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Il caso Hirsi Jamaa e altri c. Italia davanti alla Corte europea dei diritti umani [23 febbraio 2012]

2012 – 1.4

Fogli di lavoro
per il Diritto Internazionale

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Il 23 febbraio 2012 la Grande Camera della Corte europea dei diritti dell'uomo, adita da 24 cittadini somali ed eritrei nel caso *Hirsi Jamaa e altri*, ha condannato all'unanimità l'Italia per violazione dell'art. 3 (sia per aver esposto i ricorrenti al rischio di subire maltrattamenti in Libia sia per averli esposti al rischio di rientrare nei rispettivi Paesi di origine dove sarebbero stati oggetto di nuova persecuzione), dell'art. 4 Protocollo n. 4, che vieta le espulsioni collettive, nonché dell'art. 13 (in relazione ai due articoli precedenti) della CEDU.

I ricorrenti facevano parte di un gruppo di circa 200 persone che il 6 maggio 2009 erano state intercettate da motovedette italiane e riportate in Libia, da dove erano partite, in conformità agli accordi bilaterali fra Italia e Libia, senza essere identificate e senza essere informate circa la loro reale destinazione.

Pubblichiamo la parte della decisione relativa alla controversa questione della giurisdizione, ossia se potesse dirsi che i ricorrenti fossero sottoposti alla giurisdizione italiana ai sensi dell'articolo 1 della Convenzione europea dei diritti umani

La redazione

(omissis)

I. PRELIMINARY ISSUES RAISED BY THE GOVERNMENT

A. Validity of the powers of attorney and further consideration of the application

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3. The Court's assessment

1. The Court reiterates at the outset that the representative of the applicant must produce "a power of attorney or written authority to act" (Rule 45 § 3 of the Rules of Court). Therefore, a simple written authority would be valid for the purposes of the proceedings before the Court, in so far as it has not been shown that it was made without the applicant's understanding and consent (see *Velikova v. Bulgaria*, no. 41488/98, § 50, ECHR 2000-VI).

2. Furthermore, neither the Convention nor the Rules of Court impose any specific requirements on the manner in which the authority form must be drafted or require any form of certification of that document by any national authority. What is important for the Court is that the form of authority should clearly indicate that the applicant has entrusted his or her representation before the Court to a representative and that the representative has accepted that commission (see *Ryabov v. Russia*, no. 3896/04, §§ 40 and 43, 31 January 2008).

3. In the instant case, the Court observes that all the powers of attorney included in the case file are signed and bear fingerprints. Moreover, the applicants' lawyers have provided detailed information throughout the proceedings concerning the facts and the fate of the applicants with whom they have been able to maintain contact. There is nothing in the case file that could call into question the lawyers' account or the exchange of information with the Court (see, conversely, *Hussun and Others*, cited above, §§ 43-50).

4. In the circumstances, the Court has no reason to doubt the validity of the powers of attorney. Consequently, it rejects the Government's objection.

5. Furthermore, the Court notes that, according to the information provided by the lawyers, two of the applicants, Mr Mohamed Abukar Mohamed and

Mr Hasan Shariff Abbirahman (nos. 10 and 11 on the list respectively), died shortly after the application was lodged (see paragraph 15 above).

6. It points out that the practice of the Court is to strike applications out of the list when an applicant dies during the course of the proceedings and no heir or close relative wishes to pursue the case (see, among other authorities, *Scherer v. Switzerland*, 25 March 1994, §§ 31-32, Series A no. 287; *Öhlinger v. Austria*, no. 21444/93, Commission's report of 14 January 1997, § 15, unreported; *Thévenon v. France* (dec.), no. 2476/02, ECHR 2006-III; and *Léger v. France* (striking out) [GC], no. 19324/02, § 44, 30 March 2009).

7. In the light of the circumstances of the case, the Court considers that it is no longer justified to continue the examination of the application as regards the deceased (Article 31 § 1 (c) of the Convention). Furthermore, it points out that the complaints initially lodged by Mr Mohamed Abukar Mohamed and Mr Hasan Shariff Abbirahman are identical to those submitted by the other applicants, on which it will express its opinion below. In those circumstances, the Court sees no grounds relating to respect for human rights secured by the Convention and its Protocols which, in accordance with Article 37 § 1 *in fine*, would require continuation of the examination of the deceased applicants' application.

8. In conclusion, the Court decides to strike the case out of the list in so far as it concerns Mr Mohamed Abukar Mohamed and Mr Hasan Shariff Abbirahman, and to pursue the examination of the remainder of the application.

B. Exhaustion of domestic remedies

9. At the hearing before the Grand Chamber, the Government submitted that the application was inadmissible because domestic remedies had not been exhausted. They claimed that the applicants had failed to apply to the Italian courts to seek acknowledgment of and compensation for the alleged violations of the Convention.

10. In the Government's view, the applicants, now free to move around and in a position to contact their lawyers in the context of the proceedings before the Court, should have lodged proceedings with the Italian criminal courts to complain of violations of domestic and international law by the military personnel involved in their removal. Criminal proceedings were currently under way in similar cases and that type of remedy was "effective".

11. The Court notes that the applicants also complained that they were not afforded a remedy satisfying the requirements of Article 13 of the Convention. It considers that there is a close connection between the Government's argument on this point and the merits of the complaints made by the applicants under Article 13 of the Convention. It therefore takes the view that it is necessary to join this objection to the merits of the complaints lodged under Article 13 of the Convention and to examine the application in this context (see paragraph 207 below).

II. THE ISSUE OF JURISDICTION UNDER ARTICLE 1 OF THE CONVENTION

12. 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."

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B. The Court's assessment

1. General principles governing jurisdiction within the meaning of Article 1 of the Convention

13. Under Article 1 of the Convention, the undertaking of the Contracting States is to "secure" ("*reconnaître*" in French) to everyone within their "jurisdiction" the rights and freedoms defined in Section I of the Convention (see *Soering v. the United Kingdom*, 7 July 1989, § 86, Series A no. 161, and *Banković and Others v. Belgium and Others* (dec.), [GC], no. 52207/99, § 66, ECHR 2001-XII). The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004-VII).

14. The jurisdiction of a State, within the meaning of Article 1, is essentially territorial (see *Banković and Others*, cited above, §§ 61 and 67, and *Ilaşcu and Others*, cited above, § 312). It is presumed to be exercised normally throughout the State's territory (loc. cit., and see *Assanidze v. Georgia* [GC], no. 71503/01, § 139, ECHR 2004-II).

15. In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention (see *Drozd and Janousek v. France and Spain*, 26 June 1992, § 91, Series A no. 240; *Bankoviç and Others*, cited above, § 67; and *Ilaşcu and Others*, cited above, § 314).

16. In its first judgment in *Loizidou v. Turkey*, the Court ruled that bearing in mind the object and purpose of the Convention the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory ((preliminary objections), 23 March 1995, § 62, Series A no. 310), which is however ruled out when, as in *Banković and Others*, only an instantaneous extraterritorial act is in issue, since the wording of Article 1 does not accommodate such an approach to "jurisdiction" (cited above, § 75). In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined with reference to the particular facts, for example full and exclusive control over a prison or a ship (see *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 132 and 136, ECHR 2011, and *Medvedyev and Others*, cited above, § 67).

17. Whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Court has now accepted that Convention rights can be "divided and tailored" (see *Al-Skeini and Others*, cited above, § 136-37; compare *Banković and Others*, cited above, § 75).

18. There are other instances in the Court's case-law of the extraterritorial exercise of jurisdiction by a State in cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, the Court, basing itself on customary international law and treaty provisions, has recognised the extraterritorial exercise of jurisdiction by the relevant State (see *Banković and Others*, cited above, § 73, and *Medvedyev and Others*, cited above, § 65).

2. Application to the instant case

19. It is not disputed before the Court that the events in issue occurred on the high seas, on board military ships flying the Italian flag. The Government acknowledge, furthermore, that the Revenue Police and Coastguard ships onto which the applicants were embarked were fully within Italian jurisdiction.

20. The Court observes that, by virtue of the relevant provisions of the law of the sea, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying. This principle of international law has led the Court to recognise, in cases concerning acts carried out on board vessels flying a State's flag, in the same way as registered aircraft, cases of extraterritorial exercise of the jurisdiction of that State (see paragraph 75 above). Where there is control over another, this is *de jure* control exercised by the State in question over the individuals concerned.

21. The Court observes, furthermore, that the above-mentioned principle is enshrined in domestic law in Article 4 of the Italian Navigation Code and is not disputed by the Government (see paragraph 18 above). It concludes that the instant case does indeed constitute a case of extraterritorial exercise of jurisdiction by Italy capable of engaging that State's responsibility under the Convention.

22. Moreover, Italy cannot circumvent its "jurisdiction" under the Convention by describing the events in issue as rescue operations on the high seas. In particular, the Court cannot subscribe to the Government's argument that Italy was not responsible for the fate of the applicants on account of the allegedly minimal control exercised by the authorities over the parties concerned at the material time.

23. In that connection, it is sufficient to observe that in *Medvedyev and Others*, cited above, the events in issue took place on board the *Winner*, a vessel flying the flag of a third State but whose crew had been placed under the control of French military personnel. In the particular circumstances of that case, the Court examined the nature and scope of the actions carried out by the French officials in order to ascertain whether there was at least *de facto* continued and uninterrupted control exercised by France over the *Winner* and its crew (ibid., §§ 66-67).

24. The Court observes that in the instant case the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel. In the Court's opinion, in the period between boarding the ships of the Italian armed forces and being

handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities. Speculation as to the nature and purpose of the intervention of the Italian ships on the high seas would not lead the Court to any other conclusion.

25. Accordingly, the events giving rise to the alleged violations fall within Italy's "jurisdiction" within the meaning of Article 1 of the Convention.