamahiriya of 1988*³⁰ and *Law No. 20 for the Promotion of Freedom of 1991 (Law No. 20)*.³¹ Nevertheless, various reports continue to express concern over the implementation of Libya’s international legal obligations, in particular as related to civil and political rights.³²

²⁶ See “Protocollo tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista”. http://www.ilvelino.it/archivio/documenti/allegato_documento_621.pdf and “Protocollo aggiuntivo tecnico-operativo al protocollo di cooperazione tra la Repubblica Italiana e la Gran Giamahiria Araba Libica Popolare Socialista, per fronteggiare il fenomeno dell’immigrazione clandestina”, http://www.ilvelino.it/archivio/documenti/allegato_documento_622.pdf.

²⁷ See *UNHCR interviews asylum seekers pushed back to Libya*, UNHCR Briefing Notes, 14 July 2009, <http://www.unhcr.org/4a5c638b6.html>.

²⁸ Those include: the International Convention on the Elimination of All Forms of Racial Discrimination (in 1969), the International Covenant on Economic, Social and Cultural Rights (1976), the International Covenant on Civil and Political Rights (1976), Convention on the Elimination of All Forms of Discrimination against Women (1989), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1989) and Convention on the Rights of the Child (1993). In 2004, Libya also signed the International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. Libya has also acceded to the United Nations Convention against Transnational Organized Crime, and its two Protocols on migrant smuggling and human trafficking.

²⁹ Declaration on the Establishment of the Authority of the People [Libyan Arab Jamahiriya], of 1977, <http://www.unhcr.org/refworld/docid/3ae6b4ec14.html>.

³⁰ Great Green Charter of Human Rights of the Jamahiriya Era [Libyan Arab Jamahiriya], 12 June 1988, <http://www.unhcr.org/refworld/docid/3dda540f4.html>. The principles of the Charter are supposed to be incorporated into every law in accordance with the Law No. 5 of 1991 on Implementation of the principles of the Great Green Charter for human rights in the Jamahiriya era. [Libyan Arab Jamahiriya], July 1991, <http://www.unhcr.org/refworld/docid/3defab9f2.html>.

³¹ The Law No. 20 for Endorsement of freedom (1991), <http://www.unhcr.org/refworld/docid/3dda542d4.html>.

³² UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: concluding observations of the Human Rights Committee: Libyan Arab Jamahiriya*, 15 November 2007, CCPR/C/LBY/CO/4, <http://www.unhcr.org/refworld/docid/474aa9ea2.html>.

3.1.2 No domestic asylum legislation has been adopted, and there are no national asylum institutions and processes. References to asylum in existing domestic legislation are made in Article 11 of Libya's *Constitutional Declaration of 1969*,³³ which states that "the extradition of political refugees is prohibited," and in Article 21 of *Law No. 20* which contains a reference to the principle of *non-refoulement*.³⁴ In 2006, the Ministry of Justice established a National Legal Committee, tasked with the drafting of national legislation on asylum. A draft text was prepared at the end of 2007, and UNHCR was invited to provide comments on the conformity of the draft with international standards. While UNHCR's comments were largely incorporated by the drafting committee, no further progress has been made in advancing the bill to the next stage of deliberation and eventual adoption.

3.1.3 In the absence of a national asylum system, all asylum-related activities are carried out exclusively by UNHCR and its partners.³⁵ This includes the examination of any requests for international protection pursuant to UNHCR's mandate. The absence of a cooperation agreement between UNHCR and the Libyan Government formally establishing UNHCR's presence and operations in the country has meant that UNHCR's operating environment remains largely unpredictable, and the execution of its protection functions ad-hoc and unsystematic.³⁶

3.2 Entry into Libya and Access to UNHCR's Refugee Status Determination Procedure

3.2.1 Libya is both a country of destination and transit for many seeking employment or an exit point to Southern Europe. This migratory movement includes persons who have fled their countries for fear of persecution as well as situations of generalized violence resulting in serious and indiscriminate threats to life, physical integrity or freedom and are in need of international protection.³⁷

3.2.2 Entry into Libya is regulated by *Law No. 6, Regulating Entry, Residence and Exit of Foreign Nationals to and from Libya of 1987 (Law No. 6)*.³⁸ The Law prescribes that persons violating Libya's legislative entry provisions are subject to fines and imprisonment of up to three months. It also stipulates the grounds for the deportation of foreign nationals, including entry without a visa and overstay without a valid residence permit. In reality, very few asylum-seekers (primarily Iraqi nationals) enter the country through the airports and other official border entry points with valid documentation. The majority enter the country through irregular means; the most common route for persons fleeing from Sub-Saharan Africa is from Sudan and Chad, across the southern Libyan desert. Others enter from Niger and Mali. In the majority of cases, travel and entry are facilitated by smuggling networks.

3.2.3 The Government's response to irregular entry has been further shaped by an increasing trend of attempted irregular exits from the country through the Mediterranean Sea routes.

3.2.4 The sizeable migrant population, currently estimated at some 1.3 million³⁹, is increasingly perceived by the authorities as a serious problem. Libyan efforts to manage population flows into and

³³ Constitution Proclamation [Libyan Arab Jamahiriya], 11 December 1969, <http://www.unhcr.org/refworld/docid/3ae6b5a24.html>.

³⁴ The Law No. 20 for Promotion of Freedom, (see footnote 4) Article 21: "Great Jamahiriya provides shelter for oppressed people and those struggling for freedom. It is prohibited to extradite to any destination refugees seeking safety in Jamahiriya".

³⁵ UNHCR has been present in Libya since 1991, initially under the auspices of UNDP, and since 2002, independently of UNDP. The Government has not yet agreed to lend any official recognition or status under international law to UNHCR's presence in the country. UNHCR collaborates with a number of Government authorities and NGOs in carrying out its activities that include capacity-building, refugee status determination, seeking access to potential asylum-seekers in detention, screening and profiling of new arrivals to identify persons in need of protection, finding durable solutions for refugees (mainly through resettlement to third countries which are willing to offer places to those refugees identified as being in need of resettlement), and the improvement of conditions in detention centres, as well as some care and maintenance activities for persons of concern. UNHCR in 2009 signed a quadripartite agreement with International Centre for Migration Policy Development (ICMPD), the Italian Refugee Council (CIR) and International Organization for Peace and Relief (IOPCR).

³⁶ The extent of this vulnerability was underscored in a recent note verbale from the Department of International Organization of the General People's Committee for Foreign Liaison and International Cooperation, addressed to the Office of the United Nations Development Programme (UNDP) in Tripoli, questioning in particular: UNHCR's acquisition of an office separate from UNDP, the signing of an agreement on joint humanitarian activities with the International Organization for Migration (IOM), and the issuance of refugee documentation.

³⁷ As at December 2009, there are some 9,000 refugees (which include some 40% Palestinians, 30% Iraqis, 10% Sudanese, 7% Somalis and 6% Eritreans, and 7% others) as well as some 3,700 asylum-seekers (comprising 41% Eritreans, 18% Sudanese, 14% Iraqis, 13% Somalis and 14% other) registered with UNHCR in Libya.

³⁸ See, http://www.globaldetentionproject.org/fileadmin/docs/Libya_Law_No._6_of_1987_EN_1.pdf.

³⁹ UN Development Programme, Arab Human Development Report 2009: Challenges to Human Security in the Arab Countries, July 2009; <http://www.unhcr.org/refworld/docid/4a6f0ad82.html>.

through the country have led to the intensification of border surveillance and a clampdown on smuggling networks. In the absence of national asylum legislation and procedures, asylum-seekers attempting to enter Libya in an irregular manner are considered illegal migrants and subject to detention in “alien holding/accommodation centres” in accordance with the provisions of *Law No. 6*. The same practice was applied to persons caught in the “push-back” movements.

3.2.5 Individuals wishing to apply for asylum in Libya are required to approach UNHCR’s only representation in the country in Tripoli, where their protection needs and status are determined in accordance with UNHCR’s mandate. Given that UNHCR’s presence is currently limited to Tripoli, asylum-seekers caught in the larger migration flows and subsequently detained in other cities may not be able to contact UNHCR, unless encountered by UNHCR in the course of a visit to a detention facility, provided UNHCR is aware of the person’s presence, and access is granted by the authorities.

3.3 Reception and Detention Conditions

3.3.1 Persons considered illegal migrants are detained in “holding/accommodation centres” across the country. While conditions vary from centre to centre, most of those to which UNHCR has been able to have access are of very low standard. They suffer from overcrowding and inadequate sanitation and health facilities. These conditions have been exacerbated by the “push-back” movements, which caused further overcrowding, and a subsequent deterioration of health and sanitation conditions, triggering an increased need for basic, life-saving assistance.⁴⁰

3.3.2 Three witnesses of “push-back” operations interviewed by UNHCR reported that once persons had been handed over to the Libyan authorities and transferred to different detention centres, they suffered regular beatings and ill-treatment. Despite such reports, in the context of discussions over the “push-back” policy, the Italian government has underlined that Libya is a safe country for asylum-seekers and refugees.⁴¹

3.3.3 Although *Law No. 6* provides for a maximum detention sentence of three months for illegal entry, detention periods range from a few months to two years and are often set by arbitrary decisions of the relevant centre’s administration. Since 2008, UNHCR secured the release of some 640 refugees and asylum-seekers from various centres. While UNHCR has recently been granted increased access to the centres (15 centres throughout the country as of October 2009),⁴² such access has been on an ad-hoc basis. Moreover, UNHCR currently does not have access to the border zones in southern Libya, where the majority of asylum-seekers enter the country. This limits UNHCR’s ability to identify those in need of international protection at entry points, where conditions are reported to be extremely poor.⁴³

3.4 Protection from *Refoulement* in Libya

3.4.1 UNHCR has not recorded or documented specific incidents, based on its own observations, of deportations of refugees and asylum-seekers from in Libya over recent years. However, restricted opportunities to observe or receive information about border practices, and other constraints on its activities, mean that UNHCR is not in a position to monitor systematically removals which may take place.

3.4.2 The Libyan and Eritrean governments have reportedly concluded an agreement for the return and re-admission of Eritrean nationals, which may have serious consequences for Eritreans in Libya. Based on the reports about abuse and ill-treatment by the Eritrean government of individuals in particular those

⁴⁰ See also Human Rights Watch, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, 21 September 2009, [1-56432-537-7, http://www.unhcr.org/refworld/docid/4ab87f022.html](http://www.unhcr.org/refworld/docid/4ab87f022.html), para XVI Migrant detention Centres: Conditions and Abuses; and Human Rights Watch, *World Report 2010 – Libya*, 20 January 2010, <http://www.unhcr.org/refworld/docid/4b586ceac.html>, p. 539.

⁴¹ Oral information provided by the Minister of Interior. Senato della Repubblica, XVI Legislatura, 214^a seduta pubblica di lunedì 25 maggio 2009, Resoconto. Sommario & stenografico, pages 1-24, <http://www.senato.it/service/PDF/PDFServer/BGT/00424000.pdf>.

⁴² Misrata, Zleitan, Zawya, Garabuli, Surman, Towisha, Zuwara, Bangalzi, Ajdabia, Sirt, Ben Waleed, Kufra, Sabha, Brak and Gunfoda.

⁴³ See footnote 11, Human Rights Watch, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, 21 September 2009, <http://www.unhcr.org/refworld/docid/4ab87f022.html>.

forcibly returned to Eritrea, UNHCR urges states to exercise caution when considering return of Eritreans to their country of origin.⁴⁴

3.4.3 UNHCR has issued Guidelines⁴⁵ (attached as Annexes 1 and 2) documenting the risks of persecution and other forms of serious harm that continue to threaten many people in both Eritrea and Somalia. Under current circumstances, UNHCR considers that the return of persons seeking international protection from either country (Somalia or Eritrea) to their countries of origin, or to countries through which they may be so returned, is likely to be in breach of the principle of *non-refoulement*.

3.4.4 On two occasions, in February and June 2008, UNHCR was obliged to intervene at both local and central levels to stay reported preparations for the deportation of groups of several hundred Eritreans, including persons registered with UNHCR, from the Misrata centre.⁴⁶ In January 2010, UNHCR was alerted by a number of human rights organizations to reported preparations for deportations of Eritreans from Misrata, Surman, Zawya and Gruble-2 centres. The concerns were triggered by reports of visits to those centres by Eritrean Embassy officials. The approached detainees included both persons registered as mandate refugees, and those not yet screened by UNHCR. Reports further alleged the use of force by detention centre officials in coercing Eritrean nationals to complete forms, believed to be part of the preparation of a forcible return operation. Human Rights Watch subsequently issued a statement expressing concern about the risk of persons with protection needs amongst the group being forcibly returned to Eritrea.⁴⁷ UNHCR, having subsequently secured access to those centres, confirmed that visits by Eritrean Embassy officials had taken place. However, it could not be established from interviews with the centre's detainees and the authorities whether those actions were indeed linked to removal plans. The forms in question were reportedly distributed to verify the detainees' wish to remain in Libya for the purpose of organizing employment (labour) opportunities outside the centres.

3.4.5 While the Libyan government has assured UNHCR that no deportation plans exist for Eritreans, the incidents outlined above demonstrate the unpredictability of an environment characterized by the lack of an established asylum system, and where ad-hoc interventions are often the only means of attempting to offer protection from *refoulement*.

3.5 Post-Recognition Treatment of Refugees

3.5.1 The concept of refugee protection is not commonly understood in Libya and general public opinion does not distinguish refugees from economic migrants. Refugees, particularly those from Sub-Saharan Africa, are often subject to xenophobic attacks and portrayed in the media as responsible for the increase in illegal migration into the country, criminal behaviour and social misconduct.

3.5.2 No formal status is accorded by the government to individuals following their registration as mandate refugees by UNHCR. While their presence is tolerated, it is on the understanding that their stay is temporary. UNHCR's attestation letters are not a guarantee of protection from violations of rights, as holders have been imprisoned for lack of government-issued documentation, and illegal entry into the country. While refugees and asylum-seekers are able to access public education and medical facilities, in the absence of a regularized status, access to accommodation and employment is severely restricted, leaving many vulnerable to abuse and exploitation. Similarly, access to legal remedies is limited, due to the unavailability of legal representation services for refugees and persons seeking asylum, and to the refugee population's fear of exposure and subsequent arrest on grounds of their 'unlawful' entry and stay in the country.

3.6 Availability of Durable Solutions

3.6.1 Voluntary repatriation remains impossible for many refugees in Libya, particularly for Eritreans and Somali, in view of conditions in their countries of origin. The absence of a national asylum framework

⁴⁴ See Annex 1, UN High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea*, April 2009, <http://www.unhcr.org/refworld/docid/49de06122.html>, p. 33..

⁴⁵ *Ibid.*

⁴⁶ See also Amnesty International, *Amnesty International Report 2009 – Eritrea*, 28 May 2009, <http://www.unhcr.org/refworld/docid/4a1fadeec.html>.

⁴⁷ Human Rights Watch, *Libya: Don't Send Eritreans Back to Risk of Torture*, 15 January 2010, <http://www.unhcr.org/refworld/docid/4b5578333b.html>.

in Libya and the fact that no legal status is granted to refugees recognised by UNHCR under its mandate, makes local integration generally difficult in Libya. Resettlement to third countries remains very limited in numbers, as resettlement countries have to date made few places available for resettlement from Libya, although this remains the only available durable solution in the current environment.

3.6.2 The provision of asylum remains a State responsibility. UNHCR considers that Libya does not at this point have either the legal framework or institutional capacity to ensure the protection of asylum-seekers and refugees. The already fragile asylum situation in Libya risks being further exacerbated by the “push-back” practice.⁴⁸

4. Extraterritorial protection from *refoulement*

4.1 The extraterritorial scope of the principle of *non-refoulement* under Article 33 (1) of the 1951 Convention

4.1.1 The obligation of states not to expel or return (*refouler*) a person to territories where his/her life or freedom would be threatened is a cardinal protection principle, most prominently expressed in Article 33 of the 1951 Convention. Article 33 (1) prohibits states from expelling or returning (*refouler*) a refugee in any manner whatsoever to a territory where s/he would be at risk of persecution. The prohibition of *refoulement* applies to all refugees, including those who have not been formally recognised as such, and to asylum-seekers whose status has not yet been determined.⁴⁹

4.1.2 The territorial scope of Article 33 (1) is not explicitly defined in the 1951 Convention. The meaning, purpose and intent of the provision demonstrate, in UNHCR’s view, its extraterritorial application, e.g., to situations where a state acts outside its territory or territorial waters.⁵⁰ Furthermore, the extraterritorial applicability of human rights obligations contained in various instruments supports this position (further detailed below).

4.2 The extraterritorial scope of the principle of *non-refoulement* in human rights law

4.2.1 The complementary and mutually reinforcing nature of international human rights law and international refugee law speak strongly in favour of delineating the same territorial scope for all expressions of the *non-refoulement* principle, whether developed under refugee or human rights law. The extraterritorial applicability of the principle of *non-refoulement* is firmly established in international human rights law. This has been confirmed by the International Court of Justice.⁵¹ The United Nations Human Rights Committee has affirmed that the principle of *non-refoulement* developed under the International

⁴⁸ The establishment of an effective protection system in Libya, would require, among other steps, its accession to the 1951 Convention and the adoption of appropriate asylum legislation, the creation of a competent asylum authority, the improvement of reception and detention conditions for refugees and migrants, as well as ensuring UNHCR’s full access to persons who are or may be seeking international protection, including those held in detention.

⁴⁹ EXCOM, Conclusion No. 6 (XXVIII), 1977, para. (c), EXCOM Conclusion No. 79 (XLVII), 1996, para. (j), EXCOM Conclusion No. 81 (XLVII), 1997, para. (i), <http://www.unhcr.org/pages/49e6e6dd6.html>. See also, Note on International Protection (submitted by the High Commissioner), A/AC.96/815, EXCOM Reports, 31 August 1993, para. 11, <http://www.unhcr.org/refworld/docid/3ae68d5d10.html>

⁵⁰ UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, January 2007, paras. 26-31, <http://www.unhcr.org/refworld/docid/45f17a1a4.html>. See also, UNHCR, *Gene McNary, Commissioner, Immigration and Naturalization Service, et al. (Petitioners) v. Haitian Centers Council, Inc., et al. (Respondents)*, Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Respondents, October 1992, pp. 8-13, <http://www.unhcr.org/refworld/docid/3f336bbc4.html>.

⁵¹ Judgment of the International Court of Justice in *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, (2005) ICJ Gen. List No. 116, 19 December 2005, para. 180, <http://www.icj-cij.org/docket/files/116/10455.pdf>. Also, Advisory Opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, 9 July 2004, <http://www.icj-cij.org/docket/index.php?pr=71&code=mwp&p1=3&p2=4&p3=6&case=131&k=5a>, para. 111, and International Convention of Justice, *Order on the Request for the indication of provisional measures, Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, (2008), ICJ Gen. List No. 140, 15 October 2008, para. 109, <http://www.icj-cij.org/docket/files/140/14809.pdf>.

Covenant on Civil and Political Rights applies in any territory under a State Party's jurisdiction, and to any person within a State Party's actual control, irrespective of his/her physical location.⁵²

4.2.2 Similarly, the United Nations Committee Against Torture found that the prohibition of *refoulement* contained in Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment applies to all people under a State Party's *de facto* control.⁵³ Relevant in this regard is the Committee's view in the case of *J.H.A. v. Spain*,⁵⁴ where the Committee observed that Spain had control over persons on board a vessel from the time the vessel was rescued and throughout the identification and repatriation process that subsequently took place.⁵⁵ The Committee confirmed that the rescued passengers were within the jurisdiction of Spain and that Spain was under the duty to respect the prohibition of *refoulement* entailed in Article 3 of the Convention against Torture.⁵⁶

4.2.3 The concept of jurisdiction is also used in regional human rights instruments to define the territorial scope of their application. The Inter-American Commission on Human Rights⁵⁷ and the European Court of Human Rights⁵⁸ have developed similar interpretations of the concept of jurisdiction as mentioned above.

4.3 The principle of *non-refoulement* in the context of interception and search and rescue operations on the high seas

4.3.1 As stated earlier, the principle of *non-refoulement* applies whenever a state exercises jurisdiction.⁵⁹ Jurisdiction can be based on *de jure* entitlements and/or *de facto* control. *De jure* jurisdiction on the high seas derives from the flag state jurisdiction.⁶⁰ *De facto* jurisdiction on the high seas is established when a state exercises effective control over persons. Whether there is effective control will depend on the circumstances of the particular case.

4.3.2 Where people are intercepted on the high seas, rescued and put on board a vessel of the intercepting state, the intercepting state is exercising *de jure* as well as *de facto* jurisdiction. While *de jure* jurisdiction applies when the people on board a ship are sailing under the flag of the intercepting state, it is also exercised – relevant to the case of “push-backs” – where the intercepting state has taken the persons on board its vessel, bringing them under its full (effective) control. In UNHCR's view, as becomes clear from section 2.2 above, the Italian authorities were in full and effective control of the persons throughout the “push-back” operations until the formal hand-over to the Libyan authorities. Article 4 of the Italian Code of Navigation specifies that Italian ships on the high seas are considered as Italian territory.

⁵² UN Human Rights Committee (HRC), *General comment no. 31 [80], 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. 10, <http://www.unhcr.org/refworld/publisher.HRC.GENERAL..478b26ae2.0.html>. See the decisions of the Human Rights Committee in: *Lopez Burgos v. Uruguay*, U.N. Doc. CCPR/C/13/D/52/1979, 29 July 1981, para. 12.3 and *Celiberti de Casariego v. Uruguay*, U.N. Doc. CCPR/C/13/D/56/1979, 29 July 1981, para. 10.3. See Concluding Observations of the Human Rights Committee, Israel, U.N. Doc. CCPR/C/79/Add.93, 18 August 1998, para. 10 and U.N. Doc. CCPR/CO/78/ISR, 21 August 2003, para. 11. See also, Concluding Observations of the Human Rights Committee, United States of America, U.N. Doc. CCPR/C/79/Add.50, 3 October 1995, para. 284 and U.N. Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 10. The International Court of Justice has confirmed that the ICCPR is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, see the Advisory Opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, 9 July 2004, para. 111.

⁵³ Concluding Observations of the Committee against Torture, United States of America, U.N. Doc. CAT/C/USA/CO/2, 25 July 2006, para. 15. Also, Concluding Observations of the Committee against Torture, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CAT/C.CR/33/3, 10 December 2004, para. 4 (ii) (b), *General Comment No. 2 of the Committee against Torture*, U.N. Doc. CAT/C/GC/2, 24 January 2008, para. 16.

⁵⁴ Decision of the Committee against Torture in *J.H.A. v. Spain*, CAT/C/41/D/323/2007, UN Committee Against Torture (CAT), 21 November 2008, <http://www.unhcr.org/refworld/docid/4a939d542.html>.

⁵⁵ Decision of the Committee against Torture in *J.H.A. v. Spain*, U.N. Doc. CAT/C/41/D/323/2007, 21 November 2008, para. 8.2.

⁵⁶ *Ibid.*

⁵⁷ Inter-American Commission on Human Rights, *Coard et al. v. United States*, Case No. 10.951, Report No. 109/99, 29 September 1999, para. 37.

⁵⁸ *Öcalan v. Turkey (Preliminary Objections)*, Application No. 46221/99, 12 March 2003, para. 93. *Ilascu and Others v. Russia and Moldova*, Application No. 48787/99, 8 July 2004, paras. 382-384. *Issa and Others v. Turkey*, Application No. 31821/96, 16 November 2004, para. 71.

⁵⁹ UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, January 2007, para. 24, <http://www.unhcr.org/refworld/docid/45f17a1a4.html>.

⁶⁰ Article 92 in conjunction with Article 94 of the United Nations Convention on the Law of the Sea, U.N.T.S. 1833, p. 3, which entered into force 16 November 1994.

4.3.3 When jurisdiction on the high seas has been established, the obligations deriving from it in relation to the principle of *non-refoulement* should be examined. The UNHCR's Executive Committee has emphasized the fundamental importance of fully respecting this principle for people at sea,⁶¹ underlining that:

“interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law.”⁶²

4.3.4 In UNHCR's view, the situation in which a state exercises jurisdiction on the high seas over people on board its vessels requires respect for the principle of *non-refoulement*. It follows that states are obliged, inter alia, not to hand over those concerned to the control of a state where they would be at risk of persecution (direct *refoulement*), or from which they would be returned to another country where such a risk exists (indirect *refoulement*). The state exercising jurisdiction needs to ensure that asylum-seekers are able to access fair and effective asylum procedures in order to determine their needs for international protection.

4.3.5 The need to ensure the safety of asylum-seekers and refugees has also been acknowledged by the International Maritime Organization Guidelines on the Treatment of Persons Rescued at Sea.⁶³ According to these Guidelines, disembarkation of asylum-seekers and refugees recovered at sea, in territories where their lives and freedom would be threatened, should be avoided (unless maritime safety requires otherwise).

4.3.6 For interception or rescue operations carried out by EU Member States, UNHCR has clarified that,

“... disembarkation of people rescued in the Search and Rescue (SAR) area of an EU Member State should take place either on the territory of the intercepting/rescuing State or on the territory of the State responsible for the SAR. This will ensure that any asylum-seekers among those intercepted or rescued are able to have access to fair and effective asylum procedures. The disembarkation of such persons in Libya does not provide such an assurance”.⁶⁴

5. Conclusion

5.1 UNHCR considers that the interception of persons on the high seas between Italy and Libya, their transfer from Italian to Libyan custody, and their return to Libya, may be at variance with the principle of *non-refoulement* and in contradiction to Article 3 of the ECHR. By returning persons to Libya without an adequate assessment of their protection needs, the Italian authorities appear not to have sufficiently taken into account the potential risk of *refoulement*, including indirect *refoulement*, and other possible violations of fundamental rights upon return of the affected persons to Libya. The lack of an asylum system in Libya means that there are not sufficient safeguards to ensure that persons in need of international protection will be recognized as such and accorded legal status and associated entitlements that could ensure their rights, including to protection against *refoulement*, are not violated. The risk of chain *refoulement* denying international protection, especially to Eritrea, cannot be excluded.

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⁶¹ EXCOM Conclusion No. 89 (LI), 2000.

⁶² EXCOM Conclusion No. 97 (LIV) 2003, para. (a) (iv).

⁶³ International Maritime Organization (IMO), *Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued At Sea*, 20 May 2004, <http://www.unhcr.org/refworld/docid/432acb464.html>. The IMO Guidelines on the Treatment of Persons Rescued at Sea, which were developed to provide guidance to governments and to shipmasters in implementing recent amendments to the SAR and SOLAS Conventions, clarify that “a place of safety” is a location where rescue operations are considered to terminate and where the survivor's safety or life is no longer threatened and basic needs, such as food, shelter and medical needs, can be met.

⁶⁴ UNHCR, *Letter to His Excellency Mr. Martin Pecina, Minister of the Interior of the Czech Republic*, 28 May 2009.