



The Refugee and Humanity

A Theoretical Study of the Enjoyment
of Human Rights in the Case of Hirsi
Jamaa and Others v. Italy

Carolina Pereira

Human Rights Studies
Department of History
Course: MRSK30
Semester: Spring 2013
Supervisors: Lina Sturfelt & Andrea Karlsson



Abstract

This essay explores the refugee's access to human rights in regard to the case of Hirsi Jamaa and others v. Italy. The status of refugee, official or not, entails certain rights and state obligation, but the correlation between refugee rights and human rights is problematic. The analysis of the case parties' arguments for and against violation of relevant articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms, shows how the parties define concepts crucial to the concept of refugee. The comparison of the summarized results with theories relating to the refugee conception and humanhood, conjures an image of the refugee as less than human, lacking a political voice, and in extension unable to enjoy human rights to the full.

Keywords: refugees – human rights – Hirsi Jamaa and Others v. Italy – push-back – asylum – non-refoulement – territorial jurisdiction – safe (third) country

Denna uppsats utforskar flyktingens tillgång till mänskliga rättigheter när det gäller fallet med Hirsi Jamaa m.fl. mot Italien. Flyktingstatus, officiell eller inte, medför vissa rättigheter och statsskyldighet, men sambandet mellan flyktingars rättigheter och mänskliga rättigheter är problematisk. Den analys av parternas argument för och mot kränkning av relevanta artiklar i Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna, visar hur parterna definierar begrepp som är avgörande för begreppet flykting. Jämförelsen av de sammanfattade resultaten med teorier som rör uppfattningen av flykting och mänsklighet, frammanar en bild av flyktingen som mindre än mänskliga, som saknar en politisk röst, och i förlängningen inte kan åtnjuta de mänskliga rättigheterna till fullo.

Nyckelord: flyktingar - mänskliga rättigheter - Hirsi Jamaa m.fl. mot Italien - push-back - asyl - non-refoulement - territoriell jurisdiktion – säkert tredjeland

Table of Contents

1 Introduction	1
1.1 Purpose, Problem Statement and Question Formulation	3
1.2 Material	3
1.3 Restrictions	4
1.4 Related research	5
2 Method and Theory	5
2.1 Method	5
2.1.1 Goodwin-Gill & McAdam	6
2.1.2 Benhabib and Nyers	6
2.2 Theory	7
2.2.1 Benhabib	7
2.2.2 Nyers	9
3 Analysis of Relevant Concepts	11
3.1 The Institution of Asylum and Asylum-seekers	11
3.1.1 Legal Definition by Goodwin-Gill and McAdam	11
3.1.2 The Applicants	11
3.1.3 The Italian Government	12
3.1.4 The European Court of Human Rights	12
3.1.5 Conclusion	12
3.2 The Principle of Non-Refoulement	13
3.2.1 Legal Definition by Goodwin-Gill and McAdam	13
3.2.2 The Applicants	15
3.2.3 The Italian Government	15
3.2.4 The European Court of Human Rights	15
3.2.5 Conclusion	16
3.3 Jurisdiction and Territory	17
3.3.1 Legal Definition by Goodwin-Gill & McAdam	17
3.3.2 The Applicants	17
3.3.3 The Italian Government	18
3.3.4 The European Court of Human Rights	18
3.3.5 Conclusion	19
3.4 Safe (Third) Country	20
3.4.1 Legal Definition by Goodwin-Gill and McAdam	20
3.4.2 The Applicants	21
3.4.3 The Italian Government	21
3.4.4 The European Court of Human Rights	22
3.4.5 Conclusion	22
4 Analysis of Refugee Status and Rights	23
4.1 Refugee status	23
4.1.1 Legal Definition by Goodwin-Gill and McAdam	23
4.1.2 The Applicants	24
4.1.3 The Italian Government	25
4.1.4 The European Court of Human Rights	27
5 Conclusion	28

1 Introduction

”We are all refugees of a future that never happened.”¹ But what if that future was the present?

The interception of refugees from Somalia and Eritrea on the high seas off the coast of Italy in 2009, as well as the push-back and return to Libya has called into question what the definition of a refugee is, and what the relation between refugee rights and human rights is.

The driving force for picking the case of *Hirsi Jamaa and others v. Italy*² as my primary material was inspired by an article³ I read addressing the bilateral agreement between Libya and Italy⁴, allowing the push back of refugees intercepted by Italian military on the high seas off the coast of Italy. The court case was processed by the European Court of Human Rights, following an application lodged by Somali and Eritrean refugees against the Italian Republic. My research in to the matter led me to the case in question and it sparked an interest in the perception and definition of the concept and term *refugee*. In addition, the reading of the material resulted in questioning if the concept of refugee in theory as well as in reality enables refugees to enjoy human rights to the full.

The application was lodged under article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁵ (the Convention), stating:

“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

¹ Lee Weiner, in: Mc Call, Cheryl, *Their Anger Behind Them, the Chicago 7 Declare Peace in the '70s*,

² Case of *Hirsi Jamaa and Others v. Italy* (Application no. [27765/09](#))

³ Kreickenbaum, Martin, *Italy carries out mass deportation of refugees*, World Socialist Web Site, 9 October 2004, retrieved 23 December 2012, <http://www.wsws.org/en/articles/2004/10/ital-o09.html>

⁴ Case of *Hirsi Jamaa and Others v. Italy*, pp. 5-6

⁵ European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950

The situation, referred to in the application and the case, took place on May 6, 2009. Eleven Somali and thirteen Eritrean nationals, part of a group of approximately 200 migrants, departed from Libya in boats, with the purpose of reaching the coast of Italy. Italian Revenue Police and Coastguard intercepted the boats within the search and rescue zone of Malta. The migrants were transferred onto the Italian military ships and claim that they were stripped of their personal effects including identification documents. Without being informed of the intent, they were returned to Tripoli and handed over to the Libyan authorities despite objecting to the transfer. The applicants state that the Italian authorities made no attempt either to identify them or evaluate their claim for international protection and asylum.

The day after the interception, May 7, the Italian Minister of the Interior stated that the action was a consequence of the bilateral agreements with Libya that came into force February 4, 2009, on interception and push-back of migrants on the high seas. He described it as a turning point in the fight against clandestine immigration⁶.

In the case the applicants argue that the action violated Article 3 of the Convention, ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’, as well as Article 4 of Protocol No 4⁷, ‘Collective expulsion of aliens is prohibited’. They also criticize the lack of remedy in relation to Article 13 of the Convention:

“Everyone whose rights and freedoms as set forth in this 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.”

The case shows how crucial it is to be viewed and treated as a person before the law. The negligence of an identification process has proved to be a violation of all human rights, as the lack of this process leads to the denial of personhood and the status of being a human being.

⁶ Case of Hirsi Jamaa and Others v. Italy, pp. 3-4

⁷ Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto - [1963] COETS 4 (16 September 1963)

1.1 Purpose, Problem Statement and Question Formulation

The purpose of this essay has been to explore the case applicants', Italy's, and the European Court of Human Rights' definition of the concept refugee and to what extent their definitions correlate with human rights. I have seen a problem in what actual rights and obligations that derive from the process of defining a refugee.

The execution has entailed a concept analysis of the three parties' definitions of a series of concepts relating to the status of refugees. These concepts are: *asylum*, *non-refoulement*, *jurisdiction* and *territory*, and *safe (third) country*. In addition I have performed a theoretical analysis of the summarized result of the concept analysis. This has assisted me in answering the questions I have posed to my primary material.

I question if the concept refugee is an applicable qualification for attaining the status of human rights bearer and/or if the collective belief of the status of refugee gives someone the function of human rights holder. To answer this question I have asked subsequent questions:

- How do the applicants, the Italian Government, and the European Court of Human Rights define the concepts asylum, non-refoulement, territory and jurisdiction, and safe (third) country?
- What are the differences between the three parties' definitions?
- Do the three parties' definitions result in the appreciation of the applicants as refugees?
- How does the status of refugee correlate to human rights?

1.2 Material

The primary material of this essay is the *case of Hirsi Jamaa and others v. Italy*. The case cites the Somali and Eritrean applicants' (the Applicants) and Italy's (the Government) arguments in relation to the situation described above. In addition, the European Court of Human Rights (the Court) received written observations by third party actors⁸. The case also presents legal documents, such as previous cases, international and European law, Italian domestic law, as well as various conventions and reports. Furthermore, the case

⁸ Case of Hirsi Jamaa and Others v. Italy, p. 2

presents the Court's perspective on the merits and application of laws regarding the claims of violations and results in the Court's verdict, a judgment in favor of the Applicants.

The primary material allowed me to examine the Applicants', the Government's and the Court's definitions of the concept refugee. Furthermore it presented a situation where the definition of the concept refugee is central to the rights of refugees, which gave me the opportunity to analyze what those rights entail in connection to human rights.

I want to emphasize how significant the book *The Refugee in International Law*⁹ has been for my research and understanding regarding the different concepts I have analyzed. The legal definitions presented in *The Refugee in International Law* have helped me to distinguish the parties' perspectives concerning the concepts – and in extension their perception of refugee – and human and refugee rights.

1.3 Restrictions

I have chosen to dismiss previous cases that are mentioned in the case, as not significant to the purpose of this essay. The Court summarizes and evaluates the contributions by third party actors and previous court cases and has used them to assess the Applicants' and the Government's arguments. Therefore I have chosen not to include the arguments of third parties or previous court cases. I have focused on the Applicants', the Government's and the Court's arguments, relating to violations of article 3 and 13 of the Convention and article 4 of Protocol 4, because I believe them to be relevant to the analysis of the three parties' definitions of the different concepts.

Furthermore I have disregarded the document of Italy's reply on the lists of issues raised by the U.N. Human Rights Committee during its 85th session in 2005. The Committee asks Italy for comments on the reports of Italy's interception and expulsion in circumstances precluding the examination of applications for asylum. Italy's reply does not contain any comments on or answers to the questions raised.

In regard to the articles presented in related research I have chosen not to use them, as they focus on the de facto and de jure application of international law and

⁹ Goodwin-Gill, Guy S. & McAdam, Jane, *The refugee in international law*, 3. ed., Oxford University Press, Oxford, 2007

Convention articles. They are therefore not of use, as I approach the material from a theoretical perspective. I will not examine the concept of collective expulsion, as I believe the concepts presented below will suffice for the purpose of this essay.

1.4 Related research

In the article *Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?*¹⁰, Violeta Moreno-Lax examines the legal implications presented in the case. By doing so she highlights the development and the impact the Court's ruling might have on the extraterritorial obligation of states. She points out that the case and ruling should "lead to a radical change in the way migration and border controls have been designed and implemented so far – both at the national and supranational levels"¹¹.

Mariagiulia Giuffr s article *Watered-down Rights on the High Seas: HIRSI JAMAA AND OTHERS V ITALY (2012)*¹² focuses on the "extraterritorial interpretation of the legal notion of 'jurisdiction'"¹³ and "the level of protection owed to refugees intercepted on the high seas and returned to third countries without an assessment of their protection claims"¹⁴. She concludes by pointing out the human rights obligations that arise out of an extraterritorial exertion of authority. The result is that countries are obliged to conduct themselves according to the national human rights standards inside as well as outside their borders when they practice an authoritative control over individuals.

2 Method and Theory

2.1 Method

I have looked at the legal definitions of concepts that I believe are important to refugee status and refugee rights in relation to my primary material. By presenting the legal definitions, with the help of the book *The Refugee in International Law*, I have informed

¹⁰ Moreno-Lax, Violeta, 'Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?', *Human Rights Law Review*, vol. 12, no. 3, 2012, pp. 574-598

¹¹ Moreno-Lax, p. 598

¹² Giuffr , Mariagiulia, 'Watered-down Rights on the High Seas: HIRSI JAMAA AND OTHERS V ITALY (2012)', *International and Comparative Law Quarterly*, vol. 61, no. 3, 2012, pp. 728-750

¹³ Giuffr , p. 731

¹⁴ Giuffr , p. 731

the reader of a legal definition of each concept and laid a base for the examination of the Applicants', the Government's and the Court's definitions of the concepts. By analyzing the three actors' arguments relating to the proposed violations of article 3 and 13 of the Convention and article 4 of Protocol 4, I have been able to summarize and interpret their perception of the concepts in question and in conclusion assess their conception of what it entails to be a refugee.

2.1.1 Goodwin-Gill & McAdam

Guy S. Goodwin-Gill, researcher of public international law including international organizations, human rights, and migrants and refugees, is a practicing barrister and a professor of International Refugee Law at the University of Oxford. Jane McAdam is Scientia Professor of Law at UNSW Australia and focuses the area of international refugee law and human rights in her research. In their book *The Refugee in International Law*¹⁵, they examine the current status of the fundamental principles in international law of non-refoulement, asylum, and the right to seek asylum. Furthermore, the authors analyze the framework of international refugee law by focusing on the core issues: refugee definition, asylum, and protection. I have used the book as a source of information regarding the legal definitions of the different concepts I have examined.

2.1.2 Benhabib and Nyers

After examining the three parties' perceptions of the different concepts, I have summarized the results. The summary has given me an overview of their conceptions of refugee status and what this entails. To answer the questions posed in 1.1, I have compared the theoretical perspectives of Seyla Benhabib and Peter Nyers, presented in 2.2, to examine how they correlate to the parties' definitions of refugee and refugee rights. By doing so, I have been able to see how and if the status of refugee makes a difference in the substantive enjoyment of human rights. Both theorists focus on refugees in a human rights context, allowing me to examine the refugee's position regarding human rights in connection to the court case.

¹⁵ Goodwin-Gill, Guy S. & McAdam, Jane, *The refugee in international law*, 3. ed., Oxford University Press, Oxford, 2007

2.2 Theory

2.2.1 Benhabib

Seyla Benhabib is the Eugene Meyer Professor of Political Science and Philosophy at Yale University. She is known as one of the leading political theorists in the world. In *The Rights of Others: Aliens, Residents and Citizens*¹⁶, Benhabib focuses on political membership, defined by her as the incorporation of different groups of migrants into existing polities.

Benhabib argues for a cosmopolitan theory that includes a perspective of just membership that “entails: recognizing the moral claim of refugees and asylees to first admittance; a regime of porous borders for migrants; an injunction against denationalization and the loss of citizenship rights; and the vindication of the rights of every human being “to have rights”, that is, to be a legal person, entitled to certain inalienable rights, regardless of the status of their political membership.”¹⁷

The moral claim of first admittance is argued for with the support of Kant’s cosmopolitan right theory and his expression “the right of hospitality”. This right is founded on the human right to associate, that humans have “by virtue of their common possession of the surface of the earth”¹⁸. Thus allowing an alien first entry and to temporarily occupy a space within a civic entity, other than his own, and not be refused access by a state if it results in his destruction. This right is today characterized as the principle of non-refoulement in the Geneva Convention on the Status of Refugees.¹⁹

Contra Kant, Benhabib argues for an extension of temporary resident to full membership. She does not challenge the sovereign state’s right to decide under what conditions that membership would be obtained, but stresses the importance of the restrictions that human rights create, such as non-discrimination and immigration rights to due process.²⁰

¹⁶ Benhabib, Seyla, *The rights of others: aliens, residents, and citizens*, Cambridge University Press, Cambridge, 2004

¹⁷ Benhabib, *The rights of others: aliens, residents, and citizens*, p. 3

¹⁸ Benhabib, *The rights of others: aliens, residents, and citizens*, p. 27

¹⁹ Benhabib, *The rights of others: aliens, residents, and citizens*, pp. 27-35

²⁰ Benhabib, *The rights of others: aliens, residents, and citizens*, p. 42

Benhabib proceeds by examining Hanna Arendt's theory on "the right to have rights". She does so by analyzing the phrase. The first use of "right" is "a moral claim to membership and a certain form of treatment compatible with the claim to membership"²¹. The second use of "right" is dependent on that right claim to membership. Benhabib suggests that this second "right" creates a three party relationship where the claim of a person entitled to the rights, generates an obligation on others and a need for an established legal organ, as for example the state and its institutions, that protects and enforces the right claim.²²

"The right to have rights" therefore gives everyone, as an entity of humanity, the right to be a member of civil society, which in turn grants us the ability to be entitled to juridico-civil rights. Now, this right to have rights can only be fulfilled within a political community where we are judged by our actions and not by the fortuitousness of birth.²³

Benhabib states, contrary to Arendt's focus on rights entitlement dependent on national membership, i.e. citizenship, that "The right to have rights today means the recognition of the universal status of personhood of each and every human being independent of their national citizenship."²⁴ This highlights the paradox of the universal human right of seeking asylum, a first step to be included in society, and the right of the sovereign state to grant asylum according to its own conditions.²⁵

Benhabib argues that the human rights of refugees and asylum seekers, even in the most rights progressive states, are limited, as they are viewed as somewhat criminal and lack the civil and political rights of representation and association. She continues by stressing the importance of enhancing the cosmopolitan justice in the world by extending the enjoyment of human rights to the full for refugees and asylum seekers and to decriminalize their status and their worldwide movement. Furthermore, she states that, unfortunately, state interest regulates the right to universal hospitality. Instead of focusing on a person's political status, it is the dignity of moral personhood that should be the foundation for the treatment of these individuals.²⁶

²¹ Benhabib, *The rights of others: aliens, residents, and citizens*, p. 56

²² Benhabib, *The rights of others: aliens, residents, and citizens*, pp. 56-57

²³ Benhabib, *The rights of others: aliens, residents, and citizens*, p. 59

²⁴ Benhabib, *The rights of others: aliens, residents, and citizens*, p. 68

²⁵ Benhabib, *The rights of others: aliens, residents, and citizens*, p. 69

²⁶ Benhabib, *The rights of others: aliens, residents, and citizens*, pp. 168, 177

To exercise personal autonomy, Benhabib states that there must be human rights. One of the fundamental rights of a moral being is the right to justification. This right is significant for the freedom of person, as the restriction of freedom of person must be justified as a restriction that is applicable to all, i.e. universally applicable. This in turn produces a limitation on sovereign states not to create certain criteria for membership that permanently bar people from attaining membership.²⁷

Benhabib concludes by saying that she argues for “subjecting laws governing naturalization to human rights norms”²⁸ and that “those subject to the laws also be their authors”²⁹.

As citizenship, or participation and recognition in a political context, seems to be pivotal for the ability to enjoy human rights, I see a problem in the refugee’s ability to obtain those rights and enjoy them to the fullest. They have lost the ability to partake and be recognized in a political context, but are still subject to the laws of the state they seek refuge in. It is therefore questionable if the status of refugee qualifies a person’s claim to human rights.

2.2.2 Nyers

Peter Nyers is Associate Professor of the Politics of Citizenship and Intercultural Relations at McMaster University. His primary interest and area of research relates to the social movements of non-status refugees and migrants and how their political claims are reforming the norms connected to citizenship and political community.

In his book, *Rethinking Refugees: Beyond states of emergency*³⁰, Nyers points out that UNHCR Convention’s definition of refugees³¹ has had a substantial impact regarding the standardization of states’ determination of the qualifications for legal refugee status and the accompanying protection that derive from it. He argues that the UNHCR Convention’s definition, i.e. a person, fleeing across international borders, that has a well-founded fear of being persecuted, is a dualistic structure that presents a tension

²⁷ Benhabib, *The rights of others: aliens, residents, and citizens*, pp. 133,135

²⁸ Benhabib, *The rights of others: aliens, residents, and citizens*, p. 221

²⁹ Benhabib, *The rights of others: aliens, residents, and citizens*, p. 221

³⁰ Nyers, Peter, *Rethinking refugees: beyond states of emergency*, Routledge, New York, 2006

³¹ Convention and Protocol relating to the Status of Refugees, Resolution 2198 (XXI) adopted by the United Nations General Assembly (1951, 1967)

between the human capacity to reason, which relates to the word well-founded, and the emotion of fear. This, Nyers means, represents the paradox of humanity in the sense that although the concept of humanity is believed to be of a universal character, it works in a restrictive manner. This restriction emerges when the UNHCR Convention defines the refugee on grounds of the human emotion of fear, because humans defined by their fear are also often defined as “social outcasts, lacking full reasoning capacity, and incapable of presenting an autonomous, self-governing form of personal subjectivity”³². This fear and lack of reasoning results in an idea of the refugee as incapable of verbalizing his or her experiences in political terms, thus conjuring the image of the refugee as speechless.³³

Nyers argues that the refugee’s relationship to the political could be described as an “inclusive exclusion”. This means that the refugee is included only on the grounds of being something other than the norm of the sovereign state, which in turn excludes them for not being a part of the “us” but being a part of the “them”.³⁴

This “otherness” paired with “speechlessness” has, historically, established a discourse where refugees have been given an animal quality. This challenges the refugee’s identity concerning the concept of universal humanity and in extension their right to an identity within a political community and the access to political speech.³⁵

Nyers points out that the lack of the political identity of citizenship makes the refugee a part of humanity, but that this humanity is not a full humanity but a thin one that casts the refugee as a speechless and fearful animal. This creates a hierarchy within the concept of humanity where someone can be more or less human depending on his or her ability to be perceived as a politically articulate entity of society.³⁶

I believe that Nyers view of the refugee identity in relation to humanity and the sovereign state calls into question the refugee’s ability to enjoy human rights to the fullest. If the perception of the qualities of and criteria for refugee status is founded on fear and speechlessness, the refugee finds himself or herself outside of politics and is treated as less than human, thus excluding him or her from the enjoyment of all human rights.

³² Nyers, *Rethinking refugees: beyond states of emergency*, pp. 45-46

³³ Nyers, *Rethinking refugees: beyond states of emergency*, pp. 45-46, 60

³⁴ Nyers, *Rethinking refugees: beyond states of emergency*, p. xiii

³⁵ Nyers, *Rethinking refugees: beyond states of emergency*, pp. 73-75

³⁶ Nyers, *Rethinking refugees: beyond states of emergency*, p. 95

3 Analysis of Relevant Concepts

3.1 The Institution of Asylum and Asylum-seekers

3.1.1 Legal Definition by Goodwin-Gill and McAdam

In the introduction of chapter 7, Goodwin-Gill and McAdam, write that asylum is referred to in the Universal Declaration of Human Rights, that the act of giving asylum is urged by the UN General Assembly and that the promise of asylum can be found in states' constitutions and law. They do, however, present a problem, which is that the actual meaning of the word "asylum" is not defined in either of these authorities. The right to asylum implies both the right to a place of refuge, as well as the right to give protection to refugees. This suggests that there exists a right for an individual to seek asylum. It also indicates an existing sovereign right by state to determine, on grounds of its own competence, to exercise its authority over, i.e. give protection to, a foreign national in its own territorial jurisdiction. Thus granting asylum to a person, in need of protection, defined as a refugee. An important note to keep in mind is that the individual's right to seek asylum does not give the right to be granted asylum, but to have the "claim considered on its merits, in combination with the principle of non-refoulement"³⁷. Furthermore it should be stated that the receiving state is free to decide what the grant of asylum concludes, that means what the refugee has the right to enjoy while being under the protection of that state. The conditions could be permanent or temporary residence, or the right to work or not.³⁸

As I have indicated above, the criteria for granting asylum is that the individual is defined as a refugee, thus limiting the application of the concept to people in need of protection from persecution.

3.1.2 The Applicants

The Applicants argue that a formal request for asylum was impossible aboard the ships. There were no attempts by national authority to submit them to any form of examination relating to their identity or need for protection. The interception was not carried out in

³⁷ Goodwin-Gill & McAdam, *The refugee in international law*, p. 368

³⁸ Goodwin-Gill & McAdam, *The refugee in international law*, pp. 355-358

accordance to the law and no examination took place, thus denying them to be recognized by the law. On their arrival to Libya they clearly expressed a wish not to be handed over to the Libyan authority and argue that this was an expression for requesting international protection.³⁹

3.1.3 The Italian Government

The Government argues that the migrants' unwillingness to be handed over to Libyan authority was not an expression for seeking asylum and protection. If they had done so they would have been taken to Italian territory.⁴⁰

3.1.4 The European Court of Human Rights

As to the Italian claim that the migrants had failed to apply for asylum and that their refusal to disembark in Libya did not suffice as a claim for protection, the Court observes that the Applicants, supported by UNCHR and Human Rights Watch witness statements, informed the Italian authorities of their intention to seek protection. The Court contends that the Italian authorities have breached the directives given by Article 4, as the migrants were not subjected to any form of individual examination of identity, situation or need for protection. Furthermore the applicants were not given the opportunity to individually oppose the expulsion to qualified authorities. The military personnel of the Italian ships were not educated interviewers and no interpreters or legal advisers were present during the event. The Applicants were not given information on the destination of the Italian ships and were under the impression that they were to be taken to Italy for asylum assessment. The lack of information consequently deprived the Applicants of the access to effective remedy as well as the opportunity to lodge a complaint with the Italian national court in regard to violations of Article 3 and Article 4 of Protocol 4.⁴¹

3.1.5 Conclusion

According to Goodwin-Gill and McAdam, a state is in its full right to grant or refuse asylum. Exception to this freedom of choice is related to the refoulement of people with a

³⁹ Hirsi Jamaa and Others v. Italy, pp. 29-30, 50-51

⁴⁰ Hirsi Jamaa and Others v. Italy, pp. 30-31

⁴¹ Hirsi Jamaa and Others v. Italy, pp. 50, 52-55

well-founded fear of persecution, a status that is a criterion for the consideration of an asylum grant. Also, as the right to seek asylum is crucial to the concept of asylum, there should exist a correlating duty to receive and evaluate asylum applications, but a problem arises as this responsibility to process any claims of asylum is not clarified or identified in any legal terms or treaties.

The Applicants believe that the state failed to exert its obligation that correlates to the right to seek asylum, as they were not able to present their circumstances, resulting in the denial of that right. In contrast to that, the Government believes that for the duty of the state to be triggered there must be a verbalized and precise expression for seeking asylum. The Court is of the opinion that the lack of examination, information and sufficient means to carry out the duty to receive asylum applications, has resulted in the neglect and denial of the right to seek asylum.

What is under evaluation here is how important the actual verbalization of the need for protection is. Italy tried to circumvent their responsibility to examine the migrants' circumstances by claiming that the migrants never voiced their need, but the neglect resulted in a denial of access to due processes, which in extension lead to the risk of refoulement. The Government's argument could be perceived as not only a violation of the right to seek asylum, but also an expression of discrimination, as any person that does not have the ability to voice their fear and need, be it due to language barriers, psychological impairment, or biological reasons, would not be considered as a rights claimant.

3.2 The Principle of Non-Refoulement

3.2.1 Legal Definition by Goodwin-Gill and McAdam

According to Goodwin-Gill & McAdam, the principle of non-refoulement, in its broad sense, means that a refugee is not to be returned to any country where there is a risk for said refugee to be subjected to persecution or torture.⁴²

They state that the three concepts refugee status, asylum and non-refoulement, are intimately connected, because asylum and non-refoulement are activities of protection

⁴² Goodwin-Gill & McAdam, *The refugee in international law*, p. 201

directed at refugees. If a refugee presents himself or herself at a border or inside a territory of a state, he or she is not entitled to an asylum grant, but is entitled not to be returned, or sent, to a country where there might be a risk of endangerment to life or freedom. States are bound by treaty not to refoul refugees and therefore have the obligation to consider and process asylum application and not refoul before asylum-seekers are determined to be of refugee status. This should solve the problem relating to the lack of law or treaty definitions of the responsibility to process asylum claims. As the principle of non-refoulement relates to refugees, i.e. people in need of protection from persecution, it applies to asylum-seekers and there is therefore no need for a formal recognition of refugee status for the principle to be applicable.⁴³

Exceptions to the principle of non-refoulement are few. The state can justify expulsion by judging an individual as a threat to the state, society or public order. Usually this applies to criminals. Note that the action of refoulement in relation to criminals should be in proportion to the crime committed and the expected punishment by the state of origin. For example the death penalty usually stops refoulement.⁴⁴

It is irrelevant how an asylum-seeker comes within the territory or jurisdiction of a state, legal or not. What is relevant is the result of a state's actions. For example, even if the state has the right to refuse disembarkation or the right to tow boats, carrying refugees, back to sea, the result could be the return of refugees to a place of persecution, in other words it could be an act of refoulement. Furthermore, in the event of a rescue-at-sea operation of a boat carrying refugees, which states are obliged to carry out, the refusal to consider claims to be refugees, would not suffice as a way to circumvent liability for violation of the principle of non-refoulement.⁴⁵

If a state were to ignore the principle it would be an act of denial of refugee status under international law, as the two terms are dependent on each other. Even if the formal criterion for the application of non-refoulement is refugee status, general international law holds that the principle of refuge equals the protection of persons with a well-

⁴³ Goodwin-Gill & McAdam, *The refugee in international law*, pp. 208, 232-234

⁴⁴ Goodwin-Gill & McAdam, *The refugee in international law*, pp. 123, 178, 241, 311-312

⁴⁵ Goodwin-Gill & McAdam, *The refugee in international law*, pp. 272, 284,

founded fear of persecution or at risk of being subjected to relevant harm, thus encompassing people with no formal status of refugee.⁴⁶

3.2.2 The Applicants

The Applicants argue that they were submitted to arbitrary refoulement. They state that the refoulement was a consequence of the lack of opportunity to challenge their return to Libya as they were not informed of the return and were under the impression that they were to be taken to Italy. The Applicants argue that Libya's lack of any form of protection of refugees exposed them to the risk of being returned to their country of origin that they had fled from for fear of human rights violations.⁴⁷

3.2.3 The Italian Government

The Government states that Libya's ratification of different international human rights instruments and the fact that Libya allowed the establishment of a UNHCR office act as a guarantee for non-arbitrary expulsion of anyone entitled to the status of refugee and asylum. Furthermore, the Government is of the opinion that the bilateral agreement with the added provision, posed on Libya by Italy, of compliance with the UN Charter, further insured the safety of the migrants.⁴⁸

3.3.4 The European Court of Human Rights

The Court states that the state executing the return of migrants has the obligation to guarantee that the intermediary country can ensure that no person will be returned to his or her country of origin without undergoing exhaustive assessment of the risks that the return would entail. This is particularly important when the intermediary country is not committed to the UNHCR Convention. Libya has not ratified the UNHCR Convention and has no domestic laws or system regarding asylum and refugee protection. The failure of state authority to recognize the refugee status granted by the UNCHR office proves that the Applicants' fear of repatriation was real and well-founded. Information given by UNCHR and Human Rights Watch, confirms the insecurity and risk of being exposed to

⁴⁶ Goodwin-Gill & McAdam, *The refugee in international law*, pp. 49-50

⁴⁷ Hirsi Jamaa and Others v. Italy, pp. 29-30, 39

⁴⁸ Hirsi Jamaa and Others v. Italy, pp. 30-31

ill-treatment due to arbitrary repatriation. Italy is bound by the Convention to comply with the obligations affirmed by Article 3, despite its claim that the migrants failed to ask for asylum and describe the risk of being returned to Libya.⁴⁹

3.2.5 Conclusion

Goodwin-Gill and McAdam are of the opinion that the principle of non-refoulement is a guarantee for asylum seekers and refugees, independent of formal recognition, to have access to due process regarding the determination of refugee status. During that time they are under the protection of the receiving country and cannot be sent back to their country of origin if there is a risk of ill-treatment.

In regard to the case, the Applicants believe that the denial of the right to seek asylum and have that request examined, put them at risk of being returned to a country that could send them back to the place that they were fleeing and seeking refuge from. Contrary to the Applicants, the Government believes that Libya had the means to carry out the duty of receiving and evaluating asylum requests. The risk of refoulement did not exist because of Libya's ratifications and promise to Italy that arose with the signing of the bilateral agreement, thus relieving Italy of any obligation relating to the principle of non-refoulement. The Court has, on the other hand, come to the conclusion that the obligation to the principle of non-refoulement lies with the country that is bound by the Convention, whether that implies direct duty to an individual on the state's territory or an extended duty to ensure the protection and safety of migrants being returned to the intermediary country.

What is under discussion here is the safety status of the transit country as well as the receiving country's extended responsibility regarding asylum processes and protection against refoulement. What is important to remember is that the ratification of different human rights instruments is not sufficient to secure the rights of refugees. It is crucial to examine a country's asylum and refugee protection practices, as this will reveal the factual reality regarding the risk of refoulement. At the time of the interception of the migrant boats, Libya had no asylum system and it was widely known that refugees were at great risk of refoulement. Therefore Italy could not circumvent its responsibility as a

⁴⁹ Hirsi Jamaa and Others v. Italy, pp. 40-42

receiving state, because the return to Libya could equal the refoulement of the migrants. That means that real practice trumps any signatory act in the evaluation of refoulement risk and safe third country utilization.

3.3 Jurisdiction and Territory

3.3.1 Legal Definition by Goodwin-Gill & McAdam

The duty, by states, to protect a person fulfilling the criterion for refugee status, no matter the formal determination of that status, arrives as soon as that person presents himself or herself within a state's territory or jurisdiction.

According to Goodwin-Gill and McAdam, a state's obligation under international law extends beyond physical jurisdiction. The obligation of states under the Convention extends to include everyone under states' actual authority and responsibility. This applies even if that authority is exercised outside of the states' territories. This means that a state has the responsibility to ensure all persons human rights within its jurisdiction or under its authority. In relation to the right to have a claim for asylum examined, the combined implementation of the right to leave a country, the right to seek and enjoy asylum, and the non-refoulement principle oblige states to give "asylum seekers access to an asylum determination procedure"^{50, 51}.

3.3.2 The Applicants

The Applicants argue that they were put under Italian jurisdiction when they were transferred onto the Italian ships. They had been under the exclusive control of the Italian authorities, thus generating Italy's obligations in relation to the rights and freedoms defined in the Convention and Protocols. They call attention to Article 4 of the Italian Navigation Code that declares that Italian jurisdiction is extended outside of state territory if a ship is flying the country flag. As above, concerning the concept of asylum, the Applicants argue that the interception was not carried out in accordance to the law. They were not submitted to an examination by national authority, hence denying them to be recognized by the law. Consequently, they were not able to lodge an appeal with the

⁵⁰ Goodwin-Gill & McAdam, *The refugee in international law*, p. 387

⁵¹ Goodwin-Gill & McAdam, *The refugee in international law*, pp. 385-387

national court. The fact that the interception took place on a ship made it impossible for the applicants to be subjected to the legal procedurals provided by Italy upon a possible request for asylum. The Applicants also point to a state's obligation, issued by the Convention, "to guarantee the right to effective remedy before a national court to any person falling within its jurisdiction"^{52, 53}.

3.3.3 The Italian Government

The Government argues that although the Applicants were transferred to the Italian military ships, Italian authorities have not had "absolute and exclusive control" as the interception was carried out as a rescue operation on the high seas. The rescue of persons in distress on the high seas is an obligation established by international law, in compliance with Montego Bay Convention and Search and Rescue (SAR), and the obligation to rescue did not extend Italy's jurisdictional obligation and power. The Government points out the encouragement from the European Union (EU) for cooperation between Mediterranean countries with the purpose to control and fight clandestine migration. Therefore the interception and return of migrants to Libya was an expression for the bilateral agreement and a cooperation of states, condoned by EU. As the event took place on ships it was impossible for the Italian authorities to ensure access to a national court. The Government is of the opinion that the Applicants should have applied to the national courts, which "would have enabled any responsibility on the part of the military personnel who had rescued the applicants to be established both under national and international law". Furthermore the Applicants that had obtained refugee status were free to enter Italy and exercise their right to lodge an application with the Italian judiciary.⁵⁴

3.3.4 The European Court of Human Rights

The Court states that all acts of control over an individual on a vessel flying a state's flag is, according to the law of the sea, control exercised within the jurisdiction of that state. The principle of extra-territorial jurisdiction is pronounced in Article 4 of the Italian

⁵² Hirsi Jamaa and Others v. Italy, p. 51

⁵³ Hirsi Jamaa and Others v. Italy, pp. 25, 50-51

⁵⁴ Hirsi Jamaa and Others v. Italy, pp. 24, 30-31, 51

Navigation Code. Italy cannot evade the obligations that arise when migrants enter its territory by claiming the intervention was an act of rescue. During the return to Libya, the migrants were subject to the "exclusive de jure and de facto control of the Italian authorities"⁵⁵. The Court believes that the difficulties that have arisen with the increase of migration by sea do not absolve states' obligations in regard to Article 3 of the Convention. Italy, bound by the Convention, cannot evade this by relying on the subsequent bilateral agreement with Libya. The Court states that a state executing the return of migrants has the obligation to guarantee that the intermediary country can ensure that no person will be returned to its country of origin without undergoing exhaustive assessment of the risks that return would entail. This is particularly important when the intermediary country is not committed to the Convention. Libya has not ratified the UNHCR Convention and has no domestic laws or system regarding asylum and refugee protection. The failure of state authorities to recognize the refugee status granted by the UNCHR office proves that the applicants' fear of repatriation was real and well-founded. Information given by UNCHR and Human Rights Watch, confirms the insecurity and risk of being exposed to ill-treatment due to arbitrary repatriation. The Government is bound by the Convention to comply with the obligations affirmed by Article 3, despite its claim that the migrants failed to ask for asylum and describe the risk of being returned to Libya.⁵⁶

3.3.5 Conclusion

The legal definition implies that a state exercising its authority outside of its physical territory, i.e. state border, is exercising extra-territorial control. Thus generating that state's responsibility and obligations in relation to asylum processes and human rights protection.

The Applicants' view of a state's jurisdiction is that it is not only applicable within a state's territorial borders. It also applies when a state exercises its authority, resulting in an expansion of the jurisdictional territory. This means that Italy's obligations as a Convention state were at the time in effect. The Government's opinion, contrary to the Applicants', is that the interception and return of the migrants were carried out as a

⁵⁵ Hirsi Jamaa and Others v. Italy, p. 28

⁵⁶ Hirsi Jamaa and Others v. Italy, pp. 28, 33-39, 40-42

rescue in compliance with international law. The act was performed in accordance with the bilateral agreement with Libya, an agreement that embodies EU's wish for Mediterranean states' cooperation in the fight against clandestine migration. With this said, the Government believes that the interception, at no point, provoked the obligations of a state in relation to state jurisdiction, as the action took place outside Italian territory and the Italian authorities did not exercise absolute control over the migrants. The Court believes that Italy, both de facto and de jure, exercised control over the migrants as they were transferred to the Italian ships and returned to Libya. The rescue perspective and influx in migration does not absolve Italy from any obligation that arises within the scope of Italian jurisdiction. The conclusion is that the migrants were under Italian jurisdiction. Italy had a duty not only to ensure access to asylum processes, but also to guarantee the migrants' safety and prevent any risk of refoulement. Italy failed to do so when returning the migrants to a country with a non-existing asylum system, known for its arbitrary repatriation of migrants of determined and undetermined refugee status.

The discussion is once again focused on the principle of non-refoulement, safe (third) country, and asylum processes, but the major focus is on the territorial and jurisdictional scope of state authority. The Government's attempt to circumvent state obligation, triggered by authority exertion, gives rise to the question of sovereign power versus individual rights. The sovereign power of a state to exercise authority within its jurisdiction creates a duty to protect and ensure the rights of its subjects. The duty/right correlation that arises from the exercise of authority should come in to effect regardless of factual territorial borders, as the exercise of authority acts as a subjection of the individual to state jurisdiction.

3.4 Safe (Third) Country

3.4.1 Legal Definition by Goodwin-Gill and McAdam

A key principal of the UNHCR's protection policy is the principle of access to a fair and efficient procedure in determining the grant of asylum. Goodwin-Gill and McAdam conclude that the return of refugees to a country without a functional asylum system therefore equals refoulement. For a state to be able to justify the return of refugees to the country of origin or a transit country, i.e. a country that refugees have passed through on

their way to the receiving state, the state of return must fulfill four fundamental requirements to be seen as a safe country:

- it must ensure that there is no risk to the life and freedom of the asylum applicants,
- the applicants must have been granted protection,
- there must exist a promise of no form of torture, and
- an effective protection from refoulement.

Goodwin-Gill and McAdam argue that the ratification of different human rights and refugee instruments does not prove a third country as safe, and that it is crucial to examine what the state's actual practice is.⁵⁷

3.4.2 The Applicants

The conditions in Libya, regarding inhuman and degrading treatment of refugees, should have been clear to the Italian authorities at the time Italy entered the bilateral agreement with Libya. These conditions were validated by the migrants' testimonies on their release from detention. Furthermore, the Applicants point out that Libyan authorities did not recognize the refugee status granted by the UNHCR office in Tripoli and that this, in addition to Libya's lack of protection for refugees, exposed them to the danger of being refouled to the country they were fleeing for fear of ill-treatment.⁵⁸

3.4.3 The Italian Government

The Government states that the Applicants have not proved that they were subjected to inhuman and degrading treatment during detention in Libya, thus nullifying their claim to be "victims". The fact that most of the migrants eventually were granted refugee status by the UNHCR office in Tripoli, proves Libya's commitment to comply with its obligations generated by the Libyan membership of IOM and ratification of ICCPR, UNCAT, and the African Union Refugee Convention. The Libyan consent to abide by the UN Charter and UNHCR by signing the Friendship Treaty of 2008 (bilateral agreement) proves that

⁵⁷ Goodwin-Gill & McAdam, *The refugee in international law*, pp. 390-396

⁵⁸ Hirsi Jamaa and Others v. Italy, pp. 29-30, 39

Libya at the time of the intervention was to be perceived as a safe country.⁵⁹

3.4.4 The European Court of Human Rights

The Court is of the opinion that at the time of the interception it was well-known that Libya had no laws ensuring the protection of migrants and refugees. Libya lacks an asylum system and has not ratified the UNHCR Convention. The migrants that were granted refugee status by the UNHCR office in Tripoli were not recognized by the Libyan authorities and were subjected to ill-treatment and inhuman conditions in detention and risked being returned to their country of origin. The Court states that sufficient proof has been shown in regard to the Applicants' real risk of being subjected to treatment that is not synonymous to the principle of Article 3 by being returned to Libya.⁶⁰

3.4.5 Conclusion

Goodwin-Gill's and McAdam's definition of a safe country is a country that has a working asylum system, practices refugee protection where there is no risk for ill-treatment, and in no way violates the principle of non-refoulement.

The Applicants are of the opinion that the lack of refugee protection and recognition of refugee status puts migrants at risk for refoulement and that Libya is not to be perceived as a safe country. The Government's view of a safe country is a country that has ratified different human rights instruments and that has allowed the UNHCR to establish an office where migrants can apply for asylum and be granted refugee status. In the Government's opinion, there seems to be no state obligation relating to the investigation as to the de facto circumstances in the intermediary country. The result is that the only prerequisite for a safe country is what is officially stated. The Court believes that Libya's lack of laws regarding refugee protection and the denial of the recognition of refugee status results in the risk of migrants being subjected to inhuman and degrading treatment, as well as putting them in danger of refoulement. The actual situation in the intermediate country is of vital importance. Consequently the Court's perception of Libya does not correspond with the perception of a safe country.

⁵⁹ Hirsi Jamaa and Others v. Italy, pp. 30-31, 39-40

⁶⁰ Hirsi Jamaa and Others v. Italy, pp. 33-39, 40-42

The relevant risk of refoulement in relation to the evaluation of the safety status of a safe (third) country is once again the focal point of the discussion. The status of “safe” is dependent on a reliable asylum system and the de facto protection practices regarding migrants and refugees.

4 Analysis of Refugee Status and Rights

4.1 Refugee status

4.1.1 Legal Definition by Goodwin-Gill and McAdam

According to Goodwin-Gill and McAdam, the term refugee is a term of art, i.e. a term with a specific use or meaning relating to a certain field; in this case general international law. They point out the conceptual limitation that states have insisted on drawing for the purpose of international law, which restricts the usage of the word, and the obligations and responsibilities of states in terms of protection. However, they observe that the general usage of the word is broader. Refugee implies a person fleeing from insufferable conditions, seeking refuge. The conditions that the refugee is trying to escape can be many, for example oppression, persecution, poverty, war, natural disaster etc., but the common belief is that, regardless of the grounds for flight, the meaning of the word refugee entails the right or worth of the person in question to be assisted and protected from the causes for flight. Now, this is where the general definition differs from the definition in regard to international law. The cause and reason for flight is used as a separator in determining refugee status and is a way to distinguish refugees from ordinary aliens. Socio-economic refugees are excluded in terms of state responsibility and asylum, as the support has more to do with international aid and development.⁶¹ This restriction conjures an image of refugees, in connection to international law and treaties, as a group in need of aid and protection outside its own country of origin and which is no longer under the protection of that country. The definition of refugees is reduced to persons that have crossed an international frontier, who can be determined to have a well-founded fear

⁶¹ Goodwin-Gill & McAdam, *The refugee in international law*, p. 15

of persecution on specific grounds, i.e. no longer under the protection of the state of origin because of persecution or fear of persecution relating to reasons based on “race, religion, nationality, membership of a particular social group, or political opinion”.⁶²

Important to remember is that Goodwin-Gill and McAdam state that the three concepts of refugee status, asylum and non-refoulement, are intimately connected. This is because asylum and non-refoulement are activities of protection directed at refugees.

4.1.2 The Applicants

By producing a summary of the collected information and arguments presented by the Applicants, I will show if and how the Applicants, from their perspective, fulfill the criteria for refugee status and rights in Italy. Furthermore I will challenge the universality of human rights in relation to refugee rights by examining the Applicants’ situation from the perspectives of Benhabib and Nyers.

According to the legal definition presented above, the Applicants have shown that they fulfill the criteria regarding flight for fear of persecution and ill-treatment in relation to both their country of origin and Libya. They have crossed several international borders and situated themselves outside of their country of origin and presented themselves as asylum seekers, in need of protection and refuge, within the territory and jurisdiction of the Italian state. Furthermore they have proven that the lack of procedures for identification has led to the denial of them being seen as persons recognized by the law, which in turn has made it impossible for them to voice their objection for return and right to access to legal remedy in front of a national court. In addition they have proven that Libya does not fulfill the criteria for safe country status and by doing so shown that they were at risk of refoulement by being returned.

In accordance with Benhabib’s theoretical approach, the Applicants have, by leaving their country of origin, made use of the right to leave their state of origin, and by presenting themselves at an international border, as asylum seekers, they have made claims to the right to associate. This, in turn has generated the Italian state’s obligation, to offer entry, an obligation that correlates with the right of hospitality. This right allows the Applicants to occupy a part of the surface of the earth, as this surface is a possession

⁶² Goodwin-Gill & McAdam, *The refugee in international law*, p. 37

common to all human beings, and not to be refused to do so as it would result in their “destruction”. The Italian denial of the right to be seen as persons before the law, has not only violated the Applicants’ right to due process, in other words, access to an asylum process and a national court, but it has also stripped them of “the right to have rights”. Benhabib states that “the right to have rights” gives everyone, as an entity of humanity, the right to be a member of society, generating the entitlement to juridico-civil rights. If we put this in reverse the loss of legal personhood, that is the loss of juridico-civil rights, means the loss of societal membership, thus resulting in the denial of being perceived as an entity of humanity. In conclusion the Applicants loss of legal personhood signifies the loss of humanity and the ability to enjoy all human rights.

In Nyers’ opinion this would not be the loss of humanity but rather a diluted version of humanity. He argues that the status of refugee in itself is a lower form of humanhood, as the perception of a refugee is a person in a state of limbo, a state of “inclusive exclusion”. The lack of identification would further exacerbate the Applicants’ situation. They are part of a hierarchical humanity, where the fear of persecution and lack of access to political identity render the Applicants voiceless, a characteristic feature of animality, thus refusing them the status of “pure” humanhood and in extension excluding them from the full enjoyment of human rights.

4.1.3 The Italian Government

The Government’s arguments will show if and how the applicants fulfill the criteria for refugee status in Italy and in extension if it generates governmental obligations. Furthermore I will show how the Government tries to circumvent state obligation by transferring the responsibility on Libya.

The Government argues that it has practiced minimal control over the migrants. Thus, the territorial state duty to grant protection and access to asylum processes to asylum seekers within state jurisdiction was not evoked. The bilateral agreement with Libya gives Italy the right to return migrants without identifying the migrants or investigate their situation and need for protection, as Libya is perceived as a safe country. Furthermore, the Applicants did not voice their need for protection during the return to Libya and their unwillingness to disembark in Tripoli was not an expression for seeking

asylum. As previously mentioned the Government states that the Applicants have failed to prove inhuman and degrading treatment during detention in Libya, thus nullifying their claim to be "victims".

According to the Government's belief, the aggregation of the application of the third (safe) country term and dismissal of territorial and jurisdictional responsibility, as well as the lack of pronounced protection claim and victimhood by the migrants, invalidate the Applicants' claim to refugee status and rights. With Benhabib's theory in mind, Italy's refusal of first admittance and temporary stay is therefore not a violation of the right to hospitality, because of Libya's safe country status. The return of the migrants does not result in the "destruction" of persons and the Government is of the opinion that Libya is able to give the migrants access to the appropriate processes needed for attaining refugee status and refuge.

Italy's bilateral agreement with Libya is perceived, by Italy, as an active instrument used to fight clandestine migration. This shows Italy's view of migrants, approaching the Italian border by boat, as criminals. Italy's criminalization of migration offers a justification for the interception of migrant boats and the return of migrants to Libya. In addition to the criminalization perspective the Government claims that the interception was a rescue mission, which, in the Government's opinion reduces the issue of authority control and the correlating duty that comes from that act. The idea of the migrants as subject to rescue and the return policy to Libya, exonerates Italy from the obligation to identify the migrants and evaluate their individual need for protection.

As mentioned above, the second part of "the right to have rights" creates a three party relationship. But if the person doing the claiming is perceived as not being entitled to the rights he or she is claiming, the obligation of others is not generated. Furthermore there is no need for a legal institution that protects and enforces the right claim. In the Government's opinion, the migrants are not entitled to asylum rights in Italy, therefore Italy has no obligation to give access to a legal forum that can handle the right claim. Important to remember here is the Government's view of Libya as a state with an adequate protection system for handling asylum seekers and refugees. The result is a transfer of state obligation from Italy onto Libya. The lack of identification would

therefore not strip the migrants of national and political legitimacy, and in extension their status as legal persons, but rather define them as legal persons within a Libyan context.

According to Oxford Dictionaries online, a victim is defined as “a person who has come to feel helpless and passive in the face of misfortune or ill-treatment”⁶³. The helpless and passive nature of a victim could be interpreted as an expression for speechlessness. According to Nyers, speechlessness is a quality imposed on the term refugee, giving the refugee an animalistic attribute. This attribute conveys a view of refugees as less than human, giving them a lower position in a hierarchical humanity. The Government argues that the Applicants have not proven their victimhood, which indicates that the belief is that the Applicants do not have a well-founded fear of persecution or ill-treatment. By doing so, the Government has denied the Applicants not only the status of victim, but also the “label” refugee. The complexity of the Government’s view of the Applicants reaches new heights when taking into account the Government’s argument regarding the migrants’ failure to verbalize their need for protection. On one hand, the Government denies that the Applicants have a viable claim to victimhood, a term founded on characteristics such as helplessness and passiveness. On the other hand, the Government denies the migrants the access to refugee rights by arguing that the migrants did not actively voice their intention to seek asylum. The conclusion is that the Applicants are neither victims, refugees, nor political entities but rather having an animalistic quality, i.e. lacking humanhood.

4.1.4 The European Court of Human Rights

The Court believes that the Applicants have a sufficient claim to refugee status and rights in Italy. Italy exercised de facto and de jure control over the migrants during the interception and return to Libya. Consequently, the migrants were subject to Italian jurisdiction, extending Italy’s territorial scope and generating the obligation of receiving states.

Libya’s factual practices and lack of asylum system show that the migrants were at risk of being subjected to both ill-treatment and the risk of refoulement, upon the

⁶³ Oxford Dictionaries online, definition of victimhood, retrieved 25 May 2013, http://oxforddictionaries.com/definition/english/victim?q=victimhood#victim__10

return, thus evoking the responsibility of Italy as a Convention state. The Government's argument to disregard the migrants right to appropriate asylum processes, because of the bilateral agreement with Libya, the influx in migration and the rescue perspective, is therefore not viable. Furthermore, the Court argues that the migrants did in fact voice their intention to seek asylum, but that the lack of examination, information and sufficient means, further enhanced the migrants inability to claim that right.

As shown above, the Court is in agreement with the Applicants, resulting in a court ruling in favor of Hirsi Jaama and others. Consequently, the theoretical approach corresponds with that of the Applicants.

5 Conclusion

This essay's purpose has been to examine the Applicants', the Government's, and the Court's definition of *refugee* and how and if their definitions correlate with human rights. The main question I have posed to my material is if the concept refugee is an applicable qualification for attaining the status of human rights bearer and/or if the collective belief of the status of refugee gives someone the function of human rights holder.

I have examined the three actors' definitions of four different concepts: the institution of asylum, the principle of non-refoulement, territory and jurisdiction, and safe (third) country. In a general sense, the concepts are all important components regarding the definition of refugee status and refugee rights. The institution of asylum gives the refugee, regardless of status, the right to seek refuge and protection when he or she has lost the protection of his or her country of origin. It also generates a state duty to receive and examine asylum applications. The principle of non-refoulement, gives the refugee the right not to be returned if there is a risk of ill-treatment and destruction of person and a state duty not to refoul. Territory and jurisdiction presents what obligations states have in regard to asylum applications, non-refoulement, and refugee protection and gives the refugee the right to be seen as a person before the law. The term safe (third) country works as a tool for states, as it gives the state the ability to decide who has the right to refuge within state borders, without accepting asylum applications, because it can refuse asylum application and return refugees to transit countries if those countries are deemed

as safe. The term also works as a safety net for refugees in certain situations, as the return to a safe country must be defined as a return to a country where the refugee will be protected from refoulement, as well as given access to due process regarding asylum application and protection.

The analysis of relevant concepts has shown the three parties' definitions regarding the different concepts and how those definitions differ from each other. The understanding of the perceived violations put forth by the interception and return of the migrants divides the parties into two camps. The Applicants and the Court believe that the lack of adequate asylum processes, the neglect of individual identification and the assessment of the migrants need for protection violate the right to seek asylum. The Government is of the opinion that the migrants failed to voice their intention to seek asylum, thus absolving Italy from any duty to provide access to asylum processes. The denial of the right to seek asylum put the Applicants at risk of ill-treatment and refoulement, a belief shared by both Court and Applicants, as their perception of Libya do not correlate with the perception of a safe (third) country. Libya does not have an asylum system and is known to disregard the official status of refugee, which has resulted in arbitrary refoulement of refugees and asylum seekers. The Government, on the other hand, views Libya as a safe country on the grounds of Libya's ratification of different human rights instruments and the establishment of a UNHCR office in Tripoli. The territorial and jurisdictional scope of state obligation is dependent on the actual exertion of state authority and control. The Government argues that as the interception took place outside of Italian territory and that the Italian authorities practiced minimal control over the migrants, consequently absolving Italy of any jurisdictional duty. Further, the Government claims that the interception was a rescue operation and not an act of state authority. The Applicants view the interception, along with the transfer of the migrants to Italian military boats, and the return to Libya as an action that placed the migrants within Italian territory and jurisdiction. As proof they quoted Italian national law that states that vessels flying the Italian flag is Italian territory. The Court agrees with the Applicants and points out that the exertion of authority triggered Italy's duty to ensure access to asylum processes in Italy.

The summarized result of the parties' definitions of the different concepts shows their view of the Applicants right to seek asylum within Italian territory, and the assessed risk of refoulement and ill-treatment, founded on the safety status of Libya. Furthermore, it presents the parties assessment of the Applicants' refugee status. Consequently, the Applicants and the Court believe that the Applicants have the right to refugee status in Italy, whilst the Government transfers the responsibility of the state, in regard to asylum and refugee rights, on to Libya, denying the Applicants the status of refugee in Italy.

In accordance with Benhabib's theories that I present in 2.2.1, I have shown, from the Applicants' and the Court's viewpoint, that the Applicants have claimed the right of association, thus generating the receiving state's obligation to ensure the right to first admittance and hospitality, if the violation of this right could amount to the destruction of persons. The right of hospitality is founded on the idea that the earth's surface is a common possession to all human beings. Therefore it is every human beings right to temporarily occupy a part of that surface. Furthermore, "the right to have rights" should ensure everyone as a part of humanity, the right to societal membership, which would generate the entitlement to juridico-civil rights. By not identifying the Applicants' and their need for protection, Italy denied them the status of legal personhood, and in extension their humanity, resulting in a repudiation of their enjoyment of human rights. This loss of humanity is not of importance, according to the theories of Nyers. The image of refugees is a passive, voiceless image, more in resemblance of animals than human beings. This animality simply produces a more diluted version of humanity, creating a hierarchical humanity where refugees are excluded from the full enjoyment of human rights. The lack of identification therefore only exacerbated the Applicants' situation. As to the Government's opinion, the lack of identification is irrelevant because the transfer of state obligation onto Libya, viewed as a safe (third) country, absolves the Italian state from any responsibility generated by the act of seeking asylum. The Applicants' failure to voice their need for protection and lack of proof for the claiming victimhood, invalidates the Applicants' claim to refugee status in Italy. This linking of two contradictory expressions, one demanding a verbalization, the other producing an image of speechlessness, renders the Applicants neither refugees, victims or political entities.

Consequently, the rights of refugees offer a certain amount of protection and the access to some rights. But if the perception of refugees and their rights are to remain within a rigid framework, and the denial of their societal and political membership, as well as the deprivation of their humanhood, continues, “the right to have rights”, as a right of all humans, will be unattainable for them.

References

Benhabib, Seyla, *The rights of others: aliens, residents, and citizens*, Cambridge University Press, Cambridge, 2004

Case of Hirsi Jamaa and Others v. Italy (Application no. [27765/09](#))

Convention and Protocol relating to the Status of Refugees, Resolution 2198 (XXI) adopted by the United Nations General Assembly (1951, 1967)

Convention for the Protection of Human Rights and Fundamental Freedoms - [1950] COETS 1 (4 November 1950)

Giuffré, Mariagiulia, *Watered-down Rights on the High Seas: HIRSI JAMAA AND OTHERS V ITALY (2012)*, *International and Comparative Law Quarterly*, vol. 61, no. 3, 2012, pp. 728-750

Moreno-Lax, Violeta, *Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?*, *Human Rights Law Review*, vol. 12, no. 3, 2012, pp. 574-598

Nyers, Peter, *Rethinking refugees: beyond states of emergency*, Routledge, New York, 2006

Oxford Dictionaries, definition of victimhood, retrieved 25 May 2013, http://oxforddictionaries.com/definition/english/victim?q=victimhood#victim_10

Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto - [1963] COETS 4 (16 September 1963)