insights

American Society of International Law

April 17, 2012 Volume 16, Issue 14

European Court of Human Rights Protects Migrants Against "Push Back" Operations the High Seas

By Jan Arno Hessbruegge

Introduction

Between 2007 and 2009, Italy and Libya (then under the rule of Colonel Muammar el-Qaddafi) concluded several agreements to combat clandestine immigration. Pursuant to these agreements, Italy instated a policy of sending undocumented migrants and asylum seekers who had crossed the Mediterranean Sea from Africa back to Libya. In a number of cases, boats were intercepted on the high seas, and those on board were taken back to Libya without a prior individualized assessment of their situation and protection needs.

On February 23, 2012, the European Court of Human Rights issued a landmark judgment in the case of *Hirsi Jamaa et al. v. Italy* against such "push back" operations.[1] The case concerned a group of Somali and Eritrean nationals who tried to reach Europe in May 2009. Italian coast guard and customs vessels intercepted their boats on the high seas, thirty-five nautical miles south of the island of Lampedusa. On board Italian vessels, the men were taken back to Libya, from where they had originally embarked, and handed over to the Libyan authorities.

The Grand Chamber of the European Court, which dealt with the case due to its importance,[2] held that Italy had violated the European Convention on Human Rights and awarded each applicant EUR 15,000 in compensation. The seventeen judges unanimously ruled that Italy had breached its obligation to protect the applicants from torture and inhuman or degrading treatment (Article 3 of the European Convention) as well as the prohibition of collective expulsion of non-nationals (Article 4 of Protocol No. 4 to the European Convention), even though the applicants never reached Italian territorial waters.[3]

The Court thereby clarified and strengthened the extraterritorial protection offered by international human rights law in two important respects.

RELATED ASIL INSIGHTS

European Court of Human Rights' Judgment on Expulsion of Asylum Seekers: M.S.S. v. Belgium & Greece

Saadi v Italy: European Court of Human Rights Reasserts the Absolute Prohibition on Refoulement in Terrorism Extradition Cases

Hurricane Katrina and Internally Displaced Persons

Insights Archive>>

DOCUMENTS OF NOTE

Hirsi Jamaa v. Italy, App. No. 27765/09

Sale v. Haitian Centers Council, 509 U.S. 155 (1993).

European Convention on Human Rights

Protocol No. 4 to the European Convention

1951 Convention Relating to the Status of Refugees

1967 Protocol Relating to the Status of Refugees

ORGANIZATIONS OF NOTE

European Court of Human Rights

The United Nations High Commissioner for Refugees

The Principle of Non-refoulement Applies Extraterritorially

Under international human rights law, no one may be expelled if substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to torture, inhuman or degrading treatment or comparably serious human rights violations.[4] This principle, known as the principle of non-refoulement, finds its parallel under international refugee law in Article 33 of the 1951 Convention Relating to the Status of Refugees ("1951 Refugees Convention") and its 1967 Protocol, prohibiting states from "expel[ling] or return[ing] (*refouler*)" refugees to places where their lives or freedoms would be threatened.[5]

The United Nations High Commissioner for Refugees ("UNHCR") has long taken the position that the principle of non-refoulement also applies where refugees and others in need of international protection are under the effective control of a state acting outside its territory or territorial waters.[6] UNHCR made this point as an intervening third party in the *Hirsi* case.[7]

This position contrasts with that of the U.S. Supreme Court, which held in the controversial 1993 judgment of *Sale vs. Haitian Centers Council* that the Refugee Convention's prohibition of non-refoulement did not apply extraterritorially. On this basis, the Supreme Court upheld the practice of the U.S. Coast Guard intercepting Haitians outside U.S. territorial waters and repatriating them directly to a country engulfed in violent turmoil.[8]

In its judgment, the European Court effectively aligns itself with UNHCR's position by applying its established jurisprudence that a state is bound to respect the rights under the European Convention (and hence also the principle of non-refoulement flowing from these rights) where the state has established effective control and authority outside its territory.

The Court ruled that Italy had exercised both *de jure* and *de facto* control over the applicants from the moment they were taken aboard Italian ships.[9] According to the long settled rules of the international law of the sea, the Court observed, anyone on board the Italian ships was legally subject to the exclusive jurisdiction of Italy, the vessels' flag state. Noting that the events took place entirely on board of ships of the Italian armed forces, with crews composed of Italian military personnel, the Court also held that Italy exercised *de facto* control over the applicants, thereby rejecting the Italian government's argument that they had merely rescued the applicants on the high seas and thus exercised only minimal control.

The Court reasoned that since Italy had effective control, the jurisdiction of the European Convention attached, and Italy was under an obligation to protect the intercepted Somali and Eritrean nationals from torture and inhuman or degrading treatment. Italy violated its obligation by transferring the applicants to Libya, where they were at risk of ill-treatment.[10] Furthermore, the Court recognized that Italy exposed the applicants to a risk of so-called secondary refoulement because risk existed that Libya would arbitrarily repatriate them to their home countries where they would face "widespread serious problems of insecurity."[11]

In his concurring opinion, Judge Pinto de Albuquerque spelled out the implications of the Court's findings, noting that "the prohibition of refoulement is not limited to the territory of a State, but also applies to extra-territorial State action, including action occurring on the high seas."[12] He also took the opportunity to offer a detailed critique of the arguments advanced by the U.S. Supreme Court in support of its position in *Sale v. Haitian Centers Council*. Judge Pinto de Albuquerque noted in particular that the meaning of the French

Cymie Payne, UC Berkeley School of Law; Amelia Porges; and David Kaye, UCLA School of Law. Djurdja Lazic serves as the managing editor.

verb *refouler,* which is also used in the English text of the 1951 Refugees Convention, was wider than that of the English verb "to return" and "includes the removal, transfer, rejection or refusal of admission of a person."[13]

The findings of the Court on the extraterritorial scope of the principle of non-refoulement have implications that extend beyond the case of non-nationals intercepted on the high seas. The judgment implies, for instance, that people who stow away on ships must be protected from refoulement by the flag state, at least as soon as they reach the high seas, where the flag state enjoys exclusive jurisdiction and hence *de jure* control.[14]

Perhaps even more importantly, the judgment provides further support for the position that people who take refuge in embassies to escape persecution or other serious human rights violations must not be subjected to refoulement by the state to whom the embassy belongs. Indeed, Judge Pinto de Albuquerque's concurring opinion in *Hirsi* specifically draws this conclusion.[15] Like a ship on the high seas, embassy grounds constitute an island of almost exclusive jurisdiction located outside the territory of the embassy state.[16] The embassy state therefore has *de jure* and *de facto* effective control over the embassy ground, and it remains fully bound by the prohibition of torture under the European Convention and the prohibition of refoulement flowing from it.

"Push Back" on the High Seas Amounts to Collective Expulsion

While the European Court's ruling on the extraterritorial application of the non-refoulement principle was widely expected, the Court broke new ground with its finding that Italy also violated the prohibition of collective expulsion because "the transfer of the applicants to Libya was carried out without any form of examination of each applicant's individual situation."[17]

Insisting on the ordinary sense of the word "expulsion," Italy strenuously argued that only a person who had actually reached the state's territory could be subject to expulsion. The prohibition of collective expulsion, Italy advanced, only came into play when individuals already within the territory of a state, or those who had crossed the national border illegally, were expelled.[18] Conversely, the applicants took the position that pushing back migrants on the high seas could constitute hidden expulsions. They also noted that Italian law considered ships flying the Italian flag to be Italian territory, which implied that removing the applicants from the Italian coast guard vessels was tantamount to expelling them from Italian territory.[19]

The United Nations High Commissioner for Human Rights expanded on both arguments made by the applicants in her brief as an intervening party in the case.[20] In particular, the High Commissioner invoked the principle of good faith and insisted that a state should not be allowed to circumvent the obligation not to collectively expel non-nationals simply by advancing its interception operations to the high seas.

The Court followed the applicants' position. After finding that neither the text of Article 4 Protocol No. 4 ("Collective expulsion of aliens is prohibited") nor the historical record of its negotiation (*travaux preparatoires*) required a territorial nexus in collective expulsion cases, the Court adopted a purpose-orientated interpretation of the provision. The Court based its decision on the understanding that the European Convention "is a living instrument which must be interpreted in the light of present-day conditions."[21] The Court elaborated that

> the purpose of Article 4 of Protocol No. 4 is to prevent States

> being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority. If, therefore, Article 4 of Protocol No. 4 were to apply only to collective expulsions from the national territory of the States Parties to the Convention, a significant component of contemporary migratory patterns would not fall within the ambit of that provision, notwithstanding the fact that the conduct it is intended to prohibit can occur outside national territory and in particular, as in the instant case, on the high seas.[22]

Echoing an argument made by the High Commissioner for Human Rights, the Court also noted that "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."[23]

The Court's findings on collective expulsion reinforce those relating to non-refoulement. While the principle of non-refoulement imposes primarily an obligation of *result* (requiring that people are not transferred to places where their lives and freedoms are at risk), the prohibition of collective expulsion under international law imposes a duty of *due process* in that it requires an examination of each applicant's individual situation. Push back operations without such individualized assessment are therefore generally illegal, regardless of where the victims are pushed back (e.g., a place like Libya under Qaddafi rule or another, more secure state). This implication is significant as Italy and other European states are currently negotiating new agreements to combat clandestine migration with the emerging democracies on the southern rim of the Mediterranean Sea.

The Court's findings on collective expulsion will also have a bearing on the ongoing work of the International Law Commission ("ILC") on the topic of the expulsion of aliens. In particular, the ILC might consider broadening the definition of collective expulsion, which it had provisionally defined as "an act or behaviour by which a State compels a group of aliens to leave its territory."[24]

Conclusion

With the *Hirsi* judgment, the European Court continues to strengthen the extraterritorial protection offered by the European Convention, pursuing a path that many legal observers had prematurely deemed foreclosed after the Court issued its much discussed *Bankovic* decision.[25] Notably, the *Hirsi* judgment reiterates the Court's position that the "special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention."[26]

In a climate of increasingly stringent migration control measures, the *Hirsi* judgment sends an important signal for the protection of the human rights of migrants, refugees, and asylum seekers. The decision can be expected to have a jurisprudential impact beyond the reach of the European Convention, because the two principles it rests on—the principle of non-refoulement and the prohibition of collective expulsion—have both attainted the status of customary international law and therefore apply across the world.[27]

Australian politicians have already cited the judgment in criticizing Australia's own push-back policies.[28] It remains to be seen whether the U.S. Supreme Court will be willing to revisit its interpretation of the principle of non-refoulement, which is more restrictive than that adopted by the European Court in the *Hirsi* case.

About the Author:

Jan Arno Hessbruegge, Human Rights Officer for Legal Advocacy in the Executive Office of the High Commissioner for Human Rights, worked on the intervener's brief submitted by the High Commissioner in the case of *Hirsi Jamaa et al. v. Italy*. The article is submitted in a personal capacity, and, unless specifically indicated, the views expressed do not necessarily reflect those of the High Commissioner or the United Nations. The author thanks Paul Oertly for his comments on the initial draft.

Endnotes:

[1] Hirsi Jamaa v. Italy, App. No. 27765/09 (Eur. Ct. H.R. Feb. 23, 2012).

[2] Article 43 of the European Convention on Human Rights provides that the Grand Chamber "shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance." *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

[3] In addition, the Court found a violation of the right to an effective remedy (Article 13 of the European Convention) read in conjunction with the cited provisions. *See Hirsi Jamaa*, *supra* note 1, ¶ 270.

[4] United Nations Human Rights Committee, General Comment No. 20, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, ¶ 12 (May 26, 2004); Soehring v. United Kingdom, 161 Eur. Ct. H.R. (ser. A), ¶¶ 90-91 (1989); *see also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

[5] *See* Convention Relating to the Status of Refugees art. 33 (1), July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

[6] U.N. High Comm'r for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (Jan. 26, 2007), http://www.unhcr.org/refworld/pdfid/45f17a1a4.pdf; *see also* Haitian Centre for Human Rights v. United States, Case No. 10.675, Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser.L/V/II.95 Doc. 7 rev., at 550, ¶ 157 (1997).

[7] Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Hirsi and Others v. Italy, App. No. 27765/09 (Eur. Ct. H.R. Feb. 23, 2012), *available at* http://www.unhcr.org/refworld/pdfid/4d92d2c22.pdf.

[8] Sale v. Haitian Centers Council, 509 U.S. 155 (1993).

[9] *Hirsi Jamaa*, *supra* note 1, ¶¶ 76-82.

[10] *Id.* ¶¶ 122-38.

[11] *Id*. ¶¶ 146-58 (citing ¶ 151).

[12] *Id.* (Pinto de Albuquerque, J., concurring).

[13] *See also Sale*, 509 U.S. 191-93 (Blackmun, J., dissenting).

[14] *See* United Nations Convention on the Law of the Sea art. 92 (1), Dec. 10, 1982, 1833 U.N.T.S. 3.

[15] *See Hirsi Jamaa*, *supra* note 1; *see also* Al-Saadoon & Mufdhi v. United Kingdom, App. No.

61498/08, 49 I.L.M. 764, ¶ 139 (2010) (*obiter dicta*).

[16] *See* Vienna Convention on Diplomatic Relations art. 22, Apr. 18, 1961, 23 U.N.T.S. 3227 (stating that the only—from a human rights perspective immaterial—difference lies in the fact that the embassy grounds remain on the territory of the state from which the victim seeks protection).

[17] *Hirsi Jamaa*, *supra* note 1, ¶ 185.

[18] *Id*. ¶ 160.

[19] *Id*. ¶¶ 161-63.

[20] *Id*. ¶ 164. For the full text, *see* Intervener Brief Filed on Behalf of the U.N. High Comm'r for Human Rights, Hirsi Jamaa v. Italy, App. No. 27765/09 (Eur. Ct. H.R. Feb. 23, 2012), *available at* http://ohchr.org/EN/Issues/Migration/Pages/StudiesAndReports.aspx.

[21] *Hirsi Jamaa*, *supra* note 1, ¶¶ 173-75.

[22] *Id*. ¶ 177.

[23] *Id*.

[24] *See* Rep. of the Int'l Law Comm'n, May 7- June 5, July 9-Aug. 10, 2007, ¶ 199 (n.400, draft art. 7 (2)), U.N. Doc. A/62/10; GAOR 59th Sess. (2007), *available at* http://untreaty.un.org/ilc/reports/2007/english/chp7.pdf.

[25] Bankovic v. Belgium, App. No. 52207/99, ECHR 2001-XVII (2001) (finding inadmissible claims of Serbian victims of NATO bombings during the Kosovo war given that the alleged violations occurred outside the territory of those states carrying out the bombings and those states never established effective control over the victims).

[26] *Hirsi Jamaa*, *supra* note 1, ¶ 178; *see also* Medvedyev v. France, App. No. 3394/03, ¶ 81 (Eur. Ct. H.R. Mar. 29, 2010).

[27] *See* U.N. High Comm'r for Refugees, *supra* note 6; *see also* U.N. High Comm'r for Human Rights, *supra* note 20.

[28] Kirsty Needham, Court Rules Against "Turn Back the Boats" Policy, Sydney Morning Herald (Feb. 25 2012), http://www.smh.com.au/national/court-rules-against-turn-back-the-boats-policy-20120224-1tti3.html.