As delivered

UNHCR's oral intervention at the European Court of Human Rights
Hearing of the case *Hirsi and Others v. Italy* (Application no. 27765/09)
Strasbourg, June 22, 2011

Mr. President, Distinguished Judges,

Introduction

The Office of the United Nations High Commissioner for Refugees would like to thank the Court for allowing UNHCR to intervene as a third party in the present case, including at today's hearing. It is an honour for me, as the Head of the Policy and Legal Support Unit in the Bureau for Europe, to represent UNHCR on this occasion.

The present case is of particular interest to UNHCR. It raises issues of law and State practice regarding the scope and the implications of the *non-refoulement* obligation under international refugee and human rights law, in particular in the context of the interception and rescue of people at sea. This case reminds us of the humanitarian drama that has been, and is still, taking place in the Mediterranean[1] - but, also in the Gulf of Aden[2] and in other areas of the world[3], where many persons die after taking to the seas to seek safety through perilous journeys.

In this connection, UNHCR has been cooperating with concerned States, including the Italian authorities, in order to ensure that people in distress at sea will be rescued and brought to safety. In many instances, States save lives, often under difficult circumstances. These vital actions are duly acknowledged by UNHCR. But, States' engagement in rescue at sea – a clear obligation under the international law of the sea – does not alter their additional responsibility to honour their *non-refoulement* obligations.

UNHCR's submissions in the present case are informed by our detailed knowledge of the deplorable conditions for asylum-seekers in Libya, as well as of the specific situation of many of the persons affected by the so-called 'push-backs'. Over several months in 2009, UNHCR staff in Libya screened 916 persons, out of a total of approximately 1,200, who were sent back by or with the support of Italy after being intercepted at sea. Of those 916 persons screened, UNHCR was able to conduct a full refugee status determination procedure for 73 - including 63 Eritreans and 10 Somalis – all of whom were found to be refugees. This confirms that the push-back operations created a real risk of *refoulement.* In this context, UNHCR considers that Italy was bound to take responsibility for ensuring that they would not be sent, directly or indirectly, to a country where they could face persecution or ill-treatment.

---

[1] UNHCR News Stories, *Hundreds risk return to Libya in bid to reach Europe by boat*, 17 May 2011, http://www.unhcr.org/4dd27eea9.html.
[2] UNHCR News Stories, *Gulf of Aden drownings raise concerns over smuggling and rescue-at-sea tradition*, 15 April 2011, http://www.unhcr.org/4da8598d6.html.
[3] UNHCR News Stories, *UNHCR saddened at loss of life as boat breaks up on Christmas Island*, 15 December 2010, http://www.unhcr.org/4d08e40b6.html.

Although it is of primary importance to this case, UNHCR today will *not* address Article 4 of Protocol 4 of the European Convention on Human Rights, since the Office of the United Nations High Commissioner for Human Rights covers it comprehensively in its written submission. UNHCR supports and shares the views expressed in that submission, holding that the prohibition of collective expulsion is at stake in this case including in relation to extraterritorial acts.

This submission will highlight UNHCR's position on:

- First, the situation for asylum-seekers and refugees in Libya at the time of the push-back operations, including particularly with regard to detention, support and living conditions,
- Thereafter, it will address the risk of onward *refoulement* which faced asylum-seekers and refugees in Libya, and
- Finally, the scope and application of the *non-refoulement* principle in the context of extraterritorial measures, as seen in the present case.

1. Firstly, allow me to describe the situation for asylum-seekers and refugees in Libya at the relevant time.

The Court will examine the present case in the light of the circumstances prevailing in Libya at the time of and shortly after the expulsion of the applicants. Accordingly UNHCR's assessment focuses on the period from mid-2009 until early 2010.

UNHCR is concerned that, in practice, the international human rights and refugee law instruments that Libya has ratified have not been respected. For instance, while Libyan domestic law sets a maximum three months period of detention for illegal entry, in practice, detention periods at the relevant time ranged from a few months, to as long as two years. Moreover, detention periods were often determined by arbitrary decisions of the relevant centre's administrations.

Libya's national human rights safeguards are limited in their scope, in particular for asylum-seekers. In Libya there was - and is still today - no domestic asylum system. Only in 2007 did the Libyan authorities produce a *first* draft law on asylum for the country, which is still not finalized nor adopted. Moreover, the processes and institutions needed to determine refugee claims and to provide protection have never been established.

Accordingly, the examination and determination of asylum claims and the provision of support to asylum-seekers and refugees have been carried out exclusively by UNHCR and its partners. However, it is extremely important to recognize that these activities were not able to address in any comprehensive way the very difficult situation for asylum-seekers and refugees in Libya. Most importantly, they did not eradicate nor reduce the significant risk of ill-treatment and human rights violations in the country.

Mr. President, Distinguished Judges, allow me to elaborate on the situation in Libya.

In the absence of a cooperation agreement between UNHCR and the Libyan government, UNHCR's operating environment in recent years has been unpredictable, and the execution of its protection functions ad-hoc and unsystematic. This difficult situation culminated in April 2010,

when the Libyan government ordered UNHCR to close its office in Libya and halt its activities. Following intensive negotiations, UNHCR continued its work, albeit with a severely limited scope. This entailed restricting its contact exclusively to asylum-seekers and refugees who were already registered with the Office. Registration of new asylum-seekers and refugees was not permitted. The movement and activities of UNHCR personnel were also curtailed, including travel outside Tripoli to visit the various administrative detention centres.

Until April 2010, individuals wishing to apply for asylum in Libya were required to approach UNHCR's only representation in the country, in Tripoli. Asylum-seekers detained in various places in Libya were not able to contact UNHCR unless encountered coincidentally by UNHCR in the course of one of its visits to one of the detention centres. However, UNHCR's access to those centres was possible only on an ad hoc basis.

In the centres that UNHCR was able to visit, the conditions observed were of an extremely low standard. Overcrowding, poor sanitation and inadequate or absent medical treatment were rife. These deplorable conditions, coupled with the arbitrary duration of detention periods - and reports from many asylum-seekers and refugees of frequent violence - were, and remain, causes of grave concern for UNHCR.[4]

When registering the claims of asylum-seekers in Libya before April 2010, UNHCR issued a formal attestation letter confirming that the holders had requested protection, and that their claims were under review by UNHCR. However, holders have nonetheless been imprisoned for lack of government-issued documentation or permission to remain in the country. Persons recognized by UNHCR as refugees were accorded no formal status or entitlements, and their stay in Libya was officially understood to be temporary. As a result, there was no assurance of protection of their human rights.

Without any formal status, asylum-seekers and refugees held no official entitlement to accommodation nor employment, resulting in poor living conditions or destitution for many. Thus in general, the reception conditions of asylum seekers and refugees were, and remain, completely inadequate.

UNHCR therefore submits that, despite its presence in the country, there were substantial grounds for believing that persons returned to Libya faced a real risk of violation of their human rights in that country.

2. Let me now outline **the risk of onward *refoulement*** from Libya to face **persecution, ill treatment or other serious harm.**

After 2009, among the persons who had been 'pushed back' to Libya, and who were able subsequently to come to Italy and apply for asylum, at least five were recognized as refugees. This constitutes a recognition by the Italian authorities of their well-founded fear of persecution.

[4] 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, pp. 58-67.

Due to the operational constraints outlined previously, UNHCR was not in a position systematically to monitor removals from Libya of persons irregularly in the country. However a number of factors indicated that the Libyan authorities were forcibly returning people, including refugees recognized by UNHCR under its mandate, to countries where they had a well-founded fear of persecution or ill-treatment.

For instance, the Libyan and Eritrean governments concluded an agreement for the return and re-admission of Eritrean nationals. This was despite the fact that it was well-established by a range of sources, including UNHCR's Guidelines, that risks of persecution and other forms of serious harm threaten many people in Eritrea, and that return is likely to be in breach of the principle of *non-refoulement*. UNHCR was required to intervene on two documented occasions, in order to stay evident preparations for the deportation of Somalis and Eritreans from Libya to their countries of origin - including persons who were registered with UNHCR.

Given UNHCR's lack of systematic monitoring capacity and limited presence in the country, these interventions took place only in the limited cases where we learned from asylum-seekers or other informal sources that the deportations were imminent. It was apparent in those cases that but for UNHCR's direct appeals to the Libyan authorities, removals would have taken place.

Importantly, UNHCR underlines that the persons affected by the push-backs, including those who were (as well as those who were not) detained upon return, had no effective opportunity to pursue their complaints regarding the above risks of onward removal before the Libyan authorities. Indeed, in Libya, no remedies were available in practice.

3. Mr President, Distinguished Judges, I would like now to turn to **the scope and the implications of the *non-refoulement* obligation** in the context of **extraterritorial measures**.

It is not contested in the present case that the applicants were under the jurisdiction of Italy. In this regard, UNHCR recalls the Court's assessment in previous cases that the exercise of full and exclusive control by a state over persons is sufficient to conclude that they fall under its *de facto* jurisdiction.[5] Accordingly, *non-refoulement* obligations, both under international refugee law and international human rights law - including Article 3 of the ECHR - bound the respondent State in the present case.

UNHCR underlines that the responsibility of a State to protect a person from *refoulement* is engaged wherever there is conduct exposing the individual to a risk of being subject to persecution or ill-treatment in another country. Thus, the absence of an explicit and articulated request for asylum does not absolve the concerned state of its *non-refoulement* obligations.

More particularly, UNHCR considers that such a request for asylum is not necessary where the concerned State has information about, or ought to have known of, risks of direct or indirect *refoulement*. In this case, the appalling human rights and asylum situations in Libya were known, or ought to have been known, to the Italian authorities. Information about the conditions were freely available from reliable sources, including UNHCR as well as Human Rights Watch

[5] ECtHR, *Medvedyev and Others v. France*, Grand Chamber Judgment of 29 March 2010, Appl. no. 3394/03, para. 67.

and Amnesty International. UNHCR expressly drew the attention of the Italian authorities and of other EU Member States at the time to the deplorable situation in Libya.[6] In such circumstances, the Court has held in its ruling in the case of M.S.S. that an applicant's failure to inform the authorities of the reasons for his claim could not be held against him, and that he should not be expected to bear the entire burden of proof.[7]

In UNHCR's view, that finding about what should be expected from an applicant is all the more applicable in the present case - for three reasons.

Firstly, persons rescued at sea are, very often, even more vulnerable than other asylum-seekers, both physically and psychologically. This makes it very difficult, if not impossible, for them to declare their intention to apply for asylum immediately after their rescue. This has been recognized by the Italian authorities themselves during the 2009 monitoring visit of the European Committee for the Prevention of Torture.[8]

In the second place, according to testimony from the persons concerned, upon interception, they were led to believe that they would be taken to Italy. If so, it would not be reasonable to hold against them that they did not express their need for protection while on board the intercepting vessel, as they were led to believe there would be an opportunity to do so later. More generally, UNHCR notes the views of the Court, expressed in its judgment in *Conka v Belgium,* that (*quote*) "acts whereby the authorities seek to gain the trust of asylum-seekers with a view to (…) deporting them may be found to contravene the general principles stated or implicit in the Convention"[9] (*end quote).*

Third, it is established, on the basis of various testimonies, that the Italian authorities confiscated a number of items from the persons concerned during the push-back operations - including, in some cases, refugee status certificates issued by UNHCR. For these persons, there were clear indications of an individual need for protection that could not be disregarded by the Italian authorities - irrespective of whether those persons expressed their fear of persecution or ill treatment. On the contrary, the Court has previously held that due weight should be given to UNHCR's conclusions with respect to ill-treatment.[10]

On the part of the State concerned, the *non-refoulement* obligation implies a number of duties.

UNHCR submits these include the provision of effective access for potential asylum-seekers to a fair and efficient asylum procedure. This must allow them to submit and argue their claims and to have them examined thoroughly by competent authorities.

---

[6] UNHCR, *Letter of the High Commissioner for Refugees to the Czech Republic European Union Presidency*, 28 May 2009.
[7] ECtHR, *M.S.S. v. Belgium and Greece*, Judgment of 21 January 2011, Appl. no. 30696/09, paras. 351, 352 and 389.
[8] European Committee for the Prevention of Torture and Inhumane and Degrading Treatment or Punishment (CPT), *Report to the Italian govt on the visit to Italy of the CPT 27-31 July 2009 (28 April 2010)*, para. 32.
[9] ECtHR, *Conka v. Belgium,* Judgment of 5 February 2002, Appl. no. 51564/99, para. 41
[10] ECtHR, *Jabari v Turkey*, Judgment of 11 July 2000, Appl. no. 40035/98, para. 41.

This Court has defined the procedural implications of the *non-refoulement* obligation. In particular, the Court has held that the persons concerned must not be prevented from establishing the arguable nature of their complaints under Article 3 of the ECHR. In the absence of any facility for assessment of asylum claims on board the boats used for the push-back operations, and given the particular circumstances of the applicants, this safeguard was clearly lacking. Furthermore, the persons concerned are entitled to a remedy, effective in law and in practice, against the impugned measure, involving *inter alia* a close and rigorous scrutiny of the complaint. Such safeguards were also missing in the present case, as none of the applicants were given the opportunity to challenge the push-back measure before being handed over to the Libyan authorities.

UNHCR submits that, in line with the Court's recent findings in its *M.S.S.* ruling, the respondent State was obliged to verify how the country of return complies, in practice, with its obligations in asylum matters.[11] UNHCR further highlights that this duty of enquiry is all the more important where legislation on asylum – and indeed any legal or procedural safeguards - do not exist, as is and was the case in Libya.

In **Conclusion** - Mr President, Distinguished Judges:

Under these circumstances, the act of intercepting people at sea, and handing them over to Libya, amounted to a failure to ensure protection from *refoulement*.

This is a fundamental responsibility that all states bear towards people under their jurisdiction - both within State territory, and where they act outside it.

I thank you for your attention.

[11] ECtHR, *M.S.S. v. Belgium and Greece*, Judgment of 21 January 2011, Appl. no. 30696/09, para. 359.