



**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 submitted its observations in March 2010. Following the relinquishment of jurisdiction by the competent Chamber to the Grand Chamber on 15 February 2011, the Court informed UNHCR about the possibility to submit new observations. Given the importance of the legal issues raised by the present case as well as a number of developments since March 2010, UNHCR hereby submits an updated intervention which supersedes its initial intervention dated March 2010.

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 submission addresses the practice and justification of “push-back” operations by the Italian government (part 2), the situation and legal status of asylum-seekers and refugees 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 “push-back” operations

2.1.1 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 practice where Italian naval forces had regularly disembarked such persons in Lampedusa or Sicily.⁵ Based on UNHCR’s estimates, in 2008 some 75% of sea arrivals in Italy applied for asylum, and 50% of those

* 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>.

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 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 UNHCR, *Refugee protection and international migration: a review of UNHCR’s operational role in southern Italy – Pre-publication edition*, September 2009, <http://www.unhcr.org/4ac35c600.html>.

who applied received some form of protection after their claims were assessed in the Italian asylum procedure.⁶

2.1.2 According to the Italian authorities,⁷ from 6 May to 6 November 2009, a total of nine operations were carried out, returning a total of 834 persons to Libya.⁸ 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.

2.1.3 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 *Polizia di Frontiera* (border unit within the Police Department). Based on information available to UNHCR,⁹ 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” operations of 6 May and 4 July.

2.1.4 As stated by the Undersecretary of the Ministry of the Interior during an official hearing before a Parliamentary Committee,¹⁰ neither an identification process nor an interview of the persons in question was carried out aboard the Italian vessels during the “push-back” operations.¹¹ It is thus unlikely that any specific inquiry or individual assessment was made on whether such persons would be in need of international protection.¹² Among the persons who were pushed back to Libya, UNHCR was able to interview four persons who subsequently arrived in Italy, all of whom confirmed that they had been seeking protection and claimed they did indicate this expressly, in one way or another, to the Italian authorities during the operations. While no official information is available from Italian 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”, as well as from those interviewed by UNHCR upon their return to Libya. 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)

⁶ 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 Briefing Notes, *UNHCR shocked by accounts of survivors from boat tragedy in Mediterranean*, 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.

⁷ 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.

⁸ 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).

⁹ This is based on the Italian news agencies (ANSA) reporting on the specific incidents.

¹⁰ 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/nochiosco.asp?pagina=/bicamerale/leg16/schengen/home.htm>.

¹¹ European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (CPT), *Report to the Italian Government on the visit to Italy carried out by the CPT from 27 to 31 July 2009*, 28 April 2010, para. 13, <http://www.cpt.coe.int/documents/ita/2010-inf-14-eng.pdf>.

¹² The CPT submits that “in sum, the procedures in place would not appear to be capable of establishing whether among the migrants there are persons in need of international protection. On the contrary, it would appear that the clear guidelines issued by the Italian authorities are that migrants who are intercepted at sea be pushed back, to the extent possible, provided they have not reached Italy’s territorial waters”. *Ibid.*, para. 33.

and Eritrea (the 30 June-1 July operation).¹³ Other operations saw a prevalence of Nigerian citizens, or involved several nationalities. Children were also involved in some “push-back” operations.¹⁴

2.1.5 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.¹⁵

2.1.6 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-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.¹⁶ 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.

2.1.7 Furthermore, among the persons who were pushed back to Libya and who subsequently managed to reach Italian territory, at least four were granted refugee status by the Italian authorities. Two of those granted protection originated from Ethiopia, while the other two came from Somalia. This demonstrates that, at least with respect to these persons, the “push-back” operation brought with it a risk of *refoulement*, namely onward removal by Libya to face a risk of persecution.¹⁷

2.1.8 During late 2009, UNHCR staff in Libya also interviewed people who had reportedly been sent back to Libya by or with the support of Italy after their interception at sea. In this process, they identified 232 persons, of Eritrean or Somali nationality, who were seeking or potentially in need of international protection. UNHCR was able to complete the full refugee status determination process only in the case of 73 persons (63 Eritreans and 10 Somalis). In all 73 cases, this resulted in recognition of refugee status under UNHCR’s mandate. The claims of the remaining 159 people could not be finalized for several reasons, including: (1) the relocation of detainees by the Libyan authorities from one facility to another; (2) agreement by the Libyan authorities to allow UNHCR to carry out refugee status determination interviews at only two of the 15 known detention centres (Misrata and Al Zawiyah); and (3) Libya’s decision of April 2010 to require UNHCR to limit its activities in the country, precluding UNHCR from proceeding to interview and consider claims by the remaining applicants. For the 73 people recognised as refugees by UNHCR, and for a potentially larger group among those whose claims could not be determined conclusively, the “push-back” operations similarly created a risk of *refoulement*.

¹³ 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>.

¹⁴ 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.

¹⁵ 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.

¹⁶ See UNHCR Briefing Notes, *UNHCR interviews asylum-seekers pushed back to Libya*, 14 July 2009, <http://www.unhcr.org/4a5c638b6.html>.

¹⁷ Official information obtained by UNHCR in the exercise of its Mandate function in Italy (December 2009 – May 2010).

2.2. Italy's justification and/or legal basis for its "push-back" operations

2.2.1 The terminology used by Italian government officials to describe "push-back" operations has varied,¹⁸ and different legal bases have been cited in justifying this policy. In this context, the Italian government has referred to the general principle of "co-operation between states,"¹⁹ 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,²⁰ 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".²¹ Further reference was made by Italy²² 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.²³ If evidence confirming the suspicion is found, appropriate measures may be taken in accordance with relevant domestic and international law.²⁴

2.2.2 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.²⁵ 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.²⁶

2.2.3 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 2009,²⁷ 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".²⁸ 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 are without prejudice to their other international legal obligations in particular with regard to *non-refoulement*.

¹⁸ The terms used to describe a "push-back" operation have included "*respingimento*" (non admission at the border) and "*riconsegna*" (handing back).

¹⁹ 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>.

²⁰ 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>.

²¹ Undersecretary 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.

²² *Ibid.*

²³ 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, Article 8(7).

²⁴ *Ibid.*

²⁵ The principle of *non-refoulement* is also enshrined in art. 19, para. 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."

²⁶ "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>.

²⁷ Senato della Repubblica, XVI Legislatura, 214^a seduta pubblica di lunedì 25 maggio 2009, Resoconto. Sommario & stenografico, p. 1-24. Oral information provided by the Minister of Interior, available at: <http://www.senato.it/service/PDF/PDFServer/BGT/00424000.pdf>.

²⁸ 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. February 2009²⁸ (which is not a publicly available document).

2.2.4 UNHCR cannot establish with certainty whether, in the present case, the “push-back” operations concerned persons who were rescued at sea or who were intercepted, independent of any distress calls or rescue situation, for the purpose of preventing irregular migration.²⁹

2.2.5 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 member states’ obligations under international law, in particular with reference to the principle of *non-refoulement*.³⁰

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 Preliminary observations

3.1.1 UNHCR notes that, in line with its established case-law,³¹ the Court will examine the present case in light of the circumstances prevailing in Libya at the time of the expulsion of the applicants. The Court will have regard to information which has come to light subsequent to the expulsion insofar as it may be of value in confirming or refuting the assessment that has been made by the respondent of the well-foundedness or otherwise of the applicants’ fears. Accordingly, section 3 of this submission includes information about the situation in Libya after the date of the “push-back” operation in question, i.e. May 2009, which is relevant to issues before the Court in the present case.

3.1.2 For the purposes of this submission, however, UNHCR does not provide detailed information about the situation prevailing in Libya as of the present date. This is because these circumstances, while significant in their impact on asylum-seekers and refugees, are not directly relevant for the purpose of the Court’s task in assessing the risk which prevailed at the time when the “push-back” operations were carried out in 2009 and, in particular, for determining what the Italian authorities knew or ought to have known at that time.

3.1.3 It is noted, by way of background information, that the recent outbreak of violence in Libya in February and March 2011 has seriously prejudiced and further undermined the legal and practical situation of refugees and asylum-seekers in Libya. The current volatile conditions have significantly heightened the risk of further displacement within and beyond North Africa. There are increasing numbers of people fleeing Libya who are unable to return to their countries of origin, including refugees and asylum-seekers from countries such as Eritrea, Sudan and Somalia. It may also be anticipated that significant numbers of Libyans may flee by land or sea, and seek international protection in neighbouring countries³² or in Europe.

²⁹ 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/briguglio/immigrazione-e-asilo/2003/settembre/decreto-mininterno-14-7-03.html#_ftn1.

³⁰ European Union, *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)*, 15 March 2006, No. 562/2006, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0001:0032:EN:PDF>.

³¹ European Court of Human Rights, *Cruz Varas and Others v. Sweden*, Application No. 15576/89, Plenary judgment of 20 March 1991, paras. 75-76, <http://www.unhcr.org/refworld/docid/3ae6b6fe14.html>; *Vilvarajah and Others v. The United Kingdom*, Application Nos. 13163/87/ 13164/87/ 13165/87/ 13447/87/ 13448/87, Chamber judgment of 30 October 1991, para. 107, <http://www.unhcr.org/refworld/docid/3ae6b7008.html>; *Mamatkulov and Askarov v. Turkey*, Application No. 46827/99 and 46951/99, Grand Chamber judgment of 4 February 2005, para. 61, <http://www.unhcr.org/refworld/docid/42d3ef174.html>; *Y v. Russia*, Application No. 20113/07, Judgment of 4 December 2008, para. 81, <http://www.unhcr.org/refworld/docid/493e39922.html>.

³² UNHCR, *UNHCR prepares for possible massive influx to Egypt from Libya*. News stories, 18 March 2011, <http://www.unhcr.org/4d83657f9.html>. Further information about the developing situation in Libya and the resultant displacements is available continuously on www.unhcr.org.

3.2 Legal and administrative framework

3.2.1 Libya has ratified a number of international human rights instruments³³ and is party to the 1969 Organization of African Unity (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 its authority based on the *Declaration on the Establishment of the Authority of the People of 1977*,³⁴ is 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*³⁵ and *Law No. 20 for the Promotion of Freedom of 1991 (Law No. 20)*.³⁶ Nevertheless, various reports have continued to express concern over the implementation of Libya's international legal obligations, in particular as related to civil and political rights.³⁷

3.2.2 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*,³⁸ 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*.³⁹ 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.

3.2.3 In the absence of a national asylum system, asylum-related activities have been carried out exclusively by UNHCR and its partners.⁴⁰ This included the examination of any requests made in Libya for international protection, which have been considered 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 in recent years has

³³ 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.

³⁴ Declaration on the Establishment of the Authority of the People [Libyan Arab Jamahiriya], of 1977, <http://www.unhcr.org/refworld/docid/3ae6b4ec14.html>.

³⁵ 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>.

³⁶ The Law No. 20 for Endorsement of freedom (1991), <http://www.unhcr.org/refworld/docid/3dda542d4.html>.

³⁷ 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>.

³⁸ Constitution Proclamation [Libyan Arab Jamahiriya], 11 December 1969, <http://www.unhcr.org/refworld/docid/3ae6b5a24.html>.

³⁹ The Law No. 20 for Promotion of Freedom, 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".

⁴⁰ 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).

been unpredictable, and the execution of its protection functions ad-hoc and unsystematic.⁴¹ In this regard, in April 2010, the Libyan government told UNHCR to close its office in Libya and to halt its activities, reiterating this request in June 2010.⁴² Following negotiations with the authorities, UNHCR was allowed to resume a limited scope of work, but only for the already registered caseload, impacting the movement and activities of its personnel.

3.3 Entry into Libya and access to UNHCR's refugee status determination procedure

3.3.1 Libya is both a country of destination and transit for many seeking employment or an exit point to Southern Europe. This migratory movement for many years has included 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.⁴³

3.3.2 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)*.⁴⁴ 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 in recent years has been from Sudan and Chad, across the southern Libyan desert. Others have entered from Niger and Mali. In the majority of cases, travel and entry have been facilitated by smuggling networks.

3.3.3 The government's response to irregular entry over recent years has been further shaped by an increasing trend of attempted irregular exit from the country through the Mediterranean sea routes.

3.3.4 The sizeable migrant population, estimated in 2009 at some 1.3 million,⁴⁵ has been perceived by the authorities as a serious problem. Libyan efforts to manage population flows into and through the country 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 have generally been 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 of 2009.

3.3.5 Until April 2010, individuals wishing to apply for asylum in Libya were required to approach UNHCR's only representation in the country in Tripoli, where their protection needs and status were determined in accordance with UNHCR's mandate. Therefore, asylum-seekers detained in detention/holding centers throughout the country were not able to contact UNHCR, unless encountered by UNHCR in the course of a visit to one of these facilities. As of April 2010, UNHCR was only authorized to deal with the registered population at that date. New asylum applications could therefore not be registered. Furthermore, visits to detention facilities by UNHCR also ceased in April 2010. Since February 2011, UNHCR has been obliged to withdraw its international staff members from Libya, and its Libyan staff members have been severely constrained in their work and movements, due to the violence and general disruption to normal activities.

⁴¹ 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.

⁴² UNHCR, *UNHCR says ordered to close office in Libya*, News stories, 8 June 2010, <http://www.unhcr.org/4c0e79059.html>.

⁴³ As at December 2009, there were 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.

⁴⁴ See http://www.globaldetentionproject.org/fileadmin/docs/Libya_Law_No._6_of_1987_EN_1_.pdf.

⁴⁵ 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>.

3.4 Reception and detention conditions

3.4.1 In and before 2009 and 2010, persons considered illegal migrants were detained in Libya in “holding/accommodation centres” across the country. While conditions varied from centre to centre, most of those to which UNHCR was able to have access were of very low standard. They suffered from overcrowding and inadequate sanitation and health facilities. These conditions were 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.⁴⁶

3.4.2 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 beatings and ill-treatment. Despite such reports, in the context of discussions over the “push-back” policy, the Italian government in May 2009 expressed the view that Libya was a safe country for asylum-seekers and refugees.⁴⁷

3.4.3 Although *Law No. 6* provides for a maximum detention sentence in Libya of three months for illegal entry, detention periods ranged in practice from a few months to two years, and were 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 in 2009 was granted increased access to the centres (15 centres throughout the country as of October 2009),⁴⁸ such access was on an ad-hoc basis. Moreover, UNHCR did not have access to the border zones in southern Libya, where the majority of asylum-seekers enter the country. This limited UNHCR’s ability to identify those in need of international protection at entry points, where conditions have long been reported to be extremely poor.⁴⁹

3.5 Protection from *refoulement* in Libya

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

3.5.2 The Libyan and Eritrean governments reportedly concluded an agreement for the return and re-admission of Eritrean nationals, which may have serious consequences for Eritreans in Libya. Based on reports about abuse and ill-treatment by the Eritrean government of individuals, in particular those forcibly returned to Eritrea, UNHCR has urged states to exercise caution when considering return of Eritreans to their country of origin.⁵⁰

3.5.3 UNHCR has issued Guidelines⁵¹ (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. At the relevant date and currently, UNHCR considers that the forced return of persons seeking international protection from either country (Somalia or Eritrea) to their countries of origin, or to countries from which they may be so returned, is likely to be in breach of the principle of *non-refoulement*.

3.5.4 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,

⁴⁶ 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>, 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; Press release of Commissioner Malmström, “EU and Libya cooperate on migration”, 06/10/2010, at: http://ec.europa.eu/commission_2010-2014/malmstrom/news/archives_2010_en.htm.

⁴⁷ Oral information provided by the Minister of Interior. Senato della Repubblica, XVI Legislatura, 214ª seduta pubblica di lunedì 25 maggio 2009, Resoconto. Sommario & stenografico, pages 1-24, <http://www.senato.it/service/PDF/PDFServer/BGT/00424000.pdf>.

⁴⁸ Misrata, Zleitan, Zawyia, Garabuli, Surman, Towisha, Zuwara, Bangalzi, Ajdabia, Sirt, Ben Waleed, Kufra, Sabha, Brak and Gunfoda.

⁴⁹ 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>.

⁵⁰ See Annex 1, UNHCRs, *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.

⁵¹ *Ibid*; Annex 2, UNHCR, *Displacement and international protection needs of Somalis, in particular, Somalis originating from Mogadishu*, October 2009.

including persons registered with UNHCR, from the Misrata centre.⁵² 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 detainees approached by the visitors included both persons registered as UNHCR 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 prepared for forcible return to Eritrea.⁵³ 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. According to the Libyan authorities, the forms in question were distributed to verify the detainees' wish to remain in Libya for the purpose of organizing employment (labour) opportunities outside the centres.

3.5.5 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*.

3.6 Treatment of asylum-seekers and refugees in Libya

3.6.1 The concept of refugee protection is not commonly understood in Libya and public opinion does not distinguish refugees from economic migrants. Refugees and asylum-seekers, 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.

3.6.2 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.

3.7 Availability of durable solutions

3.7.1 Voluntary repatriation remains impossible for many refugees in Libya, particularly for Eritreans and Somalis, in view of conditions in their countries of origin. The absence of a national asylum framework in Libya, and the fact that no legal status is granted to refugees recognised by UNHCR under its mandate, has made local integration generally difficult or impossible in Libya. Resettlement to third countries has remained very limited in number, 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.

3.7.2 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-

⁵² See also Amnesty International, *Amnesty International Report 2009 – Eritrea*, 28 May 2009, <http://www.unhcr.org/refworld/docid/4a1fadeec.html>.

⁵³ Human Rights Watch, *Libya: Don't Send Eritreans Back to Risk of Torture*, 15 January 2010, <http://www.unhcr.org/refworld/docid/4b5578333b.html>.

seekers and refugees. The already fragile asylum situation in Libya was further exacerbated by the “push-back” practice.⁵⁴

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.⁵⁵

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.⁵⁶ 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.⁵⁷ The United Nations Human Rights Committee has affirmed that the principle of *non-refoulement* developed under the International

⁵⁴ 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.

⁵⁵ 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>.

⁵⁶ 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, p. 8-13, <http://www.unhcr.org/refworld/docid/3f336bbc4.html>.

⁵⁷ 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 Court 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.⁵⁸

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.⁵⁹ Relevant in this regard is the Committee's view in the case of *J.H.A. v. Spain*,⁶⁰ 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.⁶¹ 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.⁶²

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 Rights,⁶³ the European Court of Human Rights⁶⁴ and the CPT⁶⁵ have developed similar interpretations of the concept of jurisdiction as mentioned above.

4.2.4 More particularly, in a case involving the interception, on the high seas, by the French Navy of a ship flying a Cambodian flag and the detention of the crew on that ship under the control of French officials until an harbour in France was reached, the European Court of Human Rights observed that France had "exercised full and exclusive control over the [ship] and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they [the crew members] were tried in France," and concluded that the applicants were effectively within France's jurisdiction for the purposes of Art. 1 of the European Convention on Human Rights ("ECHR").⁶⁶

⁵⁸ 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.

⁵⁹ 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.

⁶⁰ 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>.

⁶¹ 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.

⁶² *Ibid.*

⁶³ 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.

⁶⁴ European Court of Human Rights, *Öcalan v. Turkey (Preliminary Objections)*, Application No. 46221/99, judgment of 12 March 2003, para. 93,

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=46221/99&sessionid=68753718&skin=hu-doc-en>; *Ilaşcu and Others v. Moldova and Russia*, Application No. 48787/99, Grand Chamber judgment of 8 July 2004, paras. 382-384,

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=48787/99&sessionid=68754005&skin=hu-doc-en>; *Issa and Others v. Turkey*, Application No. 31821/96, judgment of 16 November 2004, para. 71, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=31821/96&sessionid=68754005&skin=hu-doc-en>.

⁶⁵ CPT, *Report to the Italian Government*, para. 29.

⁶⁶ European Court of Human Rights, *Medvedyev and Others v. France*, Application No. 3394/03, Grand Chamber judgment of 29 March 2010, para. 67,

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=865670&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>; see also *Viron Khavara & 15 Others v. Italy and Albania*, Application No. 39473/98, Inadmissibility decision of 11 January 2001,

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=680165&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>; see also *mutatis mutandis*, *Rigopoulos v. Spain*, Application No. 37288/97, Inadmissibility decision of 12 January 1999,

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=682200&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>. Art. 1 ECHR provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

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.⁶⁷ 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.⁶⁸ *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 2.1 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. Accordingly, the Italian authorities acknowledge expressly that the ships, which operated in the present case, fall within Italian jurisdiction.⁶⁹

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,⁷⁰ 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.”⁷¹

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 existence of jurisdiction triggers state responsibilities under international human rights and refugee law⁷², including for protection against *refoulement*. The responsibility of a state to protect a person from *refoulement* is engaged because of any conduct exposing the individual to a risk of being subjected to persecution, torture or inhuman or degrading treatment.⁷³ Thus, the absence of an explicit and articulated request for asylum does not absolve the concerned state of its *non-refoulement* obligation. The state authorities should allow the potential asylum-seeker an effective opportunity to express his or her wish to seek international protection.⁷⁴ This is particularly justified in the

⁶⁷ 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>.

⁶⁸ 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.

⁶⁹ Observations du Gouvernement italien, Requête no 27765/09 – Hirsi et 23 autres contre l’Italie, 9 avril 2010, paras 9 and 13.

⁷⁰ EXCOM Conclusion No. 89 (LI), 2000.

⁷¹ EXCOM Conclusion No. 97 (LIV) 2003, para. (a) (iv).

⁷² UNHCR, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010, para. 9, <http://www.unhcr.org/refworld/docid/4cd12d3a2.html>.

⁷³ European Court of Human Rights, *Soering v. UK*, Application No. 14038/88, Plenary judgment of 7 July 1989, para. 91, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae6b6fec&skip=0&query=soering>; *Cruz Varas and Others v. Sweden*, Application No. 15576/89, Plenary judgment of 20 March 1991, para. 76, <http://www.unhcr.org/refworld/docid/3ae6b6fe14.html>.

⁷⁴ The responsibility of the concerned State may be engaged if its authorities fail to do so. This is reflected in general terms in the case law of the European Court of Human Rights, which held repeatedly that “the States (...) remain responsible under the Convention for all actions and omissions of their bodies under their domestic law or under their international legal obligations”. See for instance, European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Grand Chamber judgment of 21 January 2011, para. 338, <http://www.unhcr.org/refworld/docid/4d39bc7f2.html>.

context of rescue at sea. In practice, as stated by an Italian official to the CPT, persons surviving a sea voyage are clearly not in a condition in which they should be expected to declare their wish to apply for asylum.⁷⁵ As the European Court of Human Rights held recently, the concerned state cannot hold against the asylum-seeker that he or she did not inform the authorities of the reasons of his claim where there is no procedure in place to allow him or her to do so.⁷⁶ In any case, at the time of the “push-back” operations, the appalling situation of asylum in Libya had been repeatedly substantiated by numerous reports, which were publicly available and emanated from various sources including UNHCR,⁷⁷ Amnesty International⁷⁸ and Human Rights Watch.⁷⁹ A letter was addressed by UNHCR to the Presidency of the EU, at the beginning of the “push-backs” and ahead of the Justice and Home Affairs Council meeting of 4 and 5 June 2009, in which UNHCR drew the specific attention of Member States to the lack of protection available in Libya for asylum-seekers.⁸⁰ In those circumstances, the Italian authorities knew or ought to have known about the risk faced by the persons concerned upon return to Libya and, in the light of the recent case law of the Court,⁸¹ should have assessed such risk. In UNHCR’s view, 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 European Court of Human Rights has clarified that the *non-refoulement* obligation under Article 3 ECHR includes an obligation for the returning state to verify the compliance, in practice, of the receiving state with international obligations in asylum matters.⁸² More particularly, this assessment shall include whether the person concerned has access to an effective asylum procedure upon return, and whether he or she is subject to detention and living conditions which are in line with Article 3 ECHR.⁸³

4.3.6 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.⁸⁴ 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).

4.3.7 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.”⁸⁵

⁷⁵ CPT, *Report to the Italian Government on the visit to Italy carried out by the CPT from 27 to 31 July 2009*, 28 April 2010, para. 32.

⁷⁶ European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Grand Chamber judgment of 21 January 2011, para. 366, <http://www.unhcr.org/refworld/docid/4d39bc7f2.html>.

⁷⁷ On 7 May 2009, the day after the first pushback intervention, UNHCR issued a strong public statement expressing deep concern over the fate of the forcibly returned persons. UNHCR highlighted the likelihood that amongst the persons returned there were persons in need of international protection, urging the Italian government to ensure “full access to territory and asylum procedures”. This was followed by several other UNHCR statements regarding the possible violation of the principle of *non-refoulement* and reiterating concern over the fact that “Libya is not a State party to the 1951 Refugee Convention and does not have a national asylum law or refugee protection system”. See UNHCR, *Follow-up from UNHCR on Italy’s push-backs*, 12 May 2009, <http://www.unhcr.org/4a0966936.html>; and UNHCR, *UNHCR interviews asylum-seekers pushed back to Libya*, 14 July 2009, <http://www.unhcr.org/4a5c638b6.html>.

⁷⁸ Amnesty International, *Amnesty International Report 2008 - Lybie*, 28 May 2008, <http://www.unhcr.org/refworld/docid/4842725b2.html>.

⁷⁹ HRW, *Libya: Rights at Risk*, 2 September 2008, at: <http://www.hrw.org/en/reports/2008/09/02/libya-rights-risk>.

⁸⁰ UNHCR, *Letter of the High Commissioner for Refugees to the Czech Republic European Union Presidency*, 28 May 2009, <http://www.unhcr.org/refworld/docid/4ae9accd0.html>.

⁸¹ *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Grand Chamber judgment of 21 January 2011, para. 352, <http://www.unhcr.org/refworld/docid/4d39bc7f2.html>.

⁸² *Ibid.*, paras. 345 - 358.

⁸³ *Ibid.* paras. 249-264, 216 -234, see also with regard to the responsibility of the transferring state paras. 365 - 368.

⁸⁴ 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.

⁸⁵ UNHCR, *Letter of the High Commissioner for Refugees to the Czech Republic European Union Presidency*, 28 May 2009, <http://www.unhcr.org/refworld/docid/4ae9accd0.html>.

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*, resulting from the absence of international protection, could not, at the time of the acts in question, be excluded. In the current circumstances, refugees and others at risk of persecution or other serious human rights violations, including of Article 3 ECHR, in their countries of origin, are unable to find protection in Libya.

UNHCR
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