



MARTA FONT SILVA FERNANDES GONÇALVES

THE HIRSI JAMAA AND OTHERS v. ITALY

**THE APPLICABILITY OF THE PRINCIPLE OF NON-REFOULEMENT IN THE HIGH
SEA**

Dissertation to obtain the degree of
Master in Law and Economics of the Sea

Mentor

Vasco Becker-Weinberg, Professor at Nova University, Faculty of Law, Lisbon.

June 2018

MARTA FONT SILVA FERNANDES GONÇALVES

THE HIRSI JAMAA AND OTHERS v. ITALY

**THE APPLICABILITY OF THE PRINCIPLE OF NON-REFOULEMENT IN THE HIGH
SEA**

Dissertation to obtain the degree
of Master in Law and Economics of the Sea

Mentor

Vasco Becker-Weinberg, Professor at Nova University, Faculty of Law, Lisbon.

June 2018

DISCLAIMER

I hereby declare that this thesis is my own and autonomous work. All sources and aids used have been indicated as such. All texts either quoted directly or paraphrased have been indicated by in-text citations. Full bibliographic details are given in the reference list which also contains internet sources containing URL. This work has not been submitted to any other examination authority

NUMBER OF ALPHANUMERIC CHARACTERS

The body of this dissertation, including spaces and footnotes, has a total of 151,012 characters.

To my grandmother.

ACKNOWLEDGMENTS

During the accomplishment of this dissertation, many were those that contributed for its conclusion. That being said, I would like to show my gratitude to some of those individuals that did not let me give up:

To my parents and sister, my biggest supporters and the ones that always believed in me, even when I did not;

To my family, who asked every time about this dissertation and accepted my absence of answer;

To my faculty family, who dealt with me in times of desperation and heard my never-ending doubts, always keen and caring. A special thank you to, Ana, Bernardo, Daniela, Gabriela, Guilherme Taveira, João Barros, José Pedro, Laurinha, Maria do Mar, Miguel and Pedro;

To my old-time friends, António, Frederica, João, Sofia and Zé, that have been key to my intellectual and personal growth;

To my friends, who I neglected during this time but did not leave my heart, especially Carolina, Mara, Mariana and Rita;

A special acknowledgement to my mentor, Professor Vasco Becker-Weinberg, who accepted my invitation to guide me during this final stage of my masters. A person who I admire, for his human and professional characteristics, and always believed in me, especially when I was uncertain of my capabilities;

Finally, a warm thank you to F.D.U.N.L.. Many tears were shed, many battles were fought, yet I always felt at home.

METHOD OF QUOTATION

- I. In the footnotes, monographs are mentioned, the first time, by the following order: author's complete name (first his last name), title of the monograph, volume, issue, publisher, year and relevant pages. In further quotation, mentioning the same book, it will be mentioned by the author's name followed by the abbreviation 'op. cit.' and the relevant pages.
- II. In articles of periodic publications, the first quotation will have the following order: author's complete name (first his last name), title of the article, name of the journal, year or volume, number and relevant pages. In further quotation, mentioning the same book, it will be mentioned by the author's name followed by the abbreviation 'op. cit.' and the relevant pages.
- III. Regarding on-line documents, the site where the document was downloaded will be quoted.
- IV. International documents will have the following method of quotation, name, article and year.
- V. Case law will be quoted, first the name of the Court, name of the case, number and year.
- VI. The abbreviations are identified in alphabetical order in the following page.
- VII. Any latin and foreign expressions will be in italic.

LIST OF ABBREVIATIONS

ASEAN – Association of Southeast Asian Nations

ATCA or ATS - Alien Tort Act

Art.- Article

ECOSOC – United Nations Economic and Social Council

EU – European Union

ECHR – European Court of Human Rights

EXCOM – Executive Committee of the United Nations High Commissioner for Refugees

ICJ – International Court of Justice

ICEM - Inter-Governmental Committee for the Movement of Migrants

Id. – Idem

IRO – International Refugee Organization

IMO – International Maritime Organization

NGO – Non-Governmental Organization

Op. cit. – Opere citato

Pg.- Page

SOLAS – Convention for the Safety of Life at Sea

UN – United Nations Organization

UNCLOS – United Nations Convention of the Law of the Sea

UNGA – United Nations General Assembly

UNHCR – United Nations High Commissioner for Refugees

USSR – Union of Soviet Socialist Republics

V. – Versus

ABSTRACT

The following dissertation focuses on the application of the principle of non-refoulement in the High Seas. The idea to investigate this theme had, as background, the severe migration crisis that has been affecting Europe and the use of the sea as a method of entrance in the European continent. Even though many migrants are able to reach the land, this paper is dedicated to those who are sent back to the place they were coming from and that might suffer a violation on their human rights as a consequence of the non-compliance of the principle of non-refoulement. Many States consider that the actions taken in international waters are excluded of guilt as they are not in their jurisdiction and that international waters are a space of freedom in a broader sense, ergo they cannot be held responsible for any kind of exercise. The problematic is divided in to chapters to help build an organized and clear conclusion throughout its reading.

All in all, this dissertation aims to demystify the idea that the High Sea has a loophole and to prove that the principle of non-refoulement must be applied in the High Sea, regardless of the States acting inside their jurisdiction or not.

RESUMO

Este trabalho teve como centro de estudo a aplicação do princípio do non-refoulement no Alto Mar. A ideia de investigar este tema teve como antecedente a grave crise de migração que tem vindo a assolar a Europa e o uso do mar como meio de entrada no continente europeu. Apesar muitos dos migrantes conseguirem chegar a terra este trabalho foca-se naqueles que são reencaminhados para o mesmo lugar de onde vinham e que sofrem uma violação de direitos humanos por consequência do não cumprimento do princípio do non-refoulement. Muitos Estados consideram que as acções que tomam no Alto Mar são excluídas de culpa por não estarem no âmbito da sua jurisdição e que as águas internacionais são um espaço de liberdade no seu sentido amplo, que não podem ser alvo de responsabilidade por qualquer exercício. A problemática encontra-se dividida por capítulos de forma a ajudar na construção de uma conclusão à medida que se avança, culminando numa conclusão crítica.

Este trabalho serve para desmistificar a ideia da existência de uma lacuna no Alto Mar e para provar, o que já devia ser aceite e praticado pelos estados, que o princípio do non-refoulement tem que ser aplicado no Alto Mar, sem prejuízo de os Estados intervirem ou não dentro da sua jurisdição.

TABLE OF CONTENTS

| | |
|--|----|
| 1. INTRODUCTION | 1 |
| 1.1. Ratio..... | 1 |
| 1.2. Scope..... | 3 |
| 1.3. The problematic: Application of the principle of non-refoulement in the High Sea..... | 4 |
| 1.4. The Case <i>Hirsi Jamaa and Others v. Italy</i> , the reason behind the choice..... | 6 |
| 2. SOCIO CULTURAL AND HISTORIC CONTEXT | 9 |
| 2.1. Origins..... | 9 |
| 2.2. International Response..... | 10 |
| 2.3. The UNHCR in the 1950's | 11 |
| 2.4. Challenges after the Second World War | 13 |
| 2.5. The sea as a channel for migration | 17 |
| 2.6. The Principle of Non-Refoulement..... | 19 |
| 3. CASE OF HIRSI JAMAA AND OTHERS v. ITALY | 23 |
| 4. THE PRINCIPLE OF NON-REFOULEMENT | 32 |
| 5. JURISDICTION AND SOVEREIGNTY AT SEA | 41 |
| 5.1. Extraterritorial Exercise of Jurisdiction: Application of the Principle in International Waters | 45 |
| 5.1.1 Defining the scope of the problem..... | 45 |
| 5.1.2 The High Sea | 47 |
| 5.1.3 Geographical scope of the principle | 49 |
| 5.2. U.S. Aliens Tort Claims Act..... | 52 |
| 6. CONCLUSION | 60 |
| 6.1 The definition of refugee | 60 |
| 6.2 The Principle of Non-Refoulement..... | 60 |
| 6.3 Principle in the High Sea | 62 |
| 7. BIBLIOGRAPHY | 66 |
| 8. ANNEX..... | 77 |

1. INTRODUCTION

1.1. Ratio

To obtain the master degree in Law of the Sea, the application of the principle of non-refoulement in the High Seas was studied. The decision to investigate this theme was obvious, not only due to the current problems arising every day but also, due to my personal interest, that arose first than my academic interest, in matters of refugees.

The first time I heard something juridical about this theme was in a class of European Community Law lectured by Professor Dr. Nuno Piçarra, a professor of Nova Law School of Lisbon, and, immediately at the same time I enrolled in a course of Asylum Law and Immigration, co-coordinated by the same professor and Dr. Ana Rita Gil. The path until the theme choice starts, in and unconscious way, here.

It was part of the syllabus of the subject of European Community Law with special attention to the Area of Freedom, Security and Justice, the Immigration Policy, specifically, in what concerns this paper, the protection against expulsion of anyone – found legally or illegally in the country¹. The Directive 2008/115/EC², also known as the Returns Directive, was thoroughly studied both in class and in the Asylum Course. It is its main aim to correct an irregular situation- being that the return of illegal immigrants to their country of origin- in the most transparent and impartial way, giving special attention to article 5, d) – the principle of non-refoulement. Furthermore, the Qualification Directive³, which determines that,

¹ Charter of Fundamental Rights of the European Union, Dec. 2000, 2000/C 364/01, article 19.

² Directive 2008/115/EU of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

³ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, a recast of the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as

independently if it is an asylum seeker or a person already legally protected by the law, it is protected by the non-refoulement principle.

In 2016, a UNHCR Report⁴ stated that, in the end of the year 2016, 65.6 million people⁵ left their homes due to reasons of persecution, conflict and violence – consequently linked to human rights violations - and that 22.5 million people were refugees and 2.8 million were asylum-seekers. Moreover, it stated that more than 55% of the refugees were Syrians⁶, Afghans and south Sudanese, yet the conflicts were also found Eritrea, Libya, Yemen, Ukraine, Sudan, which led to other displacements. The refugees from these countries do not seek asylum only close to home, this is where the core problem of this thesis start, they seek protection in an international level and they risk their lives crossing terrestrial and maritime borders. The Mediterranean Sea has been key to many people who are looking for safety and protection in Europe, yet this poses a problem to the host countries as well, leading to preventive actions, like the push back operations at seas, and, consequently to the violation of human rights and principles of customary law.

One must not ignore that the protection of refugees is a ‘collective responsibility of the international community’⁷ and the truth is that Europe is facing an unprecedented wave of refugees and asylum seekers which has put the immigration policy, the freedom to circulate and basilar principles at stake. According to the World Bank⁸, the number of asylum seekers in Europe more than doubled in a year (2014 and 2015) and 70% of the asylum seekers are active which, compared with the 63% in the EU, which has consequence in their integration.

persons who otherwise need international protection and the content of the protection granted.

⁴ UNHCR- Global Trends: Forced Displacement in 2016, Geneva, Switzerland, 2016, UNHCR

⁵ Compared to the 33.9 million in 1997, *supra* 4.

⁶ Most of Syria’s populations lived in displacement in 2016, due to the Syrian Conflict, *supra* 4.

⁷Antonio Guterres, UN Secretary General, (available at: <https://news.un.org/en/story/2017/11/636842-world-community-has-collective-responsibility-stop-human-trafficking-support>).

⁸ World Development Indicators 2016, The World Bank (available at: <https://data.worldbank.org/data-catalog/world-development-indicators>).

1. Introduction

1.2. Scope

For purposes of defining the scope of this paper, the definition of *refugee* we will be adopting is the one established in international human right laws as it is found to be broader than the one versed in international refugee law⁹. There should be no distinction between *de jure* refugees and *de facto* refugees as the recognition of one being a refugee is ‘merely declaratory’¹⁰ and there should not be a dependency on recognition to be protected by the refugee status. We will not adopt the distinction on refugees, in this paper independently of the declaratory recognition, any person who shares the same need for international protection¹¹ will be considered one. Directly linked to this aspect is the one of the application of the non-refoulement principle which applies to asylum seekers – those who have not have their status declared – and to those who have not had the opportunity to ask for protection¹². It would not make any sense to make the distinction of *de jure* and *de facto* refugees when it came to the application of this principle as the distinction in the premature stage of the recognition has also been left behind.

We shall not forget as well that the refugee status is necessarily linked to human rights protection as the status grants the absolute application by the States of the non-refoulement principle hence protecting any human right that was threatened. Being clear that the prohibition of *refoulement* is considered a principle of customary international law, a rule of *jus cogens*, would mean that this paper would have no problematic, the rules of the game are clear, and all refugees were to be protected by States. Unfortunately, doctrines diverge, States do not act as predicted in international law – sometimes unconsciously, others consciously and other times because of the flowery of the law, the overlap of

⁹ United Nations Convention relating to the Status of Refugees, 1951, Article 33. Also known as the Geneva Convention 1951 it was ratified by 145 States, was adopted in 28 July 1951 and entered into force on 22 April 1954.

¹⁰ ECHR, *Hirsi Jamaa and Others v. Italy*, no. 27765/09, 2012, Separate Opinion, pg.63.

¹¹ See Recommendation No. R (84) 1 of the Committee of Ministers to member States on the protections of persons satisfying the criteria in the Geneva Convention who are not formally recognized as refugees, and UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1979, re-edited 1992, paragraph 28.

¹² ECHR, *M.S.S v. Belgium and Greece*, no. 30696/09, 21st January of 2011.

interests, the coexistence of many international conventions, domestic law and current problems that change the way the States look at the problems.

1.3. The problematic: Application of the principle of non-refoulement in the High Sea

The problematic of this paper focusses on the principle of refoulment in the High Seas. This decision of focusing in the such a turbulent area that is international waters has a fundament which is relevant to this dissertation. The master's degree I decided to enrol in, although very specific in what matters of the sea were concerned, lacked, in my opinion – due to a personal interest of myself- a human rights approach on matters that were linked to the sea. The United Nations Convention on the Law of the Sea, which was examined in class, predicts in Article 98 the cases in which there is a duty to render assistance. Well, in the current juncture, one might refer as a refugee crisis, there must be a study of what the duty to render assistance embarks, its correlation with international conventions and principles. We have been witnessing the refugee influx in Europe, mainly people arriving by sea, yet some of them do not get to arrive safely or and are pushed back.

The access to the European Union territory has been diminished to control the migration. Many states act, or do not 'act' as the action assumes legal responsibility, on the High Seas being under the false assumption that their responsibility is unclear in this area and so they should not be held accountable for any human rights violation that might occur. Well, this supposed loophole rises many problems- one of them is the push-back policy, yet this will not directly be approached in this paper, being of our opinion, however, that it is a policy against international human rights and international refugee law- the first of them being that there is not really a loophole and the States are accountable for their actions in the High Sea.

This is one of the reasons why I chose the High Sea to concentrate my study, the States try to avoid their own culpability stating that the extraterritorial acts, ergo beyond their jurisdiction, are not their responsibility, provoking curiosity and confusion. The High Sea are property of no one and are not susceptible of being possessed by any state, yet, acknowledging that it is not an anarchy and a

1. Introduction

loophole for any kind of illicit action, there must have been a compilation of reasons and proof that would transform this, so called, loophole, so beneficial to State's interests and private affairs, in a regulated area.

The idea of sovereignty is directly linked to the territory of the state which means that areas like the Territorial Sea and the Exclusive Economic Zone would not arise questions of accountability of actions taken there.

The Territorial Sea and Contiguous Zone are Part II of the Montego Bay Convention. Article 2 repeats the aspect of sovereignty making clear that whatever happens in the Territorial sea is undoubtedly the State's responsibility. The Territorial Sea does not exceed 12 nautical miles, where the State exercises its sovereignty limited with respect of the article 1, n1 of UNCLOS. This limit to the sovereignty has to do with the right for innocent passage in the territorial sea. The Contiguous Zone, up to 24 nautical miles from where the territorial sea starts, is an area of control where the states acts to prevent crimes. The Contiguous Zone sees the regime of the High Sea applicable to itself in case of conflict between states.

The Exclusive Economic Zone, Part V of the Montego Bay Convention, is the area beyond the territorial sea which has a specific legal regime that cares for a brief note. The sovereignty is not absolute, Article 56, n. ° 1a), the coastal state only has sovereign rights over the natural resources found in the EEZ and the jurisdiction is limited, b) of the same Article. The High Seas regime is complementary of the one of Part V and the only sovereignty the coastal state has is the one written in article 56. The remnant is, as Article 89 states, is unable to suffer from appropriation.

The High Seas is studied further on of this paper.

The openness to receive refugees is not to be confused with the core of the Schengen Agreement- which would not be studied in this paper but the reason why we are putting ourselves far away from it cares for explanation. Although this paper is about the refugee crisis in Europe, the Schengen

Agreement¹³ was adopted to open the internal borders of the countries – mostly members of the European Union. It is the emanation of one of the basilar principles of the EU, the free movement of persons through the EU territory. The inexistence of internal border controls¹⁴ contrasts with the necessary external controls between a Schengen state and a non-Schengen state.

Article 17 of the Schengen Agreement mentions the combat by the Parties of the Agreement of illegal immigration, this is the object of Frontex which helps manage the external borders, the countries which have external borders are responsible for its control but Frontex provides support for those countries which cannot face on their own the migratory influx. Despite this controls, the Schengen Border Code¹⁵ clarifies, in the article 3 that the code will apply to those in need of protection being it intrinsic to the application of the principle of non-refoulement.

1.4. The Case *Hirsi Jamaa* and Others v. Italy, the reason behind the choice

The case that I used as the example and backbone of this work is the *Hirsi Jamaa* and Others v. Italy, judged by the European Court of Human Rights in Strasbourg in February 2013. The case is scrutinized in chapter 3 of this paper yet some notes are pertinent in this section.

Firstly, the reason why I chose this case and not another one. It is fair to state that when the problematic of the application of the principle of non-refoulement in the High Sea occurred, the first reading and searches about this theme got me to this exact case. One would state that it was a rushed decision as it was a case that immediately suited the problematic I wanted to explore,

¹³ Schengen Agreement, signed in June 1985 by Belgium, Germany, France, Luxembourg and the Netherlands, the Schengen area guarantees unlimited travel within 26 countries, of which 22 are EU states.

¹⁴ Although there are no controls, the Schengen Information System (SIS) was founded to guarantee the internal security between Schengen states. It is a data base with relevant information gathered by different authorities from 30 European countries which not only contributes for the internal security but also to the protection of the external Schengen border. With the help of the Visa Information System (VIS), the connection between non-EU countries and Schengen States is facilitated and helps verify the authenticity of the visa.

¹⁵ Regulation (EU) No.2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

1. Introduction

however, being an updated case, that explored non-Schengen nationals attempting to reach EU territory by sea and being intercepted in the High Sea, it was a cautious decision.

Secondly, I wanted to explore the reasons the Italian government, accused amongst other things, of the violation of the non-refoulement principle, would use to abstain themselves from responsibility as I wish to discredit them along the work.

Lastly, the concurring opinion by Judge Pinto de Albuquerque – caught my attention because he was the only judge who decided to analyse the case and, although his research has to do with the ‘intersection between international human rights law and refugee law’, I used many of his ideas and explored other bibliographic notes as, all in all, the opinion sustained my thesis.

The principle of non-refoulement requires a brief introduction before being explored in chapter 4. It is a principle present in international humanitarian law, international refugee law and international human rights and it is considered customary international law, like most fundamental principles of human rights. The principle prohibits the transfer of a person from an authority to another when there is the suspicion that the person would be in danger of being subjected to violations of certain fundamental rights, like the risk to be tortured, persecution or deprivation of life due to race, religion, nationality, social group or political opinion. The principle applies wherever the State exercises jurisdiction and when persons ‘come within the effective control and authority of that State¹⁶, for example the interception of vessels in the high seas.

The introducing of more strict migration policies to deter foreigners of migrating to the country arises some actions by that States that one might say were negligent, more specifically when those persons are looking for international protection there. The denial of entry or the return of the vessel back to the high seas does not mean, always, that there has been a violation of the principle. The

¹⁶ 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, January 2007, §§ 24, 43.

The *Hirsi Jamaa* and Others v. Italy - The Applicability of the Principle of Non-Refoulement in High Sea

principle is only at stake when foreigners are returned to a place where they can be at risk, therefore it is crucial to assess case by case if the migrate would see its fundamental rights at risk if sent back.

Being that said, one would think that there is no question in what the application of the principle regards, this is not true. The extraterritorial application of the principle has been an issue, especially now. Some states believe that their actions in the high seas are not relevant because of the specific characteristic of it.

All in all, the aim is to show that the principle is to be followed wherever the States are acting, regardless of whether they are out of their sovereign territory or if their actions in the high seas are not, really, an exercise of jurisdiction.

2. SOCIO CULTURAL AND HISTORIC CONTEXT

2.1. Origins

After the Second World War the international community joined forces to deal with the flow of refugees at the time, especially Germans who were forced to leave eastern Europe. This population movement¹⁷ made Europe erratic and, therefore, asked for an active answer on behalf of the European states. The arrival and integration of the millions who fled was not gentle and many problems were arising, both to those who fleeing and to those who lived in the countries where they were moving to.

The failure to prevent the Second World War, even more devastating than the one two decades before, by the League of Nations, established after the First World War, and its collapse, made it clear that the world needed an organization that actively promoted peace and acted as a bridge between the countries. The urge for a peaceful and safer world lead to the formation of United Nations Organization on the 24th October 1945¹⁸, after it was ratified by China, the United Kingdom, the Soviet Union, the United States and by most of the other signatories. This was a turning point to international relations and, as its acronym suggests (UN), aimed for a united world, a world working together to achieve peace and prosperity.

The work was far from finished and during the first three years many agreements were established and climaxed in the United Nations Universal Declaration of Human Rights¹⁹.

¹⁷ It is estimated that a total of about 60 million Europeans became refugees during World War II, according to Malcom J. Proudfoot in HARRIS, CHANUCY D., WÜLKER, GABRIELE, *The Refugee Problem of Germany*, Economic Geography, Vol. 29, No. 1, Taylor & Francis, Ltd., Jan 1953, pg. 10.

¹⁸ 50 countries gathered at the San Francisco Conference where they worked towards the formation of the United Nations Charter and the Statue of the International Court of Justice.

¹⁹ UN General Assembly Resolution 217 A, Paris, December 10th, 1948, established in December 1950.

2.2. International Response

The first international instrument that arose was the International Refugee Organization^{20, 21}, it was a non-permanent agency which was specialized in solving the refugee problem that had been created by the Second World War, its work did not include the repatriation of refugees but their resettlement. The IRO, not only inherited the functions of the Intergovernmental Committee on Refugees²² but also became responsible in aspects of repatriation and maintenance, legal and political protection, transport and resettlement, moreover it regulated an International Tracing Service. As the global feeling was that the refugee problem would be an endless one, especially due to the Korean conflict and the victory of Mao in China – that reflected the tension between the east and western blocs. As it was a non-permanent UN agency it ceased to exist on the 30th September 1953, but it was clear that the world needed an international agency to deal with the problem.

Despite the end of World War II, the world was far from being at peace and a new era started, the Cold War²³, an intense and volatile period with two main characters, the United States and the Soviet Union. In addition to the number of refugees that WWII originated, the Cold War also contributed to a substantial increase of refugee flow from east to west. For these reasons, Europe was a special point of concern and when the United Nations High Commissioner for Refugees²⁴, that acted under the authority of the UN General Assembly²⁵ an intergovernmental organization created to protect refugees and solutions to

²⁰ Economic and Social Council Resolution of 16th February 1946 and approved by the UN General Assembly in December 1946. However, it was only officially established on the 20th of August 1948.

²¹ “Part Two: The Specialized Agencies. X. The International Refugee Organization,” in The Yearbook of the United Nations 1947-1948 (United Nations Publications, 1949), pgs. 955–67.

²² Organized in August 1938 and triggered by President Roosevelt, to face the refugee problem by allowing permanent immigration from European countries.

²³ A long state of geopolitical rivalry between the powers in the East and the powers in the West, during 1947 until 1991.

²⁴ The office of UNHCR was created in 1950 to help the millions of Europeans who had lost their home or fled. Its Statue was adopted by the UN General Assembly on December 14, 1950 as Annex to Resolution 428 (V).

²⁵ UNHCR was established as an organ which as subsidiary to UNGA, as stated in Paragraph 1 of the UNHCR Statue.

2. Socio Cultural and Historic Context

protect them, was established, in December 1950, it had in spirit the vicissitudes in Europe. The first twenty-eight years of the UNHCR were neglected, as its actions were not given the right appreciation²⁶. It is said that the UNHCR does not have autonomy and it is just a method by which states act and it only survives due to donations and places where it initiates programs. However, and it is also our understanding, in fact, being the main authority concerning refugees and displaced people, the Office has full legitimacy in humanitarian affairs with great weight in the world's policy, therefore it is quite preliminary the observation of the passive character or the subjugation to the states desires of the UNHCR. The truth is that it was created having in mind the impossibility of it turning into a threat to the sovereignty of the Western states or inflicting a financial burden to them. Although the orders came from the States themselves, there was no promise of economic involvement.

Due to the special interest that the United States had in Europe after the Second World War and, continuously through the Cold War period – due to its policy of containment, they applauded emigration from the East - the USA aimed to limit the role of UNHCR. For this matter, the United States created its own organizations to defend their own interests. Inevitably, the UNHCR started working with the US organizations as a superior organ and soon became an authority, something that was not supposed to when it was created.

2.3. The UNHCR in the 1950's

In 1950 and 1951, the role of UNHCR was legally consolidated by the Statute²⁷ and the Refugee Convention²⁸, they were the first legal instruments concerning refugees and gave full power to the Office to deal with any problems of the matter. Its origins were found in the work of the Ad Hoc Committee on

²⁶ LOESCHER, GIL, *“UNHCR's Origins and Early History: Agency, Influence, and Power in Global Refugee Policy,”* *Refuge: Canada's Journal on Refugees* 33, no. 1 (March 23, 2017): 77–86.

²⁷ United Nations Organization, *“Statue of the Office of the United Nations High Commissioner for Refugees”*, 1950.

²⁸ United Nations Organization, *Convention Relating to the Status of Refugees*, 1951.

Statelessness and Related Problems by the UN Economic and Social Council²⁹ and culminated in a draft of the Refugee Convention. The Convention's purpose was to make sure that every single refugee had its fundamental rights and freedoms satisfied and protected. However, the Convention only included the refugees who fled before 1951³⁰ and excluded some individuals³¹, it was placed under the supervision of the UN General Assembly and the ECOSOC.

Despite the various restrictions placed to the UNHCR, it was capable of expand its original functions, competence and authority and made sure to demonstrate to every state, especially the US, that it was the supreme organization dealing with refugees. Goedhart, the first High Commissioner, had, as a goal, to show the relevance of UNHCR and promote the leading role of the office in a worldwide scale. An important breakthrough was the raising of funds, autonomously from the United Nations³² that evolved in the creation of the United Nations Refugee Emergency Fund Executive Committee and predicted what was inevitable: the centralization of refugee issues and knowledge in the Office³³. As its legitimacy grew, the UNHCR was requested to lead various refugee crisis, one of which was in Hungary in 1956, and it represented a cornerstone in the Office's field action. Not only it had to deal with the financial assistance to the refugees, but it also had to harmonize the refugees, the country who was taking in them and the interference by NGO's that were aiding as well.

Despite the fructiferous and indispensable work of the Office, the temporal restrictions predicted in the Convention were still an issue that had to be

²⁹ By Resolution 248 (IX) of 8 August 1949 to "consider the desirability of preparing a revised and consolidated convention relating to the international status of refugee and stateless persons and, if they consider such a course desirable, draft the text of such convention".

³⁰ United Nations Organization, "*Statue of the Office of the United Nations High Commissioner for Refugees*," § Chapter II, Article 6. (1950).

³¹ Paragraphs D-F of Article 1 of the Convention Relating to the Status of Refugees.

³² Op. cit. LOESCHER, GIL, "*UNHCR's Origins and Early History: Agency, Influence, and Power in Global Refugee Policy*," *Refuge: Canada's Journal on Refugees* 33, no. 1 (n.d.): 79.

³³ The acknowledgement of the Office of the UNHCR was enhanced with the awarding of the Nobel Peace Prize in 1955, being the first UN Organization to be awarded this honour. The reason to this award was to underline the importance of the Convention of Refugees, to raise awareness to the economic necessities that were blatant due to the scarce aid by the UN members.

2. Socio Cultural and Historic Context

overcome. However, the incompatibility was clear when the organization was called to help and deal with the refugee crisis in Hungary, its interference was temporarily not predicted, as the Convention was only to be applied to people who fled from events in Europe that occurred before January 1st of 1951. Due to the importance of the Office when dealing with the crisis, Auguste Lindt³⁴ wanted to enlarge the temporal scope of the convention and sustained the opinion that refugees, that fled from Hungary, should be immediately recognized instead of suffering an individualized determination. In addition to this, the Office's role showed that its policies were increasing and that it could deal, in an autonomous way, with future crisis.

2.4. Challenges after the Second World War

The Hungarian Crisis followed the Second World War, when Hungary was occupied by the USSR (1945-1955). The occupation brought political instability and, combined with a poor crop year, fuel shortages and a harsh winter, started an uprising by Hungarian students on the streets of Budapest. This demonstration of dissatisfaction was fruitful as the soviet troops were pulled out of the capital and a more liberal Prime Minister was 'elected'. However, when he announced that Hungary was to withdraw from the Warsaw Pact it triggered the USSR and led to the invasion, once more, of Budapest with hundreds of soviet tanks against the civilians. Consequently, many thousands died and nearly 200,000 Hungarians fled to other countries as refugees from Soviet violence. The number of refugees frightened the international community and raised awareness for the global problem of refugees, it also underlined the importance of NGO's regarding the work of the UNHCR. The Hungarian crisis and the thousands of displaced people from the Second World War was vital to the work, legal growth and the future path of the Office and refugee law.

It was felt, by the international community and by the local ones, the need to raise funds and lobby its work, therefore the World Refugee Year was announced – the propaganda was a way to spread the work done by the UNHCR

³⁴ The second High Commissioner of the Office of the UNHCR.

in a global way and create a network. The World Refugee Year had a very positive impact, especially in the decrease on the number of displaced people, the amount of money raised to help clear the refugee camps and the public opinion reflect sympathy towards the cause. Although there were positive aspects arising from this year it also had the misfortune of coinciding with the decolonization and emergence of new states which were leading to another new problem of displaced people. This made imperative the change of the legal spectre of the Refugee Convention as it did not understand these problems.

Despite the importance of the Hungarian Crisis, the crisis in Algeria in May 1957, where 85,000 Algerians fled to Tunisia in a period of two and a half years, was also significant to the UNHCR. It was the first time where help was requested to UNHCR in countries of the developing world, this meant a huge step in the responsibility and a proof of trust shown to the Office. Furthermore, it showed the necessity of an authority like the UNHCR to give aid in these aspects and how it was indispensable to the countries its existence, therefore to include the refugee problems in a wider way than the one predicted in the convention. Lindt's stubbornness linked with the impossibility of ignoring the problems in Tunisia made clear that the UNHCR should show its goodwill and use the contacts earned due to the Hungarian Crisis, and the precedent created when coming to rescue of refugees that did not fit in article 1 of the Convention, to help and show its power and independence as lead agency in dealing with refugees.

The breakthrough caused by the crisis in Algeria meant that, in a geographical perspective, Europe was no longer its main place of action, and it was ready to help any country that needed. The UN General Assembly gave the Office more independence when it decided it no longer felt the need for the UNHCR to ask for permission every time a new case arose.

Despite the end of WWII, the world was far from being stable, mainly due to the Cold War which inevitably was extended to Africa and Asia. The US contributed largely to the UNHCR's action in Africa and reduced its interference in the rest of the world which meant that it detained the monopoly in the global refugee regime, which was the Office's wish since its origins. When Felix Schnyder and Sadruddin Aga Khan were, separately, high commissioners, they

2. Socio Cultural and Historic Context

concluded that the convention was too European based to be applied in less developed countries. This was an obstacle that had to be overcome as it was clear the demand of the Office in other continents, therefore there should be an adaptation of the legal text. Once more, the argument pended towards the problem of the temporal and geographical restrictions of the convention which led to the adoption of the 1967 Protocol³⁵. Due to the refugee flux and the limitations of the Convention, a colloquium was set in Italy in April 1965. It was the majority's understanding the urge to adapt the convention to the present problems hence the adoption of the protocol.

The Protocol, despite being short in length, reflected an important milestone that had been in the UNHCR core discussion since the Convention was adopted. From 1967 onwards, the UNHCR had no limitations in matters of subjects, time and place, formally the Office could aid anyone, anywhere, with no discrimination. Basically, it removed the dateline that existed (1 January 1951). This widen on the range of application was especially useful during 1960s and 1970s as the Cold War started to spread outside of Europe. The definition of refugee was amended by the protocol which became 'Any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.'

In 1965 the General Assembly recognized the UNHCR's competence to protect and find permanent solutions to refugees under UNHCR and made clear that the commission was to have a universal interference when it appointed five additional members from North and Sub-Saharan Africa to the Office's Executive Committee. The interference in international humanitarian crisis became the Office's monopoly which made it act not only as an active part in the crisis but also raising awareness to other states to apply refugee norms in a national way.

³⁵ Protocol Relating to the Status of Refugees, 1967.

Once the ICEM³⁶ ceased to exist, as there were no refugees to justify its existence, and its donors withdrew their help, this inevitably empowered UNCHR.

Obviously, the growth of the Office meant it needed higher financial aid, especially due to the staff's growth and the funds that were needed to make face to the global humanitarian problems. The higher the budget the more confidence it reflected in the UNHCR to carry out its programs and to be the major actor in the global scene.

The Statue of the UNHCR points out the ones that the Commission protects³⁷ and its exceptions³⁸, it considers the circumstances in which each person is and, only after considering each person, it grants international protection. For the past 50 years, the UNHCR's competence has broaden³⁹ to fit

³⁶ Provisional Inter-Governmental Committee for the Movement of Migrants, an operational organization funded by the United States. Its aim was to facilitate international migration and help refugees.

³⁷ "*who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence*", Paragraph 6 of the Statue of the UNHCR.

³⁸ UNHCR Statute, para. 7(d). Art. 6 of the London Charter refers to crimes against peace, warcrimes, and crimes against humanity. Art. 14(2) of the Universal Declaration of Human Rights provides that the right to seek and enjoy asylum "*may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations*". Cambridge University Press, *The Scope and Content of the Principle of Non Refoulement: Opinion*, June 2003 (available at: <http://www.refworld.org/docid/470a33af0.html> [accessed 21 July 2017]).

³⁹ See, for example, A/RES/1499 (XV), 5 Dec. 1960, which invited UN members to consult with UNHCR "*in respect of measures of assistance to groups of refugees who do not come within the competence of the United Nations*"; A/RES/1673 (XVI), 18 Dec. 1961, which requested the High Commissioner "*to pursue his activities on behalf of the refugees within his mandate or those for whom he extends his good offices, and to continue to report to the Executive Committee of the High Commissioner's Programme and to abide by directions which that Committee might give him in regard to situations concerning refugees*"; A/RES/2039 (XX), 7 Dec. 1965, which requested the High Commissioner "*to pursue his efforts with a view to ensuring an adequate international protection of refugees and to providing satisfactory permanent solutions to the problems affecting the various groups of refugees within his competence*"; A/RES/31/35, 30 Nov. 1976, endorsing ECOSOC Resolution 2011 (LXI) of 2 Aug. 1976, which commended UNHCR for its efforts "*on behalf of refugees and displaced persons, victims of man-made disasters, requiring urgent humanitarian assistance*" and requested the High Commissioner to continue his activities for '*alleviating the suffering of all those of concern*'

2. Socio Cultural and Historic Context

all kinds of cases, distancing it from the first definition of refugee which was limited, geographically and temporally. The importance given nowadays to the UNHCR makes it legitimate for it to apply and instruments and principles of international law according to the situation it is found in, for this reason it can, apart from making reference to the principle of non-refoulement, also support its cause by mentioning that it is a principle of customary law, thus strengthening its defence.

2.5. The sea as a channel for migration

Migration flows by the sea are not, unfortunately, a new thing, they remount to the Indochinese crisis in the seventies and this was when the international community found a shadow in the international law, there was no way to deal with the asylum seekers arriving by sea. It arose the question of which the obligations of each state in each maritime zone were and, linked to this, the application of the non-refoulement principle. The High Seas was always, and still is, an area of shadow when it comes to the rights and obligations of the States, the uncertainty of the obligations makes the state feel as if it could act however it likes without being accountable for its actions. When, in 1958, was signed the Convention on the High Sea⁴⁰, which entered into force on 30 September 1962, it was the first time it was being defined what were the High Seas. The Geneva Convention produced four conventions and a protocol, the one about High Sea had originated from the League of Nations. With the help of the International Law Commission and the General Assembly, many drafts were made regarding the law of the sea, which culminated in the work of the 1958 Geneva Conference. This Conference has an historical weight as it was the first to organize and examine the sea and, later, was used as the basis for the Montego Bay Convention. As this paper has, as its core, the problem of the non-refoulement in the High Seas, we shall focus on this area.

to his Office. Cambridge University Press, *The Scope and Content of the Principle of Non-Refoulement Opinion*, June 2003, available at: (<http://www.refworld.org/docid/470a33af0.html> [accessed 21 July 2017]).

⁴⁰ The 1958 High Sea Convention focussed mainly in aspects like the freedom of the High Sea, the flag State, piracy, hot pursuit, the laying of cables and pipelines.

The French colonies of Indochina are an important part of the refugee history as more than three million people fled in twenty years and it tested the role of the UNHCR as it acted in a leading way in a non-precedented humanitarian crisis. In the background of this crisis was the rivalry between the US, the USSR and China. When the French were defeated in 1954, Vietnam divided itself in two separate states, in the north the Democratic Republic of Viet Nam, a communist state, and in the south the Republic of Viet Nam. Less than two decades after, the Cold War arrived to southeast Asia, mostly due to the rollback communist policy, practiced by the US. When the Paris Peace Agreement⁴¹ was signed it triggered an assistance programme to help refugees from Vietnam and Laos. Although the Agreement had, in its core, to put an end to the conflict in Vietnam, with the fall of Saigon in 1975, the communist ideology spread over Indochina, yet the UNHCR remained involved in the protection and aid of the displaced people, it was especially focused on the ones who were fleeing the country⁴². Those who were fleeing were adopting a new way to do so, using the sea as an escape route from the war⁴³. This reaction increased due to the unhappiness linked to the proliferation of the communist regime, especially with the fall of Saigon. As the numbers kept on increasing and most of the Vietnamese were fleeing to China⁴⁴, the UNHCR strengthened its relations with China and opened an office in Beijing.

During the Indochinese crisis,⁴⁵ the EXCOM stated that ‘in all cases the fundamental principle of non-refoulement – including non-rejection at the frontier – must be scrupulously observed’⁴⁶, this was also observed in the 1967 Declaration on Territorial Asylum⁴⁷. When, in 1975, EXCOM of the UNHCR concluded that

⁴¹ Signed in January 27 of 1973

⁴² To understand how big this crisis was, about 140,000 Vietnamese were evacuated and settled in the US.

⁴³ Around 62,000 Vietnamese escaped by boat, hence ‘boat people’.

⁴⁴ China was the only east Asia region granting asylum and local settlement for Vietnamese refugees.

⁴⁵ Where destination states, like Malaysia, Singapore and Thailand, were not parties to the 1951 Refugee Convention.

⁴⁶ Executive Committee, Conclusion No. 22 (XXXII) 1981; reaffirmed during the crisis in former Yugoslavia, in Executive Committee, Conclusion No. 74 (XKV) 1994, para. (r).

⁴⁷ UN General Assembly, Declaration on Territorial Asylum, 14 December 1967, A/RES/2312(XXII): (available at: <http://www.refworld.org/docid/3b00f05a2c.html>).

2. Socio Cultural and Historic Context

the arrival of asylum seekers in the states territorial sea reflected the necessity to take decisions to help, both the State and also the refugees seeking protection this would mean that other organizations, like IMO and IOM would have to help. When the Tampa incident happened⁴⁸ it was noticeable that the states were not aware of its obligations regarding the assistance to the asylum seekers. According to Goodwin-Gil, there is a duty, derived from treaties⁴⁹ and general international law⁵⁰ and crystalized into customary international law that binds all states.

Many problems arose with the arrival of Vietnamese 'boat people', the amount of people arriving was too large to remain unnoticeable, inevitably the tension was obvious and the conditions of the boats and the obscure interests behind them were too serious to be ignored. When in 1978 the Hai Hing arrived to Malaysia and asked to 'unload' the 2,500 Vietnamese that were in it, the authorities demanded the push back of that same vessel. The UNHCR position was very much strengthened when it condemned the Malaysian decision by stating that any boat arriving from Vietnam with people were to be of primary concern to UNHCR.

2.6. The Principle of Non-Refoulement

Conveniently, in the beginning of the crisis none of the Indochinese countries were bounded to the 1951 UN Refugee Convention nor to the Protocol, this meant that nobody who was in need for protection was given protection. This lack of compassion towards people in distress and in need of temporary or permanent protection reflected the lack of importance given to human life and

⁴⁸ The Tampa Incident took place in Australia, 26th August 2001, when a Norwegian cargo ship (Tampa) rescued more than 430 afghans seeking asylum and the Australian Prime Minister at the time refused the ship to offload the refugees in Australian territory. Tampa's captain decided to enter Australian territorial waters after declaring an emergency, and the Australian special forces took over the ship and the refugees were detained. This incident shifted the attention to the problem of responsibility for the refugees that are rescued at sea. UNHCR, *The State of the World's Refugees 2006-Chapter 2 Safeguarding asylum: Box 2.3 The Tampa Affair: interception and rescue at sea*, 16 April 2006.

⁴⁹ SOLAS Treaty, UNCLOS, 1958 High Sea Convention, the ICMSR.

⁵⁰ GOODWIN-GILL, GUYS S., *The Refugee in International Law*, Oxford: Clarendon Press, 2nd ed., 1996

safety, in a broader sense, there was a total ignorance of human rights. Furthermore, despite the reluctance to accept more people, the ASEAN claimed that they could no longer accept more people, the small number of people that they were admitting became even smaller. This decision, which threatened the *raison d'être* of the UNHCR, was tackled with an international conference⁵¹ relative to the crisis in Southeast Asia, from which arose a three-way agreement that committed the ASEAN countries to provide temporary asylum. This did not mean a full stop of arrivals by sea, many people perished at sea despite many programmes to fight piracy and rescue-at-sea. When the agreement, that had been reached in 1979, started to be distorted the solution found was to hold another international conference where a Comprehensive Plan of Action was formed⁵² and had positive repercussions such as the end of pushbacks in Malaysia. Curiously, Thailand, who was not part of the 1951 Refugee Convention, was one of the countries where asylum seekers went, especially Cambodians who fled the country⁵³. The situation got more acute when more than 40,000 Cambodian refugees were pushed by Thai's military forces into Cambodian and the UNHCR remained silent, yet fully conscious of what was happening, while one of the pillars of its existence was being neglected- the principle of non-refoulement. To make up for the abstention of action, the UNHCR asked for the highest budget to date, was involved in the establishment and construction of refugee camps and created an Emergency Unit.

The work of the UNHCR in the evolution of the principle of non-refoulement has been important, especially in the interpretation of article 33. The UNCHR, contrary to what people aimed in the Refugee Convention, opened the scope of application, applying the principle to the ones who suffer from 'well-founded fear of being persecuted', including 'de facto refugees'. In 1982, the EXOCOM, through Conclusion No. 25 (XXXIII), reaffirmed the importance of protecting refugees and making sure that their human rights were followed, especially the

⁵¹ International conference on refugees and displaced persons in Southeast Asia, in July 1979.

⁵² Second International conference about the Indochinese refugees, June 1989.

⁵³ This was because of the Khmer Rouge regime, which was characterized by repression and violence and, subsequently due to the Vietnamese invasion.

2. Socio Cultural and Historic Context

principle of non-refoulement which was 'progressively acquiring the character of a peremptory rule of international law'. After this declaration, continued to beg for states to avoid any kind of refoulement actions as it would be 'contrary to fundamental prohibitions'⁵⁴. The peak of importance and imperativeness of this principle was when, in 1996, EXOCOM stated that the principle could not be subject to derogation.

The Indochinese refugee crisis was of an extreme importance as it made the UNCHR act and be creative in its plans to protect the most number of people possible, as it had to deal with the displacement of more than three million people. Although many positive aspects arose from this the negative ones are still ongoing and repeated over the world, especially in this new wave of refugees. People are still drowning, getting lost at sea, suffering from piracy attacks and, pushbacks are still a normal reaction to the arrival of people in need of help and the violation of human dignity is acutely linked to this.

Nowadays, we are witnessing refugees not surviving the arrival to the EU shores. The tragedies occurring in the Mediterranean Sea are not avoided despite the amount of European and international legislations. The United Nations estimated that more than a million refugees had crossed Europe in 2015, mainly from Syria. Its location, in the Middle East, and its dictatorial regime under Assad, who refused to stand down after the Arab Spring of 2011. The Arab Spring triggered a massive civil war with a miscellaneous of ethnicities and religious groups, one of those was ISIS which aimed to form a totalitarian Islamic caliphate. This fight for power originated various war crimes, like mass murders and the use of chemical weapons. Inevitably the Syrian population saw itself in between a rock and a hard place, or they remained in Syria and faced the consequences of a civil war or they flee to an unknown place. The greater part decided for the last and left for Lebanon, Iraq, Jordan and Egypt while the Arab States were not accepting Syrians. The UNHCR was not prepared for this crisis so the refugees decided to turn to Europe for haven, however the European Union's legislation obliges the refugee to remain in the country of arrival which poses an increase pressure on the border countries like Greece.

⁵⁴ Executive Committee, Conclusion No. 55 (XL), 1989.

The *Hirsi Jamaa* and Others v. Italy - The Applicability of the Principle of Non-Refoulement in High Sea

The most imperative action and priority must be to protect those who need, the Ten Point plan⁵⁵ was made as a rapid response to the problem in the Mediterranean Sea and, attached to it came the idea of the Agenda on Migration. However, these measures have not tackle the problem as a whole, there is acknowledgement of the decrease of irregular border crossings from 2012 to 2017⁵⁶.

The problem of the arrivals is not the only one, it is the root of other problems that arise from it. When the Return Directive was adopted it was supposed to be followed as it was an emancipation of the principle of non-refoulement. However, the European Commission acknowledges its compliance by the States and makes it a priority, In the Agenda on Migration, as its non-observance directly endangers human lives and human rights. Greece and Italy, the two most affected countries in Europe of the refugee crisis due to their proximity to the Mediterranean Sea were protected by the European Union⁵⁷

⁵⁵ European Commission- Press Release: *Joint Foreign and Home Affairs Council: Ten point action plan on migration*, 20th April 2015.

⁵⁶ See Annex I.

⁵⁷ Proposals like, International protection: provisional measures for the benefit of Italy and Greece (This Decision establishes a temporary and exceptional relocation mechanism over two years from Italy and Greece to other Member States.); International protection: provisional measures for the benefit of Italy, Greece and Hungary (establishes provisional measures in the area of international protection for the benefit of Italy and of Greece, in view of supporting them in better coping with an emergency situation characterised by a sudden inflow of nationals of third countries in those Member States.), were adopted by the European Parliament and Council in 2015.

3. CASE OF *HIRSI JAMAA AND OTHERS v. ITALY*⁵⁸

This case originated from an application⁵⁹ by eleven Somalis and thirteen Eritreans, hereinafter applicants, against the Italian Republic. They alleged that when they were transferred to Libya by the Italian authorities there was a violation of:

1. Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 4 of Protocol No.4;
2. Article 13 of the Convention, requirements were not followed.

According to Article 29 n.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, hereinafter European Convention on Human Rights, it was decided by the Grand Chamber that it would rule on the admissibility and merits of the application at the same time.

The vessels where the applicants were intercepted, on 6th May 2009, were 35 nautical miles south of Lampedusa. According to UNCLOS^{60,61} the vessels were in Malta's Contiguous zone⁶² where the Maltese authorities could exercise the

⁵⁸ ECHR, *Hirsi Jamaa and Others v. Italy*, no. 27765/09, 2012.

⁵⁹ This application was designated to the Second Section of the European Court of Human Rights (Rule 52 n. ° 1 of the Rules of Court). In a national level there had to be an exhaustion of domestic procedures, the national courts no longer can judge on the cause and the decision of the highest domestic court was the last one. The reason for this lays on the principle of subsidiarity, Article 5(3) of the TEU and Protocol (No. 2), its aim is to regulate the exercise of the Union's non-exclusive powers; the Court only intervenes when the States has failed in their obligations. The case was designated to the Grand Chamber, composed by 17 Judges, due to Article 30 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Rule 72 of Court. They predict the relinquishment of jurisdiction when the application is substantiated in a question of interpretation of the Convention or the Protocols, which was the case. None of the parties objected to this decision.

⁶⁰ United Nations Convention on the Law of the Sea, also known as Montego Bay Convention.

⁶¹ The limits of the sea are predicted in the Montego Bay Convention. Article 3 limits the territorial sea up to 12 nautical miles; Article 33 (2), the Contiguous zone 'may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured'; Article 57, the Exclusive Economic Zone does not go beyond 200 nautical miles and High Sea, Article 86, includes every part of the sea that is not included in the Montego Bay Convention.

⁶² The vessels were in an area where the responsible organ was the Maltese Search and Rescue Region. See *Hirsi Jamaa and Others v. Italy*, no. 27765/09, § 10, ECHR 2012.

necessary control to prevent the entry of the migrants into its jurisdiction, if it found it had reasons to do so. However, the vessels were intercepted by three Italian ships and those found there were returned to Tripoli, without the people in it knowing where they were heading and not being identified, by the Italian authorities. Accordingly, when they arrived to Tripoli, they objected to being handed over to the Libyan authorities but were forced to stay there. When the Italian government was asked about what had happened, the Minister of the Interior stated that the push-back operation that had taken place in the High Sea was a consequence of the bilateral agreement made with Libya⁶³ and that Italy had fulfilled the principle of cooperation between States and its action had been effective.

The Italian government started to place formal flaws⁶⁴ in the powers of attorney of the applicant's representatives. However, this claim was dismissed by the Court reaffirming what was decided in *Veikova v. Bulgaria*⁶⁵ and *Ryabov v. Russia*. Since there are no reasons to doubt the validity of the powers of attorney, the Government's objection is rejected.

Article 35 of the Convention gives the national courts the opportunity to determine the compatibility of domestic law with the Convention. That is why the Court only deals with the matter, after all domestic resources have been exhausted. According to the Italian government this was not the case, it claims that the applicants should have had seek to see its claim solved in the Italian courts. On the other hand, the applicants argued that Article 13 of the Convention⁶⁶ was not fulfilled. As the Court considers that these two points are intrinsically connected it decides to join the objection made by the government to the complaints under Article 13.

According to the government, the events that occurred on Italian ships did not mean that the authorities had exercised 'absolute and exclusive control' over the

⁶³ Italy and signed a bilateral agreement regarding clandestine immigration, signed on 29th December 2007 and entered into force on 4th February 2009.

⁶⁴ See *Hirsi Jamaa and Others v. Italy*, no. 27765/09, § 45, ECHR 2012.

⁶⁵ ECHR, *Veikova v. Bulgaria*, no. 41488/98, § 50, 2000-Vi and *Ryabov v. Russia*, no. 3896/04, § 40 and 43, 31 January 2008. It was considered that a written authority was enough as long as it did not show that the applicant had not consented.

⁶⁶ It guarantees the right to an effective remedy.

3. Case of Hirsi Jamaa and Others v. Italy

applicants. The reason why the interception had occurred was to follow an obligation imposed by the Montego Bay Convention, to help people in distress in the High Seas and nothing to do with maritime police operation. This was not what the applicants claimed, they felt they had been under exclusive control of Italy although the latter claimed it provided the necessary assistance and did not use violence. This help given should not mean that between Italy and the people saved there had to be established State's jurisdiction.

The matter of jurisdiction is thoroughly examined having in mind Article 1 of the Convention. It is established that, for the state to be held responsible, for acts or omissions, it must exercise jurisdiction. This was undoubtful in *Medvedyev and Others v. France*⁶⁷ and, subsequently in this case, especially when the exercise of jurisdiction is to guarantee the rights and freedoms of people in distress. It is very much pertinent to mention *Loizidou v. Turkey*⁶⁸, which is considered a landmark considering rights of refugees. An important criterion to bear in mind is the one of exceptional circumstances⁶⁹, if in each case the extraterritorial action is justified the Court may decide that due the circumstances of the case the exercise of extraterritorial jurisdiction was legitimate. Consequently, when the State operates outside its territory, its actions reflect their jurisdiction, thus it must guarantee the respect for the Convention.

According to Article 92/1 of the Montego Bay Convention, ships are subject to the exclusive jurisdiction, on the High Sea, of the flag it is flying⁷⁰. However, in this case there has been no mention regarding the flag of the ships that were heading to Italy. On the other hand, and underlining what has been said, this case is one of extraterritorial jurisdiction and Italy is responsible for the consequences that derived from its actions. The argument of the intervention being one of rescue

⁶⁷ ECHR, *Medvedyev and Others v. France*, no. 3394/03, 2010, it was established that a State that is bound to the ECHR and acts outside its national territory – exercises effective control on the area – it is responsible for its actions.

⁶⁸ ECHR, *Loizidou v. Turkey*, no. 15318/89, 1996. In this specific case, the ECHR ruled that Turkey violated Mrs. Titina Loizidou's human rights as she had the legitimate right to return to her home. It was considered that here had been a violation of Article 1 of Protocol No.1.

⁶⁹ See ECHR, *Hirsi Jamaa and Others v. Italy*, no. 27765/09, § 62, 2012.

⁷⁰ This principle is included as well in Italy's national law, see *Hirsi Jamaa and Others v. Italy*, no. 27765/09, § 18, 2012.

and minimum intervention does not convince the Court and it considers that there has been a 'continuous and exclusive *de jure* and *de facto* control of the Italian authorities.'^{71,72}.

One of the consequences of the return of the applicants to Libya was the mere risk of exposure to torture, which is expressively prohibited in the Convention in Article 3. The interpretation of this article must take in consideration two aspects, firstly the risk of suffering any kind of torture in Libya.

It is consensual in International Law that Contracting States have the right to control its borders and what happens inside them, including the expulsion of aliens. However, these rights may easily enter in conflict with the prohibition of torture in Article 3 of the Convention thus making the State incur in responsibility when, the person expelled from the country is sent to country where this kind of treatment is most likely to occur. Therefore, when there is a direct conflict between the right to allow entry or expel and the obligation to protect the individual by not returning them back to the country that might violate its rights, the one that protects the person must prevail.

Specific requisites must be fulfilled to conclude if there is real risk of the treatment predicted in Article 3. Evidently, each case is different, and the Court must assess the dangers that is the removal of the victim to the country it is returning from, taking into consideration the context of the country and the personal situation of the victim. The information about the country, which is always subjective, is drawn by reports from independent international human rights protection associations⁷³ but, especially, it is demanded of the Contracting State the knowledge of the situation to where it is returning the individual- it must be aware of the risks that might occur when engaging this type of action.

Nowadays, the European Union faces a crisis without precedent, its borders are under pressure due to the influx of migrants and asylum-seekers that seek protection inside the Union. In the economic context felt all over Europe, the pressure to harbour migrants that arrive by sea in decadent conditions, enhances

⁷¹ See ECHR, *Hirsi Jamaa* and Others v. Italy, no. 27765/09, § 81, 2012.

⁷² These criteria originated from *ECHR, Medvedyev and Others v. France*, no. 3394/03, 2010.

⁷³ *ECHR, Hirsi Jamaa* and Others v. Italy, no. 27765/09, §§ 101-109, 2012.

3. Case of Hirsi Jamaa and Others v. Italy

the difficulties of the countries in what border control matters. The junction of the economic and humanitarian crisis, however, should not and cannot be a reason to ignore the provision laid by Article 3 of the Convention. It was required that, at the time of the vicissitudes, Italy must have known the instability that was felt in Libya⁷⁴. Furthermore, it should not be taken for granted that Libya follows its obligations just because it has instruments of protection in its national law or because it has ratified international agreements, this is a presumption that cannot exist, especially when violations are reported. Italy substantiated its actions in a bilateral agreement that it had completed with Libya, this is inadmissible⁷⁵ as the Contracting State's responsibility does not cease to exist in detriment of the bilateral agreements.

For the Court, it is undoubtful that the situation was known and could be easily identified with the minimum research, not only the situation in Libya but also the intentions of the applicants when fleeing from Libya. If Italy had inquired them, it would have discovered that there was a legitimate fear and the non-request of asylum did not exclude Italy's responsibility and justified the push-back operation lead by the Italian authorities. This operation violated the rules for the rescue of persons at sea and traffic of people and, moreover, it violated the principle of *non-refoulement*^{76,77}.

Secondly, the dangerous possibility of being sent back to Eritrea or Somalia, thus the indirect refoulement⁷⁸ by Italy must also be examined. The

⁷⁴ ECHR, *Hirsi Jamaa and Others v. Italy*, no. 27765/09, §123, §§125-126, 2012.

⁷⁵ ECHR, *Hirsi Jamaa and Others v. Italy*, *op.cit.* §§ 129.

⁷⁶ ECHR, *Hirsi Jamaa and Others v. Italy*, *op.cit.* §§ 134, ECHR 2012. Furthermore, by reading the preamble of the 1951 Refugee Convention, it links the prohibition of torture and the right to life as a necessary corollary of the principle of non-refoulement. In addition to this, the lack of opportunity to ask for asylum constitutes a breach of article 14 of the UDHR.

⁷⁷ TREVISANUT, SELINE, *The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection*, Max Planck Yearbook of United Nations Law, Vol. 13, 2008, pag. 205-246.

⁷⁸ It is accepted that, having in mind the Refugee Convention has a humanitarian basis that Article 33 §1 of the Refugee Convention does not allow the "removal to a place from which the refugee would be in danger of subsequent removal to a territory of risk" Cambridge University Press, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, pag. 123, June 2003, available at: (<http://www.refworld.org/docid/470a33af0.html>)

element that must be taken into consideration is the 'real risk' of, if repatriated, violation of the fundamental rights of the person. A person might be repatriated but may not suffer from it which leaves the responsibility of the States intact, on the other hand, if there is real risk of being tortured the Contracting State is considered responsible. Especially in this case, when the intermediary country, Libya, is not part of the Convention. It is required the knowledge, by Italy, that in Libya there is a possibility of re-repatriation to other countries where their human rights may be undermined. It is a fact accepted by the Court that the situation in Somalia and Eritrea posed a threat to human rights thus, breaching Article 3. The question is if Italy could expect Libya to offer guarantees in what the arbitrary repatriation regards, considering that the latter did not ratify the Geneva Convention on Refugee Status and did not have any form of protection of refugees, and the Court considers that Italy should have known that Libya was not a safe place and had many vulnerabilities regarding refugee aspects.

The problem of interpretation must be dealt according to the rules expressed in Vienna Convention on the Law of Treaties⁷⁹ never forgetting the spirit of the protocol and taking in consideration that its main aim is to protect human rights.

When Protocol No. 4 of Article 4 of the Convention⁸⁰ was firstly made to prevent the collective expulsion⁸¹ of aliens it was only followed when each case had been under a thorough examination⁸². This does not mean that a chain of decision to expel reflects a 'collective expulsion', one does not mean the other. In this specific case, the definition of collective expulsion was very important, expulsion must be interpreted according to the *travaux préparatoires*⁸³ of the Protocol. This means that the 'aliens' must include those passing through the country, thus including the Eritreans and Somalis. Although they did not pass

⁷⁹ Vienna Convention on the Law of Treaties, Section 3 Interpretation of Treaties, Articles 31 to 33.

⁸⁰ Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights: *Prohibition of collective expulsions of aliens* - Updated on 30 April 2017.

⁸¹ ECHR, *Becker v. Denmark*, no. 7011/75, Commission decision of 3 October 1975, Decisions and Reports 5, pag. 236.

⁸² See ECHR, *Andric v. Sweden*, no.45917/99, 1999; ECHR, *Conka v. Belgium*,no. 51564/99, 2002, § 59.

⁸³ See *Hirsi Jamaa* and Others v. Italy, no. 27765/09, §174.

3. Case of Hirsi Jamaa and Others v. Italy

through the Italy's territory, when Italy exercised its jurisdiction in an extraterritorial way it included the aliens in its territory, thus including them in the scope of interpretation in the part of which they were passing through. The precedent has been set by this case where this article must be applied in the case of the interception on the High Seas by ships that flew the flag of the respondent State and were returned to the originating State.

This case was a turning point as it was the first time⁸⁴ that the question of territorial applicability was placed⁸⁵, it is demanded that there is a functional and teleological interpretation of the article. The question in the specific case was, as the push-back operations were in the High Seas, the question about the scope of application of the article arises.

The problem was that neither the *travaux préparatoires* nor the text made clear the territorial scope of the article. As aforementioned, having Italy exercised jurisdiction outside of its national borders, its actions fell under the interpretation of the article, therefore having occurred a collective expulsion of aliens due to the omission to examine each person's case and deciding to return every single one of them. The question should not be ignored or driven out just because of the lack of sovereignty over the High Seas, instead, as Italy exercised sovereignty over the vessel found in High Seas, there was, without a doubt, an exercise of jurisdiction that triggers the Italy's responsibility under the article in question. It is said by the Court that the individuals were, to a certain extent, in Italy's territory and that the way Article 4 is written does not impose a limitation to the extraterritorial application as it does not mention, in the wording of the article, that the notion of territory is limited to the Italy's borders (unlike other articles of the same Protocol). Having exercised, exceptionally, jurisdiction beyond their formal borders its action took the form of collective expulsion, thus demystifying that there is no one to be held responsible in the High Sea.

The present-day conditions must be taken in consideration and, as migration problems are very acute these days and continue to increase, mostly by sea, the Court is of the opinion that the purpose of the Article is to prevent the

⁸⁴ *Xhavara and Others v. Italy and Albania* ((dec.), no. 39473/98, 11 January 2001).

⁸⁵ Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights: Prohibition of collective expulsions of aliens - Updated on 30 April 2017, § 8.

arbitrary expulsion of immigrants as a tool to control the migratory flow. This can be dealt by the thorough examination of each individual's profile, as has already been stated. The article must be applied to any individual arriving by land or by sea.

To conclude, the court decides that, as the transfer has been carried away without any form of examination of each individual situation, with no identification procedure by the Italian authorities and the lack of knowledge when dealing with these kinds of situation by the Italian personnel, this consists of a violation of article 4 of Protocol 4.

Article 13 of the Convention guarantees that, anyone who sees its rights and freedoms violated will have an effective remedy, however the notion of 'effective remedy' must be explored. An effective solution should prevent the acts against the Convention and its, most likely, irreversible effects. Moreover, what is demanded to the State is that the person in question has the possibility to defy the decision to expel her by having its complaints examined. The lack of this procedure, which guarantees that the aliens see their complaints assessed, which, indirectly, follows the rights of Article 3 of the Convention and Article 4 of Protocol No.4, with the responsible authority to secure a full assessment of their requests before their removal consubstantiate a violation of Article 13 of the Convention⁸⁶. It is convenient to say that an 'effective remedy' might not translate into a positive solution to the one who claims it, this means that, despite a thorough investigation of the cause and the argument that his removal to a third country might expose him to the treatment foreseen in Article 3 of the Convention, the alien might see its request not granted. It is clear for the Court that there was, without a doubt, a violation of Article 13, combined with article 3 and 4, following the return of the applicants to Libya.

To conclude, when the Court find that the State violated or failed its obligations, the latter is legally obligated to pay the interested parties what was decided according to article 41 of the convention and to apply any other measures. In the case *Hirsi Jamaa and Others v. Italy*, the Court decided that individual measures should be in order apart from the general ones. In the end,

⁸⁶ *Hirsi Jamaa* and Others v. Italy, §§ 201-207.

3. Case of Hirsi Jamaa and Others v. Italy

the court decided for the applicant and it considers that the Italian government should work towards obtaining assurances that the Libyan authorities would not give the applicants a treatment worth condemning. In matters of repatriation, the Court accepted the non-pecuniary and pecuniary requests made by the applicants.

4. THE PRINCIPLE OF NON-REFOULEMENT

The rule of non-refoulement is sedimented in international human rights, in doctrine and in customary international law. The prohibition of refoulement of refugees arises from international law, more specifically from the UN Convention relating to the Status of Refugees⁸⁷.

This convention, that saw its scope enlarged by the removal of the geographical and temporal limits by the 1967 Protocol, has universal coverage and has a single definition of what it means to be a 'refugee'⁸⁸. The fundamental principle we are focusing here is the principle of 'non-refoulement', which means that no Contracting state⁸⁹ may expel or return a refugee against his will to a territory where it will most likely see his rights violated and his life threaten. This principle must be applied with no reservations or exception, the first version of the Convention had enshrined the prohibition to refouler, in its Articles 31 to 33, especially the latter and prohibits the making of reservations concerning the non-refoulement. It has been a principle that suffers from the sovereignty of states and their lack of sympathy towards the migrates that try to enter the territory. Its first appearance is in article 33 § 1 of the 1951 Refugee Convention yet it is also present in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in article 7 of the 1966 International Covenant on Civil and Political Rights and article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

For the sake of an accurate understanding of the principle it is important to have in mind the rules of treaty interpretation gathered in the Vienna

⁸⁷ Yet its historical background relates to the Convention Relative au Statut International des Refugies, of October 1933.

⁸⁸ "a person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.", Article 1 of the Refugee Convention.

⁸⁹ This refers to all States party to the 1951 Convention or/and party to the 1967 Protocol.

4. The Principle of *Non-Refoulement*

Convention on the Law of Treaties of 1969⁹⁰, more specifically articles 31 and 31. Although the literary meaning of a treaty is meaningful, its purpose and object is even more important, this is because it is easy to distort something we read yet, when we have in mind, the reason why it was written, the environment in it was adopted and thought, the literal meaning can change to a more well thought and sensible interpretation. Therefore, it is crucial to have background knowledge⁹¹ about the principle of *non-refoulement* and awareness of what the legislator intended, which rights he wanted to protect and to which matters it should be applicable, especially in the case of treaties that have a humanitarian basis⁹². However, if the background is important to understand the *raison d'être* of a treaty, the present is also as relevant⁹³ thus, the interpretation must be contemporary to the time being.

The International Court of Justice when ruling on the case of *Guinea-Bissau v. Senegal*⁹⁴ stated that 'The rule of interpretation according to the natural and ordinary meaning of the words employed in not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it'. This makes even more sense after the *Gabcikovo-Nagymaros Case*⁹⁵, where the judge declared that 'Treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application. A Court cannot endorse actions which are a violation of human rights by the standards of the time merely because they are taken under a treaty which dates to a period when such action was not a violation of human rights.'⁹⁶. This sustains the obligation to

⁹⁰ 1969 Vienna Convention on the Law of Treaties, (hereinafter 'Vienna Convention').

⁹¹ The existence of the *travaux préparatoires* constitute an important instrument to understand the ratio legis but must be examined in a sensible way.

⁹² *Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, pag. 15, at para. 23.

⁹³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, pag. 16 at para. 53

⁹⁴ ICJ, *Guinea-Bissau v. Senegal*, 1991, ICJ Rep 53, pp. 69-72.

⁹⁵ ICJ, *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997,

⁹⁶ *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, pag.114.

interpret always for the protection of human life and human right regarding what today are the fundamental rights, even if, when the treaty was drafted, the rights were not the same or did not exist. The interpretation must include other international treaties and principles of international customary law, consequently the interpretation cannot be isolated or fragmented.

The scrutiny of this international and core principle is very much relevant in matters of the case *Hirsi Jamaa and Others v. Italy* but also, due to its constant violation, consequently, to the victim's lack of protection. It is the UNHCR task and obligation to guarantee that the principles included in the Refugee Convention are being followed and it must supervise the application made by the states. The amount of people who die due to the lack of compliance of international rules reflect an ineffective and small intervention on behalf of the UNCHR.

Although the purpose of this paper is not to judge the work carried out by the High Commission, it is in our understanding that something is failing as the prohibition to expel is being bypassed, especially in matters occurring in High Sea. We take in account that Europe is suffering an unprecedented immigratory flow that challenges its structures and border policy. The purpose of this paper is to evaluate the strength of the principle of *non-refoulement* in the High Sea, in practice it should give us the answer to the question of the legality of the push-back operations occurring in the High Sea, despite this not being the core of the paper⁹⁷.

Forced migration is, as its name suggests, a movement from a place to another that was not voluntary. The factors that normally force people to leave their homes are mainly political reasons, like Daesh⁹⁸, wars and persecution. According to the UNHCR, in 2015 it was recorded the highest level of forced migration, 60 million people were seeking for a new place to live and in 2015, 55.3 million people were displaced due to persecution, human rights violation or

⁹⁷ We consider that push-back operations are illegal when they target refugees.

⁹⁸ Present in Syria, which has an on-going civil war and which, in 2014, had 3.9million people fleeing the country. Syria was followed by Afghanistan (2.6millions) and Somalia (1.1 million). *An Economic Take on the Refugee Crisis – A Macroeconomic Assessment for the EU*- Institutional Paper 033, July 2011, European Commission, pag.9.

4. The Principle of *Non-Refoulement*

war. The forced displacement occurs both by land and by sea, the latter being the focus for this paper. The increase of people arriving by sea since 2015 has increased severely, more than 1 million people in 2015, especially through the Mediterranean Sea to reach Europe, where they consider to be safe. The peak of arrivals by sea was during 2015, being in 2016, 362,753 people and 17th July 2017, 110,374 people⁹⁹. The principle of *non-refoulement* gains a new relevance when its application, or lack of application, is in areas where there is no sovereignty of states, the High Seas more specifically.

The principle is understood as customary international law¹⁰⁰ and it is directly linked with other rights to be applicable. This provision is foreseen in international refugee law¹⁰¹, in international human rights law¹⁰² and regional human rights¹⁰³ and, although there is no direct mention of the prohibition in the European Convention on Human Rights, the ECHR applies it with no restrictions. It has been commonly accepted and crystalized that the principle is a 'rule of international customary law (and that it) is based on a consistent practice combined with a recognition on the part of States that the principle has a normative character'¹⁰⁴. One major problem is that the Convention only binds the States party to it (which was Italy's case) and a state which is party to the Protocol but not to the convention, is obliged to apply Articles 2 to 34 of the convention. It

⁹⁹ Source of sea arrivals: UNHCR Information Portal: Refugees/Migrants Emergency Response – Mediterranean available at <http://data2.unhcr.org/en/situations/mediterranean>.

¹⁰⁰ UN High Commissioner for Refugees (UNHCR), *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, available at: <http://www.refworld.org/docid/3d60f5557.html> [accessed 17 July 2017].

¹⁰¹ Article 33 of the 1951 Convention for Refugees and Article 2 § 3 of the 1969 OAU Convention.

¹⁰² Article 3 of the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment and Article 16 § 1 of the 2006 UN International Convention for the Protection of All Persons from Enforced Disappearance.

¹⁰³ Article 22 § 8 of the 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 and Article 19 § 2 of the 2000 Charter of Fundamental Rights of the EU.

¹⁰⁴ UN High Commissioner for Refugees (UNHCR), *The Principle of Non-Refoulement as a Norm of Customary International Law*. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994, available at: <http://www.refworld.org/docid/437b6db64.html> [accessed 21 July 2017].

is clear why a State party to the Protocol is bound by the Convention but the other way around, not. Ultimately, the principle of *non-refoulement* will only be opposable to states that are, at least party to one of these instruments.

According to Judge Pinto de Albuquerque¹⁰⁵, about the *Hirsi Jamaa Case*, it is a problem of harmony between international human rights law and international refugees law, as one must not shade the other but respect each other. In the case in question, where the victims suffered a real risk of being tortured and see their rights violated¹⁰⁶, the prohibition of *refoulement* comes attached to it. As the European Convention predicts, a refugee cannot be subjected to *refoulement*¹⁰⁷ when there is a real risk of torture or inhuman or degrading treatment^{108,109}, either from the receiving State¹¹⁰ or from the delivery of such person to a third state where it is likely that the violations will occur¹¹¹. Therefore, it is strictly forbidden to expel a person knowing that their fate will be torture or death¹¹², the State must let the person remain in its territory. Human rights go beyond state's will and sovereignty, it must, no matter what, protect the

¹⁰⁵ Judge of the European Court of Human Rights since 2011 who gave an extended opinion about the *Hirsi Jamaa Case*.

¹⁰⁶ “*The principle (...) is also applied as a component part of the prohibition on torture or cruel, inhuman or degrading treatment or punishment*” Cambridge University Press, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, June 2003, available at: <http://www.refworld.org/docid/470a33af0.html> [accessed 21 July 2017], pag. 92 § 6, Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Article 7 of the 1966 International Covenant on Civil and Political Rights.

¹⁰⁷ The act of *refoulement* may include “*expulsion, extradition, deportation, removal, informal transfer, 'rendition', rejection, refusal of admission on any measure*”. *Hirsi Jamaa and Others v. Italy*, no. 27765/09, Concurring Opinion of Judge Pinto de Albuquerque, pg. 60, ECHR 2012.

¹⁰⁸ These are not the only reasons for the prohibition but are the ones relevant to the case in question.

¹⁰⁹ The prohibition of torture is foreseen in many international conventions, for example Article 5 of the Universal Declaration of Human Rights and Article 3 of the European Convention on Human Rights in addition of being an *ius cogens* principle.

¹¹⁰ Which is a case of direct *refoulement*.

¹¹¹ Indirect *refoulement*, this happened in the Case, the victims were transferred from Italy to Libya and then to Eritreia and Somalia, where they most likely see their rights violated.

¹¹² Declaration on the Protection of all Persons from Enforced Disappearance, UNGA Resolution 47/133, 18 December 1992, Article 8 § 1.

person¹¹³. This happens regardless of being a refugee or an individual that benefits from complementary protection, the international protection does not discriminate into groups people who need protection and, for this reason there cannot be an excuse, like the one of intense migrate influx, to justify helping ones and ignoring the rights of others. Ultimately, this means that an asylum seeker has the same right of not being returned, linking this aspect to the case, the victims had not been able to apply for a refugee status, but the absence of the request does not mean the absence of protection by Italy, which was what happened.

It is clear from the reading of Article 33 §1 that the ones viewed in the convention are refugees, yet the term 'refugee' is applied to anyone being persecuted or unable to return home, opening the application of the term to both refugees, the ones formally known as and the ones that fit in the definition. This is because, firstly the article does not link the term refugee to being formally recognized as one¹¹⁴. If this was not the procedure, the person who escaped his own country in seek of protection and shelter would need to be formally recognized as a refugee immediately after its entry to benefit from the protection, this would include a small range of people and the convention would have little purpose. Secondly because, a refugee that entered illegally in the territory will, most likely, have difficulty in requesting its recognition as a refugee but its lack of request does not incur him on a crime. A refugee is not guilty of needing protection and being forced to migrate, therefore there is no reason to impose penalties to someone who left its home for a better life. In the end, the conclusion

¹¹³ *"the non-refoulement obligation can be triggered by a breach or the risk of breach of the essence of any European Convention right, such as (...) prohibition of torture and ill treatment (...)", Hirsi Jaama and Others v. Italy, no. 27765/09, Concurring Opinion of Judge Pinto de Albuquerque, pg. 60, §2, ECHR 2012.*

¹¹⁴ *"A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee". UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979, re-edited 1992), at para. 28, "whether or not they have been formally recognized as refugees" Executive Committee, Conclusion No. 6, (XXVIII) 1997 at para. (c)., "whether or not they have been granted refugee status", Executive Committee, Conclusion No. 81 (XLVIII) 1997.*

should be that the principle of non-refoulement is to be applied both to refugees and to asylum seekers.

Italy defended itself by stating that the applicants had not requested refugee status but that should not reflect the omission on behalf of the state in question to act¹¹⁵. This does not mean that the notion of sovereignty ceases to exist, one can and must live with another, although the states sees its authority limited as there are no exceptions to the non-protection of human rights, concluding that universal human rights like the principle of non-refoulment should be followed¹¹⁶ when there is a real risk of serious harm.

However, despite the so called absolute character of the principle in question, there is a proportionality control that must exist for there to be order and rigor on the actions of the state when it decides to expel or maintain the individual. It makes sense the existence, when there is a risk of violation of any European Convention¹¹⁷ by the receiving States¹¹⁸, the state may ignore its international obligation to protect the person, depending on the proportionality evaluation of the values competing.

On the other hand, this test requires an exception, which is so permissive that questions the existence of the proportionality test. As the state acts in preventive way, or should act, they consider the risk and not the action itself, this makes sense as they must decide before the violation takes place. The threat must be imminent and the core of the right in danger, in *Hirsi Jamaa*, it was clear, through the reports and the victims statement, that their life would be threatened the moment they were handed to Libya, in the first place and then Somalia and Eritrea, later. Therefore, as it is not possible to deny help and protection to

¹¹⁵ ECHR, *M.S.S v. Belgium and Greece*, 2011.

¹¹⁶ It is considered "*an absolute obligation of all Sates*" *Hirsi Jamaa* and Others v. Italy, no. 27765/09, Concurring Opinion of Judge Pinto de Albuquerque, p. 64, *ECHR* 2012

¹¹⁷ Not including the right to life and physical integrity and the principle of legality in criminal law.

¹¹⁸ In the case of *Hirsi Jamaa*, Libya.

4. The Principle of *Non-Refoulement*

anyone, it is not possible to make reservations^{119, 120, 121} to the principle. This does not mean that everyone that enters in a country's territory remains there, the ones who are expelled and are not threatened in any way, are not under the scope of the *non-refoulement*, this is also true in what push-back operation are concerned. There is a breach of the principle only when the ones expelled or returned are in 'flagrant' risk of seeing their life threatened.

Bear in mind that the principle does not include the obligation to grant access to the state or the granting of the refugee status. According to G.S Goodwin-Gill¹²², the principle of non-refoulement must be applied independently of the future recognition of the status of refugee of a person or other right to protection, it must be applied to the actions of the states – wherever, 'including the High Sea'. This means that the only characteristic of the action that truly matters is whether the states has placed a person in a sensible and dangerous situation, against international law.

For the principle to be correctly implemented, as its wrongful implementation would mean sending people to an unsafe environment making the convention ineffective, there must be an individual assessment¹²³ of each

¹¹⁹ Reservations cannot go against the "*object and purpose of the treaty*" Article 19 of the Vienna Convention on the Law of the Treaties, "(...) a norm accepted and recognized by the international community of states as a whole as norm from which no derogation is permitted", Article 53 of the Vienna Convention on the Law of the Treaties and Article 42 § 1 of the Refugee Convention and Article VII § 1 of the 1967 Protocol.

¹²⁰ Article 21 of the Qualification Directive (2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

¹²¹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, also known as the Asylum Procedures Directive. According to its Article 9, it is allowed for the applicants who ask for international protection to remain in the Member State pending a decision on its asylum request.

¹²² GOODWIN-GILL, GUY S., *Opinion "The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement"*, International Journal of Refugee Law, Oxford University Law Press, Vol. 23 No.3 pp.443-457.

¹²³ One note regarding the omission to assess the case, to discharge the non-refoulement would necessarily mean that there was an individual evaluation of the case and this is why the collective expulsion of aliens is prohibited and unacceptable. For there to be a collective expulsion it would necessarily mean that there was not an individual assessment of the case *Hirsi Jamaa and Others v. Italy*, no. 27765/09, *Concurring Opinion of Judge Pinto de Albuquerque*, p. 72, ECHR 2012

person's case, which did not happen in the *Hirsi Jamaa* Case. This assessment has many features¹²⁴ and they must be applied to all asylum-seekers regardless of external factors. This is one of the reasons for condemning the action of Italy as there was an evident negligence by the authorities to analyse the victims background. Furthermore, according to Judge Pinto de Albuquerque, a situation like the one in the case, that a mass-influx of refugees, cannot deter the state to assess each case individually due to time and human capital constraints. It had been underlined in the convention's *travaux préparatoires*, where the mass influx does not generate an exception to the application of the principle and the guarantee of protection and human rights¹²⁵.

¹²⁴ *Hirsi Jamaa* and Others v. Italy, no. 27765/09, Concurring Opinion of Judge Pinto de Albuquerque, pg. 72 §3 ECHR 2012

¹²⁵ The same opinion as expressed by the Executive Committee following the humanitarian crisis in Yugoslavia, Conclusion No. 74 (XLV) 1994.

5. JURISDICTION AND SOVEREIGNTY AT SEA

To understand the concept of extraterritorial jurisdiction it is indispensable to understand the concepts of sovereignty and jurisdiction, their connections between themselves and with territory. In this work we will be referring to two types of regime¹²⁶, territorial sovereignty and *res communis*.

The elements that compose a State are the existence of territory, government and population, this gives the premise for territorial sovereignty and consequently the existence of jurisdiction. However, it is not this linear as the exercise of jurisdiction may not be dependent of territorial sovereignty, therefore it is pertinent the study of the concept of jurisdiction separated from the concept of territory or sovereignty. As a matter of fact, the example¹²⁷ given by Brownlie, to differentiate sovereignty and jurisdiction using as criterion the consent, and linking sovereignty to legal competence, being in our understanding that the states has legitimacy to act due to legal reasons and linking jurisdiction to the objective rights or powers that a State has, makes it less difficult to separate both concepts.

According to Brownlie: 'State A may have considerable forces stationed within the boundaries of state B. State A may also have exclusive use of a certain area of state B, and exclusive jurisdiction over its own forces. If, however, these rights exist with the consent of the host state then state A has no claim to sovereignty over any part of state B. In such case there has been a derogation from the sovereignty of state B, but state A does not gain sovereignty as a consequence. It would be otherwise if state A had been able to claim that exclusive use of an area hitherto part of state B belonged to state A as sovereign, as of right and independently of the consent of any state.' However, this example applies to States and not to areas or *res communis*, like international waters. An adaptation might be made to explain when a state exercises jurisdiction outside its sovereign territory and in international waters, like in the *Hirsi Jamaa Case*.

¹²⁶ BROWNLIE, I., *Principles of Public International Law*, 4th Edition 1990 Clarendon Press Oxford, pg. 106.

¹²⁷ BROWNLIE, I., *op. cit.* pg. 108.

The *Hirsi Jamaa* and Others v. Italy - The Applicability of the Principle of Non-Refoulement in High Sea

It is important to understand the types of jurisdiction, when we are referring to the power to make laws, rules and take decisions, the jurisdiction is prescriptive. On the other hand, the power to take executive or judicial action according to the rules, is called enforcement jurisdiction¹²⁸. To be truth, Italy's actions fit in the latter jurisdiction, yet its actions were not in commodity with international law, but the actions had in mind the agreement made with Libya, therefore, Italy was acting according to the agreement that had been established between them. In the specific case, Italy acted in a defensive way and not in accordance with international law, something that was declared by the Court. One of the arguments used was that it was acting outside its borders, excusing itself from the actions as they were exercised without jurisdiction.

Italy was under the assumption that jurisdiction is a concept limited by territorial borders, this is a wrong and restricted interpretation of the law. The reality is that acting outside a State's territory does not exclude the state which acts from being responsible for the consequences arising from those acts. We can accept that it might not be an exercise of jurisdiction *de iure* but actions were taken *de facto*, and cannot be ignored. Despite some authors admitting that an important starting point to limit jurisdiction is the territorial aspect, it is also true that, in a more modern theory, there appreciation of the specific situation is essential, especially when the rights in question are fundamental ones, as are human rights.

The power of jurisdiction is different if the action takes place in the territorial sea or in the high seas, different regimes end in different solutions. The examples that follow are all about the *Hirsi Jamaa* case, and how jurisdiction is different from one area to the other, despite the finale being always the same.

An action occurring in the territorial sea of the States, the law is undoubtful, that same state has jurisdiction along the 12 miles that compose the territorial sea¹²⁹. The state has sovereignty and jurisdiction over the territorial sea, it is the

¹²⁸ CRAWFORD, JAMES R., *Brownlie's Principle of Public International Law*, Oxford, 8th Edition, 2012, pg. 456.

¹²⁹ Geneva Convention on the Territorial Sea, article 2 and Montego Bay Convention, article 3.

5. Jurisdiction and Sovereignty at Sea

extension of its land, its laws and rights, for 12 miles, hence the law that is applicable is the national law of that same state, it has both prescriptive and enforcement jurisdiction. Nevertheless, this does not mean that the national law prevails over international law, it must be accordance with its basilar principles, therefore it is subject to the limits that international law imposes. If Italy had intercepted the Libyan vessel in Italian sea, the question of whether Italy had or had not exercise jurisdiction would not make sense. It would be obvious that it had acted inside its borders, however this would not mean that Italy could have acted against international law because of sovereignty and jurisdiction over the area as it is bound to it. The case could be judged in Italian courts, each state must be able to apply international law in its court as it is part of its legal regime, and the conclusion reached should be the same reached by the EUHR, as there was a violation of the non-refoulement principle. We dare state that decision would be easier to reach as the question of jurisdiction would no longer be a question or, in that matter, part of Italy's defence (would not make sense as it would mean total lack of knowledge of its own territory).

The aspect of jurisdiction is essential, especially when actions take place beyond the territorial borders, which are somewhat visible. On the other hand, if the exercise and power of jurisdiction is clear in the territory of each state it is unclear in what the high seas concerns. We must consider two aspects, the exercise of jurisdiction in the high seas and the jurisdiction over vessels, which are linked with each other.

The principle that dominates the High Sea, is that it is open to all States and not susceptible of jurisdiction, vessels found there do not share this freedom as they are dependent of the law of its nationality¹³⁰. The nationality of a vessel is perceived by the flag it fly's and another state cannot interfere without the consent of the responsible state, which holds jurisdiction over it. The state responsible has the duty and obligation to protect its vessels and, even if they do not have means to exercise jurisdiction over them, they must protect both the

¹³⁰ The Case of the S.S. "Lotus" (France v. Turkey), Permanent Court of International Justice (1927) and Article 92/1 of UNCLOS.

The *Hirsi Jamaa* and Others v. Italy - The Applicability of the Principle of Non-Refoulement in High Sea

vessel and people found there¹³¹. The flag pre-emption is an extension of the rights and obligations of the state, therefore the commitment to protect and guarantee that the law is being followed should be the same as if it was in its territory. We admit that the flag principle is flawed, yet the most problems arise when the vessels fly no flag.

Flagless vessels¹³² are not under any jurisdiction and act autonomously in the high sea, they are a true challenge because the knowledge of their existence and the supervision of its actions is even harder. The fact that the ship does not have a nationality, a consequence of not having a flag, means it does not benefit from protection of the State, but it does not exclude it from international obligations, especially those under customary international law. If it was the case, there would be a loophole and the high seas would be a free space with no obligations, which, as we have seen, it is not the case. The intervention of other parts in vessels that fly no flag is possible when there exists a suspicion that, for example, a vessel is smuggling migrants¹³³, the state may board and search for suspicious behaviour, if it proves to be the truth, there can be action under international law.

The exercise of jurisdiction beyond the territory of states is key to understand that, regardless of the many legal regimes each area has, it cannot be isolated from basilar international principles. Unfortunately, this is a common practice, the fact that UNCLOS does not include 'any provisions specifically on the protection of human rights at sea'¹³⁴, does not mean they exclude each other. International law is not fragmented despite what some state's actions reflect, there is an 'overlapping' of various fields of law¹³⁵ as UNLCOS is not an impermeable

¹³¹ BECKER-WEINBERG, VASCO, *Human Trafficking & IUUF: Legal and Gender Implications*, pgs. 28-29.

¹³² Or vessels flying two flags due to convenience.

¹³³ Article 8 n. ° 7 of the Protocol Against Smuggling of Migrants by Land, Sea and Air.

¹³⁴ BECKER-WEINBERG, VASCO., *Human Trafficking & IUUF: Legal and Gender Implications*, pg. 4 and footnote 16.

¹³⁵ TREVES, TULLIO., *Human Rights and the Law of the Sea*, Berkeley Journal of International Law, Vol. 28:1, 2010, I. Introduction., pg. 2.

regime¹³⁶. Therefore, the high seas will benefit from this overlapping of laws, limiting the exercises by states and forbidding others.

5.1. Extraterritorial Exercise of Jurisdiction: Application of the Principle in International Waters

5.1.1 Defining the scope of the problem

The core of this paper is the possibility of applying the non-refoulement principle in action occurring in the High Seas. Furthermore, considers that the exercise of sovereign powers arises state responsibility¹³⁷ therefore I must answer for its acts, including the exercise of its sovereignty in an extraterritorial way. Without a doubt, the principle must be applied whether the person is formally recognized as a refugee or not and regardless of where he/she is. To answer this question, we must analyse firstly the regime of the High Sea regime, secondly if the action to *refouler* is prohibited in the High Sea which, consequently will answer the question if the push-back operations are legal. Once more, we will focus in the Hirsi Jamaa Case as an example of case where the court decided for the applicants and admitted the prohibition of refoulement in the High Sea.

Article 2§ 1 of UNCLOS limits the state's sovereignty to its territorial sea and the high sea is defined in a negative way in article 86 of UNCLOS it is characterized by excluding from its definition the exclusive economic zone, territorial sea and a States' internal waters or archipelagic waters.

Before starting the analysis of the characteristics of the High Sea. It is relevant to make a brief mention about the territorial sea and the Exclusive Economic Zone.

¹³⁶ BECKER-WEINBERG, VASCO, *Human Trafficking & IUUF: Legal and Gender Implications*, pg. 5.

¹³⁷ Doctrine defended by Ian Brownlie which, according to Goodwin-Gill, does not exclude the possibility of "*joint responsibility, where one or more states or international organizations may be liable for conduct in breach of international law*", GOODWIN-GILL, Guy S., *The Refugee in International Law*, Oxford, Clarendon Press, 2nd edn., 1996.

The *Hirsi Jamaa* and Others v. Italy - The Applicability of the Principle of Non-Refoulement in High Sea

The territorial sea has a limit of 12 nautical miles¹³⁸, it was not always like this, yet both the Geneva Convention on the Territorial Sea, Article 2, and UNCLOS, Article 3, were in harmony about the fact that states would have sovereignty over the territorial sea. The 12 nautical miles were an extension to the sovereignty of the coastal state in the land to the sea, on the other hand, the exclusive economic zone is an area where sovereignty is limited. Legally, in the territorial sea, the coastal state has full sovereignty, rights and obligations, and vessels with foreign flags have privileges like the right of innocent passage¹³⁹.

It is relevant to mention the contiguous zone¹⁴⁰, which is an extension of the territorial sea, with the maximum limit of 24 nautical miles starting from the territorial sea baselines, in the way that the jurisdiction of the state is extended beyond the territorial sea but for specific intentions. It can be said that the contiguous zone is a zone which is used as a security area to prevent violations 'of customs, fiscal, immigration or sanitary regulations within the territory or territorial sea of the coastal sea'¹⁴¹. The state's actions cannot go further than this as there must be limits to the exercise of sovereignty in this area, the right of the territorial sea are not the ones in the contiguous zone and therefore the actions must be restrained to those predicted.

The Exclusive Economic Zone is a complex zone, it is the area beyond the territorial sea which has a specific legal regime that cares for a brief note. The High Sea regime is complementary of the one of Part V and the only sovereignty the coastal state has is the one written in article 56. The remnant is, as Article 89 states, is unable to suffer from appropriation. This zone is only used for the exploration of resources which can also be passed onto another state if the coastal state cannot explore it due to lack of economic resources or interest, yet coastal states have the sovereign right over that specific zone. Furthermore, the jurisdiction belongs to the coastal state and, consequently the violation of refoulement would hold the state accountable.

¹³⁸ See UNCLOS, Article 3.

¹³⁹ Geneva Convention on the Territorial Sea, Article 14 and UNCLOS, Article 17.

¹⁴⁰ Op. Cit., Article 24, UNCLOS, Article 33 and Article 55.

¹⁴¹ UNCLOS, Article 33, n. °1, a) and b).

5.1.2 The High Sea

To understand the nature of the high sea firstly it is important to clarify some aspects. Some defend the theory that the High Sea are *res nullius*, others *res communis*. This is crucial for our thesis to comprehend the high sea itself. The *res nullius* theory is the most ancient one related to the High Sea, and it defends that the High sea is impossible to revendicate. According to it, it is not susceptible to any kind of regulation and each state applies its own law as there is no superior law¹⁴². Due to the lack of physical borders, this doctrine is comprehensible, the impossibility to divide the High Sea makes it insusceptible of appropriation. However, arguing that it is impossible to appropriate is against the *res nullius* as the idea of appropriation is inherent to the *res nullius* doctrine. Furthermore, the *res nullius* doctrine is very permissive, as the High Sea would be an area of free action, with no sanctions, no law, no obligations nor rights¹⁴³. This kind of freedom is dangerous and border line anarchist, as the states would have no limitation at all. The *res communis* doctrine, on the other hand, defends that the high sea is property of all states¹⁴⁴, the main rule is that each state has jurisdiction over the vessel flying its flag.

Nowadays, international law regulates about this matter, especially in the Montego Bay Convention, however, in the writing of article 87^o there is no mention about who is the owner of the High Sea, it only mentions that any state can use it. This means that the main feature of the High Sea is its freedom regime, doctrine defended by Hugo Grotius, who said that the sea is common property of the *ius gentium*. However, by mentioning property it suggests that it is susceptible of sovereignty, which it is not. In modern days it makes more sense to mention

¹⁴² Doctrine defended by Rivier.

¹⁴³ “Nevertheless, the special nature of the maritime environment relied upon by the Government in the instant case cannot justify an area outside the law where ships’ crews 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, any more than it can provide offenders with a “safe haven” *Medvedyev v. France*, Application no. 3394/03, Grand Chamber, 29 Mar. 2010, §81.

¹⁴⁴ Grotius position, CRAWFORD, JAMES R., *Brownlie’s Principle of Public International Law*, Oxford, 8th Edition, 2012, pg. 298.

that the high sea is characterized by its freedom of navigation and is not susceptible of acquisition by occupation, hence it is said it is *res extra commercium*¹⁴⁵.

Secondly, it is important to analyse to what extent does the freedom in the High Sea extend to. Despite the freedom of seas, it is crucial for it to be regulated as the lack of rules would mean that the High Sea would be a loophole for any criminal or reprehensible acts. As the high sea does not belong to any State, every state has the same equal rights to use it with the rule that it must be used for pacific actions, this being a necessary limitation to the freedom of seas. One of the rights that every state, coastal or non-coastal, has is the right of navigation¹⁴⁶, which has to be 'normal and regular'. If, in any way, a State that feels its safety threatened, it has the right de visit the vessel and arrest the vessel in high sea^{147, 148}, the threat must be imminent and there must be a severe suspicion.

Thirdly, it is important to hold accountable the authority that is responsible for the maritime interceptions and for the treatment given after.

There are other rights inherent to the High Sea, like the freedom of overflight, of fishing, to lay submarine cables and pipelines, construct artificial island and other installations and scientific research. However, the one that matters the most to this paper is the freedom of navigation and the possibility to interfere, that was what had happened in the *Hirsi Jamaa* Case, this interference is predicted in article 98 of UNCLOS.

One of the restrictions to the freedom of seas is the 'duty to render assistance', in Article 98 of the Montego Bay Convention, this means that the lack of sovereignty in the highs seas does not reflect, in any way, the lack of omission by the state to help people in danger. Although the High Sea are outside the territorial jurisdiction, there are cases where extra-territorial jurisdiction may be

¹⁴⁵BROWNLIE, I., *Principles of Public International Law*, Oxford University Press, 4th Edition, 1990, pg.297.

¹⁴⁶Article 90^o of the Montego Bay Convention.

¹⁴⁷ The *Virginus* Affair and *Mary Lowell* are two cases that the vessels were intercepted because of the threat they imposed.

¹⁴⁸ MELLO, CELSO D. de ALBUQUERQUE., *Alto-Mar*, Renovar, 2001, p. 60 § 1

necessary¹⁴⁹. However, it is pertinent to add that the freedom of navigation is limited by the principle of safety of life at sea, therefore when there is a situation where both of the rules matter, the one which must prevail should be the duty to assist, which is considered a principle of customary law¹⁵⁰.

5.1.3 Geographical scope of the principle

To determine the extent of the principle of non-refoulement it is necessary to understand the concept of jurisdiction. As previously explored, the term 'jurisdiction'¹⁵¹ is directly linked with the term 'sovereignty', as one exercises jurisdiction because it is sovereign over something and having sovereignty over something surmises that it can exercise jurisdiction over it. However, in the context of the High Seas the state can exercise its jurisdiction and not be sovereign, distancing the corollary of jurisdiction from the principle of sovereignty.

It is understandable that a state cannot take measures on another state's territory, yet the question that is raised in this thesis is if the state can take measures in an area which belongs to no one and which is impossible to be appropriated, being that the High Sea. This is why the UNHCR has divided the concepts of 'territory' and 'jurisdiction' as they are not intrinsically the same thing and are not cumulative requirements¹⁵², this raises the problem of the possibility to exercise jurisdiction in an area which the state is not sovereign and, furthermore raises the question if the exercise of jurisdiction can be called as such when it occurs in a place where it does not possess territorial jurisdiction. Conveniently, the EU Charter of Fundamental Rights does not limit its scope of application, accepting the legitimacy of the exercise of jurisdiction in an extraterritorial way, and it goes even further in its analyses of jurisdiction when

¹⁴⁹ Situation that happened in *Hirsi Jamaa Case*.

¹⁵⁰ TREVISANUT, SELINE, *The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection*, Max Planck Yearbook of United Nations Law, Vol. 13, 2008, pag. 205-246.

¹⁵¹ Jurisdiction can be established by three indicators, *de jure* control; *de facto* control over a territory or a person and the exercise of public powers.

¹⁵² "Scope of the principle of non-refoulement in contemporary border management: evolving areas of law", European Union Agency for Fundamental Rights, 2016

international human rights law are at stake¹⁵³. In the case *Bankovic and Others v. Belgium and Others*¹⁵⁴ in paragraph 61, the Court accepts the existence of extra-territorial jurisdiction being it 'exceptional and requiring special justification in the particular circumstances of each case'. The Court goes further and lists four situations in which actions that were to happen outside a state's territory would reflect jurisdiction (inside the Charter), one of those situations are military operations in which the states exercises 'effective control' of an area which is not part of its territory. Curiously, in the *Hirsi Jamaa*, Italy's actions would fit in this situation, hence we could consider this another reason for Italy to have had exercised extraterritorial jurisdiction.

According to the UNHCR¹⁵⁵, the principle of non-refoulement goes beyond a question of jurisdiction. The obligation not to return derives from humanitarian rights, it must be applied everywhere, without being discriminated whether the governments are acting inside its borders, any person, regardless of where they are found, if it is in a position of vulnerability due to persecution, it is covered by the principle. Furthermore, the Executive Committee of the UNHCR gives special attention to the compliance of the principle in the context of maritime operations 'interception measures should not result in asylum-seekers and refugees being denied access to international protection, or in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law.'¹⁵⁶. Making the parallelism with the *Hirsi Jamaa* Case it is clear that, if the decision

¹⁵³ MORENO LAX, V and COSTELLO, C., *The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model*, (2014), in S. Peers et al (eds), *Commentary on the EU Charter of Fundamental Rights* (Oxford: Hart Publishing, 2014), pg.1662.

¹⁵⁴ ECHR, *Bankovic and Others v. Belgium and Others* (GC), No. 52207/99, 12 December para.59, states that "*from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial*", however "*international law does not exclude a State's exercise of jurisdiction extra-territorially*".

¹⁵⁵ Commenting about a case of the Supreme Court of United States, *Sale v. Haitian Centres Council, Inc.*, 21 June 1993, ILM 32 (1993), where the Supreme Court stated article 33 of the Refugee Convention did not apply in the high sea, stating that "*an alien intercepted on the High Sea is in no country at all*", adding that, if the article was to be applied extraterritorially, it would give benefits to the *aliens* "*while those residing in the country that sought to expel them would not*".

¹⁵⁶ UNHCR Executive Committee, *Protection Safeguards in Interception Measures*, Conclusion No. 97 (LIV), 2003, para. (a)(iv).

of the Court had not been in favour of the applicant, that Italy's actions and others that threat human rights, are condemned by the UNHCR.

The mere fact that the principle is applicable on the High Sea does not mean those found there must be hosted by the state, the only obligation is to give the opportunity for migrants to ask for refugee status and make an informed decision on whether they can go back to their country safely. When this does not happen and there are severe consequences that, due to its nature, cannot be ignored, the parts' actions must be weighed. This arises another problem; which is the amount of legislation that must be applied and harmonized, this includes the action taken by Frontex, RABIT, the Schengen Code and a decision made by the Council in 2010.

The Schengen area, created in the 1980's, was a territory without any internal borders which was characterized by the free movement of people, this meant that the only existing border would be an external one, this would also mean that the countries had to work together, cooperate, to fight issues that were inherent to the new status. Consequently, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) was established by the European Union.¹⁵⁷

The urge of a community policy of the EU external borders made imperative the formation of a homogeneous and strict level of control to balance the freedom of movement by the European citizens. The external borders were to be the Members States' responsibility, yet they were to be coordinated by Frontex. In September 2016, a new regulation¹⁵⁸ entered into force, encouraged by 'unprecedented migratory flows towards Union territory'¹⁵⁹ and the tasks of Frontex were expanded. It is relevant to mention the (34) of the regulations which puts the actions and duties of Frontex in a higher hierarchy of the agreements

¹⁵⁷ Council Regulation (EC) No 2007/2004 of 26 October 2004.

¹⁵⁸ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulations (EC) No 2007/2004 and Council Decision 2005/267/EC.

¹⁵⁹ Ibid (1).

between states, being that the Agency monitors the compliance of international law in issue related to the external borders, (74) of the Regulation, which underlines the importance of the Convention Relating to the Status of Refugees and the principle of non-refoulement; its article 34 which, as well, gives relevance to the principle and predicts the formation of an 'effective mechanism to monitor the respect for fundamental rights in all the activities of the Agency'. Moreover, number 2 of that same article mentions that it must ensure the compliance of the principle of non-refoulement. It is relevant to mention EU Regulation No. 656/2014 on sea operations coordinated by Frontex article 4, which predicts the consequences of both the interception and the ignorance of the important procedure of identification.

However, the existence of Frontex does not mean that the principle is being followed. Despite the intransigency of the countries to let Frontex act, undoubtedly it should play an important and relevant work in monitoring the High Sea. This chapter, with the help of the previous ones, reflects the legitimacy of the application of the principle of non-refoulement in the High Seas, leaving no doubts about the necessity and obligation to apply it and that states are wrong if they thought that the actions in the High Sea have no repercussions.

5.2 U.S. Aliens Tort Claims Act

This reference to the Aliens Tort Act¹⁶⁰, dated 1789, in the chapter about extritoriality will be understood throughout this part of the paper, however there are a few definitions that must be cleared before we go in depth on the matter.

First of all, there is a difference between universal jurisdiction and the jurisdiction granted by the ATS, not that they are not both very broad but because their application is different, one is to be applied in criminal cases that were executed in a state that did not condemn those acts¹⁶¹ and the latter in civil cases.

¹⁶⁰ From now onwards, referred to as ATCA or ATS.

¹⁶¹ Crawford, James R., *Brownlie's Principle of Public International Law*, Oxford, 8th Edition, 2012, page 467

Universal jurisdiction is adopted by states when the nature of the crime in question goes against international public law and it is an act that caresses censure¹⁶². Universal jurisdiction has accompanied the passing of times and has broadened its scope of application, from being exclusively used to fight piracy and slavery to adapting to the crimes that have arisen throughout the years., giving space for the possibility to be used as an answer to torture¹⁶³, as it is set in the 1984 Convention against Torture. A parallelism with the *Hirsi Jamaa Case* is pertinent, as universal jurisdiction may be another way to prove the responsibility that Italy had to defend and not return the refugees found in the High Sea existed. In what concerns this matter, the focus is the possibility of suffering torture if returned, therefore linking Italy's actions with universal jurisdiction, admitting that there was an absence of law in the high sea. Italy, knowing that its actions would interfere in the future of the people found on the vessels, should have had acted in a preventive and protective way, exercising jurisdiction to prevent the any breach of international human rights law, wherever they would be sent to, doing not so, it failed its moral duty to protect¹⁶⁴. However, the case in question was a civil one and did not fall under the scope of universal jurisdiction.

On the other hand, ATS, act that dates to the 18th century, and that it was a novelty in what extraterritoriality was concerned. Although it is an old act it was only in 1980 that it was first used in court. Contrary to the universal jurisdiction mentioned above, the ATS only focusses on actions that violate civil rights. For there to be grounds for the U.S. federal courts to interfere there are three elements¹⁶⁵ that must be verified:

1. The plaintiff must be a foreign national;
2. The reason for the civil action must be the existence of a tort;

¹⁶² Eichmann Case, a series of heinous crimes committed in Israel were not considered crimes yet they were against international law, therefore jurisdiction to try this case was legitimated under international law. CRAWFORD, JAMES R., *Brownlie's Principle of Public International Law*, Oxford, 8th Edition, 2012, page 468

¹⁶³ CRAWFORD, JAMES R., *Brownlie's Principle of Public International Law*, Oxford, 8th Edition, 2012, page 469

¹⁶⁴ See supra .

¹⁶⁵ United States Code, Title 28, Section 1350.

3. The tort must violate the law of nations¹⁶⁶ or U.S. law.

To understand the application of the ATS and its importance on the validation of extraterritorial jurisdiction, we will be analysing three cases, the *Filártiga v. Peña-Irala Case*, the *Sosa v. Alvarez-Machain Case* and the *Kiobel v. Royal Dutch Petroleum Case*.

*Filártiga v. Peña-Irala Case*¹⁶⁷

The Filártiga family declared that their son was kidnapped and tortured to death by a police officer named Peña-Irala. This took place in Paraguay and the Filártiga's sought justice there but were not successful. The plaintiffs and defendant moved, separately, to the U.S. where the Filártiga's took the case to court arguing that the death had violated the U.N. Charter, the Universal Declaration of Human Rights and the U.S. Declaration of Rights and Duties of Man. The plaintiff formed its defence to fit the demands the ATS, gathering the three cumulative elements¹⁶⁸, the plaintiff was a foreigner, there had been a tort and the argument was that there had been a violation of law of nations and U.S. law, to obtain a decision from a U.S. Court. The court ruled in favour of the Filártiga's and it was considered a milestone to both American law and international law¹⁶⁹. The breakthrough was the importance given to human rights, including the prohibition of torture, which violations are strictly prohibited and

¹⁶⁶ PALMOBO, DALIA., *The Law of the Nations in the United States Constitution after the cases Sosa v. Alvarez and Kiobel v. Royal Dutch Petroleum Co.*, Cuadernos de Derecho Transnacional, Vol.6, N.º1, pages 397-413, March 2014.

The term 'law of the nations' appears in the U.S. Constitution and in the ATS, for purpose of clarifying what we understand by the term, an explanation follows. Although some understand that the term '*no longer has a meaning in the United States Constitution as it referred to the law between civilized nations of 1787*'. In our understanding, a comprehension of the ATS must be contemporary, and agreeing with the more modern view, we consider the term 'law of the nations' to include customary international law, limiting any violations to the limits imposed by public international law and jus cogens rights.

¹⁶⁷ Dolly M.E. *Filártiga and Joel Filártiga v. Americo Norberto Peña-Irala*, 630 F.2d 876 (U.S. Court of Appeals for the 2d Circuit 1980).

¹⁶⁸ *Supra*, n.º 45.

¹⁶⁹ *Supra*, n.º 45, '*(...) earlier cases did not involve such well-established, universally recognized norms of international law that are here at issue.*'

condemned¹⁷⁰. The court declared that the ATS *raison d'être* was to protect aspects of customary international law that protected human rights.

*Sosa v. Alvarez-Machain Case*¹⁷¹

The case arose from the kidnapping and subsequent murder of an American Drug Enforcement Administration (DEA) agent by a Mexican drug cartel, more specifically by Alvarez-Machain, in 1985. As the DEA was unable to convince the Mexican government to extradite Alvarez to American soil, it decided to hire Mexican nationals to kidnap the criminal and bring him to U.S. soil to face justice. This trial got to the Supreme Court, which concluded that, despite the way the defendant faced trial, the government can try a civilian that was brought to justice in a forcibly way. However, his abduction may constitute reason for a civil suit, as it may be considered a violation of international law. This was exactly how Alvarez responded and placed a suit against the U.S.¹⁷² and the Mexican nationals that had abducted him, more specifically against José Francisco Sosa, the defendant. Once more, there is a foreigner, an existing tort and a claim that he had seen his rights violated by another foreigner, thus violating, so he thought, international law and U.S. law.

The Court did not decide for the plaintiff, yet it did not go against the case law established in *Filártiga v. Peña-Irala*. Álvarez was under the impression that the nature of the violation was serious enough, therefore the court had to decide for his claim, but the court was not convinced that it had jurisdiction¹⁷³. As we had seen in *Filártiga*¹⁷⁴, the violation must be against *jus cogens* law and customary law or against American law, the nature of tort sees its jurisdiction limited by what is customary international law and what is not. If this limit did not exist, there

¹⁷⁰ *Supra*, n. ° 54.

¹⁷¹ *Jose Francisco Sosa v. Humberto Alvarez- Machain, et al.*, 542 U.S.692 (Supreme Court of the U.S. 2004)

¹⁷² Álvarez-Machain filed the suit against the American government under the Federal Tort Claims Act (FCTA), which grants the possibility for the federal government to be sued on tort claims.

¹⁷³ *Sosa v. Alvarez-Machain* (03-339) 542 U.S. 692 (2004) 331 F.3d 604, reversed. Opinion of the Court, Justice Souter.

¹⁷⁴ See *supra*, IV, B.

would be no limits to the actions under ATS and civilians would choose this immediate way to seek justice for themselves¹⁷⁵. In this case, the court did not consider that kidnapping, the crime committed on Álvarez by Sosa, part of customary international law¹⁷⁶ being that 'norms of an international character accepted by the civilized world'¹⁷⁷.

*Kiobel v. Royal Dutch Petroleum Case*¹⁷⁸

It brought to the discussion the question of whether the ATS was to have an extraterritorial application because of the U.S. interference in another country's sovereignty, deriving in a clash of laws¹⁷⁹, becoming a question of private international law. The reason for this case was the accomplice by Dutch, British and Nigerian oil-exploration companies with the Nigerian government to commit violations of customary international law against Nigerian citizens. The truth is, reading the ATS, there is no mention of the extraterritorial application despite granting district courts to hear claims and, despite the fact that in other cases the question had not been considered, it did admit, in *Sosa v. Alvarez-Machain*, that the 'grant of jurisdiction is instead 'best read as having been enacted on the understanding that the common law would provide a cause of action for (a) modest number of international law violations'¹⁸⁰. The question here was not a jurisdictional one but to place a limit on which violations could the American courts could decide on.

Considering these three cases one might state that its application has been changing over time. If in 1980 the question of whether the U.S. court had jurisdiction of an action brought upon the ATS was not under scrutiny, the

¹⁷⁵ See supra, note 21.

¹⁷⁶ PALOMBO, DALIA., The Law of the Nations in the United States Constitution after the cases *Sosa v. Alvarez* and *Kiobel v. Royal Dutch Petroleum Co.*, Cuadernos de Derecho Transnacional, Vol.6, N.º1, pages 397-413, Part II, March 2014.

¹⁷⁷ *Sosa v. Alvarez-Machain*.

¹⁷⁸ *Kiobel*, individually and on behalf of her late husband *Kiobel*, et al. v. *Royal Dutch Petroleum Co. et al.*, 133 S.Ct. 1659 (2013).

¹⁷⁹ *Kiobel*, individually and on behalf of her late husband *Kiobel*, et al. v. *Royal Dutch Petroleum Co. et al.*, Opinion of the Court by Chief Justice Roberts, 569 U.S. (2013), Part II.

¹⁸⁰ See supra.

application of ATS has suffered some, much needed in our opinion, limits. The interference by American courts in crimes, committed by a foreigner, that occurred abroad, would arise questions about sovereignty and self-determination. However, in *Filártiga v. Peña-Irala*, the court did not hesitate to accept the case and decide in favour of the plaintiff. The reason behind the acceptance of the case was because of the nature of the violation, there was no question about the legitimacy of American courts to decide on a matter beyond its territory, therefore, in the first case that the ATS was used, the court interfered in a decision already made in Paraguay and decided otherwise.

Nearly 25 years after the decision on *Filártiga*, the ATS witnessed one of its first limits when the court decided against the plaintiff because the tort he was claiming to have suffered was not enough to justify the interference of American courts under the ATS. The nature of the tort in question was not part of customary international law, thus it did not fit the elements required for the suit. The, very abstract, concept of 'law of nations' brought to the discussion what was to be included in the concept in what the ATS concerns, concluding that 'the common law would provide a case of action for the modest number if international law violation with a potential for personal liability at the time'¹⁸¹. The violations would include customary international law such as international humanitarian law and refugee law, basically jus cogens rights.

In *Kiobel v. Royal Dutch Petroleum Co.*, the limits imposed are, once more, restrictive of the application of ATS, the question of application of extraterritorial jurisdiction is finally put in question. It is surprising that the possibility to interfere in other country's sovereignty and decide about matters that happened outside American territory by non-American citizens under the ATS, is only put at stake in 2013, with this case. Most of the judges agreed that the ATS did not apply in an extraterritorial way yet admitted its application in two cases;

1. If Congress adopts a law where it states that human right norms are to be applied under ATS or,

¹⁸¹ U.S. Supreme Court 29 June 2004, *Sosa v. Alvarez*, 542 U.S. 692, 124 S.Ct. 2739, 724.

2. If the act happened in international waters (outside any country's territory because the aspect of interfering in a country's order would not be an issue).

The other Justices believed that the ATS was to be applied, when the aspects in the spotlight were of international human rights law, the extraterritorial application was to be applied when one of these elements was verified: the tort happened in American soil or, defendant is American or, if the defendant's conduct affects America's national interest.

We have been witnessing a crescendo limit on the possibility of acting to place an action upon the ATS. We walked from a case that had minimal requirements to a regime that is limited by the nature of the right at risk, nonetheless there is space for the absolute application in matters that occur in the high sea. The limit of the ATS should have always been the state's sovereignty as the disruption on the legal order of a state would compose a problem of private international law.

On the other hand, the mechanism of ATS may be a way to guarantee that, in case of a violation of the principle of non-refoulement in the high sea, there is a legitimate way for the refugee to seek justice. This is the conclusion we have been trying to reach since the beginning of the study of ATS. As we have seen, in *Hirsi Jamaa*, civilians who suffered from refoulement, or other violation of their fundamental rights have the right to be protected and see their human rights enforced¹⁸². If the *Hirsi Jamaa* had not reached the ECHR it could have been fit, without a doubt, for a suit under the ATS, even after the decision on *Kiobel v. Royal Dutch Petroleum*. Italy's actions took place in the High Seas and put in danger refugees by committing a violation of customary international law- the prohibition to refouler. The plaintiffs in the case were from Somalia and Eritrea, fitting the requisite of not being American nationals, furthermore, the tort's existence was unquestionable. Even assuming the interpretation of the ATS given in *Kiobel v. Royal Dutch Petroleum* against the presumption of extraterritoriality, the tort happened in international waters and violated a fundamental right, as we can conclude from the limits established under *Sosa v.*

¹⁸² They can seek for justice in the ECHR or in the International Criminal Court.

5. Jurisdiction and Sovereignty at Sea

Alvarez-Machain and Kiobel v. R.D.P. This possibility to act under ATS is only valid because of the specific character of the high sea and because the vessel had no nationality. However, the ATS only has prescriptive jurisdiction which means it can decide but it does not have the strength of a decision from the European Court, which is gifted of enforcement jurisdiction (placing sanctions).

6 CONCLUSION

The following analysis is a personal opinion based in the investigation. We have been determining the exact problematic of this dissertation and this chapter must be read in accordance to the conclusions reached in the previous chapters. It will be divided in different parts and, in the end of the chapter, they all should all converge in the same opinion: that it is undoubtful that the principle of *non-refoulement* finds application anywhere needed, including the High Sea.

6.1 The definition of refugee

The refugee definition adopted throughout the whole paper was the most broader - a refugee is a person in danger or who might be in danger. This must be, in my opinion, the definition adopted by those which deal with refugee problems or influxes. This comprehension, who is considered or not a refugee, should be clear to any state which guides and places itself as a democratic state of law, guided by the principle of human dignity. Considering human rights as the backbone of the guarantee of human life, the non-observance of the refugee status, the *facto* or *de jure*, is the exact same thing as violating the principle of human dignity and not guaranteeing the respect for human rights. Furthermore, the delays to declare a person as a refugee arises as well possible human rights violation, therefore a more rapid and efficient process should be implemented, regardless the nature of the refugee status being merely declaratory.

6.2 The Principle of Non-Refoulement

The principle of non-refoulement is predicted, as showed throughout the paper, in many international and European conventions and domestic laws. One might say it is predicted to its exhaustion, placed in most of the relevant documents, yet it is not followed in practice to the same level of rigor and effectiveness as it is theorized.

The problem is not the theory of the principle, it exists, and it is not juridically forgotten, and it is actually quite clear on what it aims to protect – human life above all, without any reservations or exceptions. However, although it is clear

for the people who studied it, the principle is, sometimes, interpreted wrongfully being mistaken for something it is not.

The verb 'refouler', which means 'to return' - from the prohibition to return - must not be mistaken for the right of every single individual to enter the country in question and start a new life there. The principle must not be interpreted without a very important condition – the well-founded fear of being persecuted, the possibility of danger attached to their own specific situation. This principle is literally the prohibition to ignore people who might or might not be in danger – the assumption must be that they are, because it is a principle that should anticipate possible consequences. The investigation of whether they fit the definition of refugee and if they are in danger is a later investigation, the reason is that we first must protect and prevent possible consequences and only after investigates if the person in question was actually in danger. Compassion for another drives this principle the problem is that states are not driven by feelings but by internal and external pressures, lobbies that provide primacy to private interests and economic interests. This means that the investigation about each individual is neglected ab initio as they are returned to where they were coming from as it is easier and requires less use of human and economic capital.

The principle must be followed strictly yet the pressure of its execution should not be entirely placed in the state who has to deal with the influx of migrants. Its compliance goes beyond the states competence to ensure its application, especially when the state in questions receives a massive influx, like the case of Greece and Italy. The authorities do not have the thoroughness that is demanded to deal with problems of this nature, many interests interfere when it comes to the taking of the decision and, ultimately, it is easier to dispatch the problem instead of perpetuating it. Perhaps, if States benefited in some way from guaranteeing the compliance of the principle of non-refoulement, as the principle of *pacta sunt servanda* and human dignity are not clearly, by themselves, enough.

By the end of this paper, the question remains, how does a principle of international law, with jus cogens nature and considered customary law, that is responsible to, ultimately, guarantee the principle of human dignity, is still questioned and violated by some states. Admittedly, the application of the

principle entails work and resources for states, therefore it is clear that they need help on how to follow the principle, however it is extremely hard to teach every single government the importance of the primacy of this principle which is directly linked to human life. The sovereignty of states must not be the reason to ignore international obligations and, although sovereignty is a reflection of jurisdiction and power, it is not the synonym of not being accountable of actions occurring inside or outside their jurisdiction or ignorant of their obligations. Human Rights go beyond any border and sovereignty of countries, and the last ones must understand that, despite their jurisdiction, the hierarchy and compliance of human rights is superior to any others.

6.3 Principle in the High Sea

After all the investigation there should not remain any doubts about the application of the principle of non-refoulement anywhere, earth or sea. For any reasonable person, it is clear that the high sea is not a paradisiac place where one can practice illicit actions or do whatever it wants to do, and be completely ignored and remain innocent because of the lack of authority and property there. The legislator would not create a large area where the states would act at their own mercy. Moreover, if states are governed, supposedly, by intelligent and reasonable people, why would any country act against international obligations and even defend itself by stating that they should not be held accountable for action taken beyond their jurisdiction. It seems like a fabricated excuse to avoid the work that might had arisen from those actions.

To act in the High Seas should have the same consequences of acting on the country's territory, especially when considering the spirit of the principle of non-refoulement. The high seas is nothing but an extension of the obligations and some rights of states into an area which, despite being of no one, it is not a loophole in law or something intentionally forgotten by the legislator. To witness the conscient and continuous disregard by states in the High Sea is to witness a continuous violation of international treaties, customary and jus cogens law. While in Europe we point out the finger to countries under dictatorships and to

those who violate basic human rights, that perpetuate slavery, xenophobia, religious wars and so on, and we are doing the same thing. The oldest continent of the world, supposedly the wisest and most developed, violates human rights on its shores and still believes to be the holy of the holies when it comes to the defence of human rights. We may not share the same problems as some countries of Asia or Africa, but we are hypocrite to think like our actions are not as alarming as others.

Despite court's decisions, UNHCR Reports, NGO's reports, governmental opinions, it is still worrying that states act against the prohibition to return and think that, as they did not act in its territory they did not act at all, as acts assume the existence of jurisdiction. Fortunately, the European Court of Human Rights has decided for human rights, unfortunately, the action that inflict human rights violation continue.

Over this research, it was not found a juridical document, a law or a treaty, that holds the state accountable – that clearly states that actions in the high sea that go against human rights are the states responsibility – for the violation of human rights in the high sea, only indirectly can we assume this. However, as this subject is, in my opinion, not ambiguous, perhaps the international community thought it would be excessive bureaucracy and that the states would act accordingly to the principles that should drive and characterize them. On the contrary, perhaps it would be intelligent to legislate this given the current situation.

Acknowledging that challenges to a country's maritime borders are more defiant than challenges to terrestrial borders and that actions that occur in the High Sea are also difficult to deal with. The migration crisis that Europe has been slowly dealing with has put the spotlight on problems that should not exist or should have had been predicted by the legislator, must be solved- balance must be find between the humanitarian aspects and security concerns.

The Member States of the European Union should unite themselves, without fearing any repercussion to their sovereignty or of having their sovereignty undermined and form a thought through a tangible plan to guarantee the fulfilment of the principle of non-refoulement. All in all, the priority must be the population and its inherent rights. Any complex due to the country's sovereignty

The *Hirsi Jamaa* and Others v. Italy - The Applicability of the Principle of Non-Refoulement in High Sea

and its intransigency to have a common strategy, should be surpassed with help of other member states and make clear that there should be no escape to the thorough application of the principle in discussion, especially in the High Sea.

I am not a supporter of over bureaucracy, however, if the law is not clear and gives space for the violation of humanitarian rights and opens the door to severe tragedies like the Tampa Incident or the *Hirsi Jamaa* case, it seems sensible to legislate over the matter. The obligations in the High Sea must be evident to any state, especially if it interferes and acts over something or someone in international waters, that benefits from the right of freedom in the high sea. This 'freedom' is not a passport to act, it should rely on the good faith of states and confidence that was the basis for the initial commitment to international law.

In what the ATS is concerned, it is nothing but a way that the United States found to intrude on aspects outside its sovereignty. The option given for States to place a claim under this act is nothing but a declaratory decision that the right claimed exists or was violated, the decision taken by the court is not legally binding – it does not have the power to enforce something on someone. If it did enforce something it would be a severe interference on another country's sovereignty and if it had legal power, it would translate on the U.S. meddling in affairs that have no link to its territory. I would go even further by stating that what the U.S. is doing is to replace an international system that can rule and decide on specific cases that affect international human rights law.

This system, with no links whatsoever with American soil, does not make any sense in an international or European point of view, there are mechanisms that provide for victims seek justice, like taking the case to the ECHR and the ICC. We can admit that in 1789, when the act was born, these forms did not exist, and one can also admit that it was an idea, although supremacist, it could have helped in some cases, however with the emergence of the United Nations Organization, it is a regime which is unnecessary.

The parallelism intended to reach, with an example far from a European precedent or from international law, is the following. Italy was judged by an act committed outside its jurisdiction – exercised extraterritorial jurisdiction in the high

6. Conclusion

seas— for which it did not believe it should be responsible as it does not think it did not violate any customary international law. However, as we declared, the high sea is not an exception to the non-compliance of state's obligations under international law, the principle of non-refoulement being part of it. The ATS would also decide against Italy, we would have a State, the U.S., that would exercise a prescriptive jurisdiction under an act from another state, Italy in this case, that enforced jurisdiction upon refugees in the High Sea. The ATS admits that, due to the seriousness of the violation in question and being it committed in high seas, the matter could be taken to U.S. courts. The truth is, that it does not concern the E.U., the U.N or the States because the ATS does not interfere, in practice, in the sovereignty and matters of the state in question. What we can take from it is the fact that a state must be brought to justice whenever it violates customary law, especially in the high seas. It is an example for the international community and it should deter states from acting carelessly in what human rights concern.

Finally, one of the most important and relevant conclusions I take from this investigation is the myth that we are witnessing a 'fragmentation of international law'. This myth, which places in danger the harmonization of principles and rights, is carried away by states which, consciously, apply parts of the law and violates norms because of its wrongful interpretation and lack of thoroughness. The existence of an international order only makes sense if there is a coexistence of refugees. The law of the sea should not become an exception to international human rights, nor the other way around. It must coexist as they are not incompatible but dependent of each other. In my opinion, the nature of this principle of customary law grants its mandatory characteristic- It must be applied wherever.

7. BIBLIOGRAPHY

BECKER-WEINBERG., *Human Trafficking & IUUF: Legal and Gender Implications*;

BROWNLIE, I., *Principles of Public International Law*, Oxford University Press, 9th Edition, 1990;

CRAWFORD, James R., *Brownlie's Principle of Public International Law*, Oxford, 8th Edition, 2012;

DEN HEIJER, Maarten, *Reflections on Refoulement and Collective Expulsion in the Hirsi Case*, International Journal of Refugee Law, Vol.25 No. 2, Oxford University Press, 2013;

FISCHER-LESCANO, Andreas, LÖHR, Tillmann and TOHIDIPUR, Timo, *Border Controls at Sea: Requirements under International Human Rights and Refugee Law*, Oxford Journals, 2009;

GALLAGHER, Anne T. and DAVID, Fiona, *The International Law of Migrant Smuggling*, Cambridge University Press, 1st edn., 2014;

GALLAGHER, Anne T., *The International Law of Human Trafficking*, Cambridge, Cambridge University Press, 2010;

GIL, Ana Rita Amaral Campos, *A Proteção Derivada de Direitos Fundamentais de Imigração*, Dissertação de Doutoramento, Orientação pelo Professor Doutor José João Abrantes e Professor Doutor Nuno Piçarra, Repositório da UNL, 2015;

GIUFFRÉ, Mariagiulia, *State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?*, International Journal of Refugee Law, Vol. 24, No. 4, Oxford University Press, 2013;

7. Bibliography

GOODWIN-GILL, Guy S., *Opinion: The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, International Journal of Refugee Law, Oxford University Law Press, Vol. 23 No.3;

GOODWIN-GILL, Guy S., *The Refugee in International Law*, Oxford, Clarendon Press, 2nd edn., 1996;

HARRIS, Chauncy D., WÜLKER, Gabriele, *The Refugee Problem of Germany, Economic Geography*, Vol. 29, No. 1, Taylor & Francis, Ltd., Jan 1953;

HATHAWAY, James C., *The Rights of Refugees Under International Law*, Cambridge University Press, 1st edn., 2005;

HOVIL, Lucy, *Refugees, Conflict and the Search for Belonging*, United Kingdom, Palgrave Macmillan, 2016;

LAUTERPACHT, Sir Elihu and BETHLEHEM, Daniel, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, Cambridge University Press, June 2003;

LOESCHER, Gil., *The UNHCR and World Politics: A Perilous Path*, Oxford University Press, 1st edn., 2001;

LOESCHER, Gil., *UNHCR's Origins and Early History: Agency, Influence, and Power in Global Refugee Policy*, *Refuge: Canada's Journal on Refugees* 33, no. 1 (n.d.);

MECA, Maria Espírito Santo Isaac, *A CEDH enquanto Instrumento e Proteção Complementar do Direito Internacional dos Refugiados*, Dissertação de Mestrado, Orientação pelo Professor Doutor Alberto Azeredo Lopes, Repositório de Teses da Universidade Católica Portuguesa, Porto 2014;

MELLO, Celso D. de Albuquerque, *Alto-Mar*, Renovar, 2001;

The *Hirsi Jamaa* and Others v. Italy - The Applicability of the Principle of Non-Refoulement in High Sea

MORENO-LAX, V and COSTELLO, C., *The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model*, (2014), in S. Peers et al (eds), *Commentary on the EU Charter of Fundamental Rights* (Oxford: Hart Publishing, 2014);

MORENO-LAX, Violeta, *Hirsi Jamaa and Others v. Italy or the Strasbourg Court versus Extraterritorial Migration Control?*, *Human Rights Law Review*, Oxford University Press, 2012;

MORENO-LAX, Violeta, *Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea*, *International Journal of Refugee Law* Vol.23 No. 2, Oxford University Press, 2011;

PALLIS, Mark, *Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes*, *International Journal of Refugees Law* Vol. 14 No. 2/3, 2002;

PALMOBO, Dalia., *The Law of the Nations in the United States Constitution after the cases Sosa v. Alvarez and Kiobel v. Royal Dutch Petroleum Co.*, *Cuadernos de Derecho Transnacional*, Vol.6, N.º1, March 2014;

TREVES, Tullio., *Human Rights and the Law of the Sea*, *Berkeley Journal of International Law*, Vol. 28:1, 2010;

TREVISANUT, Seline, *The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection*, *Max Planck Yearbook of United Nations Law*, Vol. 13, 2008;

TRIANDAFYLLIDOU, Anna and MAROUKIS, Thanos, *Migrant Smuggling*, Palgrave Macmillan, 2012;

WORSTER, William Thomas, *The Evolving Definition of the Refugee in Contemporary International Law*, Berkeley Journal of International Law, Vol. 30, Issue 1, Article 3, 2012;

EUROPEAN DOCUMENTS

An Economic Take on the Refugee Crisis – A Macroeconomic Assessment for the EU- Institutional Paper 033, July 201, European Commission;

Charter of Fundamental Rights of the European Union, Dec. 2000, 2000/C 364/01;

Council Regulation (EC) No. 2007/2004, 26 October 2004;

Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted;

Directive 2008/115/EU of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals;

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, a recast of the Council;

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013, Asylum Procedures Directive;

European Commission- Press Release: Joint Foreign and Home Affairs Council: Ten point action plan on migration, 20th April 2015;

The *Hirsi Jamaa* and Others v. Italy - The Applicability of the Principle of Non-Refoulement in High Sea

Recommendation No. R (84) 1 of the Committee of Ministers to member States on the protections of persons satisfying the criteria in the Geneva Convention who are not formally recognized as refugees, 1984;

Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard;

Regulation (EU) No. 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code);

Schengen Agreement, 14 June 1985;

The European Union Agency for Fundamental Rights, *Scope of the principle of non-refoulement in contemporary border management: evolving areas of law*, December 2016;

UN DOCUMENTS

Declaration on the Protection of all Persons from Enforced Disappearance, UNGA Resolution 47/133, 18 December 1992;

Economic and Social Council Resolution of 16th February 1946;

Executive Committee of the High Commissioner for Refugees, Conclusion No. 22 (XXXII), 1981;

Executive Committee of the High Commissioner for Refugees, Conclusion No. 6, (XXVIII), 1997;

Executive Committee of the High Commissioner for Refugees, Conclusion No. 74 (XKV), 1994;

7. Bibliography

Executive Committee of the High Commissioner for Refugees, Conclusion No. 81 (XLVIII), 1997;

Executive Committee of the High Commissioner for Refugees, Conclusion No. 55 (XL), 1989;

General Assembly Resolution 217 A, Paris, December 10th, 1948;

Geneva Convention on the Territorial Sea, UNCLOS, 1958;

Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights: Prohibition of collective expulsions of aliens, 2017;

International Convention for the Safety of Life at Sea (SOLAS), 1974;

Part Two: The Specialized Agencies. X. The International Refugee Organization,” in *The Yearbook of the United Nations 1947-1948* (United Nations Publications, 1949), 955–67.

Protocol Relating to the Status of Refugees, 1967;

Report of the United Nations High Commissioner for Refugees 1499 (XV), 5 December 1960;

Report of the United Nations High Commissioner for Refugees 1673 (XVI), 18 December 1961;

Report of the United Nations High Commissioner for Refugees 2039 (XX), 7 December 1965;

Report of the United Nations High Commissioner for Refugees 31/35, 30 November 1976;

The *Hirsi Jamaa* and Others v. Italy - The Applicability of the Principle of Non-Refoulement in High Sea

Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951;

Resolution 2011 (LXI) of 2 August 1976 of the United Nations Economic and Social Council;

Resolution 248 (IX) of 8 August 1949 of the United Nations Economic and Social Council;

Resolution 428 (V) of the United Nations Security Council adopted by the UN General Assembly on 14 December 1950;

Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971;

UN High Commissioner for Refugees (UNHCR), Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees, 16 January 2002, HCR/MMSP/2001/09, available at: <http://www.refworld.org/docid/3d60f5557.html> [accessed 17 July 2017];

UN High Commissioner for Refugees (UNHCR), The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994, available at: <http://www.refworld.org/docid/437b6db64.html> [accessed 21 July 2017];

UNHCR- Global Trends: Forced Displacement in 2016, Geneva, Switzerland, 2016, UNHCR;

UNHCR Information Portal: Refugees/Migrants Emergency Response – Mediterranean available at <http://data2.unhcr.org/en/situations/mediterranean>;

7. Bibliography

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, January 2007;

UNHCR, *The State of the World's Refugees 2006- Chapter 2 Safeguarding asylum: Box 2.3 The Tampa Affair: interception and rescue at sea*, 16 April 2006;

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, February 4, 1985;

United Nations Convention on the Law of the Sea, 1982;

United Nations Convention relating to the Status of Refugees, 1951;

United Nations General Assembly, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII);

United Nations High Commissioner for Refugees - *Global Trends: Forced Displacement in 2016*. Geneva, Switzerland, 2016;

United Nations High Commissioner for Refugees Executive Committee, Protection Safeguards in Interception Measures, Conclusion No. 97 (LIV), 2003;

United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1979, re-edited 1992;

United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992);

United Nations High Commissioner for Refugees, Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing, November 2010;

The *Hirsi Jamaa* and Others v. Italy - The Applicability of the Principle of Non-Refoulement in High Sea

United Nations High Commissioner for Refugees, *The State of the World's Refugees: Fifty Years of Humanitarian Action, chapter 4: Flight from Indochina*, 2000;

United Nations International Convention for the Protection of All Persons from Enforced Disappearance, February 6 2007;

United Nations Organization, "Statue of the Office of the United Nations High Commissioner for Refugees", 1950;

Vienna Convention on the law of treaties. Vienna, May 1969;

CASE LAW

European Court Human Rights, *Loizidou v. Turkey*, no. 15318/89, 1996;

European Court Human Rights, *Medvedyev and Others v. France*, no. 3394/03, 2010;

European Court Human Rights, *Ryabov v. Russia*, no. 3896/04, § 40 and 43, 31 January 2008;

European Court Human Rights, *Veikova v. Bulgaria*, no. 41488/98, § 50, 2000;

European Court of Human Rights, *M.S.S v. Belgium and Greece*, No. 30696/09, 2011;

European Court of the Human Rights, *Andric v. Sweden*, no. 45917/99, 1999;

European Court of the Human Rights, *Bankovic and Others v. Belgium and Others*, no. 52207/99, 2001;

7. Bibliography

European Court of the Human Rights, *Becker v. Denmark*, no. 7011/75, 1975;

European Court of the Human Rights, *Conka v. Belgium*, no. 51564/99, 2002;

European Court of the Human Rights, *Hirsi Jamaa and Others v. Italy*, no. 27765/09, 2012;

ICJ, *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997;

ICJ, *Guinea-Bissau v. Senegal*) 1991, ICJ Rep 53;

Supreme Court of the U.S., *Kiobel*, individually and on behalf of her late husband *Kiobel, et al. v. Royal Dutch Petroleum Co. et al.*, 133 S.Ct. 1659, 2013;

Supreme Court of the U.S., *Jose Francisco Sosa v. Humberto Alvarez- Machain, et al.*, 542 U.S.692, 2004;

Supreme Court of the United States, *Sale v. Haitian Centres Council*, 509 U.S. 155, 1993;

U.S. Court of Appeals for the 2d Circuit, *Dolly M.E. Filártiga and Joel Filártiga v. Americo Norberto Peña-Irala*, 630 F.2d 876, 1980;

OTHER DOCUMENTS

African Charter of Human Rights and People's Rights, 1981;

American Convention on Human Rights, 1969;

Cambridge University Press, *Summary Conclusions: The Principle of Non-Refoulement*, June 2003;

Inter-American Convention to Prevent and Punish Torture, 1985;

The *Hirsi Jamaa* and Others v. Italy - The Applicability of the Principle of Non-Refoulement in High Sea

World Development Indicators 2016, The World Bank (available at: <https://data.worldbank.org/data-catalog/world-development-indicators>)

8. ANNEX

European Commission - Migration: A Roadmap

In: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agendamigration/20171207_migration_a_roadmap_en.pdf

