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

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Returning migrants to Libya without examining their case exposed them to a risk of ill-treatment and amounted to a collective expulsion

In today's Grand Chamber judgment in the case of Hirsi Jamaa and Others v. Italy (application no. 27765/09), which is final[1], the European Court of Human Rights held, unanimously, that:

The applicants fell **within the jurisdiction of Italy for the purposes of Article 1** of the European Convention on Human Rights;

There had been **two violations of Article 3** (prohibition of inhuman or degrading treatment) of the Convention because the applicants had been exposed to the risk of ill-treatment in Libya and of repatriation to Somalia or Eritrea;

There had been **a violation of Article 4 of Protocol No. 4** (prohibition of collective expulsions);

There had been **a violation of Article 13 (right to an effective remedy) taken in conjunction with Article 3 and with Article 4 of Protocol No.4.**

The case concerned Somalian and Eritrean migrants travelling from Libya who had been intercepted at sea by the Italian authorities and sent back to Libya.

Principal facts

The applicants are 11 Somalian and 13 Eritrean nationals. They were part of a group of about 200 people who left Libya in 2009 on board three boats bound for Italy. On 6 May 2009, when the boats were 35 miles south of Lampedusa (Agrigento), within the maritime search and rescue region under the responsibility of Malta, they were intercepted by Italian Customs and Coastguard vessels. The passengers were transferred to the Italian military vessels and taken to Tripoli. The applicants say that during the journey the Italian authorities did not tell them where they were being taken, or check their identity. Once in Tripoli, after a 10-hour voyage, they were handed over to the Libyan authorities. At a press conference on 7 May 2009 the Italian Minister of the Interior said that the interception of the vessels on the high seas and the return of the migrants to Libya was in accordance with the bilateral agreements with Libya that had come into force on 4 February 2009, marking an important turning point in the fight against illegal immigration.

In a speech to the Senate on 25 May 2009 the Minister stated that between 6 and 10 May 2009 more than 471 clandestine migrants had been intercepted on the high seas and transferred to Libya in accordance with those bilateral agreements. In his view, that push-back policy discouraged criminal gangs involved in people smuggling and trafficking, helped save lives at sea and substantially reduced landings of clandestine migrants along the Italian coast. During the course of 2009 Italy conducted nine operations on the high seas to intercept clandestine migrants, in conformity with the bilateral agreements concluded with Libya. On 26 February 2011 the Italian Defence Minister declared that the bilateral agreements with Libya were suspended following the events in Libya.

1 Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

According to information submitted to the Court by the applicants' representatives, two of the applicants had died in unknown circumstances. Between June and October 2009 fourteen of the applicants had been granted refugee status by the office of the UN High Commissioner for Refugees (UNHCR) in Tripoli. Following the revolution in Libya in February 2011 the quality of contact between the applicants and their representatives deteriorated. The lawyers are currently in contact with six of the applicants, four of whom live in Benin, Malta or Switzerland and some of whom are awaiting a response to their request for international protection. One of the applicants is in a refugee camp in Tunisia and is planning to return to Italy. In June 2011 refugee status was granted to one of the applicants in Italy after he had clandestinely returned there.

Complaints, procedure and composition of the Court

Relying on Article 3, the applicants submitted that the decision of the Italian authorities to send them back to Libya had exposed them to the risk of ill-treatment there, as well as to the risk of ill-treatment if they were sent back to their countries of origin (Somalia and Eritrea). They also complained that they had been subjected to collective expulsion prohibited by Article 4 of Protocol No. 4. Relying, lastly, on Article 13, they complained that they had had no effective remedy in Italy against the alleged violations of Article 3 and of Article 4 of Protocol No. 4.

The application was lodged with the European Court of Human Rights on 26 May 2009. On 15 February 2011 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber. A hearing took place in the Human Rights Building, Strasbourg, on 22 June 2011.

The following organisations were authorised to intervene as third parties (under Article 36 § 2 of the Convention): the Office of the United Nations High Commissioner for Refugees; the Office of the United Nations High Commissioner for Human Rights; the non-governmental organisations Aire Center, Amnesty International and International Federation for Human Rights (FIDH); the non-governmental organisation Human Rights Watch; and the Columbia Law School Human Rights Clinic.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Nicolas **Bratza** (the United Kingdom), *President*,
Jean-Paul **Costa** (France),
Françoise **Tulkens** (Belgium),
Josep **Casadevall** (Andorra),
Nina **Vajić** (Croatia),
Dean **Spielmann** (Luxembourg),
Peer **Lorenzen** (Denmark),
Ljiljana **Mijović** (Bosnia and Herzegovina),
Dragoljub **Popović** (Serbia),
Giorgio **Malinverni** (Switzerland),
Mirjana **Lazarova Trajkovska** ("the Former Yugoslav Republic of Macedonia"),
Nona **Tsotsoria** (Georgia),
Işıl **Karakaş** (Turkey),
Kristina **Pardalos** (San Marino),
Guido **Raimondi** (Italy),
Vincent A. **de Gaetano** (Malta),
Paulo **Pinto de Albuquerque** (Portugal)*, Judges*,

and also Michael **O'Boyle**, *Deputy Registrar.*

Decision of the Court

The question of jurisdiction under Article 1

Only in exceptional cases did the Court accept that acts of the member States performed, or producing effects, outside their territories could constitute an exercise of jurisdiction by them.

Whenever the State, through its agents operating outside its territory, exercised control and authority over an individual, and thus its jurisdiction, the State was under an obligation to secure the rights under the Convention to that individual.

Italy did not dispute that the ships onto which the applicants had been embarked had been fully within Italian jurisdiction. The Court reiterated the principle of international law, enshrined in the Italian Navigation Code, that a vessel sailing on the high seas was subject to the exclusive jurisdiction of the State of the flag it was flying. The Court could not accept the Government's description of the operation as a "rescue operation on the high seas" or that Italy had exercised allegedly minimal control over the applicants. The events had taken place entirely on board ships of the Italian armed forces, the crews of which had been composed exclusively of Italian military personnel. In the period between boarding the ships and being handed over to the Libyan authorities, the applicants had been under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities. Accordingly, the events giving rise to the alleged violations had fallen within Italy's jurisdiction within the meaning of Article 1.

Article 3

Risk of suffering ill-treatment in Libya

The Court was aware of the pressure on States resulting from the increasing influx of migrants, which was a particularly complex phenomenon when occurring by sea, but observed that this could not absolve a State of its obligation not to remove any person who would run the risk of being subjected to treatment prohibited under Article 3 in the receiving country. Noting that the situation in Libya had deteriorated after April 2010, the Court decided to confine its examination of the case to the situation prevailing in Libya at the material time. It noted that the disturbing conclusions of numerous organisations[2] regarding the treatment of clandestine immigrants were corroborated by the report of the Committee for the Prevention of Torture (CPT) of 2010[3].

Irregular migrants and asylum seekers, between whom no distinction was made, had been systematically arrested and detained in conditions described as inhuman by observers[4], who reported cases of torture among others. Clandestine migrants had been at risk of being returned to their countries of origin at any time and, if they managed to regain their freedom, had been subjected to particularly precarious living conditions and exposed to racist acts. The Italian Government had maintained that Libya was a safe destination for migrants and that Libya complied with its international commitments as regards asylum and the protection of refugees. The Court observed that the existence of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights were not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources had reported practices contrary to the principles of the Convention. Furthermore, Italy could not evade its responsibility under the Convention by referring to its subsequent obligations arising out of bilateral agreements with Libya. The Court noted, further, that the Office of the UNHCR in Tripoli had never been recognised by the Libyan Government. That situation had been well-known and easy to verify at the relevant time. The Court therefore considered that when the applicants had been removed, the Italian authorities had known or should have known that they would be exposed to treatment in breach of the Convention. Furthermore, the fact the applicants had not expressly applied for asylum had not exempted Italy from its responsibility. The Court reiterated the obligations on States arising out of international refugee law, including the "*non-refoulement* principle" also enshrined in the Charter of Fundamental Rights of the European Union. The Court attached particular weight in this regard to a letter of 15 May 2009 from Mr Jacques Barrot, Vice-President of the European Commission, in which he reiterated the importance of that principle[5].

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[2] International bodies and non-governmental organisations; see paragraphs 37 – 41 of the judgment
[3] Report of 28 April 2010 of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) of the Council of Europe after a visit to Italy
[4] The UNHCR, Human Rights Watch and Amnesty International
[5] Paragraph 34 of the judgment

The Court, considering that the fact that a large number of irregular immigrants in Libya had found themselves in the same situation as the applicants did not make the risk concerned any less individual, concluded that by transferring the applicants to Libya the Italian authorities had, in full knowledge of the facts, exposed them to treatment proscribed by the Convention. The Court thus concluded that there had been a violation of Article 3.

Risk of suffering ill-treatment in the applicants' country of origin

The indirect removal of an alien left the State's responsibility intact, and that State was required to ensure that the intermediary country offered sufficient guarantees against arbitrary *refoulement* particularly where that State was not a party to the Convention. The Court would determine whether there had been such guarantees in this case. All the information in the Court's possession showed *prima facie* that there was widespread insecurity in Somalia – see the Court's conclusions in the case of *Sufi and Elmi v. the United Kingdom*[6] – and in Eritrea – individuals faced being tortured and detained in inhuman conditions merely for having left the country irregularly. The applicants could therefore arguably claim that their repatriation would breach Article 3 of the Convention. The Court observed that Libya had not ratified the Geneva Convention and noted the absence of any form of asylum and protection procedure for refugees in the country. The Court could not therefore subscribe to the Government's argument that the UNHCR's activities in Tripoli represented a guarantee against arbitrary repatriation. Moreover, Human Rights Watch and the UNHCR had denounced several forced returns of asylum seekers and refugees to high-risk countries. Thus, the fact that some of the applicants had obtained refugee status in Libya, far from being reassuring, might actually have increased their vulnerability.

The Court concluded that when the applicants were transferred to Libya, the Italian authorities had known or should have known that there were insufficient guarantees protecting them from the risk of being arbitrarily returned to their countries of origin. That transfer accordingly violated Article 3.

Article 4 of Protocol No.4

Admissibility of the complaint

The Court was required, for the first time, to examine whether Article 4 of Protocol No. 4 applied to a case involving the removal of aliens to a third State carried out outside national territory. It had to ascertain whether the transfer of the applicants to Libya constituted a collective expulsion within the meaning of Article 4 of Protocol No. 4. The Court observed that neither the text nor the *travaux préparatoires* of the Convention precluded the extra-territorial application of that provision. Furthermore, were Article 4 of Protocol No. 4 to apply only to collective expulsions from the national territory of the member States, a significant component of contemporary migratory patterns would not fall within the ambit of that provision and migrants having taken to the sea, often risking their lives, and not having managed to reach the borders of a State, would not be entitled to an examination of their personal circumstances before being expelled, unlike those travelling by land. The notion of expulsion, like the concept of "jurisdiction", was clearly principally territorial. Where, however, the Court found that a State had, exceptionally, exercised its jurisdiction outside its national territory, it could accept that the exercise of extraterritorial jurisdiction by that State had taken the form of collective expulsion. The Court also reiterated that the special nature of the maritime environment did not make it an area outside the law. It concluded that the complaint was admissible.

Merits of the complaint

The Court observed that, to date, the *Čonka v. Belgium*[7] case was the only one in which it had found a violation of Article 4 of Protocol No. 4. It reiterated that the fact that a number of aliens were subject to similar decisions did not in itself lead to the conclusion that there was a

[6] Judgment of 28.06.2011
[7] Judgment of 05.02.2002

collective expulsion if the case of each person concerned had been duly examined. In the present case the transfer of the applicants to Libya had been carried out without any examination of each individual situation. No identification procedure had been carried out by the Italian authorities, which had merely embarked the applicants and then disembarked them in Libya. The Court concluded that the removal of the applicants had been of a collective nature, in breach of Article 4 of Protocol No. 4.

Article 13 taken in conjunction with Article 3 and with Article 4 of Protocol No.4

The Italian Government acknowledged it had not been possible to assess the applicants' personal circumstances on board the military ships. The applicants alleged that they had been given no information by the Italian military personnel, who had led them to believe that they were being taken to Italy and had not informed them as to the procedure to be followed to avoid being returned to Libya. That version of events, though disputed by the Government, was corroborated by a large number of witness statements gathered by the UNHCR, the CPT and Human Rights Watch. The applicants had thus been unable to lodge their complaints under Article 3 of the Convention and Article 4 of Protocol No. 4 with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced.

Even if a remedy under the criminal law against the military personnel on board the ship were accessible in practice, this did not satisfy the criterion of suspensive effect. The Court reiterated the requirement flowing from Article 13 that execution of a measure be stayed where the measure was contrary to the Convention and had potentially irreversible effects. Having regard to the irreversible consequences if the risk of torture or ill-treatment materialised, the suspensive effect of an appeal should apply where an alien was returned to a State where there were serious grounds for believing that he or she faced a risk of that nature. The Court concluded that there had been a violation of Article 13 taken in conjunction with Article 3 and Article 4 of Protocol No. 4.

Article 41

Under Article 41 (just satisfaction), the Court held that Italy was to pay each applicant 15,000 euros (EUR) in respect of non-pecuniary damage and EUR 1,575.74 to the applicants jointly in respect of costs and expenses.

Separate opinion

Judge Pinto de Albuquerque has expressed a concurring opinion, which is annexed to the judgment.

The judgment is available in English and French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.