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# The legality of intercepting boat people under search and rescue and border control operations

with reference to recent Italian interventions in the Mediterranean Sea and the ECtHR decision in the *Hirsi* case

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This article briefly addresses the legal grounds for the interception of boat people on the high seas by military vessels, taking into account the Italian Navy's policy on the matter. If interceptions are conducted within the framework of an 'extraterritorial' border control operation, their legality is hardly sustainable. Conversely, when interventions are implemented as search and rescue (SAR) operations, their legal basis is much wider, provided that intervening states' obligations under the SAR legal regime are coupled with those stemming from the prohibition of refoulement under international refugee law. As a result, rescued migrants can only be disembarked to 'safe third countries', namely countries in which they do not run the real risk of being persecuted or returned to other countries 'at risk'. According to some very recent international and national jurisprudence, including the European Court of Human Rights' decision in the *Hirsi*, before disembarking migrants, intervening states should in principle carry out a positive assessment on the functionality of the recipient country's asylum system. In order to assess clearly the legality *per se* of interceptions, this article supports the necessity of applying a prevalence criterion, according to which if the SAR character prevails over the objective of preventing irregular migration, the intervention in question should be considered an authentic and lawful salvage operation.

## Introduction

Legally speaking, in the context of a naval operation, the use of the word 'interception' is somewhat vague and ambiguous. In military terminology, saying that a warship intercepts a 'target', whatever it is, means that the warship in question has an interest in approaching that target or even preventing it from continuing its journey, but it does not explain the purpose of

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the action or the conduct of the action. Similarly, the 'interception' by a warship on the high seas of a vessel with a good number of people on board – who could be irregular migrants attempting to reach the coasts of a certain state – is somewhat non-specific in both legal and operational terms. The interception of a vessel can be performed, for instance, as a part of those 'naval constabulary powers'<sup>1</sup> that warships are mandated to exercise in peacetime, or otherwise it may be implemented in the course of a rescue operation. In addition, interception can be requested or authorised by the intercepted vessel's flag state for law enforcement purposes or even conducted with the master's consent for safety reasons.<sup>2</sup> The powers and actions that a warship can legally exercise when coming across a vessel with undocumented migrants on board will depend on the combination of certain factors and circumstances. As a consequence, any generalisation before the event on the illegality *per se* of such operations is misguided.

However, when interception on the high seas is conducted as part of a border control operation, its legal basis becomes even more tenuous, owing to the lack of a solid international legal regime applicable to extraterritorial anti-illegal immigration operations. Therefore if an operation falls into this category, these actions become problematic for intervening states. Conversely, interventions carried out under the SAR legal framework are far less controversial, although such interceptions often end up hinging on the boat people's will to be 'saved'. The operation's nature and applicable legal regime are therefore not insignificant to the implementation of naval activities. Carrying out a SAR intervention entails limits, for example, to the use of force by naval officers, which are much narrower than those applicable to a border control operation. Persisting in labelling the 'interception' of boat people on the high seas as 'border control operations' may thus be counterproductive and lead to unexpected and 'painful' consequences, including exposing intervening states to legal liability, as the recent decision of the European Court of Human Rights (ECtHR) in the *Hirsi* case clearly demonstrates.<sup>3</sup> Thus *saying* the right thing means *doing* the right thing.

In addition, even when boat people are intercepted on a sound legal basis, the aftermath of intervention may turn out to be complex for the warship's crew. What should be done with the undocumented people found on board? Are the warship's commanding officer and crew responsible for their fate and, if so, to what extent?

In light of these and many other questions posed by this practice, this article briefly analyses the legal basis of migrants' interception by warships on the high seas, also referring to the Italian Navy's experience on the matter (which is not necessarily the same as that of other Italian state agencies – such as the Coastguard or the *Guardia di Finanza* – also involved in migration control operations) and taking into account the ECtHR ruling in *Hirsi*. The first section shows how the border control operations' legal regime is unfit to regulate such interventions, while the second section explains that the SAR legal regime may well represent a suitable legal basis for this purpose and also tackles the issue of the disembarkation of migrants to a 'place of safety'. The third section is dedicated to the parallel application of the principle of non-refoulement and the SAR legal regime, with further consequences for the disembarkation of migrants. In the fourth section the possibility of disembarking rescued migrants to a 'safe third country' is examined, and how this can be carried out lawfully in light of the rules elaborated by the most recent international jurisprudence on the transfer of asylum-seekers to third countries analysed. The fifth section is entirely dedicated to analysis

<sup>1</sup> On the matter of constabulary roles for warships see M Pugh (ed) *Maritime Security and Peacekeeping* (Manchester University Press Manchester 1994).

<sup>2</sup> The legal basis for boarding a vessel with the master's consent only (ie in the absence of the flag state's consent) remains questionable when exercised other than for maritime safety reasons.

<sup>3</sup> *Hirsi Jamaa and Others v Italy*, ECtHR (GC) Application No 27765/09, filed on 26 May 2009 (judgment of 23 February 2012) (*Hirsi*) at [www.echr.coe.int](http://www.echr.coe.int). The *Hirsi* case is discussed in more detail in section V.

of the *Hirsi* case and a parallel is drawn between the principles set out in the preceding section and those developed by the Strasbourg Court. The conclusion summarises the article's main findings and proposes a workable solution to the control of migration flows, with the contribution from the Navy.

### I The legal regime of border control operations unfit for interceptions on the high seas

Under Italian domestic law,<sup>4</sup> the Italian Navy is mandated to assist other state agencies in tackling the smuggling of migrants at sea. Conducting anti-illegal immigration operations is thus not among the Italian Navy's principal tasks, although the Navy is duty-bound to assist when requested to do so by the Ministry of Interior (Moi).<sup>5</sup> In particular, on the high seas, the Navy is tasked with monitoring, surveillance, identification and control of vessels suspected of carrying smuggled migrants on board.<sup>6</sup> In practice, this mainly entails spotting, identifying and tracking the vessels in question. Flag requests,<sup>7</sup> as well as the right of visit,<sup>8</sup> can be exercised only 'when necessary requirements are met',<sup>9</sup> that means in conformity with the applicable international law,<sup>10</sup> domestic statutes and/or agreements with the intercepted vessel's flag state. A 2003 Moi Decree also specifies that anti-smuggling and SAR operations can be undertaken in parallel.<sup>11</sup> This hypothetical combination of legal regimes reflects the uncertainty as to the operational nature of interventions. Indeed, an anti-illegal immigration operation may easily turn into a salvage mission and vice versa. When intervention is practically carried out, however, the two legal frameworks cannot apply simultaneously but must be on the basis of the true nature of the intervention itself, although nothing would in principle prevent them from applying in succession.

Nevertheless, the application of the border control legal regime may become quite problematic. In fact, both scholars<sup>12</sup> and domestic jurisprudence<sup>13</sup> confirm that the interception of boat people on the high seas may hardly constitute a migration control operation with further application of relevant international,<sup>14</sup> EU<sup>15</sup> and domestic<sup>16</sup> migration law provisions. Migrants are in fact halted before entering the territorial waters of intervening states and, as a consequence, it becomes difficult to define their interception and diversion/forced return to

<sup>4</sup> Code of Military Order (Legislative Decree No 66/2010) art 111(1b); Migration Act of 1998 (Law No 1998/286) art 12(9bis–9sexies); Decree of the Ministry of Interior of 14 July 2003 (2003 Moi Decree).

<sup>5</sup> 2003 Moi Decree art 3(2).

<sup>6</sup> *ibid* art 5(1).

<sup>7</sup> For a definition of 'flag request' see F Caffio 'Glossario di diritto del mare' (2007) 5 *Rivista Marittima* 3 (Supplement) 61–62.

<sup>8</sup> For a definition of 'right of visit' see *ibid* 51–52.

<sup>9</sup> 2003 Moi Decree art 7(2).

<sup>10</sup> Namely, *inter alia*, according to the UN Convention on the Law of the Sea (UNCLOS) (adopted on 10 December 1982) 1833 UNTS 3 art 110.

<sup>11</sup> 2003 Moi Decree art 2(4).

<sup>12</sup> See eg M Pallis 'Obligations of states towards asylum seekers at sea: interactions and conflicts between legal regimes' (2002) 14 (2–3) *International Journal of Refugee Law* 329–64 at 353.

<sup>13</sup> See eg Court of Cassation, I Sec, Decision No 32960 (8 September 2010) [www.cortedicassazione.it](http://www.cortedicassazione.it), restricting the Italian jurisdiction against the smuggling of migrants to Italian territorial waters. See also G Andreone 'Immigrazione clandestina, zona contigua e Cassazione italiana: il mistero si infittisce' (2011) 5 *Diritti Umani e Diritto Internazionale* 1 183–87.

<sup>14</sup> See eg Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol on Smuggling – II Palermo Protocol) UN Doc A/55/383 (15 November 2000).

<sup>15</sup> Regulation (EU) 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union OJ L304/1 (22 November 2011); Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2010/252/EU) OJ L111/20 (4 May 2010).

<sup>16</sup> See eg Migration Act 1998, as further amended.

a third country as a deportation *tout court*. Accordingly, the migration law provisions mentioned above have never been applied during interceptions performed to date by Italian forces in the Mediterranean Sea.<sup>17</sup>

## II The SAR legal regime as the only available instrument and the disembarkation of migrants

Conversely, the legal basis of interceptions carried out under the SAR legal framework is much wider. The principle of assistance to persons in distress at sea is in fact contained in several maritime law conventions, including UNCLOS,<sup>18</sup> the SAR Convention<sup>19</sup> and the SOLAS Convention.<sup>20</sup> Unsurprisingly then, as far as the author knows, whenever the Italian Navy has been requested to intercept boat people on the high seas (and so far this has occurred only rarely) its approach has always been that of considering such operations as SAR interventions.<sup>21</sup>

This approach, however, is not immune from problems. First of all, the intercepted vessel must be 'in distress', a status that is not yet clearly defined in international maritime law.<sup>22</sup> Secondly, the intervention basically depends on the boat people's will to be rescued, as – also logically – it is the vessel in peril that launches the distress call. In addition, the vessel could hypothetically resist the warship's 'rescue attempt', putting at risk the lives of people on board.<sup>23</sup> In the case of active resistance, the interception cannot fall within the SAR legal regime.

According to the SAR Convention, states should provide to those in distress at sea the 'most appropriate assistance available'.<sup>24</sup> While this in turn depends on the concrete circumstances of the case, the most challenging issue arising out of the application of the SAR legal framework is that of the disembarkation of migrants. In this context, following the amendments to the SAR and SOLAS Conventions decided in 2004 by the International Maritime Organization (IMO), people (and thus also migrants) rescued at sea must now be promptly conducted to a 'place of safety'. The latter is defined as:

... a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Furthermore, it is a place from which transportation arrangements can be made for the survivors' next or final destination.<sup>25</sup>

<sup>17</sup> For instance, if considered anti-illegal immigration operations undertaken on the basis of the II Palermo Protocol, interceptions should also see the competent national authorities opening criminal investigations and collecting evidence. Migrants should in turn be individually identified and heard as witnesses/indicted persons, while vessels should be seized and examined. Reportedly, no such activities have so far been carried out by the Italian authorities during interceptions.

<sup>18</sup> UNCLOS arts 18(2), 98(1).

<sup>19</sup> International Convention on Maritime Search and Rescue (adopted on 27 April 1979) 1403 UNTS Annex Ch 2 arts 2.1.9, 2.1.10.

<sup>20</sup> International Convention for the Safety of Life at Sea (adopted on 1 November 1974) 1184 UNTS 3 Ch 5 regs 7, 33(1).

<sup>21</sup> For example, during the Summer 2009 interception operations (which recently led to the *Hirsi* judgment (n 3) referred to in Section V), the Italian Navy intervened only twice, on 10 May and 1 July 2009. The other interceptions were conducted by the Coastguard and the *Guardia di Finanza*. Migrants were initially stopped in international waters by Italian military vessels, then taken on board and returned directly to Libyan ports. During 2009, Italian vessels carried out 11 interception operations (nine towards Libya and two towards Algeria), resulting in the forced return of 834 and 51 migrants respectively to the Libyan and the Algerian coasts; (Ministry of Interior 'Italian initiatives: security, immigration, asylum') (Rome 14 April 2010) 27 [www.interno.it/mininterno/export/sites/default/it/assets/files/19/0844\\_Opuscolo\\_ENGL\\_DEF.pdf](http://www.interno.it/mininterno/export/sites/default/it/assets/files/19/0844_Opuscolo_ENGL_DEF.pdf).

<sup>22</sup> See R Barnes 'Refugee law at sea' (2004) 53 *International & Comparative Law Quarterly* 1–77 at 58–59; M Pugh 'Drowning, not waving: boat people and humanitarianism at sea' (2004) 17 *Journal of Refugee Studies* 1 50–69 at 58–59.

<sup>23</sup> Bearing in mind that the vessel is already considered 'in distress' by the warship, otherwise it could not begin the 'rescue operation'.

<sup>24</sup> SAR Convention Annex Ch 2 art 2.1.9.

<sup>25</sup> IMO-Maritime Safety Committee 'Guidelines on the treatment of persons rescued at sea' (MSC Guidelines) art 6.12 Resolution MSC.167(78) (20 May 2004) [www.unhcr.org/refworld/docid/432acb464.html](http://www.unhcr.org/refworld/docid/432acb464.html).

The 'place of safety' concept is so broad as to include the warship conducting the salvage, but only on a temporary basis.<sup>26</sup> Indeed, the 'place of safety' is not necessarily located on land, but could be 'aboard a rescue unit or other suitable vessel or facility at sea', pending the final disembarkation of survivors.<sup>27</sup> Making available a place of safety is the responsibility of the country in whose SAR zone the survivors are recovered.<sup>28</sup> However, this principle does not automatically entail an obligation for that state or for the intervening state to disembark rescued people on its own territory. Indeed, survivors could possibly be disembarked in a third country that is willing to accept them. However, the fact that the people in question appear (and most likely are) undocumented migrants does not facilitate the procedure.

While international maritime law does not formally impose upon states an obligation to grant boat people access to their territory, it is clear that – in practice – the 'disembarkation burden' rests primarily upon the warship's flag state, with the SAR coordinating state concurring. When the latter is unable or unwilling to find a proper place of disembarkation, experience shows that it is the warship's flag state which – in the end – must find an appropriate solution to the stalemate.<sup>29</sup> Nonetheless, a number of international soft-law rules tend to balance the intervening state's position with that of the SAR coordinating state or the state hosting an international patrolling force. In this respect, in 2009, the IMO Facilitation Committee (FAL) elaborated a set of principles on the disembarkation of people rescued at sea which should guide member states in adopting their own internal policies on the matter.<sup>30</sup> According to the FAL:

... if disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued in accordance with immigration laws and regulations of each Member state into a place of safety under its control [...].<sup>31</sup>

A year later, the problems related to the disembarkation of migrants intercepted in the framework of Frontex-coordinated missions led the EU to adopt a set of non-binding guidelines which should inspire the operations' *modus operandi*.<sup>32</sup> The guidelines state that, in disembarking people 'intercepted or rescued' at sea:

... priority should be given to disembarkation in the third country from where the ship carrying the persons departed or through the territorial waters or search and rescue region of which that ship transited and if this is not possible, priority should be given to disembarkation in the host Member State [ie the EU Member State hosting the Frontex-coordinated mission].<sup>33</sup>

Hence, on the one hand, international maritime law has so far elaborated a number of guidelines regulating the disembarkation of migrants rescued at sea; on the other hand, however, these guidelines are not the sole guiding principles on the matter. Logically, since the purpose of any rescue attempt is to save lives, following their rescue, survivors cannot be conducted to a place where they might be subject to further risks or persecution, also not directly related to their journey by sea. Basically then, international maritime law rules end up

<sup>26</sup> *ibid* art 6.13.

<sup>27</sup> *ibid* art 6.14.

<sup>28</sup> *ibid* art 2.5.

<sup>29</sup> See eg the recurring disputes between Malta and Italy on the disembarkation of migrants rescued by Italian forces within the extended Maltese SAR Zone (Malta claims a SAR Zone of 250,000 km<sup>2</sup>, which is about 750 times its territory).

<sup>30</sup> IMO Facilitation Committee 'Principles relating to administrative procedures for disembarking persons rescued at sea' Doc No FAL.3/Circ.194 (22 January 2009) [www.imo.org/OurWork/Facilitation/docs/FAL%20related%20nonmandatory%20instruments/FAL.3-Circ.194.pdf](http://www.imo.org/OurWork/Facilitation/docs/FAL%20related%20nonmandatory%20instruments/FAL.3-Circ.194.pdf).

<sup>31</sup> *ibid* para 2.3.

<sup>32</sup> Council decision 2010/252/EU (n 15).

<sup>33</sup> *ibid* Annex Part II para 2.1.

being coupled with the so-called 'non-refoulement' principle,<sup>34</sup> as developed by international refugee law.<sup>35</sup>

### III The SAR legal regime, the non-refoulement principle and the right to asylum

In truth, it was for the IMO – an international maritime law body – to establish the principle according to which the prohibition of refoulement must be explicitly considered in deciding the place of safety during rescue operations.<sup>36</sup> In this regard, the 2004 binding guidelines adopted by the IMO-Maritime Safety Committee (MSC) specify that: '[t]he need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of *asylum seekers* and *refugees* recovered at sea' (emphasis added).<sup>37</sup> Naturally, the non-refoulement principle only operates with respect to individuals in need of protection. So how can they be distinguished as such among the other rescued migrants? How can it be ascertained that disembarking people in a certain port would not expose them – or at least some of them – to further risks or persecution?

In trying to answer these questions it should be noted, first, that the interception of migrants on the high seas does not *per se* violate the prohibition of refoulement.<sup>38</sup> Indeed, 'the obligation not to return a refugee to the country where he was [or will be] persecuted [does] not imply an obligation to admit him to the country where he seeks entry'.<sup>39</sup> The duties of not exposing migrants to further persecution and their right to asylum are clearly distinguished in international law.<sup>40</sup> While the former is a non-derogable or, better, a peremptory<sup>41</sup> rule of international refugee law, traditionally entailing a purely negative obligation on states,<sup>42</sup> the latter falls within the reserved powers of nations, stemming from the principle of sovereignty.<sup>43</sup> This means, *inter alia*, that it is not for rescued people to choose their port of destination. In addition, under international maritime law there is no positive obligation on intervening states to inform migrants rescued in international waters of the possibility of seeking asylum or to request them to reveal any potential cause of persecution in third

<sup>34</sup> See E Lauterpacht and D Bethlehem 'The Scope and Content of the Principle of Non-refoulement: Opinion' in E Feller, V Türk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press Cambridge 2003).

<sup>35</sup> See United Nations Convention Relating to the Status of Refugees (adopted on 28 July 1951) 189 UNTS 150 art 33(1): 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. The same principle is embedded in all the major human rights conventions as derived from the articles on the prohibition of torture.

<sup>36</sup> S Trevisanut 'The Principle of Non-refoulement at Sea and the Effectiveness of Asylum Protection' (2008) 12 *Max Planck Yearbook of United Nations Law* (Max Planck Institute for Comparative Public Law and International Law Vol 12 2008) 205–246 at 239.

<sup>37</sup> MSC Guidelines (n 25) para 6.17.

<sup>38</sup> G S Goodwin-Gill and J McAdam *The Refugee in International Law* (Oxford University Press New York 2007) 277.

<sup>39</sup> UN Ad Hoc Committee on Statelessness and Related Problems 'Comments of the committee on the draft convention' art 28 UN Doc E/AC.32/L.32/Add 1 (10 February 1950) [www.unhcr.org/refworld/docid/3ae68c1a.html](http://www.unhcr.org/refworld/docid/3ae68c1a.html).

<sup>40</sup> Goodwin-Gill and McAdam (n 38) 196. Notably, however, there are clear links between the two. For example 'the principle of non-refoulement is equally applicable to asylum-seekers who are awaiting a determination of their status' (UN High Commissioner for Refugees 'Note on International Protection (submitted by the High Commissioner)' para 23 (3 August 1987) UN Doc A/AC.96/694, [www.unhcr.org/refworld/type,UNHCRNOTES,,,3ae68c0314,0.html](http://www.unhcr.org/refworld/type,UNHCRNOTES,,,3ae68c0314,0.html)).

<sup>41</sup> *ibid* para 21. See also J Allain 'The *jus cogens* nature of non-refoulement' (2001) 13 *International Journal of Refugee Law* 4 533–58.

<sup>42</sup> A Vibeke Egli *Mass Refugee Influx and the Limits of Public International Law* (Martinus Nijhoff Publishers The Hague 2002) 155.

<sup>43</sup> As Nathwani argues: '[N]on-refoulement does not solve the ensuing problem of the individual being potentially left without any country of residence. In this sense the legal recognition of non-refoulement, without the recognition of the individual right to obtain asylum is incoherent in principle' (N Nathwani *Rethinking Refugee Law* (Martinus Nijhoff Publishers The Hague 2003) 135).

states.<sup>44</sup> Quite the contrary; few states in the world recognise the right of migrants to ask for asylum while on board their warships. Remarkably, Italy is apparently one of them.<sup>45</sup> Even choosing to apply migration law rules to SAR interventions undertaken on the high seas (which would be inappropriate in any event), under EU law (in particular, the Procedures Directive<sup>46</sup>) the right to legal assistance is only provided for 'applicants for asylum',<sup>47</sup> ie migrants who have already submitted their claim or have expressed their wish to submit the claim in question.

That being said, it is essential to find a way to offer survivors a chance to express their concern with regard to the port of destination while they are still on board the rescuing warship, without this being interpreted as giving rise to an obligation of legal assistance. A reasonable solution might be the one reported in the 2010 Rules for Frontex-coordinated missions, according to which, while on board the rescuing vessel 'the persons intercepted or rescued [must] be informed in an appropriate way so that they can express any reasons for believing that disembarkation in the proposed place would be in breach of the principle of non-refoulement'.<sup>48</sup> In this way, migrants can assist state authorities to comply with the non-refoulement rule and identify people in need of protection. This procedure, on the other hand, does not impose upon the intervening state a real obligation of compliance with the migrants' concerns; nor does it grant the latter any directly enforceable right to asylum.

In order to address such issues, a few months after the adoption of the Frontex Rules, the Dutch Government declared that:

[O]n a Dutch ship there is no authority responsible for handling applications, being the commander of the ship not entitled to receive them [...]. In this regard, it is the responsibility of a Dutch ship's commanding officer that if a migrant on board expresses a wish to submit an application, this is not left without consequences. This requires that an alien who thinks he/she needs protection has to be returned only after his/her request has been assessed and there is no reason to grant the protection in question. These migrants should therefore be given the opportunity to submit an application to a competent authority. [...] This means that the operational plan may include an explicit provision on that it is the host nation which is responsible for handling the applications of intercepted or rescued migrants made on board the Dutch ship. The Netherlands considers the inclusion of this provision as a condition to participate in a Frontex operation.<sup>49</sup>

This approach is totally reasonable for states, such as The Netherlands, whose navies operate far away from their territories. In these circumstances, the migrants' disembarkation in the intervening state's territory would simply be unfeasible or at least not in line with the 'most

<sup>44</sup> This was also highlighted by the Italian Government in its response to a report of the Council of Europe's Committee for the Prevention of Torture on the interceptions carried out by Italian military vessels in 2009 (see CPT Response of the Italian Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Italy from 27–31 July 2009 Doc No CPT/Inf (2010) 15 (28 April 2010) [www.cpt.coe.int/documents/ita/2010-inf-15-eng.pdf](http://www.cpt.coe.int/documents/ita/2010-inf-15-eng.pdf)).

<sup>45</sup> During the interception operations of 2009 the Italian authorities confirmed that any intercepted migrant willing to apply for asylum would have been brought to Italy to submit his/her application (see eg the statements of Hon Alfredo Mantovano and Hon Nitto Francesco Palma – both Undersecretaries of State for the Interior – made before the Italian Parliament on 22 September and 24 November 2009, respectively) [www.interno.it/mininterno/export/sites/default/it/assets/files/17/0895\\_Audizione\\_Mantovano\\_comitato\\_Schengen.pdf](http://www.interno.it/mininterno/export/sites/default/it/assets/files/17/0895_Audizione_Mantovano_comitato_Schengen.pdf); [www.camera.it/resoconti/dettaglio\\_resoconto.asp?idSeduta=251&resoconto=steno grafico&indice=alfabetico&tit=00070&fase=00010](http://www.camera.it/resoconti/dettaglio_resoconto.asp?idSeduta=251&resoconto=steno grafico&indice=alfabetico&tit=00070&fase=00010).

<sup>46</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326 13.

<sup>47</sup> *ibid* art 15(1).

<sup>48</sup> Council Decision No 2010/252/EU (n 32) Annex Part I Rule 1.2.

<sup>49</sup> Letter from the Minister of Justice to the President of the House of Representatives Doc No 61 (3 September 2010) [www.statewatch.org/news/2010/sep/frontex-netherlands-position.pdf](http://www.statewatch.org/news/2010/sep/frontex-netherlands-position.pdf) (unofficial translation – original version available at <https://zoek.officielebekendmakingen.nl/kst-21501-28-61.html>).

appropriate assistance available', to which rescued people would be entitled under international maritime law. At the same time, however, the Dutch approach looks like a clever – but somewhat opportunistic – way of avoiding any further problems arising from the transfer of migrants, putting the disembarkation burden primarily on the host state's shoulders. The Dutch position does, however, address the difficult situation in which a warship's commanding officer and crew may find themselves at the end of a rescue operation on the high seas. Overloading the warship's personnel with responsibilities going beyond providing first aid and medical assistance to survivors would seem unworkable for anyone with even basic experience of the reality of life on board a military vessel.

In 2009, possibly as a result of these same concerns, the IMO Facilitation Committee suggested that 'any operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress are to be carried out after disembarkation to a place of safety'.<sup>50</sup> Notably, however, the Facilitation Committee also recognised the right of rescued people to ask for asylum on board the rescuing vessel, with their requests to be examined by a competent authority (but not necessarily belonging to the rescuing vessel's flag state).<sup>51</sup>

These and other instances all point towards bridging the legal gap between, on the one hand, states' negative obligations stemming from the non-refoulement principle, and, on the other, their positive obligations stemming from domestic law or EU law on asylum. The latter is progressively becoming 'extraterritorial', in the sense that the right to access to an effective asylum system is gradually being granted to people even beyond the borders of states. At the same time, however, the concept of authority responsible for securing such access to asylum procedures is becoming flexible and adapting to the circumstances of the case. Apparently, the authority in question may vary from time to time and even be selected on the basis of an agreement among all the parties concerned (eg intervening states, host state, SAR coordinating state etc).

#### **IV The 'safe third country' concept in light of the most recent international jurisprudence**

Coupling the non-refoulement rule with the SAR legal regime is turning the place of safety concept into the 'safe third country' (STC) concept.<sup>52</sup> A state may invoke the STC paradigm when it 'den[ies] an asylum-seeker admission to substantive asylum procedures [...] on the ground that he or she already enjoyed, could request or should have requested and, if qualified, would actually be granted, asylum and protection in another country'.<sup>53</sup> Accordingly, migrants rescued on the high seas are denied entry into the country they initially intended to enter and are instead disembarked in a 'risk free' third country. This practice is in principle totally lawful and in line with Article 33(1) of the 1951 Geneva Convention Relating to the Status of Refugees.<sup>54</sup> Nevertheless, seen under the lens of the non-refoulement principle, the STC concept not only entails the absence of any immediate risk upon disembarkation, but also a reasonable certainty that the individuals in question will not be persecuted if returned to their country of origin, or to another country, as a consequence of a decision taken by the state of disembarkation ('indirect' refoulement).<sup>55</sup>

<sup>50</sup> IMO Doc No FAL.3/Circ.194 (n 30) para 2.2.

<sup>51</sup> *ibid* paras 2.2 and 2.4.

<sup>52</sup> See A Hurwitz *The Collective Responsibility of States to Protect Refugees* (Oxford University Press New York 2009) 46; S Kneebone 'The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The "Safe Third Country" Concept' in J McAdam (ed) *Forced Migration, Human Rights and Security* (Hart Publishing Oxford and Portland OR 2008) 129–54.

<sup>53</sup> UNHCR 'Note on International Protection' (submitted by the High Commissioner) para 20 (31 August 1993) A/AC.96/815 [www.unhcr.org/refworld/docid/3ae68d5d10.html](http://www.unhcr.org/refworld/docid/3ae68d5d10.html).

<sup>54</sup> Lauterpacht and Bethlehem (n 34) 87–177 at 122. The article's text is reported at note 32.

<sup>55</sup> See inter alia K Wouters and M den Heijer 'The *Marine I* case: a comment' (2010) 22 *International Journal of Refugee Law* 1 1–19 at 7.



Notably, however, this depends upon the functioning of the recipient state's asylum system. So, should the decision of handing over migrants rescued on the high seas to a certain state be based on a positive assessment of that state's asylum system? Should a 'presumption of safety' of such a system be enough to relieve the intervening state of its responsibilities regarding the prohibition of refoulement, or should that state make a thorough assessment on a case-by-case basis and, if so, who decides the meaning of 'thorough'?

On the whole, considering the absence of specific rules of international maritime law and ambiguous state practice, there is not yet a comprehensive answer to these questions. Generally, it may be observed that, given the traditionally negative character of the non-refoulement rule, any additional positive obligation deriving from it would probably find states somewhat sceptical. Notwithstanding that, some very recent international and domestic rulings on the transfer of asylum-seekers abroad have expanded the duties of states in respect of the non-refoulement principle, to the point that states willing to deport or return individuals to a third country should base their action on a careful assessment – in practical terms – of the asylum system in place in that country, in order to avoid indirect refoulement of asylum-seekers to their countries of origin or elsewhere.

In the *MSS* case,<sup>56</sup> concerning the deportation of an Afghan national from Belgium to Greece on the basis of the 'Dublin II Regulation',<sup>57</sup> the Grand Chamber (GC) of the European Court of Human Rights (ECtHR) found Belgium to be in violation of the prohibition of refoulement (as derived from Article 3 of the European Convention on Human Rights (ECHR))<sup>58</sup> for having not verified the practical application by the Greek authorities of their legislation on asylum. According to the ECtHR (thanks, inter alia, to the UN High Commissioner for Refugees' (UNHCR) reports and correspondence with the Belgian Government), Belgium knew or should have known that the applicant's asylum claim would have not been seriously examined by the Greek authorities.<sup>59</sup> The Court also affirmed that, in order to comply with the non-refoulement rule, it is not sufficient for the removing country to rely on diplomatic assurances offered by the receiving country when such assurances only concern the legislation in force and do not contain any 'relevant information about the situation in practice'<sup>60</sup> or the concrete circumstances of the case.

The same principle was later upheld by the GC of the Court of Justice of the European Union (CJEU) in its decision of 21 December 2011 on two joined cases.<sup>61</sup> The first, again, concerned the deportation of an Afghan national from the UK to Greece according to the Dublin II Regulation. The second involved Afghan, Iranian and Algerian nationals who first crossed EU borders in Greece, where they were arrested for illegal entry but did not apply for asylum, and later travelled to Ireland. The latter's authorities were now seeking to return them to Greece. According to the CJEU, the mere presumption of compliance with the non-

<sup>56</sup> ECtHR (GC) *MSS v Belgium and Greece* Application No 30696/09 judgment (21 January 2011) [www.echr.coe.int](http://www.echr.coe.int).

<sup>57</sup> Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1.

<sup>58</sup> Article 3 ECHR does not explicitly contain the non-refoulement principle but according to the jurisprudence of the ECtHR, this rule is embedded in the prohibition of torture as included in the above-mentioned provision (see ECtHR *Soering v United Kingdom* Application No 14038/88 Judgment (7 July 1989) paras 85 and 91 [www.echr.coe.int](http://www.echr.coe.int)). All the major human rights conventions, such as the International Covenant on Civil and Political Rights, the Convention against Torture, the Convention of the Rights of the Child, the ECHR and the Inter-American Convention on Human Rights, make the prohibition of refoulement derive from the absolute prohibition of torture/inhuman and degrading treatments.

<sup>59</sup> *MSS v Belgium and Greece* (n 56) para 358.

<sup>60</sup> *ibid* para 354.

<sup>61</sup> Case C-411/10 *NS v Secretary of State for the Home Department* and Case C-493/10 *ME et al v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* (judgment 21 December 2011) CJEU (GC) [www.curia.eu.int](http://www.curia.eu.int).

refoulement rule by EU Member States, as embedded in the EU Charter of Fundamental Rights of the European Union (CFR), did not represent a sufficient legal basis to allow the applicants' deportation. On the contrary, the Court noted that:

Member States, including the national courts, may not transfer an asylum seeker to [... another Member State] where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of [Article 4 CFR – ie the prohibition of torture/refoulement].<sup>62</sup>

Remarkably, the CJEU also rejected the Belgian, Italian and Polish Governments' claims that Member States lack the ability to assess in practical terms the other Member States' compliance with fundamental rights, as well as the risks to which asylum-seekers would be exposed if transferred to other EU countries. According to the Court, in fact, information such as the UNHCR's reports would make this entirely possible.<sup>63</sup>

A third case – which was decided by a domestic court, the High Court of Australia<sup>64</sup> – dealt with the deportation of two Afghan asylum-seekers (one adult and one minor) from Australia's offshore territory of Christmas Island to Malaysia, on the basis of a 'refugee swap deal' between the Australian and Malaysian Governments. Under such an agreement, the applicants would have been given the option of lodging their asylum claims directly in Malaysia. This procedure was not found unlawful *per se* by the Court. However, the latter observed that in order to comply with the non-refoulement principle (as embedded in Australian domestic legislation) there are at least three conditions to be met. In particular, the receiving state must be legally bound by international law or its own domestic law to provide asylum-seekers: (i) access to 'effective procedures' for assessing their claim for protection; (ii) protection pending determination of their refugee status; and (iii) protection in case, after the acknowledgement of their refugee status, they decide to return to their country of origin or resettle in another country.<sup>65</sup> Notably, the need to assess the effectiveness of the recipient country's asylum system is not mentioned in mandatory terms. According to the Court, the government 'may [emphasis added] scrutinise what is done in practice to ensure that the country's laws are carried into effect and to ensure that the country can be relied upon to recognise refugee status and provide the necessary protections'.<sup>66</sup> If the assessment is negative, the government 'may well conclude that the necessary protections are not in fact provided'.<sup>67</sup> However, the government's assessment does not replace the procedure's key legal requirement, namely that the recipient country is bound by its own domestic law to secure asylum-seekers' protection and recognition of their status.<sup>68</sup> Malaysia, on the contrary:

... first, does not recognise the status of refugee in its domestic law and does not undertake any activities related to the reception, registration, documentation and status determination of asylum seekers and refugees; second, is not party to the Refugees Convention or the Refugees

<sup>62</sup> *ibid* para 106.

<sup>63</sup> *ibid* para 91. There are indeed a good number of international and domestic judicial decisions on the legal relevance of reports issued by governmental and non-governmental organisations on the situation in asylum-seekers' countries of origin (countries of origin information or COI). For a comprehensive overview see G Gyulai *Country Information in Asylum Procedures – Quality as a Legal Requirement in the EU* (Hungarian Helsinki Committee Budapest, updated version 2011) 31–38 [www.iarlj.org/general/images/stories/news/COI2012/EN\\_COI\\_in\\_Asylum.pdf](http://www.iarlj.org/general/images/stories/news/COI2012/EN_COI_in_Asylum.pdf).

<sup>64</sup> High Court of Australia *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011) [www.austlii.edu.au/au/cases/cth/HCA/2011/32.html](http://www.austlii.edu.au/au/cases/cth/HCA/2011/32.html) (*Refugee Swap Deal* case).

<sup>65</sup> *ibid* paras 125–26 and 243.

<sup>66</sup> *ibid* para 245.

<sup>67</sup> *ibid*.

<sup>68</sup> *ibid*.

Protocol; and, third, has made no legally binding arrangement with Australia obliging it to accord the protections required by those instruments [...].<sup>69</sup>

The fact that the UNHCR is simply permitted to carry out its own procedures for assessing the needs for protection of persons seeking asylum is deemed not enough by the Court.<sup>70</sup>

Although all of these cases deal with refugee law issues, one could well conceive the application of their common rationale to cases involving state obligations under the SAR legal framework. Indeed, since the two legal regimes are to be applied simultaneously, developments under one inevitably end up affecting the application of the other. Moreover, although the latter case is slightly different from the first two, as it posits the responsibility of positively assessing the functionality of the receiving state's asylum system as optional, there might be some analogy with the transfer to Libya of migrants intercepted in the Mediterranean Sea by the Italian authorities in 2009, also known as 'push-backs'.<sup>71</sup> In particular, the similarity between Malaysia and Gaddafi's Libya with regard to the absence of a functioning asylum system looks striking.

And in relation to a case arising out of the 2009 'push-backs', on 23 February 2012 the Grand Chamber of the ECtHR delivered a historic decision concerning the (il)legality of such practice, shedding light on a number of key legal issues.

## V The *Hirsi* case and the 'push-backs'

The *Hirsi* case<sup>72</sup> dealt with the interception on the high seas and 'push-back' to Tripoli of roughly 200 individuals found on board a vessel stopped on 6 May 2009 in the Maltese SAR Zone, 35 nautical miles south of the island of Lampedusa, by three military ships belonging to the *Guardia di Finanza* and the Coastguard. Twenty-four migrants (11 Somalis and 13 Eritreans) were later contacted in Libya by a group of human rights lawyers, who managed to get them to sign the required powers of attorney through the humanitarian organisations operating in the various detention centres in which they had been held following their arrival. The fate of most of the applicants is currently unknown,<sup>73</sup> following the period of social unrest in Libya which started in February 2011 and forced a large number of people (especially irregular migrants) to flee the country by whatever means of transport. Some of the claimants succeeded in reaching Europe anyway and eventually saw their refugee status recognised, as happened to an Eritrean individual who paradoxically had his asylum request accepted in Italy. The main issues considered by the Court in the *Hirsi* case concerned: 1) the alleged violation of the non-refoulement principle; and 2) the analogy between 'push-backs' and collective expulsions of aliens, also prohibited under the ECHR and in general under international human rights law.

<sup>69</sup> *ibid* para 135.

<sup>70</sup> *ibid* para 125.

<sup>71</sup> See M Tondini 'Fishers of men? The interception of migrants in the Mediterranean Sea and their forced return to Libya' (INEX paper Amsterdam and Oslo October 2010) [www.inexproject.eu/index.php?option=com\\_docman&task=doc\\_download&gid=51&&Itemid=72](http://www.inexproject.eu/index.php?option=com_docman&task=doc_download&gid=51&&Itemid=72). To the author's knowledge, the term 'push-backs' first appeared in a report published by the international NGO Human Rights Watch in September 2009 (Human Rights Watch 'Pushed back, pushed around: Italy's forced return of boat migrants and asylum seekers' (New York 21 September 2009 [www.hrw.org/en/reports/2009/09/21/pushed-back-pushed-around-0](http://www.hrw.org/en/reports/2009/09/21/pushed-back-pushed-around-0))).

<sup>72</sup> *Hirsi* (n 3). Apart from the two parties to the dispute (ie the applicants and the Government of Italy), other subjects played an active role in the proceedings. The UNHCR was allowed to intervene as a third party in support of the applicants and participate in the oral proceedings. Other support for the migrants came from a number of human rights organisations (Human Rights Watch, the Columbia Law School Human Rights Clinic, the Centre for Advice on Individual Rights in Europe, Amnesty International and the International Federation for Human Rights), which submitted written observations to the Court.

<sup>73</sup> At the time of the ruling (February 2012), the counsels still had contacts with six applicants. Two applicants were declared deceased and their applications were thus struck off the list by the Court.

As a preliminary question, however, the Grand Chamber had to pronounce on its jurisdiction over the case. The Court's jurisdiction was easily determined on the basis of the ECtHR case law involving people detained in prisons run abroad by an ECHR Member State or on board a warship flying its flag on the high seas.<sup>74</sup> According to the Court, being on board military vessels, no matter what the 'nature and purpose of the intervention', 'the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities',<sup>75</sup> and thus under the Italian and the Court's jurisdiction. In the ECtHR's opinion, this stems from the 'relevant provisions of the law of the sea', according to which 'a vessel sailing on the high seas is subject to the exclusive jurisdiction of the [flag] State'.<sup>76</sup>

#### V.I Violation of the non-refoulement principle

With regard to the alleged violation of the non-refoulement principle, as embedded in Article 3 ECHR, the Italian Government immediately contended that the interception under consideration 'had been conducted in the context of a rescue operation on the high seas in accordance with international law'<sup>77</sup> (meaning UNCLOS and the SAR Convention). Furthermore, according to the responding party, the migrants had not requested asylum on board the Italian vessels (in which case they would have been taken ashore in Italy) and their request not to be disembarked to Tripoli could not be interpreted as an asylum request.<sup>78</sup> Libya had in turn to be considered a 'safe host country' (ie basically a 'place of safety'), as Gaddafi's regime had ratified a number of human rights conventions containing the non-refoulement rule, although not the 1951 Geneva Convention.<sup>79</sup> Therefore, at the time of the interception in question, 'Italy had had no reason to believe that Libya would evade its commitments' in the field of human rights.<sup>80</sup> Notably, as a proof of Libyan loyalty to its international human rights obligations, the Italian Government – just like the Australian one in the *Refugee Swap Deal* case – mentioned the presence of UNHCR and IOM (International Organization for Migration) offices in Tripoli,<sup>81</sup> irrespective of the fact that Libya lacked (and still lacks) a formal asylum system.

In response to these arguments, the Grand Chamber, mirroring the High Court of Australia, observed that, in the absence of formal recognition by the host state of the UNHCR's role in guaranteeing the protection of asylum seekers, the mere presence of an office of the High Commissioner, without any effective power established by law, is not sufficient to affirm that an asylum system is truly in place in the country.<sup>82</sup> On the other hand, contrary to what the High Court of Australia did with regard to the Malaysian legal system, the ECtHR did not pay so much attention to the absence in Libya of a domestic law on the recognition of the refugee status, but rebutted Libya's 'presumption of compliance' with its human rights obligations by restating and even expanding the *MSS* dictum on the need to consider the practical situation on the ground and not the formal legislation in force.<sup>83</sup> Indeed, the Court went so far as to argue that 'it was for the national authorities, faced with a situation in which human rights

<sup>74</sup> ECtHR (GC) *Al-Skeini and Others v the United Kingdom* Application No 55721/07, Judgment of 7 July 2011, paras 132 and 136, [www.echr.coe.int](http://www.echr.coe.int); ECtHR (GC) *Medvedyev and Others v France* Application No 3394/03, judgment of 29 March 2010, para 67, [www.echr.coe.int](http://www.echr.coe.int).

<sup>75</sup> *Hirsi* (n 3) para 81.

<sup>76</sup> *ibid* para 77. See also UNCLOS arts 92, 95–96.

<sup>77</sup> *ibid* para 95.

<sup>78</sup> *ibid* para 96.

<sup>79</sup> *ibid* para 97.

<sup>80</sup> *ibid* para 98.

<sup>81</sup> *ibid* paras 97–98.

<sup>82</sup> *ibid* paras 130 and 153.

<sup>83</sup> *ibid* para 128: '[T]he Court is bound to observe that the existence of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention'.

were being systematically violated [...] to find out about the treatment to which the applicants would be exposed after their return'.<sup>84</sup> It was therefore Italy's responsibility to assess positively the hypothetical situation faced by migrants upon their disembarkation to Tripoli, regardless of any asylum request (submitted or not, accepted or not) or plea by the migrants themselves while on board the Coastguard's or the *Guardia di Finanza's* vessels. Yet the situation in Tripoli, according to the Court, was pretty clear, thanks to the amount of reliable and publicly-available news on the status of migrants in Libyan detention centres. Therefore, the Italian authorities 'knew or should have known'<sup>85</sup> about the situation and should have acted accordingly. Indeed, similarly to the CJEU in its December 2011 decision cited above, in *Hirsi* the Strasbourg Court reiterated the importance of reliable and independent information contained in the reports of human rights watchdogs and organisations, arguing that, in the case concerned, 'numerous reports by international bodies and non-governmental organisations paint[ed] a disturbing picture of the treatment meted out to clandestine immigrants in Libya at the material time'.<sup>86</sup> Such treatment, based on those reports (which were found reliable by the Court), included detention in inhumane conditions and real risk of 'indirect' refoulement.<sup>87</sup>

More importantly, the Grand Chamber affirmed that even considering the interception and 'push-back' of migrants on the high seas as SAR interventions, as the Italian Government itself argued at the beginning of the proceedings, such operations could not be legally justified, since 'the rules for the rescue of persons at sea and those governing the fight against people trafficking impose on states the obligation to fulfil the obligations arising out of international refugee law, including the "non-refoulement" principle'.<sup>88</sup> The parallel application of the two bodies of law, ie maritime and refugee law, makes any further evaluation of the legal nature of 'push-backs' within the existing categories of law useless – no matter if the 'push-back' was carried out in the course of a salvage or border control operation, as long as the prohibition of refoulement has been breached.

## V.2 'Push-backs' as collective expulsions and the nature of border control operations

The distinction between the concepts of SAR and border control instead arises in assessing the similarity of the practice in question with a collective expulsion of aliens, prohibited under Article 4 of Protocol No 4 to the ECHR (Article 4). Here, in order to draw a parallel between the 'push-backs' taking place in international waters and the collective deportations of irregular migrants from the territory of Member States, it becomes fundamental to ascertain the real purpose of the action. Is it directed, *only or at least principally*, at saving lives or rather at preventing people from crossing state maritime borders? In addition, is the ECHR norm on the prohibition of collective expulsions applicable extraterritorially?

The second question was easily addressed by the Court, although it was the first time the ECtHR had pronounced on the extraterritorial application of this rule. The Grand Chamber found that neither the text of Article 4, nor the *travaux préparatoires* which led to its adoption, mentioned the territorial nexus in collective expulsion cases.<sup>89</sup> The rule in question is thus potentially applicable outside the ECHR Member States' territory. That said, since Italy in carrying out the 'push-backs' was exercising its jurisdiction extraterritorially,<sup>90</sup> Article 4 was

<sup>84</sup> *ibid* paras 133 and 157.

<sup>85</sup> *ibid* paras 131 and 156.

<sup>86</sup> *ibid* paras 118 and 123.

<sup>87</sup> *ibid* para 125.

<sup>88</sup> *ibid* para 134.

<sup>89</sup> *ibid* paras 173–174.

<sup>90</sup> *ibid* para 180: '[T]he Court considers that the removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction'.

thus hypothetically applicable to the conduct of Italian state officers on the high seas.<sup>91</sup> Nonetheless, in order to determine if that norm could really apply to the case at hand, it was necessary for the Court to tackle the first question, ie on the purpose of the action. On this point, the Grand Chamber observed that:

the operation resulting in the transfer of the applicants to Libya was carried out by the Italian authorities with the intention of preventing the irregular migrants disembarking on Italian soil. In that connection, [the Court] attach[ed] particular weight to the statements given after the events to the Italian press and the State Senate by the Minister of the Interior, in which he explained the importance of the 'push-back' operations on the high seas in combating clandestine immigration and stressed the significant decrease in disembarkations as a result of the operations carried out in May 2009.<sup>92</sup>

If the respondent state, through its top-level political leadership, publicly declares that the interception of boat people on the high seas is *first and foremost* aimed at tackling irregular migration, rather than saving the lives of migrants, it becomes arduous to justify the non-application to the operations concerned of the entire body of migration law norms (international, European and domestic) which would have applied if migrants had been removed from Italian soil. The discrepancy between the government's public statements (on the nature of 'push-backs' as border control operations) and its agents' submissions before the Court (claiming that the 'push-backs' were indeed SAR interventions), eventually led the Court to rely on the former.<sup>93</sup>

When a state basically anticipates its border controls on the high seas (also called 'extra-territorial border control'),<sup>94</sup> Article 4 inevitably applies to such operations, otherwise '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'.<sup>95</sup> Yet the application of Article 4 implies the screening of each migrant's *individual* situation, which in turn entails their identification with the assistance of an interpreter and a legal adviser – all activities which can be performed only ashore, possibly in a migration centre. None of these activities was in fact carried out on board the Italian vessels during the journey to Tripoli.<sup>96</sup> More importantly, according to the Court, the intercepted migrants should have been given 'sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints'.<sup>97</sup> Since this did not happen, the applicants' right to asylum was actually barred.<sup>98</sup>

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<sup>91</sup> *ibid* para 178: 'Where, however, as in the instant case, the Court has found that a Contracting State has, exceptionally, exercised its jurisdiction outside its national territory, it does not see any obstacle to accepting that the exercise of extraterritorial jurisdiction by that State took the form of collective expulsion. [...] Furthermore, as regards the exercise by a State of its jurisdiction on the high seas, the Court has already stated 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 which the States have undertaken to secure to everyone within their jurisdiction'.

<sup>92</sup> *ibid* para 181.

<sup>93</sup> See also the concurring opinion of Judge Pinto de Albuquerque, who explicitly labelled the 'push-backs' as border control operations (*ibid* pp 80–81).

<sup>94</sup> See eg M den Heijer, 'Europe beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control', in B Ryan and V Mitsilegas (eds) *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Leiden and Boston 2010) 169–98 at 173.

<sup>95</sup> *Hirsi* (n 3) para 177.

<sup>96</sup> *ibid* para 185: 'In the instant case, the Court can only find that the transfer of the applicants to Libya was carried out without any form of examination of each applicant's individual situation. It has not been disputed that the applicants were not subjected to any identification procedure by the Italian authorities, which restricted themselves to embarking all the intercepted migrants onto military ships and disembarking them on Libyan soil. Moreover, the Court notes that the personnel aboard the military ships were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers'.

<sup>97</sup> *ibid* para 204.

<sup>98</sup> *ibid* para 205.

In this way, the Court's judgment ends up quashing the practice of 'push-backs' in its entirety. Again, the reason at the basis of the Court's criticism is to be found in the nature of the border control measures of such operations.

### V.3 What the Court does not say: the need to distinguish between SAR and border control

What the Court does not consider, however, is that the interception of boat people on the high seas and their disembarkation to a port located in a third state, also when contrary to the migrants' will, is often justified by different instances, among which the prevention of their arrival on the intercepting state's territory may play some role, even if the latter is not the *leitmotif* of the intervention. A warship encountering on the high seas a boat 'stuffed' with irregular migrants in precarious safety conditions is duty-bound to intervene and welcome them on board. Even if the operation begins as a pure SAR intervention, once the life of the rescued people is no longer at risk and their basic needs have been met, the choice of port of disembarkation can be based on both the 'place of safety' concept (as interpreted in light of refugee law) and other considerations, including the concern of preventing further departures, thus trying to tackle irregular migration. Should this scenario be assimilated to a full migration control operation?

Imagine the case of an Italian military vessel tasked with the surveillance of the sea lines of communication, rescuing a group of boat people in the middle of the Mediterranean Sea and taking them back to a safe port in Tunisia or Egypt, in which their protection rights can be met. Should that vessel be equated to an Italian frontier post? In our opinion the answer is clearly in the negative, as the application of the relevant bodies of law (ie maritime or migration law) cannot be other than functional and conceived in view of the operation's true nature. Human rights provisions such as the prohibition of collective deportation cannot be applied to a genuine SAR intervention, otherwise any rescue of people in distress at sea, even when not migrants, would turn into a possibly involuntary and virtual access of such people to the flag state's territory, with all the consequences of the case, including the necessity to take them back inland for identification, possibly to a national port located thousands of miles away and irrespective of the survivors' will to be disembarked to the closest 'safe third country'. In order to assess the true nature of operations, it is thus necessary to apply a prevalence criterion, according to which if the SAR character prevails over the objective of preventing irregular migration, the intervention in question should be considered as an authentic salvage operation. On the other hand, as in the case of the summer 2009 'push-backs', when operations were *predominantly* aimed at tackling illegal migration, the analogy between warships and frontier posts is inevitable.

## VI Conclusion: the way ahead

Based on the analysis reported above, we may conclude that the interception and rescue of migrants on the high seas may be deemed lawful if implemented under the SAR legal regime, as provided by international maritime law. In parallel, any intervention must also comply with the prohibition of refoulement. This means that the disembarkation of migrants must be carried out to a 'safe third country', namely a country in which they would not be persecuted or returned to other countries in which they could run a 'real risk' of being persecuted, including their countries of origin. This in turn entails a positive assessment by the states involved in the interception (ie the rescuing vessel's flag state, the SAR coordinating state, the mission's host state, if any, etc) over the functionality of the country of disembarkation's asylum system and the migrants' reception conditions. The assessment should principally concern the receiving country's ratification of international refugee law instruments and the formal adoption of domestic legislation on asylum, including assistance to migrants upon their arrival. According to some very recent international jurisprudence, however, such an assessment should also include a careful evaluation of the functionality of the asylum system

in practical terms, so that it might be concluded that potential asylum claims would be seriously examined by the local authorities. The assessment could be also based on information and reports issued by international specialised agencies such as the UNHCR.

The ECtHR decision in the *Hirsi* case has confirmed this scenario and drawn the attention of both scholars and practitioners to the impossibility for states to anticipate border control on the high seas without applying all the relevant human rights, refugee and migration law norms. The 2009 'push-back' operations in the Mediterranean Sea, which were conducted in the absence of any individual screening of intercepted migrants and in violation of the non-refoulement principle, were thus deemed illegal *per se* by the Court. While the SAR or border control character of operations is irrelevant in assessing possible breaches of the non-refoulement rule, the distinction becomes fundamental as far as the analogy between 'push-backs' and collective expulsions is concerned. In our opinion, in order to assess the legality of operations it seems essential to apply a prevalence criterion, which basically consists of striking a balance between the SAR and the anti-irregular migration goals.

In more general terms, one should also observe that the interception of migrants on the high seas can be only considered a short-term measure, unfit to control large migration flows. Addressing the roots of migration in the countries of origin and departure appears to be the only feasible solution in this respect. This entails exploring ways to secure the full cooperation of the countries concerned, as well as the assistance of all relevant actors in the field, including international governmental and non-governmental organisations. In this context, the development of self-sustainable and long-term capacity building programmes in the countries of departure may certainly be of help.

Defence forces may also play a key role in this process, especially through cooperation with the countries of disembarkation's armed forces. A good example is the cooperation established between the Italian and Tunisian Navies following the April 2011 agreement between the two countries' governments.<sup>99</sup> This agreement facilitates the deployment of Italian (the migrants' most likely country of destination) naval assets close to the coasts of departure (although in international waters) for surveillance and detection purposes. This direct cooperation with the Tunisian Navy should in theory enhance its capacity for surveillance and detection, and therefore help to prevent the uncontrolled exodus of Tunisian citizens when vessels have not yet left Tunisian territorial waters. However, in order to comply with the obligations mentioned above, the establishment of any kind of military cooperation should in principle follow a careful evaluation of the conditions returned people are subject to in the partner country, including the treatment of non-nationals.

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<sup>99</sup> *Mol Immigrazione, Siglato l'Accordo tra Italia e Tunisia* press release (6 April 2011) [www.interno.it/mininterno/export/sites/default/it/sezioni/sala\\_stamp/notizie/immigrazione/000073\\_2011\\_04\\_06\\_accordo\\_Italia-Tunisia.html](http://www.interno.it/mininterno/export/sites/default/it/sezioni/sala_stamp/notizie/immigrazione/000073_2011_04_06_accordo_Italia-Tunisia.html). The same solution, although within a broader international legal framework, was adopted by the Italian Government in respect of the Albanian crisis of 1997 (see F Caffio 'Immigrazione clandestina via mare: l'esperienza Italiana nella vigilanza, prevenzione e contrasto' (2003) 8 *Rivista Marittima* (Supplement)).