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Contact: Abel Campos
Tel: 03 88 41 22 55

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Meeting: 1150 DH meeting (24-26 September 2012)

Item reference: Communication from the UNHCR in the case of Hirsi Jamaa against Italy (Application No. 27765/09).

Information circulated at the request of the Secretariat.

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Informations circulées à la demande du Secrétariat.

RECOMMENDATIONS by UNHCR

concerning the execution of the Grand Chamber judgment of the European Court of Human Rights in the case of *Hirsi Jamaa and others v. Italy* (Judgment of 23 February 2012, Application No. 27765/09)

Introduction: These recommendations, addressed to the Italian Government, are submitted in the context of the supervision of the execution of the Grand Chamber judgment of the European Court of Human Rights (“ECtHR” or “the Court”) in the case of *Hirsi Jamaa and others v. Italy* (Appl. No. 27765/09) by the Committee of Ministers of the Council of Europe.

UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with governments, to seek solutions to the problem of refugees.¹ Paragraph 8 of its Statute confers responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees,² whereas Article 35 of the 1951 Convention relating to the Status of Refugees (“the 1951 Convention”)³ obliges States Parties to cooperate with UNHCR in the exercise of its functions, including in particular to facilitate its duty of supervising the application of the provisions of the 1951 Convention.

In accordance with its supervisory responsibility and in light of Italy’s obligations under refugee law, UNHCR also seeks to assist the Council of Europe’s Committee of Ministers in its evaluation of the measures necessary for the execution of this judgment. UNHCR had intervened as a third party in this case before the ECtHR.⁴

1. **Just satisfaction.** UNHCR recommends that the Italian Government take all necessary measures, including through its diplomatic and consular missions, to locate those applicants whose present whereabouts are unknown, in order to execute payment of the sums due regarding compensation for non pecuniary damage and costs and expenses. Furthermore, it is to be hoped that the aforementioned sums be immediately paid through simplified procedures to applicants residing abroad.
2. **Individual measures aimed at preventing *refoulement*.** UNHCR also calls on the Italian Government to take all possible steps to ensure that applicants – wherever they are presently staying – are not at risk of treatment contrary to Article 3 of the European Convention on Human Rights (ECHR), notably of forced arbitrary repatriation or *refoulement*. When necessary and advisable, Italy should ensure that applicants will reach Italy in a safe and regular manner, and, if needed, to access the asylum procedure.

¹ *Statute of the Office of the United Nations High Commissioner for Refugees*, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, 1950, para. 1, available at:

<http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

² *Ibid.* para. 8(a).

³ *The 1951 Convention relating to the Status of Refugees*, 189 U.N.T.S. 137, available at:

<http://www.unhcr.org/refworld/docid/3be01b964.html>.

⁴ UNHCR, *Written Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Hirsi and Others v. Italy*, 29 March 2011, Application no. 27765/09, available at:

<http://www.unhcr.org/refworld/docid/4d92d2c22.html>; UNHCR, *oral intervention at the European Court of Human Rights - Hearing of the case Hirsi and Others v. Italy*, 22 June 2011, Application no. 27765/09, available at: <http://www.unhcr.org/refworld/docid/4e0356d42.html>.

3. **Publication and dissemination of the judgment.** The Grand Chamber judgment of the European Court of Human Rights has already been translated into Italian and published on the website of the Italian Ministry of Justice. UNHCR recommends that the Italian Government also disseminates the judgment to all authorities involved in rescue or interception operations, as well as to competent Provincial Police Headquarters (*Questure*) and Prefectures in areas faced with the arrival of persons in mixed migration movements by sea. Given the broader scope of the principles established by the Court, UNHCR further recommends that the dissemination of the Court's judgment be extended to include all authorities tasked with external border control.
4. **Italy-Libya Agreements should include safeguards.** UNHCR recommends that readmission and cooperation agreements aimed at, *inter alia*, combating irregular migration include safeguards to ensure actual respect for the basic human rights of all persons concerned, and to ensure adequate protection of asylum-seekers and refugees, in particular with regards to the principle of *non-refoulement*. UNHCR therefore urges the Italian Government to execute the Court's judgment by amending existing agreements with Libya with a view to explicitly include such safeguards. Furthermore, similar safeguards should be included in the Interior Ministry Decree of 14 July 2003 ("Measures to combat illegal immigration").
5. **Provision of information concerning access to the asylum procedure.** UNHCR calls on the Italian Government to implement effective measures to ensure that persons rescued or intercepted on the high seas are provided with adequate information about the possibility of requesting international protection. As highlighted by the Court, access to asylum procedures may be severely jeopardised by a lack of information. *A fortiori*, access to information should therefore be ensured prior to the adoption of any decision regarding push backs, expulsions or other forms of return to third countries.

Current Italian legislation already includes provisions related to the provision of information. Article 11, comma 6 of Legislative Decree 286/98 provides for the establishment of reception services at border crossing points, which should, *inter alia*, serve the purpose of "*providing non-nationals who intend to apply for asylum with information and assistance*". UNHCR, in view of the fundamental importance generally attached by the Court to access to information, recommends that this type of service – currently foreseen by law only at border crossing points – should be extended to all areas faced with arrivals of persons reaching Italy in the context of mixed migratory movements. Such an extension would also represent an institutionalization of the good practice established through the long-standing activities carried out in the context of the Praesidium project under the aegis of the Ministry of Interior.

Furthermore, the information services should be made available to all persons who could potentially be in need of international protection, rather than solely to those who have already explicitly expressed the intention to apply for asylum.

The extension of these information services would not only represent an important safeguard for persons in need of protection, but would also serve as a tool to support the authorities in fulfilling their obligations under national, european and international law, including respect for the principle of *non-refoulement*.

6. **Modality of asylum applications.** In order to facilitate the identification of asylum-seekers and to ensure that they are able to access international protection status

determination procedures, UNHCR suggests that the provisions of Article 10 of the Practical Handbook for Border Guards (Schengen Handbook) of 6 November 2006, developed by the European Commission, be applied in practice and guide the relevant Italian authorities. Article 10, para. 1 states: “A *third-country national must be considered as an applicant for asylum/international protection if he/she expresses – in any way – fear of suffering serious harm if he/she is returned to his/her country of origin or former habitual residence. The wish to apply for protection does not need to be expressed in any particular form. The word “asylum” does not need to be used expressly; the defining element is the expression of fear of what might happen upon return.*” For practical purposes, it would therefore be desirable that all competent authorities, including Border Police, Tax and Customs Police and Coast Guard, receive corresponding instructions containing explicit reference to this definition.

7. **Training.** UNHCR recommends that all staff who first come into contact with migrants, including asylum-seekers and refugees, receive adequate instructions and training to ensure that international protection needs are identified. UNHCR further recommends that the competent authorities be regularly updated on the situation, in particular on security and human rights conditions, in relevant countries of origin and transit. UNHCR reiterates its readiness to cooperate with the competent authorities in designing and delivering training modules on international refugee protection.
8. **Positive obligation to identify protection needs.** Drawing on the deliberations contained in the Grand Chamber judgment of the European Court of Human Rights and in light of national, European and international law, UNHCR urges the competent authorities to assess the possible existence of any impediments to push back, expulsion or other forms of return to a third country which may potentially not be safe for the concerned person(s). Indeed, if reliable sources document a “well-known” situation of a “systematic” violation of human rights, characterized notably by a lack of respect for the principle of *non-refoulement* and effective protection in the country of return, the burden of proof is reversed and the State conducting the push back operation/expulsion has a positive obligation to verify that push back operations, expulsions or other forms of return would not put the individuals concerned at risk.⁵

This principle must also be applied in the context of rescue operations on the high seas. To this effect, the Italian authorities may draw upon recommendations issued by the International Maritime Organization (IMO) in guidelines (Resolution MSC. 167/78) drafted following the 2004 amendments to the Conventions on the Safety of Life at Sea (SOLAS) and on Maritime Search and Rescue (SAR), which, *inter alia*, address the specific case of asylum-seekers rescued at sea. Paragraph 6.17 of the Resolution specifically recommends that the disembarkation of asylum-seekers and refugees recovered at sea in territories where their lives and freedom would be threatened should be avoided.

9. **Prohibition of collective expulsions (Article 4 Protocol 4 to the ECHR).** As required by the Court, any assessment of protection needs – to be carried out prior to the adoption of a decision to push back, expel or otherwise return to a third country – must take place “on the basis of a reasonable and objective examination of the particular cases of each

⁵ Cf. European Court of Human Rights, *Hirsi Jamaa and Others v. Italy* (Application no. 27765/09), Grand Chamber Judgment of 23 February 2012, paras. 123, 125, 126, 131-135, available at: <http://www.unhcr.org/refworld/docid/4f4507942.html>.

individual".⁶ However, given the practical and logistical characteristics generally associated with rescue or interception operations on the high seas, it appears hardly possible that individual examinations of this type be carried out directly on board. Furthermore, the psychological and physical conditions of those intercepted or rescued must be taken into consideration in this context. In this regard, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), as quoted in the judgment of the Court, observed that "*persons surviving a sea voyage were particularly vulnerable and often not in a condition in which they should be expected to declare immediately their wish to apply for asylum*".⁷

UNHCR therefore recommends that any operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress be carried out after disembarkation to a place of safety.

10. **Access to effective remedy.** UNHCR considers that the requirements established by the European Court of Human Rights in relation to effective remedy as defined by Article 13 taken together with Article 3 of the European Convention on Human Rights, namely "*an independent and rigorous scrutiny*" and "*the possibility of suspending the implementation of the measure impugned*",⁸ can not be practically met during rescue or interception operations at sea. Therefore, in the context of such operations, push-back or return measures - the consequences of which are potentially irreversible – should not be carried out and persons who claim to be in need of international protection/ express their fear of being persecuted upon return should be granted access to territory.

UNHCR Regional Representation for Southern Europe
05 September 2012

⁶ European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, *supra* note 5, cf. para. 166.

⁷ European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, *supra* note 5, para. 36; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009*, para. 32, available at: <http://www.cpt.coe.int/documents/ita/2010-inf-14-eng.pdf>.

⁸ European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, *supra* note 5, paras. 198 and 199 with further references to established ECtHR case-law.