Burden of proof and moment of assessment in some recent judgments on expulsions and deportations (Article 3)

(P. Gori)

Hirsi Jamaa v. Italy (application no.27765/09), Grand Chamber judgment delivered on 23 February 2012 (full text available in English at the following link: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231).

(1) Art. 1[1] - migrants intercepted on high seas - transferred onto military ships of a member State - control "de iure" over the individuals concerned - law of the sea - control "de facto" - jurisdiction of that State

(2) Art.3[2] - removal of aliens - risk of torture, inhuman and degrading treatment - danger of being returned to their respective countries of origin **- positive obligations - moment of assessment: removal time - factors to assess the risk - domestic law and bilateral agreements - relevance: no - personal circumstances and general internal conditions - relevance: yes - substantiated systematic violations - burden of proof on real treatment: on the State - violation**

(3) Art.4 Protocol No.4[3] - scope of the provision - notion of "expulsion" - removal of aliens carried out outside national territory - provision does apply - transfer without any form of individual examination - violation

(4) Art.13[4] taken together with Art.3 of the Convention and Art.4 Protocol No.4 - lack of procedures of identification, interpreters, legal advisers and information on asylum procedures - lack of remedies against expulsion with

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[1] Article 1 of the Convention provides:
"*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.*"

[2] Article 3 of the Convention reads as follows:
"*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*"

[3] Article 4 of Protocol No. 4 provides: "*Collective expulsion of aliens is prohibited*".

[4] Article 13 of the Convention reads as follows:
"*Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*"

suspensive effect - violation

(1) Although the jurisdiction of a State, within the meaning of Article 1, is essentially territorial, in exceptional cases the acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of extra-territorial jurisdiction by them, namely when the interception of a group of migrants occurred on the high seas but they were transferred on board of military ships flying the responding State flag (Italian), being under its control not only "de iure", by virtue of the relevant provisions of the law of the sea, but also "de facto".

(2) Where the individual, if expelled, would face a real risk of torture, inhuman and degrading treatment in a third country (Libya) and a further danger of being returned to the country of origin (Somalia/Eritrea), Article 3 implies a positive obligation for the responding State not to expel the individual to that third country (Libya). When the removal was really carried out to the receiving country, in assessing the risk, the Court examines the foreseeable consequences at that time, in the light of the personal circumstances as well as the real general situation there, not being sufficient domestic laws or bilateral international agreements allegedly guaranteeing respect for fundamental rights. Namely, in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment and of violation of the non-refoulement principle, confirmed by recent reports from independent international human-rights-protection associations (Human Rights Watch), or governmental sources, it is for the national authorities, faced with a situation in which human rights were being systematically violated to find out about the treatment to which the applicants would be exposed after their return and, in lack of that action, Article 3 is violated.

(3) Pursuant to the Vienna Convention on the Law of Treaties, according to which the Court must establish the ordinary meaning to be given to the terms in their context and in the light of the object and purpose of the provision from which they are taken, and having regard for the relevant rules and principles of international law applicable in the relations between the Contracting Parties, as well as for the lack of explicit statements on the point in the *travaux préparatoires* of the Convention, and finally in the light of the Convention as a living instrument which must be interpreted in the light of present-day conditions, the wording of Article 4 of Protocol No. 4 implies that the notion of "expulsion" is principally territorial, likewise for the notion of "jurisdiction" under Art.1 of the Convention, but this does not in itself pose an obstacle to its extra-territorial application, and therefore removal of aliens to a third State carried out outside national territory might be considered "expulsions" for the provision's purposes. The transfer of the aliens to a third country (Libya) without any form of examination of each applicant's individual situation is in violation of the provision.

(4) The absence of any procedure to identify aliens and to assess their personal circumstances before they were returned to a third country (Libya), as well as the lack of interpreters and legal advisers among the personnel on board and, in general, of any information to accessing asylum procedures and to substantiating complaints against expulsion with suspensive effect, is in violation of Art.13 taken together with Art.3 of the Convention and Art.4 Protocol No.4.

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(*The applicants, eleven Somali nationals and thirteen Eritrean nationals, were part of a larger group who left Libya aboard small vessels with the aim of reaching the Italian coast. On 6 May 2009, they were intercepted by ships from the Italian Revenue Police (Guardia di finanza) and the Coastguard 35 nautical miles south of Lampedusa (Agrigento), whereas on high seas within the Maltese Search and Rescue Region of responsibility. They were transferred onto Italian military ships and returned to Tripoli. During that voyage the Italian authorities took no steps to identify them. All their personal effects, including documents confirming their identity, were confiscated by the military personnel. On arrival in the Port of Tripoli, following a ten-hour voyage, the migrants were handed over to the Libyan authorities, in conformity with the bilateral agreements concluded by Italy with Libya. The applicants objected to being handed over to the Libyan authorities but were forced to leave the Italian ships.*
All three violations were deliberated unanimously by the Court, however a concurring opinion was attached to the judgment).

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1. It is well established in the jurisprudence of the Court that expulsions and deportations by a Member State may rise to an issue under Article 3 of the Convention. The State may incur liability under the Convention, if evidence is given that the person concerned, if expelled or deported, would face a real **risk of being subjected to treatment contrary to Article 3 in the receiving country**, *"in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article"* (see Soering v. the United Kingdom, No. 14038/88, 7 July 1989, para.91).

a) burden of proof

2. A frequent issue is the distribution of burden of proof. On this point the wording used in ***Saadi v. Italy*** (No.37201/06, 28 February 2008*)* in para 129 is particularly interesting. It may look somehow "elliptic" at a first glance, but it appears to be not really self-contradicting after a more detailed analysis. Let`s consider the section 129 of that judgment: "*It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see N. v. Finland, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it*.".

The ***rationale*** seems to be a distribution of burden of proof through a "proximity criterion".

3. The **applicant kicks off giving elements of evidence** that are easier to be given for her/him, for instance through presumptions relied on NGOs reports (Human Rights Watch, Amnesty International).

Of course this kind of evidence cannot be absolute, as it is the result of a deductive reasoning, and therefore it could be recognised as an "early evidence" (*principio di prova* in Italian). It is an important element supporting the applicant's thesis, but doubts still may persist.

However, in many cases it would be unfair to ask more to an applicant, because giving an evidence "above any reasonable doubt" (to use the US Supreme Court's wording) might be very difficult or maybe impossible, like in the case of an asylum seeker in Italy risking ill treatment from the Libyan authorities and further deportation to Somalia in violation of the non-refoulement principle.

4. Taking the second step is up to **the Government, which can "dispel doubts".** Frequently this legal activity finda elements not favourable for the applicant, but not necessarily, if the Government really applies the law in an objective and impartial way.

The Government has indeed more means to investigate and to give an exhaustive proof on a fact like, for example, the internal conditions of a Country not party in the proceedings. Finally, even a lack of exercise of this power may strengthen the applicant's position, confirming the "early evidence".

5. The **result of this two steps process is the "full evidence"**, of course, a legal truth as usual. The same expression "dispel doubts" is used in later concerned case-law. For example, it may be found in NA. v. the United Kingdom, (no. 25904/07, 17 July 2008): "*111. The assessment of the existence of a real risk must necessarily be a rigorous one (see Chahal v. the United Kingdom, judgment of 15 November 1996, Reports 1996-V, § 96; and Saadi v. Italy, cited above, § 128). It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see N. v. Finland, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it*."

The reasoning is fully explained in ***Salah Sheekh v. the Netherlands*** (no. 1948/04, 11 January 2007), where it is clear that the applicant may cast doubt on the accuracy of the information: "*136. (…) In determining whether it has been shown that the applicant runs a real risk, if expelled, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it, or, if necessary, material obtained proprio motu, in particular where the applicant – or a third party within the meaning of Article 36 of the Convention – provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government.*".

6. However, a **different wording** is used in the present judgment *Hirsi Jamaa and Others v. Italy* (No.27765/09, 23 February 2012): "*151. The Court considers that all the information in its possession shows prima facie that the situation in Somalia and Eritrea posed and continues to pose widespread serious problems of insecurity. That finding, moreover, has not been disputed before the Court.*".

Again, the expression used, different from "dispel doubts", reflects the same *rationale* of an **evidence built in two steps**. Indeed, as noted in the case-law after *Saadi*, the Government is placed in a better position to support or contest the information constituting "early evidence" or, as the Court put it in the *Hirsi* judgment, a "prima facie" show confirming the applicant's allegations.

7. In Doctrine it has been argued that in the *Hirsi* judgment the burden of proof on the applicant has been considerably reduced, if compared with similar and also recent judgments, like for example *Sufi and Elmi v. United Kingdom* (Nos. 8319/07, 11449/07, 28 June 2011)[5]. However, it seems maybe too early to ascertain if this is the beginning of a

[5] See Marie-Bénédicte Dembour, ***Interception-at-sea: Illegal as currently practiced – Hirsi and Others v. Italy***, available at the link: http://strasbourgobservers.com/2012/03/01/interception-at-sea-illegal-as-currently-practiced-hirsi-and-others-v-italy/.

new trend, and the new approach needs to be further confirmed.

b) moment of assessment

8. Another related aspect may be of interest: should the Court apply **a full and *ex nunc*** assessment or rather **a *ex tunc* one**? After the leading case ***Chahal v. the United Kingdom***, (no. 22414/93, GC, 15 November 1996) the Court choose clearly the first option, if the applicant has not yet extradited or deported: "*86. It follows from the considerations in paragraph 74 above that, as far as the applicant's complaint under Article 3 (art. 3) is concerned, the crucial question is whether it has been substantiated that there is a real risk that Mr Chahal, if expelled, would be subjected to treatment prohibited by that Article (art. 3). Since he has not yet been deported, the material point in time must be that of the Court's consideration of the case. It follows that, although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive.".*

In *N. v. Finland* (No.38885/02, 26 July 2005), the same reasoning is followed: "*160. (…) The assessment of the existence of the risk must be made on the basis of information concerning the conditions prevailing at the time of the Court's consideration of the case, the historical position being of interest in so far as it may shed light on the present situation and its likely evolution (ibid., p. 1856, § 86).".*

9. More recently, the ***ex nunc* assessment** in lack of real removal was confirmed by *NA. v. the United Kingdom*, (no. 25904/07, 17 July 2008): "*112. If the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see Saadi v. Italy, cited above, § 133). A full and ex nunc assessment is called for as the situation in a country of destination may change in the course of time. Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities* (see *Salah Sheekh*, cited above, § 136).".

10. Different is the present *Hirsi* case, were the removals of the applicants effectively were carried out. Here the Court seems to have made reference to the historical position and not to the present cirumstances:

"*124. The Court observes in passing that the situation in Libya worsened after the closure of the UNHCR office in Tripoli in April 2010 and the subsequent popular revolution which broke out in the country in February 2011. However, for the purposes of examining this case, the Court will refer to the situation prevailing in Libya at the material time*.".

The distinction between the two moments of assessment, as well as the factual basis of the effective removal as the decisive threshold, were "*obiter dicta*" in the above mentioned *Chahal* judgment, however it is in the present *Hirsi* case that the *ex tunc* assessment was explicitly applied[6].

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[6] Further literature: Elodie Mouthon, ***L'arrêt Hirsi Jamaa et autres c. Italie rendu en Grande Chambre le 23 février 2012***, in CESICE (http://cesice.upmf-grenoble.fr/1331310079426/0/fiche___actualite/); Paolo De Stefani, ***Hirsi Jamaa e altri c. Italia: illegali i respingimenti verso la Libia del 2009***, in Centro Diritti Umani (http://unipd-centrodirittiumani.it/it/schede/Hirsi-Jamaa-e-altri-c-Italia-illegali-i-respingimenti-verso-la-Libia-del-2009/249); Guy S. Goodwin-Gill, ***The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement***, in Int J Refugee Law, October 2011; 23: 443 – 457; Violeta Moreno-Lax, ***Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea***, in Int J Refugee Law, July 2011; 23: 174 – 220; German version of the judgment: ***Kollektivausweisung von Bootsflüchtlingen nach Libyen: Hirsi Jamaa u.a. gg. Italien***, in NLMR Newsletter Menschenrechte, Jarg. 21, H. 1, p. 50 - 53.