PROHIBITING PUSH-BACK AT SEA: EUROPEAN REGIONAL DEVELOPMENT IN THE SCOPE OF NON-REFOULEMENT

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Non-refoulement is recognized as the principle safeguard for asylum seekers worldwide. The main component of the 1951 Refugee Convention, non-refoulement prohibits states from arbitrarily pushing asylum seekers back to a state where they would face persecution. Non-refoulement has historically been applied only in those cases wherein asylum seekers successfully reached a state's sovereign territory, whether by legal or illegal means. However, this paper argues that the contemporary and massive influx of irregular migrants journeying toward European shores by sea routes has facilitated a new development in international law: the legal extension of non-refoulement to the process of state-led interception on the high seas. A number of European states have sought to re-direct or push-back the high volume of incoming migrants through state-led, maritime interception initiatives. The European Court of Human Rights (ECtHR) has ruled critically on the matter of intercepting migrants at sea and returning or re-directing them before processing takes place. This analysis begins with a brief discussion of non-refoulement as defined in international law, followed by an investigation of the extraterritorial scope of non-refoulement as argued by international law scholars and international organizations. Finally, a case analysis of Hirsi Jamaa and Others v. Italy as judged by the ECtHR in 2012, is put forward. This paper finds that the ECtHR has adopted an emerging stance on extending the scope of non-refoulement and its obligations beyond the traditional territories of states. The unfolding developments reflect a progressive shift in the global, judicial narrative around asylum.

The principle of *non-refoulement* is an internationally recognized mandate. It has been well established in international refugee law and regional conventions. Pared down, the principle of *non-refoulement* (hereinafter "*non-refoulement*") is the key stipulation safeguarding asylum seekers—even before formal processing of refugee-status begins—from being pushed back by any receiving state to any another state wherein their most fundamental human rights or life would be threatened. This summary is an oversimplification of the obligations imposed upon states by the principle. Nevertheless, the main purpose of *non-refoulement* is to prevent the forcible return of asylum seekers

before adequate processing of their applications for asylum takes place. The principle has been largely neglected in recent decades due to the influx of asylum seekers to Europe from the Middle East and North Africa (MENA). The advancement of more highly coordinated maritime operations to intercept asylum seekers in route has made it easier for states to evade their obligations under the principle. As has become evident in international waters between Europe and Africa, sea routes along the Mediterranean have become the main pathways for hundreds of thousands of irregular migrants attempting to reach Europe. Consequently, some European states have developed consistent practices of interdiction, the interception of migrant vessels before they breach state territory.

Scholars have observed that state interdiction on the high seas has led to what appears to be the push-back of migrants to their original places of departure, or to a third state before they have an opportunity to breach state territory and lodge applications for asylum.[1] A discerning eye may immediately detect a potential flaw in the accusation: can states be held accountable for *non-refoulement* if the migrants were prevented from breaching territory in the first place? After all, it is plausible that states, through interdictions, are merely using available resources to effectively divert a situation in which they would be forced to contend with the complications of *non-refoulement.* Put another way, by preventing irregular migrants from reaching their own territory, states are attempting to keep asylum seekers out of the space where *non-refoulement* obligations become legally binding. On the surface then, it may seem unclear as to whether or not states are legally culpable for the push-back of migrants from the high seas or international waters. I argue that regional international law has recently evolved to counteract this potential loophole for states to evade *non-refoulement* obligations through maritime interdiction. To be clear, international law has developed within the past two decades so as to extend *non-refoulement* to cases of interception on the high seas. In developing this assessment, I will investigate arguments put forward by international law scholars and international organizations regarding the extraterritorial scope of *non-refoulement*. Finally, I analyze the decision of the European Court of Human Rights (ECtHR) to rule against an interdicting state in *Hirsi Jamaa and Others v. Italy*.[2] The case is selected for its representation of developments pertaining to non-refoulement. Importantly, *Hirsi* was judged precisely within the period of mass movement of asylum seekers to Europe and thus reflects the migration trends leading states to resist their commitment to non-refoulement.

1 Fran Cetti, "Border Controls in Europe: Policies and Practices Outside the Law," State Crime 3, no. 1 (Spring 2014): 15; Jennifer Hyndman and Alison Mountz, "Another brick in the wall? Neo-refoulement and the
2 *Hirsi Jamaa and Others v. Italy*, Decision of 23 February 2012, Application no. 27765/09 (*Hirsi*).

Furthermore, the judgement in *Hirsi* was designated a key case, or one of the "most important cases,"[3] by the ECtHR. The case in particular provides a clear view of the regional court's stance regarding migrants' rights at sea and the shifting dynamics of *non-refoulement.*

The Extraterritorial Conundrum

The language used to describe *non-refoulement* is not straightforward and does not lend itself to an assumption that the principle must apply to events happening in international waters. Providing the essential framework for the principle, the 1951 Refugee Convention defines *non-refoulement* in article 33(1) as follows:

> 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.[4]

It is important to recognize material left intentionally absent from the article. There is no mention of "extraterritorial" conditions. The article makes no explicit mandate to the effect that "no contracting state" shall likewise refoul refugees from any region *outside* of the state's own territories. In this regard, one can reasonably ask: Is the principle legally binding if asylum seekers are refouled while still at sea? International waters are not part of any state's territory, so applying the principle to events at sea would mean it is extraterritorial in scope. On one hand, the stipulation that *refoulement* should not occur "in any manner whatsoever" may certainly imply extraterritorial application, a point taken up by the UNHCR, and which will be later discussed. On the other hand, the ambiguous phrasing allows for conflicting interpretations.

As practice in recent decades has evinced, states have largely excluded the application of *non-refoulement* to the high seas. Several scholars of international law have studied the impact of maritime bilateral agreements on states' adherence to *non-refoulement*; they found that states have indeed been more likely to view the principle as an optional protocol and not as a legal requirement in cases of interception.[5] By expanding recourse to border

3 "Judgements and Decisions," Case-law, European Court of Human Rights, accessed October 23, 2018, https://www.echr.coe.int/Pages/home.aspx?p=caselaw/reports&c=.

4 United Nations Convention Relating to the Status of Refugees, 606 UNTS 267 (entered into force 22 April 1954).

5 Guy S. Goodwin-Gill, "The Right to Seek Asylum: Interception at Sea and the Principle of Non Refoulement," *International Journal of Refugee Law 23, no. 3* (2011): 445, https://doi.org/10.1093/ijrl

security operations at sea, states have set up a system in which *refoulement* may be commonplace but does not result in a fear or threat of legal backlash.

This analysis does not take as its purpose any intention to demonize states for protecting national interests and further acknowledges the social, economic, and security challenges involved with the reception of mass groups of people. Security stresses imposed by asylum seekers venturing to Europe in recent years primarily through Italy, Malta, Greece, and Cyprus do speak to states' expressed need to regulate their borders. [6] Nevertheless, this analysis does work to identify new, emerging frames of legality or illegality in which states are compelled to operate while securing both their interests and the long-term safety of refugees. Questioning the scope of *non-refoulement* on international waters is then not only reasonable, but necessary.

Sources with an Answer: Where *Non-Refoulement* Applies

Where legal diction and state practice render the extraterritorial scope of non-refoulement uncertain, reputable international organizations with legal influence have stepped in to clarify. In an advisory opinion—including the phrase, the Extraterritorial Application of Non-Refoulement, in its title—the UNHCR clearly adopts the stance that *non-refoulement* and the high seas go hand in hand.[7] The UNHCR states early on in the opinion:

> The prohibition of refoulement…is applicable to any form of forcible removal, including deportation, expulsion, extradition, informal transfer or 'renditions'…this is evident from the wording of Article 33(1) of the 1951 Convention, which refers to expulsion or return (refoulement) "in any manner whatsoever."[8]

Legal scholars might take liberty in interpreting the use of "informal transfer" and "any manner whatsoever" by the UNHCR to include "forcible removal" from

eer018; Seunghwan Kim, "Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context," Leiden Journal of International Law 30, no. 1 (March 2017): 49, https://doi.org/ 10.1017/S0922156516000625; Silja Klepp, "A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea," European Journal of Migration and Law 12: 2, https://doi.org/ 10.1163/157181610X491169; Seline Trevisanut,"The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea," Leiden Journal of International Law 27, no. 3 (September 2014): 661, https://doi.org/ 10.1017/S0922156514000259.

6 Anna Triandafyllidou and Angeliki Dimitriadi, "Migration Management at the Outposts of the European Union," Griffith Law Review 22, no. 3 (2013): 598.

7 UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, Geneva: 2007, http://www refworld.org/docid/45f17a1a4.html. 3.

8 Ibid.

the high seas. Even so, if the above statement by the UNHCR is too opaque, the following section of the advisory opinion is undoubtedly straightforward:

> …UNHCR is of the view that the purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be at risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.[9]

Other relevant, international organizations share the UNHCR's view that *non-refoulement* is extraterritorial in scope. The International Court of Jurists (ICJ) explains that states can exercise legal decisions beyond the scope of its own territory over "all persons who fall under the authority or the effective control of the State's authorities…in a range of contexts."[10] The ICJ further observes that where the power to act beyond state territory exists, so too does the imperative to adhere to international principles: "Therefore, a State may have obligations to respect and protect the rights of persons who have not entered the territory, but who have otherwise entered areas under the authority and control of the State,[11] or who have been subject to extra-territorial action… by a State agent who has placed them under the control of that State." One can conclude, in light of the ICJ's assertion, that *non-refoulement* applies to the extraterritorial context of international waters.

Nevertheless, consensus on the extraterritorial scope of *non-refoulement* is not unanimously shared. James Crawford made the dissenting case that expulsion can only be conceptualized as taking place from within a recognized territory, which implicitly omits its application to the high seas. In his discussion on the 1951 Refugee Convention's reference to non-refoulement, Crawford states: "The generally accepted position is that the non-admittance of a refugee must occur from within or at the very least at the frontier of the State refusing entry."[12] While Crawford's view substantiates the notion that extraterritorial applications of non-refoulment cannot simply be the assumed reality, his contention is outnumbered by the formidable organizations discussed above and by various legal scholars. Seline Trevisanut contends

9 Ibid.
10 International Commission of Jurists, Migration and International Human Rights Law; A Practitioners' Guide, Switzerland: 2014, 52.
11 Ibid.
12 James Crawford, Chance, Order, Change: *The Course of International Law, General Course on Public International Law* (Hague Academy of International Law: AIL-Pocket, 2014), 281.

that by "de-territorializing border-controls" [13] through acts of interdiction, states are creating their own maritime borders, and where there are borders—*non-refoulement*—must apply.[14] Trevisanut is joined in her discretion by scholars who share the consensus that *non-refoulement* is legally binding regardless of geographic parameters.[15] What matters most is where a state chooses to exercise its authority. Where the state makes decisions over persons on the high seas, the state is exercising legal responsibility that entails an imperative to adhere to international principles.

Although the legal insights of esteemed international bodies and experienced scholars attempt to resolve any doubt over the applicability of *non-refoulement* on the open sea, it is unreliable to use exclusively the opinions of individuals and organizations who do not ultimately decide how international law is directly applied. Their advice is but advice. In order to support such informed perspectives, it will also be necessary to consider the actions of an authoritative body in the realm of jurisprudence. This analysis will now consider a case judged by the ECtHR.

The Case of '*Hirsi Jamaa and Others v. Italy*'

In at least one case before the ECtHR (hereinafter "the Court"), jurisprudence heavily indicated that *non-refoulement* is just as binding in international waters as it would be within state territory. This analysis takes as illustration the case *Hirsi Jamaa and Others v. Italy*. [16] The case involved approximately 200 irregular migrants who embarked from Libya by vessel between April and May 2009 with the ultimate goal of reaching the Italian Coast,[17] Hirsi Jamaa being one of the applicants. On May 6, when the migrant vessels were nearing Lampedusa but not yet within territorial waters of Italy, they were intercepted by three ships belonging to the Italian Revenue Police and Coastguard. The migrants were collectively transferred to Italian military ships and eventually returned to Tripoli, Libya.[18] Applicants would later claim the Italian officials neither attempted to identify the migrants, nor inform them of their final destination while in route. Applicants further claimed that when they finally became aware they were being repatriated to Libyan authorities, they contested

13 Trevisanut, "The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea," 661.
14 Ibid, 661.
15 Goodwin-Gill, "The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement"; Mariagiulia Giuffre, "State Responsibility beyond Borders: What Legal Basis for Italy's Push Back to Libya," *International Journal of Refugee Law 24, no. 3* (2013); Kim, "Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context."
16 *Hirsi Jamaa and Others v. Italy* (n 3 above).
17 Ibid, para 9.
18 Ibid., paras 10-11.

and urged the Italian operators not to hand them over.[19] Nevertheless, the migrants were collectively transferred to Libyan officials, and to this day, the subsequent outcome for most of the migrants involved remains unknown; it was confirmed that two migrants and case applicants died within months following the transfer under "unknown circumstances."[20]

The specific legal question at hand and the Court's assessment sheds light on the development of *non-refoulement* In May 2009, eleven Somali nationals and thirteen Eritrean nationals who were among the migrants transferred to Libya filed an application with the Court; they claimed Italy was responsible for the violation of Article 3 of the European Convention on Human Rights (ECHR).[21] Article 3, prohibits inhuman and degrading treatment,[22] and states which breach *non-refoulement* obligations stand in violation of the article by way of sending applicants back to a state where they could then be subjected to inhuman treatment. The legal question presented in the case of *Hirsi* can be understood as follows: Did the collective expulsion of the migrants back to Libya constitute an act of *non-refoulement*? If so, then Italy stood in violation of Article 3. Ultimately, the court sided with the applicants on the majority of their claims. Although the Court's assessment does not explicitly refer to *non-refoulement*, the court alleged that states are obligated not to expel a migrant in any situation where there is reason to believe the individual would face "real risk" [23] of suffering treatment contrary to Article 3. In *Hirsi*, the court conceded that repatriation to Libya constituted such a risk.[24] One can then recognize the obligation not to expel intersects directly with the obligation not to refoul, where both are designed to guard against pending ill treatment. It is important to note, the court warned against collective expulsion in the given Essential to this discussion is the Court's decision to recognize Italy's jurisdiction, or the right of a state to exercise authority over persons, [25] in the process of interception at sea. Additionally, a consenting judge's opinion that push-back from international waters does case irrespective of the fact that repatriation occurred entirely outside of the territorial waters or mainland of either Libya or Italy. indeed constitute a breach of *non-refoulement* is also relevant. Notably, the court assigned responsibility to Italy via the state's effective exercise of jurisdiction on the high seas:

19 Ibid., para 12.
20 Ibid., para 15.
21 Ibid. Para 3,
22 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, CETS No. 5 (ECHR).
23 Ibid., para 114.
24 Ibid., para 131.
25 Anthony Aust, Handbook of International Law: Second Edition (United Kingdom: Cambridge University Press, 2010), lv.

> The Court observes that in the instant case the events took place entirely onboard ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel. In the Court's opinion, in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities. Speculation as to the nature and purpose of the intervention of the Italian ships on the high seas would not lead the Court to any other conclusion. [26]

Here, the court has implicitly established that jurisdiction is not a product of state borders, but is instead determined by the implementation of a state's authority and control over circumstances. The court suggests in *Hirsi* that where the state created a space to exert its power over outcomes on international waters, it simultaneously created a space of responsibility outside of its own borders. In his concurring opinion annexed to the court's judgement, Judge Pinto de Albuquerque concretely associates the pushback of asylum seekers from international waters with *non-refoulement*:"the prohibition of *refoulement* is not limited to the territory of a State, but also applies to extraterritorial State action, including action occurring on the high seas."[27] Overall, the court has made clear in the given case that exercise of authority and control throughout interdiction processes of migrants at sea sufficiently creates an obligatory link between state behavior and human rights protocols.

It is true the case discussed in this analysis constitutes only a single instance of high seas interdiction among a multitude of documented interceptions. It is fair to speculate if the judgment on one case is truly representative of what one might hope to regard as consistent trend in international law. However, a critical nuance to take into consideration is that only a miniscule number of migrant push-backs from international waters actually become cases before an international court. *Hirsi* exemplifies a situation that is exceptionally difficult to bring to court. It is commonly understood that supranational courts such as the ECtHR cannot admit cases between individuals and a state unless those individuals have already exhausted all domestic legal remedies available to them. However, for multitudes of asylum seekers, such as those involved in the selected case, access to domestic, legal recourse is excessively difficult given the nature of the surrounding environment or conflict; recourse to legal means is particularly difficult when repatriated migrants face further detainment in the original state of departure or a third state. Understandably then, one is hard pressed while searching through the Court's database to find

26 Ibid., para 81.
27 Ibid., 65.

an additional case involving interception and push-back of migrants on the high seas. Consequently, the issue is not that *Hirsi* represents an instance of analytic confirmation bias, but rather that the case is one of very few in which the court has had an opportunity to confront. Hence, it is reasonable to deduce the Court's ruling on Hirsi does genuinely represent a recent development in international law, one ensuring that *non-refoulement* is made applicable to events on international waters. The ECtHR is, presently, an especially worthy subject of analysis when it comes to matters regarding *non-refoulement* due to the influx of asylum seekers to European shores within the past decade. While other regional courts like the Inter-American Court of Human Rights have also dealt with questions of refoulement, the present system of bilateral arrangements designed to patrol the Mediterranean and secure European borders presents a special context for observation. It is in this context where *non-refoulement* obligations may be either shirked or reinforced, that the Court likely to receive legal questions concerning push-back, and in this context, the Court will be none other than the ECtHR. It is therefore most helpful to look to this regional Court as an indicator of developing trends in non-refoulement.

Conclusion

Despite being well embedded in international law, ambiguity surrounding the language of *non-refoulement* and the rise of state interdictions have rendered the extension of *non-refoulement* to high seas a matter of legal inquiry. Overwhelmingly, international organizations and legal scholars are certain that states must find themselves adherent in their obligations to *non-refoulement* as surely on the high seas as anywhere else within their own territory. Likewise, the ECtHR has adopted a clear stance in its ruling on *Hirsi Jamaa and Others v. Italy*; it regarded Italy fully capable of exercising jurisdiction on international waters and equally capable of taking notice of international human rights protections for asylum-seekers. International bodies and scholars discussed in this analysis have expressed the view that *non-refoulement* has always been designed to encompass events on international waters. Nevertheless, the fact that their extensive written opinions on the matter have largely been issued just within the past two decades strongly indicates that the enforcement of *non-refoulement* on the high seas has only recently become a topic of importance on the international agenda. Thus, this analysis draws the conclusion that the heavy calls to recognize *non-refoulement* on open waters is a relatively new development currently taking form in international law. The ECtHR supported such a development in regards to *non-refoulement* in *Hirsi,* but even this judgement is as recent as 2012. In regards to the novelty of international attention now given to *non-refoulement* on the high seas, it may as yet be

too soon to claim that the extraterritorial application of the principle has fully developed as hard, concrete law. Future cases will be necessary to make such a conclusion.

The analysis is not without certain limitations. For one, it is not reasonable to allege that the recent development of law, which extends *non-refoulement* to cases of state-led acts of interdiction, is truly a development in international law. Given certain circumstances in which *non-refoulement* has not been upheld, it is clear that its extraterritorial application is not understood as hard law by all states on the world stage. For example, Kim notes that the American stance towards *non-refoulement* obligations throughout its Caribbean interdiction programs is largely inconclusive; the US has not outwardly adopted the philosophy that interdicted migrants cannot be refouled, may indeed be culpable of refouling migrants from the Caribbean, and is not currently undergoing significant legal scrutiny for the matter.[28] Additionally, European states engaging in joint operations with African states to intercept and repatriate migrants are similarly left largely uncontested on the legal front. Again, Kim notes that while both Spain and states of northern Africa are indirectly involved in *refoulement* operations due to their formalized cooperation in the interception of migrants, no condemning legal case has been brought against the states for doing so.[29]

In view of the above limitations, this analysis ultimately concludes that *non-refoulement* is certainly recognized as applicable to high seas interdictions in principle, but the newly emergent stance towards *non-refoulement* remains contentious and may therefore be regarding as developing. To be sure, the on-going development is perhaps best regarded as a regional evolution in law, particular to Southern Europe and the Mediterranean coastal states. Even so, the questionable legality of pushing-back asylum seekers still at sea is garnering attention on an international scale.

28 Kim, "Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context, 62.
29 Ibid.