E U R O P E A N C O U R T O F H U M A N R I G H T S

Application No 27765/09

Hirsi et al

v

Italy

INTERVENER BRIEF FILED ON BEHALF OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS
(Filed pursuant to leave granted by the Court on 4 May 2011)

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Statement of Interest

The United Nations High Commissioner for Human Rights (the High Commissioner) intervenes as a third party in this case, in virtue of her mandate to protect and promote all human rights and to conduct necessary advocacy in that regard. The human rights of migrants have a special place in that mandate, in view of the particular vulnerabilities that migrants endure. The High Commissioner's submissions engage the broader questions of international law and practice that the present case contemplates. Those broader questions of law and policy include the ambit of the human right to protection from collective expulsion in light of Article 4 of Protocol 4 to the European Convention on Human Rights (ECHR), its consistency with developments in international law, as well as the applicability of that rule of protection to acts of States on the high seas. The decision of the Court in those regards is of great interest to the High Commissioner, given the value of the case as judicial precedent, with potential implications for the interpretation and application of the prohibition of collective expulsion under general international law and under the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICMW).

Summary of Submissions

The High Commissioner focuses her submissions on the prohibition of collective expulsion of non-nationals, while expressing her full support for the submissions of the Office of the United Nations High Commissioner for Refugees (UNHCR) on the extraterritorial ambit of the prohibition of *refoulement*.

The prohibition of collective expulsion, as set out in Protocol 4 of the ECHR is also a rule of general international law. It is distinguishable from the principle of *non-refoulement* in that it is inherently a due process right that entitles every non-national to an individualized examination of *all* arguments militating against his or her expulsion in the first place.

All non-nationals enjoy protection from collective expulsion, including those with irregular status. Moreover, the prohibition of collective expulsion applies to the whole territory of the State concerned, including its territorial waters. It also applies, where non-nationals are intercepted on the high seas and brought on a ship registered in the State. A State should not be allowed to evade its human rights obligations merely by advancing its immigration controls to the high seas. The human rights obligations of States must attach to any basis of jurisdiction that warrants a State to intercept non-nationals on the high seas: this is particularly the case as regards the prohibitions of collective expulsion and *refoulement*.

The Court should consider that a policy of pre-emptive interception on the high seas increases the dangers for desperate migrants, asylum-seekers and refugees in terms of capsize or exposure to exploitation by organized criminal groups, as they are impelled to pursue riskier migration routes and means to avoid interception. Push-back operations on the high seas that fail to examine each intercepted person's case on an individualized basis carry further risks (upon expulsion) for refugees, victims of trafficking and unaccompanied minors. They also entail, in their effect, a regime with less rights for migrants coming by sea, mainly from Africa, compared to those who cross land borders and will generally have their case examined on an individual basis by a competent official before a decision about their expulsion is taken.

Introduction

1. International human rights law and the European Convention on Human Rights (ECHR) and its Protocols in particular, impose certain limitations on a State's sovereign freedom to remove a foreign national from its territory.

2. The High Commissioner joins the position that the doctrine of *non-refoulement*, which is also implicit in Article 3 of the ECHR, applies extraterritorially whenever a State exercises jurisdiction over persons, including by intercepting them on the high seas and exercising control over them. The intercepting State is prohibited from handing those intercepted to a State where they would be at risk of persecution, torture or other comparably serious human rights violations. This position is consistent with the Court's position that the Convention applies where persons are intercepted on the high seas by a State Party and brought under the control of that State.[1]

3. Furthermore, the High Commissioner submits, as a central matter, that each person in a group of non-nationals intercepted by a state vessel at sea also enjoys protection against rendering, without his or her consent, to *any* other State, without a prior reasonable and objective examination of the particular circumstances of that particular individual's case. This due process right ensures that all applicable grounds under international law and national law that may negate the expulsion of that particular individual are duly considered, including, *but not limited to* the prohibition of *refoulement*.

4. The United Nations Special Rapporteur on the Human Rights of Migrants shares this view. According to him, all cases of persons involved in the interception of migrants at sea, whether irregular migrants or those involved in the rescue or transport of migrants found to be irregular, should be treated on an individual basis and granted the basic right to due process.[2]

5. Under the ECHR system, the requirement of individualized examination is necessarily implicit in Article 4 of Protocol 4, according to which '[c]ollective expulsion of aliens is prohibited.'[3]

Collective Expulsion is prohibited in International Law

6. The prohibition set out in Article 4 of Protocol 4 to the ECHR is also recognized in other international and regional conventions.[4] It is noted that Article 19(1) of the Charter of Fundamental Rights of the European Union also provides that 'Collective expulsions are prohibited.' Similarly, Article 22(1) ICMW stipulates as follows: 'Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.' Notable also is Article 7(1) of the Draft Articles on Expulsion of Aliens, provisionally adopted by the Drafting Committee of the International Law Commission (ILC) in its ongoing work on the subject.[5]

7. It may therefore be observed that the prohibition of collective expulsion has evolved as a principle of general international law.[6]

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[1] *Medvedyev v. France,* Judgment of 29 March 2010, Appl. No. 3394/03, para. 67 [Eur.Ct. H.R. (Grand Chamber)]. See further *Submission of UNHCR in the Case of Hirsi and Others v. Italy*, pp. 8-10.

[2] Special Rapporteur on the Human Rights of Migrants, Mr. Jorge Bustamante, *Annual Report*, U.N. Doc. A/HRC/7/12, 25 February 2008, para. 64.

[3] *Andric v. Sweden,* Decision of 23 February 1999, Appl. No. 45917/99, para.1 [Eur.Ct.H.R.]

[4] See American Convention on Human Rights, Article 22 (9); Arab Charter on Human Rights, article 26 (2); African Convention on Human and Peoples' Rights, Article 12 (5) [prohibiting mass expulsions aimed at national, racial, ethnic or religious groups]; Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, article 25 (4).

[5] Draft Article 7(1) provides as follows: 'The collective expulsion of aliens, including migrant workers and members of their family, is prohibited. However, a State may expel concomitantly the members of a group of aliens, provided that the expulsion measure is taken after and on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.': Report of the International Law Commission, Fifty-ninth session (7 May-5 June and 9 July-10 August 2007), U.N. Doc. A/62/10, para. 199 (fn. 400); ILC Drafting Committee, *Progress Report on the topic 'Expulsion of Aliens,'* 24 July 2009, available at: http://untreaty.un.org/ilc/guide/9_12.htm

[6] Special Rapporteur on the Human Rights of Migrants, *supra* note 2, at para. 49 (fn. 36); Office of the High Commissioner for Human Rights, 'Discussion Paper on the Expulsion of Aliens', September 2006, available at: http://www2.ohchr.org/english/issues/migration/taskforce/docs/Discussion-paper-expulsions.pdf; Report

There is a distinction between the prohibitions of collective expulsion and refoulement

8. Although both rules may have simultaneous application, as they do in the present case, the prohibition against collective expulsion is distinguishable from the prohibition against *refoulement* under Article 3 of the Convention. The former is essentially a due process requirement that must be considered in its own regard. Any State considering expulsion of a group of non-nationals is required to consider, with due diligence and in good faith, the full range of individual circumstances that may militate against the expulsion of each particular individual in the group. The risk of refoulement is one such consideration among others.

9. Relevant circumstances to be considered include, but are not limited to the following:

- the individual may face a risk of persecution on account of race, nationality, ethnicity, religion, gender, sexual orientation, political persuasion, or analogous grounds, torture or a similarly serious human rights violation: this risk should be assessed as regards either in the initial destination of expulsion (direct *refoulement*) or due to a probability of subsequent secondary expulsion (indirect *refoulement*);
- under the national law of the State considering expulsion, the individual may have a direct, derived or contingent right or privilege of residence or other regular status permitting the individual to stay;[7]
- under national or international law, the individual may enjoy protection against expulsion on the basis of the right to family life;[8]
- the individual may be an unaccompanied minor subject to special protection under international law and typically also national law, which may protect the child against expulsion;[9]
- the individual may be a victim of trafficking subject to special protection under international and national law, entitling him or her to a temporary permission to stay;[10]

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of the International Law Commission, Fifty-ninth session (7 May-5 June and 9 July-10 August 2007), U.N. Doc. A/62/10, para. 239; United Nations Committee on the Elimination of Racial Discrimination, *General Comment 30 on the Rights of Non-Citizens*, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2005), para. 26.

[7] See International Covenant on Civil and Political Rights, art. 13 & Protocol 7 to the ECHR.

[8] With regard to the right to family life, protected inter alia by art. 8 of the ECHR, art. 17 & 23 ICCPR and art. 10 (1) Convention on the Rights of the Child, the United Nations Human Rights Committee has noted that where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered in light of the significance of the State party's reasons for the removal of the person concerned and the degree of hardship the family and its members would encounter as a consequence of such removal. See *Madafferi v. Australia*, CCPR/C/81/D/1011/2001, 26 July 2004, para.9.8. See also art. 19 No. 6 of the Revised European Social Charter and art. 13 of the ILO Migrant Workers (Supplementary Provisions) Convention No. 143 (both ratified by Italy).

[9] On 23 March 2011, for instance, Save the Children reported that within little more than a month, 530 mostly unaccompanied children from Tunisia had arrived on the Italian island of Lampedusa. See http://www.savethechildren.it/IT/Tool/Press/Single?id_press=315&year=2011.
It is to be noted, in this connection, that the United Nations Committee on the Rights of the Child, for instance, has taken the position that States parties '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', and requested states inter alia to 'take into account the particularly serious consequences for children of the insufficient provision of food or health services.' See Committee on the Rights of the Child, *General Comment No.6 on the Treatment of Unaccompanied or Separated Children outside their Country of Origin*, 1 September 2005, para.27.

[10] In Italy, Article 18 of *Legislative Decree n. 286 of 1998 (Immigration Consolidation Act)* establishes that the authorities may grant a special residence permit enabling a non-national to escape from the situation of abuse perpetrated by a criminal organization and to participate in a social assistance and integration program.

- the individual may be fleeing armed conflict or endemic violence and may thus claim temporary protection;[11]
- the individual may have a legal claim preventing expulsion on humanitarian grounds, e.g. due to health conditions or a calamitous natural or human-made disaster, such that precludes immediate return to the individual's country of nationality or country of habitual residence; and
- there may be some other discretionary considerations, recognized by the State in question, that officials may need to take into account when deciding whether to expel a particular individual.

Collective Expulsion is Prohibited on the High Seas

10. The notion of collective expulsion entails the removal of a group of persons from the territory of the expelling State. The European Court has specified in this regard that 'collective expulsion is to be understood as any measure compelling aliens, as a group, *to leave a country*, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.' [Emphasis added.][12] Similarly, Article 7 of the Draft Articles on the Expulsion of Aliens, provisionally adopted by the International Law Commission (ILC), defines the term expulsion as 'the displacement of an individual under constraint beyond the territorial frontier of the expelling State to a State of destination.'[13]

Collective expulsion from territorial waters is forbidden

11. In defining the term territory, the ILC Special Rapporteur on expulsion of aliens explains that 'International Law defines the territory of a state as the land surface and its vertical extensions, which are the subsoil, on the one hand, and the airspace over the subjacent surface, on the other hand... Territory also contains other maritime spaces under a State's sovereignty, such as its internal waters (including estuaries and small bays) and territorial sea, in addition to its superjacent airspace.'[14]

12. This definition implies that a group of non-nationals on a ship enjoy the right not to be subjected to collective expulsion as soon as they enter territorial waters. However, there are readily appreciable methods of legal reasoning by which the prohibition against collective expulsion is extended to the high seas. Those legal methods include the doctrine of the 'floating territory' and the principle of good faith.

Collective expulsion is forbidden from state ships on the high seas

13. One method of legal reasoning by which the prohibition against collective expulsion is extended to the high seas relates to the case of a group of non-nationals, who are to all intents and purposes headed to a particular State, but are intercepted on the high seas by a State ship of the coastal State and then brought onto the intercepting ship. The High Commissioner submits that in this case, the individuals also enjoy protection against collective expulsion from the ship onto the territory of any other State than the flag State without an individualized examination.

The *OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking*, U.N. Doc. E/2002/68/Add.1 (2002), also indicate that States shall provide protection and temporary residence permits to victims and witnesses during legal proceedings (see para. 10 of the Principles).

[11] See, e.g. European Union Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced, art. 2 (c) (i).

[12] *Andric v. Sweden,* Decision of 23 February 1999, Appl. No. 45917/99, para.1 [Eur.Ct.H.R.].

[13] See Draft Article 7 (2), as stated in *Report of the International Law Commission*, *Fifty-ninth session (7 May-5 June and 9 July-10 August 2007)*, U.N. Doc. A/62/10 (2007), para. 199 (fn. 400); ILC Drafting Committee, Progress Report on the topic 'Expulsion of Aliens,' 24 July 2009.

[14] International Law Commission, *Second report on the expulsion of aliens by Mr. Maurice Kamto, Special Rapporteur*, U.N. Doc. A/CN.4/573 (2006), para. 179 [references omitted].

14. The Inter-American Commission on Human Rights was confronted with a similar question in a case brought on behalf of Haitian immigrants, who were intercepted by the United States Coast Guard on the high seas before reaching U.S. territorial waters. The Inter-American Commission did not directly consider the prohibition of collective expulsion under the Inter-American Convention, given that the United States has not yet ratified it. Still, it held that the intercepted persons' right to have their case examined by a Court under the American Declaration of the Rights and Duties of Man had been violated, because they were summarily interdicted and repatriated to Haiti.[15]

15. The European Court has yet to decide on the question whether the prohibition of collective expulsion also protects persons held on a state vessel on the high seas.[16] There is, however, a serviceable foundation in the jurisprudence of the Court to assist in answering that question.

16. In the *Bankovic* case, for instance, the Grand Chamber of the European Court noted that 'recognised instances of the extra-territorial exercise of jurisdiction by a State include 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.'[17] More recently, in the case of *Medvedyev*, the Grand Chamber applied this principle to a case in which a French war ship intercepted on the high seas a vessel suspected of drug trafficking. As the suspects and their vessel had been kept under the full and exclusive control of the soldiers of the intercepting ship from the moment of the interception, the Court considered that the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the ECHR.[18]

17. Hence, the ECHR applies where persons on the high seas are brought under the control of a State Party. It thus follows, in the view of the High Commissioner, that wherever the ECHR territorially applies, each of the rights under the Convention and its Protocols also applies as a matter of presumption.

Ships on the high seas are an extension of the territory of their flag State

18. In the particular case of collective expulsion—a term that has, as noted, a territorial dimension—this presumption finds support in relevant general principles of international law. Notably, according to a long established principle, a ship is regarded as an extension of the territory of its flag State. This principle was clearly stated by the Permanent Court of International Justice in the *Lotus* Case, in which the Permanent Court held 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.'[19] Indeed, Italian Law incorporates this principle in the Italian Code of Navigation, according to which 'Italian ships on the high seas … are considered like Italian territory'.[20]

19. This principle necessarily extends the territorial dimension of a State, for purposes of the rule against collective expulsion, when expulsion is done from on board a vessel registered in the

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[15] *Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997), para. 180 [Inter-Am. Comm.H.R.]. In the same decision the Commission also found the prohibition of non-refoulement applicable to interceptions on the high seas, thereby rejecting the contrary position of the U.S. Supreme Court in *Sale v. Haitian Centers Council* 113 S.Ct. 2549 (1993).

[16] In *Xhavara and others v. Italy and Albania*, Decision of 11 January 2001, Appl. No. 39473/98, which concerned an Italian war ship ramming and sinking a boat with migrants in Albanian waters, the Court rejected as inadmissible claims of collective expulsion as the applicants had only claimed that an Italian Law had *in abstracto* violated Article 4 of Protocol 4, without showing how this personally affected them.

[17] *Bankovic et al v. Belgium et al*, Decision of 12 December 2001, Appl. No. 52207/99, para. 73 [Eur.Ct.HR.]

[18] *Medvedyev v. France,* Judgment of 29 March 2010, Appl. No. 3394/03, para. 67 [Eur.Ct.HR.]

[19] *S.S. Lotus (France v. Turkey)*, Judgment of Sept 27, 1927, para. 65 [Permanent Ct. of Int'l Justice]. See also Article 92 (1) of the United Nations Convention on the Law of the Sea.

[20] Unofficial translation of relevant parts of article 4 of the *Codice della Navigazione* of 30 March 1942, as amended in 2002, which states: '*Navi italiane in alto mare e gli aeromobili italiani in luogo o spaZiO non soggetto alla sovranità di alcuno Stato sono considerati come territorio italiano*.'

expelling State. That is to say, collective expulsion occurring from Italian ships is an action that, in the words of the PCIJ in *Lotus*, 'must be regarded as if it occurred on the territory of the State whose flag the ship flies.'

The principle of good faith prohibits collective expulsion on the high seas

20. Immigration control-related interception operations on the high seas also engage the principle of good faith. That is to say, obligations under the ECHR and its protocols must be fulfilled in good faith.[21]

21. As noted above, a group of non-nationals undoubtedly enjoy protection from collective expulsion once their vessel reaches territorial waters. The State in question must not expel them without an individualized examination of the circumstances of each non-national's case. It is the position of the High Commissioner that a State should not be allowed to circumvent this obligation simply by advancing its interception operations to the high seas. For to allow that is to negate the principle of good faith in the circumstances.

22. Permitting collective push-back policies on the high seas without the safeguard of individualized examination, would establish in effect different sets of protection for different groups of migrants, refugees and asylum-seekers. While people coming by land undoubtedly enjoy protection against collective expulsion without individualized examination as soon as they cross the border and are intercepted, others who use sea routes (in the European context mainly migrants, refugees and asylum-seekers from Africa) would *de facto* no longer enjoy this protection when they are intercepted on the high seas because it is easier to intercept them there.

The principle of good faith is accentuated by absence of jurisdiction for the high seas interceptions

23. The challenge of good faith involved in the effort to evade the prohibition of collective expulsion by advancing immigration control-related interceptions to the high seas, is accentuated by the possible illegality of impeding the freedom of navigation of the migrant vessel on the high seas. The conundrum for the intercepting State appears as follows. In fleeing to the high seas in hopes of escaping the rule against collective expulsion from the territory, the intercepting State runs into the alternate dilemma of possibly illegal exercise of jurisdiction on the high seas. In this regard, the most relevant bases of proper jurisdiction will be discussed next.

United Nations Convention on the Law of the Sea (UNCLOS)

24. According to Article 33 UNCLOS, a state may only assert its jurisdiction for immigration control purposes in its territorial waters and the contiguous zone adjacent to it. Conversely, on the high seas, the principle of free navigation prevails and States only have only very limited licence to intercept vessels not flying their own flag. [22]

25. Exceptionally, Article 110(1)(b) of UNCLOS gives war ships the right to board vessels on the high seas, if there is reasonable ground for suspecting that the ship is engaged in slave trade. This, it is argued, provides a basis to intercept a vessel that may transport victims of trafficking, because trafficking constitutes a contemporary form of the slave trade.[23]

26. It is, however, the position of the High Commissioner that Article 110(1)(b) of UNCLOS does not negate the obligation to examine on an individualized basis the circumstances of each suspected victim of trafficking. Before conveying the suspected victims to the territory of a State other than that of the intercepting State, all those found on board must still be afforded the due process of proper individualized examination of the circumstances of their case, so as to identify potential victims of trafficking in need of the protection contemplated by Article 110(1)(b). It would be

[21] See *Vienna Convention on the Law of Treaties*, Art. 26.
[22] See *Corfu Channel* Case (1949) ICJ Reports p 22. See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (1986) 14 ICJ Reports at pp 111—112.
[23] Efthymios Papastavridis, 'Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law', 36 *Syracuse J. Int'l L. & Com.* 145 (2009), 158-178.

strange indeed for a State to invoke Article 110(1)(b) to enable interception, only to proceed thereafter to collectively expel all those found on board to a foreign soil, thereby re-exposing victims to the risk of further trafficking or exposure to other forms of serious human rights violations. To permit a procedure that involves such a risk is also to permit negation of the principle of good faith required in the interpretation and application of Article 110(1)(b) whose purpose is genuine protection for victims of serious human rights violations such as the slave trade.

Smuggling of Migrants Protocol

27. The same consideration applies, where the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (the Smuggling Protocol) is invoked as a basis of jurisdiction for an interception on the high seas. Indeed, Article 8(2) and article 8(7) of that Protocol permit States Parties, under the prescribed conditions, to intercept and take appropriate actions against vessels reasonably suspected of migrant smuggling.

28. But, an overarching norm of respect for human rights tempers the application of these provisions. This is particularly notable in Article 9, which requires the intercepting state to, *inter alia*, 'ensure the safety and humane treatment of the persons on board'. Also notable is Article 19 of the Smuggling Protocol, according to which nothing in that 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.

29. It is further notable that in its Fundamental Rights Strategy, the European Border Control Agency Frontex recognized from the outset 'that respect and promotion of fundamental rights are unconditional and integral components of effective integrated border management' and that Frontex Joint Operations are to take into account 'the particular situation of persons seeking international protection and the particular circumstances of vulnerable individuals or groups in need of protection or special care (e.g. separated and unaccompanied children, women, victims of trafficking, and persons with medical needs).[24]

30. It is the position of the High Commissioner that comprised in this overarching norm of respect for human rights is the prohibition of collective expulsion (pursuant to Article 4 of Protocol 4 to the ECHR), and; the requirement for an individualized examination of the circumstances of those intercepted to determine whether any individual is in need of particular protection measures on account of his or her own personal circumstances. Given the inherent link between smuggling of migrants and human trafficking, an individualized examination would in particular aim to determine whether any of the presumed subjects of smuggling is in reality a victim of human trafficking in need of special protection, especially from re-exposure to further trafficking upon push-back or push-away to the territory of a State other than that of the intercepting State.

31. Similarly, the overarching norm of respect for human rights would forbid an interception conducted pursuant to the Smuggling Protocol, following which the intercepted migrants are delivered to the territory of a State where they face a reasonable risk of other serious human rights violations in view of their individual circumstances.

Interception for purposes of rescue at sea

32. The High Commissioner accepts that there may be circumstances in which a State intercepts an overcrowded boat of non-nationals on the high seas in pursuance of its duties in international law to render assistance to persons in danger or in distress on the high seas.[25] However, it may not be taken for granted that interceptions on the high seas are always linked to the duty to render assistance. Indeed, such a presumption scarcely stands in the face of a systematic 'push-back'

[24] Frontex, 'Fundamental Rights Strategy', endorsed by the Frontex Management Board on 31 March 2011, first preambular paragraph and para. 14.
[25] See Article 98 of UNCLOS.

immigration policy. Whether the intercepted ship was indeed in distress, is a question of fact in need of careful examination on a case-by-case basis. The intercepting state needs to show that it acted with the intent to rescue, rather than such rescue being only the incidental by-product of an immigration control operation, or a subterfuge calculated to mask such an immigration operation.

33. It is the position of the High Commissioner that an essential consideration in assessing the motive of the acting States is whether the particular incident complied with the requirements of rescue-at-sea operations as stipulated in the International Convention on Maritime Search and Rescue and the International Convention for the Safety of Life at Sea. According to amendments adopted in 2004 (that entered into force in 2006), States need to cooperate and coordinate so that rescued persons are disembarked and delivered to a place of safety.[26] International Maritime Organisation's Guidelines on the Treatment of Persons rescued at Sea define such a place of safety as a 'place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met.'[27] The Guidelines notably further require that 'delivery to a place of safety should take into account the particular circumstances of the case'. The Guidelines also highlight in particular the 'need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea.'[28] In line with these standards, it follows that persons rescued at sea need to be screened individually to determine, whether they face particular safety risks if disembarked in a foreign state, in particular in respect of *refoulement*, re-trafficking or special risks related to their status as unaccompanied minors or persons in need of special medical care.

34. When considering the validity of the argument that targeted interceptions on the high seas constitute rescue-at-sea operations, the Court should also bear in mind that current interception policies increase physical risks for migrants. There are already indications that migrants chose riskier routes to avoid interception and push-back, including by commencing their sea journey much further away from their intended destination and moving at night or in bad weather conditions.[29] Moreover, as noted by the Inter-American Commission on Human Rights, a 'policy of attempting to stop, board and/or tow fully loaded or overloaded crafts in poor conditions on the high seas is inherently a high risk operation which not only jeopardizes many lives, but has resulted in the loss of human life.'[30]

Interception based on Bilateral Agreements

35. State may seek to rely on bilateral agreements concluded with other States to justify interceptions on the high seas. In this respect, it has to be noted that such agreements only operate *inter partes* and cannot justify the interception on the high seas of ships flying either no flag or the flag of a third state.

36. Furthermore, such agreements have to be interpreted in line with other obligations applicable between the parties,[31] which could include the duty to ensure the safe and humane treatment of those intercepted under Article 9 of the Smuggling Protocol, human rights obligations under treaty and customary law and the prohibition of *refoulement* under general international law.

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[26] *International Convention on Maritime Search and Rescue,* as amended, paragraph 3.1.9 (ratified by Italy).
[27] Maritime Safety Committee, *Guidelines on the Treatment of Persons rescued at Sea*, Resolution MSC.167(78) adopted on 20 May 2004, IMO Doc. No. MSC 78/26/Add.2, Annex, para. 6.12: available at: http://www.mardep.gov.hk/en/msnote/pdf/msin0656anx3.pdf.
[28] *Ibid*, para 6.17.
[29] Special Rapporteur on the Human Rights of Migrants, *supra* note 2, at para. 21.
[30] *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997), para. 166.
[31] See *Vienna Convention on the Law of Treaties*, Art. 31 (3) (c).

37. The point of the foregoing review is to highlight a further manner in which the duty of good faith makes it hard for a State to evade the rule against collective expulsion by moving its immigration control operations to the high seas. Such an evasive tactic is fraught with other legal difficulties for the State concerned.

38. In any event, it is the High Commissioner's position that the ultimate service of the rule of good faith as regards respect for human rights is to the effect that human rights law must follow States wherever they go to engage in those types of conduct that human rights norms were precisely designed to control.

Personal Scope of the Prohibition of Collective Expulsion

Applicability to all Non-Nationals, including those with irregular status

39. The High Commissioner is of the position that the right not to be collectively expelled is enjoyed by all non-nationals, including those with irregular status.

40. This emerges from the plain wording of Article 4 of Protocol 4, which refers to 'aliens' without qualifying the term. It is also notable that Article 19(1) of the European Union Charter of Fundamental Rights contains no word of limitation designating which class(es) of non-nationals enjoy(s) protection from collective expulsion. In contrast, the wider safeguards regarding individual expulsion set out by Article 1 of Protocol 7 of the ECHR are specifically reserved only to 'aliens lawfully resident in the territory.' The *travaux preparatoires* to Protocol 4 of the Convention also show that while the original draft of the Assembly foresaw giving alien lawfully resident in the territory a number of specific rights, the Committee of Legal Experts, who developed Protocol 4, specifically expanded the personal scope of the norm to all aliens, while limiting its substantive scope to the prohibition of collective expulsions.[32] Finally, the object and purpose of Article 4 also calls for the inclusion of all aliens, as the norm's purpose is to allow the advancement of and fair hearing to all arguments against their expulsion, not just the fact that they are lawful residents, which would make an expulsion arbitrary in any case.

41. This position is also congruent with international human rights treaties. While the general prohibition of collective expulsion and the concomitant right to individualized examination under Article 22 ICMW applies to all migrants, irrespective of status, the farther reaching right under Article 13 of the International Covenant on Civil and Political Rights is, like those under Article 1 of Protocol 7 to the ECHR, reserved for non-nationals lawfully resident in the territory.

42. The position also finds support in the jurisprudence of the European system for the protection of Human Rights. In the case of *D.S., S.N. and B.T. v. France* (1993), the European Commission on Human Rights considered a claim based on an alleged violation of Article 4 of Protocol to be admissible, despite the fact that France had argued that the applicants were specifically refused entry into France and were kept in the international zone of the airport.[33] The European Court, implicitly confirmed the position that a non-national need not be lawfully resident to enjoy protection from collective expulsion. In *Conka,* it found that the applicants' right not to be subjected to collective expulsion had been violated, even though at the time of the expulsion the applicants no longer had permission to remain and were under an order to leave the country.[34]

43. The High Commissioner notes that the Inter-American Court on Human Rights, the Inter-American Commission and the African Commission on Human and Peoples' Rights have all

[32] See Council of Europe, *Explanatory Report to Protocol No. 4 to the Convention for the Protection of Human Rights*, para. 31 ff., available at: http://conventions.coe.int/treaty/en/reports/html/046.htm.
[33] *D.S., S.N. and B.T. v. France*, Decision of 16 October 1992, Appl. No. 18560/91 [Eur.Comm.H.R.]
[34] *Conka v. Belgium*, Judgment of 5 February 2002 , Appl. No. *5*1564/99.

interpreted the prohibitions of collective and mass expulsion in their respective regional Conventions as applying also to non-nationals not lawfully on the territory.[35]

Victims of collective expulsion do not need to form part of a homogenous group

44. The High Commissioner is further of the position that the prohibition of collective expulsion applies, whenever a number of non-nationals are expelled under the same process without individualized consideration. It is not necessary that the group has unifying characteristics, e.g. all belonging to the same national, racial, ethnic or religious group. Unlike, for instance, the prohibition of mass expulsion under Article 12(5) the African Convention on Human and Peoples' Rights, the plain text of the Article 4 of Protocol 4 to the ECHR does not stipulate such a requirement. The object and purpose of the prohibition of collective expulsion also militates against requiring homogeneity of victims. The danger of unjust decisions that fail to consider individual circumstances is greatest when groups of foreigners are rounded up and expelled who have nothing in common but the fact that they are not nationals of the expelling state.

The right to an individualized examination

45. As noted above, the prohibition of collective expulsion entails a right to a 'reasonable and objective examination of the particular case of each individual alien of the group.'[36] The prohibition of collective expulsion does not ban the expulsion of several people at the same time, as long as 'each person concerned is given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis.'[37] However, the European Court clarified that it is not decisive whether the decision formally appears to be an individual one, but whether factually an individualized examination has taken place.[38]

46. Building on these standards, the High Commissioner submits that the state official that carries out such an individualized examination must be:—able to appreciate the full range of argument that weigh against the expulsion of a particular individual; adequately trained on relevant standards of national and international law; and, in a position to corroborate relevant elements, where necessary. Furthermore, the procedure applied has to be gender sensitive and special measures have to be put in place to allow unaccompanied minors and persons with special needs the opportunity to have their case properly appreciated.

47. Where a group of non-nationals are intercepted at sea, it will therefore generally be impossible to carry out the necessary individualized examination on the intercepting ship with a view to immediately expelling in a proper manner those intercepted.

Geneva, 5 May 2011

Chile Eboe-Osuji

The Legal Advisor to the High Commissioner

[35] *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, [Inter-Am.Ct.H.R.] (on the position of the Inter-American Commission, see the first section of the order, para. 11 a). Afr. Comm.H.R., *Rencontre Africaine pour la Défense des Droits de l'Homme c. Zambia,* communication no. 71/92 (1996), para. 23 ; *Union Inter-Africaine des Droits de l'Homme et al v. Angola,* communication no.159/96 (1997), para. 20.

[36] A*ndric v. Sweden,* application no.45917/99, 23 February 1999, para.1; *Conka v. Belgium*, Judgment of 5 February 2002, Appl. No. *5*1564/99, para. 59.

[37] *Andric v. Sweden,* application no.45917/99, 23 February 1999, para.1 [Eur.Ct.H.R.]; *Conka v. Belgium*, Judgment of 5 February 2002, Appl. No. *5*1564/99, para. 59.

[38] *Conka v. Belgium*, id., para. 56.