Collective expulsion of aliens in the ECHR case-law: a comment on Hirsi Jamaa and others v. Italy (Grand Chamber, Application no. 27765/09, 23/02/2012).

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The principle of non-refoulement is a well established principle of international law. According to it, a State cannot return an individual to a place where he risks serious harm because of his race, nationality, religion, social condition, political opinions, etc. International law not only prohibits this direct return, it also prohibits the delivery of a person to a State that could further deliver him or her to a third State where such a risk exists (indirect refoulement).

The principle is enshrined in many international treaties, both relating to refugee law (article 33 of the 1951 United Nations Convention relating to the Status of Refugees) and to human rights law (article 3 of the 1984 United Nations Convention Against Torture; article 16.1 of the 2006 United Nations International Convention for the Protection of All Persons from Enforced Disappearance; article 22.8 of the 1969 American Convention on Human Rights; article 12.3 of the 1981 African Charter of Human Rights and People’s Rights; article 13.4 of the 1985 Inter-American Convention to Prevent and Punish Torture; article 19.2 of the 2000 Charter of Fundamental Rights of the European Union). Even if there is not an explicit prohibition of refoulement in the European Convention on Human Rights, the principle has been acknowledged by the European Court of Human Rights. Non-refoulement is also a customary principle, which has ius cogens status.


Closely related to the non-refoulement principle is the rule that forbids the collective expulsion of foreigners. Indeed, such kind of expulsion implies that the State does not examine the particular situation of each individual, and so cannot assess if the individual is under a risk of serious harm in the sense of the non-refoulement principle.

The prohibition of collective expulsion of foreigners is enshrined in many international treaties: article 19.1 of the Charter of Fundamental Rights of the European Union; article 12.5 of the African Charter on Human and People’s Rights; article 22.9 of the American Convention on Human Rights; article 22.1 of the International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families. It is also recognised in article 4 of Protocol 4 to the European Convention on Human Rights. As we will
see below, the European Court of Human Rights found a violation of this article in the Hirsi Jamaa and others v. Italy case.

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The case originated in an application against Italy lodged by eleven Somali nationals and thirteen Eritrean nationals. They were part of a group of about two hundred individuals who had left Libya aboard three vessels with the aim of reaching the Italian coast in 2009. When the vessels were 35 nautical miles south of Lampedusa they were intercepted by three ships from the Italian Revenue Police (Guardia di finanza) and the Coastguard. The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli. The applicants alleged that during that voyage the Italian authorities did not inform them of their real destination and took no steps to identify them. All their personal effects, including documents confirming their identity, were confiscated by the military personnel. On arrival in the Port of Tripoli the migrants were handed over to the Libyan authorities. Two of the applicants died in unknown circumstances after the events in question. Fourteen of the applicants were granted refugees status by the office of the United Nations High Commissioner for Refugees (UNHCR) in Tripoli between June and October 2009.

The applicants alleged that their transfer to Libya by the Italian authorities violated article 3 of the Convention and article 4 of Protocol 4. They also complained of the lack of a remedy satisfying the requirements of article 13 of the Convention, which would have enabled them to have the aforementioned complaints examined. The application was allocated to the Second Section of the Court, which relinquished jurisdiction in favour of the Grand Chamber.

The first problem raised by the application was whether the applicants were under Italian jurisdiction in the terms of article 1 of the Convention. This article provides that States shall secure human rights to those under their jurisdiction. The government acknowledged that the events had taken place on board Italian military ships. However, it alleged that the applicants had not been under its complete control: the Italian ships had confined to rescue people in distress in high seas (according to obligations emerging from international law) and had returned them to the Libyan coast (according to a treaty subscribed between Italy and Libya). Italy argued that the obligation to save people in high seas does not create a link between the government and the rescued people that could be qualified as an exercise of jurisdiction.

Backing on its case-law, the Court affirmed that the exercise of jurisdiction is normally territorial (Banković and Others v. Belgium and 16 Other Contracting States, dec., [GC], 12 December 2001), but exceptionally acts of the State outside its territory can constitute an exercise of jurisdiction when there is an effective control of an extraterritorial area (Loizidou v. Turkey, preliminary objections, [GC], 23 March 1995; Medvedyev and Others v. France, [GC], 29 March 2010). Furthermore, according to the law of the sea, a vessel in high seas is subject to the exclusive jurisdiction of the State of its flag. In the present case the events had taken place on board Italian ships under effective control of Italian military personnel. So it must be concluded that the applicants were de jure and de facto under Italian jurisdiction.

The applicants, relying on article 3 that prohibits torture and inhuman or degrading treatments, complained that they had been exposed to the risk of such treatments in Libya
and in their respective countries of origin, namely, Eritrea and Somalia, as a result of having been returned.

According to the Court’s case-law, States have the right to control the entry, residence and expulsion of aliens (Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985; Boujilfa v. France, 21 October 1997). On the other hand, the right to political asylum is not contained in either the Convention or its Protocols (Vilvarajah and Others v. the United Kingdom, 30 October 1991; Ahmed v. Austria, 17 December 1996). However, expulsion, extradition or any other measure to remove an alien may give rise to an issue under article 3, and hence engage the responsibility of the expelling State under the Convention, when substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to article 3 in the receiving country. In such circumstances, article 3 implies an obligation not to expel the individual to that country (Soering v. the United Kingdom, 7 July 1989; Vilvarajah and Others, 30 October 1991; H.L.R. v. France, 29 April 1997; Salah Sheekh v. the Netherlands, 1 January 2007).

Even if the Court acknowledged that the States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum seekers, it stated that this fact cannot provide a justification for States in order not to comply with article 3.

Concerning the risks the applicants faced in Libya, the Court stated that, according to international organisations, no distinction was made in that country between irregular migrants and asylum seekers. Both were treaty in an inhuman way and were at risk of being returned to their countries of origin at any time. In spite of the existence of an office of the UNHCR, the refugee status granted by the UNHCR did not guarantee the persons concerned any kind of protection in Libya.

It was controversial whether the applicants had asked for asylum before being returned to Libya. However, the Court stated that even if there had been no application for asylum, this fact could not exclude the responsibility of Italy under article 3. Indeed, States have an obligation to find out about the treatment the returned migrants will be exposed to.

Moreover, none of the provisions of international law cited by Italy (such as the treaty with Libya) justified the applicants being pushed back to Libya, in so far as the rules for the rescue of persons at sea and those governing the fight against people trafficking impose on States the obligation to comply with the rules of international refugee law, including the non-refoulement principle.

Concerning the risk faced by the applicants to be repatriated to Eritrea and Somalia, where they would probably be tortured and detained in inhuman conditions, the Court assessed that when the applicants were transferred to Libya, the Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin. Thus, there was a double violation of article 3: the returned migrants were exposed to inhumane treatment in Libya and they were also exposed to being delivered to their countries of origin, where they would face the same risks.

The applicants also alleged a violation of article 4 of Protocol 4 that prohibits collective expulsions of aliens. Italy submitted that the article was not applicable, because the notion of expulsion requires the presence of the aliens in the State territory. In this case, according to Italy, there had been a refusal to authorise entry into national territory rather than an expulsion. The Court did not agree with this view, and declared article 4 applicable.
The wording of the article, the Court said, does not entail that notion of territorality, and its teleological interpretation leads to the conclusion that if article 4 of Protocol 4 were to apply only to collective expulsions from the national territory of the State a significant component of contemporary migratory patterns would not fall within the ambit of protection. The Court, for the first time, admitted that article 4 of Protocol 4 applies to a case involving the removal of aliens to a third State carried out outside national territory.

In the Čonka case (Čonka v. Belgium, [GC] 5 February 2002), the only one in which the Court had found a violation of article 4 of Protocol 4 up to the Hirsi Jimaa case, it had stated that to assess whether or not there has been a collective expulsion the Court must consider if the deportation orders have taken into account the particular situation of each individual. In the present case, the Court found that the transfer of the applicants to Libya had been done without any consideration of those particular situations, and thus amounted to a violation of article 4 of Protocol 4.

The applicants also alleged a violation of article 13, which provides that everyone whose rights under the Convention are violated shall have an effective remedy before a national authority, in relation to articles 3 of the Convention and 4 of the Protocol 4.

The Court reminded its case-law according to which an applicant’s complaint alleging that his or her removal to a third State would expose him or her to treatment prohibited under article 3 of the Convention must be subject to close scrutiny by national authorities (Shamayev and Others v. Georgia and Russia, 12 April 2005). Moreover, according to the Čonka judgment about article 13 taken together with article 4 of Protocol 4, a remedy does not meet the requirements of the former if it does not have suspensive effect. As in the present case there had been no possibility for the applicants to appeal to a national authority to challenge, with suspensive effect, the deportation procedure, the Court stated that there was a breach of article 3.

The violation of articles 3 of the Convention, 4 of the Protocol 4 and 13 of the Convention in relation with the formers was held unanimously by the Court. Consequently, the Court awarded each applicant non-pecuniary damage compensation and declared that Italy must take all possible steps to obtain assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with article 3 of the Convention or arbitrarily repatriated.

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