



Right to life and States' extra-territorial jurisdiction over a vessel in distress: Is the UNHRC decision a step towards the emergence of a new "right to be rescued at sea"?

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1. Introduction.- In a recent ruling, the United Nations Human Rights Committee found a State party liable of violating its human rights obligations, in the context of an extra-territorial rescue operation of a vessel in distress, by applying the concept of jurisdiction as a threshold criteria¹. This decision might lead to future extensive interpretation of the concept of extra-territorial jurisdiction in analogous cases concerning violations of human rights of maritime migrants.

As the Committee set out, the case had a complex nature. The most controversial issue that was debated concerned the admissibility of the communication, under Article 1 of the Optional Protocol. A State party can only be liable for the violation of human rights obligations stemming from the International Covenant on Civil and Political Rights (ICCPR) if those violations occurred within its territory or under its jurisdiction. When referring to facts taking place in international waters, it was crucial to establish whether or not those facts occurred while the alleged victims were under the State party's jurisdiction.

In the specific circumstances of this case, the Committee found that there were factual and legal elements leading to the conclusion that a "special relationship of dependency"² had effectively been established between the individuals on the vessel in distress and the State party's authorities, therefore declaring the communication admissible.

2. The case.- The petitioners were a Palestinian national and three Syrian nationals, who lodged a claim on their own and on behalf of 13 of their relatives, who all died in the shipwreck happened on the 11 October 2013. The vessel sank 113 km South of Lampedusa and 218 km from Malta. An estimate of 200 people lost their life on that occasion, and around 60 children among them.

The authors of the communication claimed that the Italian authorities failed to assist the authors' relatives, by not taking prompt and effective measures to safeguard their lives from a foreseeable risk and by refusing to cooperate with Maltese authorities, although requested by the latter several times, not commanding the nearest Italian navy ship ITS *Libra* to take charge of the rescue operation until the vessel capsized. Such a delay had no explanation and, the authors claim, led to the evitable loss of many lives of

¹ N. Madjidian, "Mediterranean Responsibilities: Extra-territorial jurisdiction of coastal States in the context of maritime migration", in *VerfBlog*, 2021/1/29, <https://verfassungsblog.de/mediterranean-responsibilities/>.

² See *A.S., D.I., O.I. and G.D. v Italy*, CCPR/C/128/D/3042/2017, para. 7.8.

those on board of the vessel in distress. Furthermore, the State party failed to undertake a prompt and effective investigation into the facts.

The authors claimed that Italian authorities had a duty to render immediate assistance to those in distress at sea, conforming to international laws, and in particular under Article 98 of the United Nations Convention on the Law of the Sea (UNCLOS)³. However, the State party failed to take all necessary steps to safeguard their relatives' lives, by not informing Maltese authorities neither of the exact location of the vessel in distress nor of the location of the nearest ship (ITS Libra), by initially failing to inform the individuals on the vessels that they had to contact the Maltese authorities and finally by failing to send, despite requested by Maltese authorities, ITS Libra to rescue the vessel in distress. Being the vessel in immediate danger, the authors' argued, the Italian authorities had to take immediate action to rescue the vessel, and then conferring with the Maltese authorities in order to designate a responsible Centre.

The authors pointed out that although the shipwreck happened in the Maltese Search and Rescue area, Italian authorities had *de facto* control over that area. The authors claimed the vessel could be considered under both Maltese and Italian jurisdiction and that Italian authorities had an obligation to provide emergency services, based on the following considerations: both States are part of the 1979 SAR Convention⁴, and while the vessel was in the Maltese SAR zone, the Italian authorities had *de facto* control of the area; both State Parties were in contact with the vessel and activated rescue procedures. For this reason, the authors note, the Italian negligence had a direct impact on the fate of people on board. The authors also note that it had already been argued that a jurisdictional link might stem from the relationship established between a person sending a distress call and the state which receives it, as pointed out in the case of *Furdik v Slovakia*⁵. In the aftermath of the tragedy, the Italian State failed to undertake an official, independent and effective investigation, in order to establish the responsibilities of the human lives' loss in the shipwreck.

The Italian authorities objected to the admissibility of the complaint submitted to the Committee, arguing individuals on board did not fall under a strict interpretation of its jurisdiction. The incident took place outside Italian territory and outside its SAR area, and Malta was the sole State having jurisdiction over the persons on the vessel. The State party's observations underscored the fact that "Italian authorities organize rescue interventions, in an autonomous and non-obligatory manner, in the Maltese area", even though concluding that this does not imply Italian authorities have any responsibility over that area⁶.

³ "Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew of the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, in informed of their need of assistance, in so far as such action may reasonably be expected of him (...)" .

⁴ Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97.

⁵ *Furdik v Slovakia (Admissibility decision)*, App. No. 42994/05, European Court of Human Rights (ECtHR), 2 December 2008.

⁶ See *A.S., D.I., O.I. and G.D. v Italy*, CCPR/C/128/D/3042/2017, para. 4.5.

These acts and omissions, the authors said allegedly, led to a violation of Article 6(1) of the Covenant (right to life), both alone and in conjunction with Article 2(3), and of Article 7 (inhuman and degrading treatment), read in conjunction with Article 2(3) of the Covenant.

The Committee is competent to receive communications only from individuals subject to the jurisdiction of a State party, under Article 1 of the Optional Protocol. In order to decide on the admissibility of the claim, it was crucial to establish whether the shipwreck's victims were subject to Italian jurisdiction. The Committee chose to apply an extensive interpretation of the concept of extra-territorial jurisdiction. General comment No. 31 (2004) provides that the legal obligations of the State parties to respect the rights of the Covenants apply to all persons within their territory or subject to their jurisdiction, when the State Party has "power and effective control" over those individuals. Moreover, General comment No. 36 (2019) recognised that State parties have an obligation to respect the right of all persons "over whose enjoyment of the right to life it exercises power or effective control" including "persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner", or persons in a situation of distress at sea, coherently with its international obligations on rescue at sea.

The State party had a duty to immediately proceed with the rescue operations and to cooperate with other States in SAR activities according to the conventions regulating the law of the sea and rescue operations. The Committee, in a crucial passage of its decision, found that in the specific circumstances of the case, a special relationship of dependency was established between Italian authorities and the people on the vessels⁷, based both on the factual elements (initial and continuous contact, ITS Libra proximity) and legal obligations stemming from international law of the sea, and that this relationship implied that Italy had jurisdiction over the persons on the sinking vessel.

Thus, "the failure to promptly respond to the distress call", and the delay in ordering ITS Libra to intervene in the rescue operations, constitute a violation of Italy's obligation to meet its due diligence in consideration to Article 6(1) of the Covenant⁸. Due diligence also implies, recalling General comment No. 36 (2019) to take "positive measures that do not impose disproportionate burdens on States parties in response to reasonably foreseeable threats to life"⁹. This duty has necessarily to be related to the right to be protected: in this case, the risk of a violation of the right to life would compel the State party to take immediate positive measures. The Committee noted that Italian authorities failed to provide an explanation for such a delay, as well as to explain the reason of the long duration of the domestic trials¹⁰.

3. Elements of novelty of the United Nations Human Right Committee's decision.- While another international human right body, the European Court of Human

⁷ See *A.S., D.I., O.I. and G.D. v Italy*, CCPR/C/128/D/3042/2017, para. 7.8.

⁸ *Id.*, para. 8.5.

⁹ General comment No. 36, para. 21.

¹⁰ See *A.S., D.I., O.I. and G.D. v Italy*, CCPR/C/128/D/3042/2017, para. 8.7.

Rights, already developed a consistent case law on the application of human rights at sea, in so far the only case concerning the application of human rights in the context of SAR operation was the *Hirsi Jamaa v Italy*¹¹. In that case, the jurisdictional link was established by the fact that people were on board of the State's naval unit, thus effectively and exclusively under control of the State parties' authorities.

The central point of the present case was represented by the Committee's interpretation of the issue of a State's jurisdiction, representing a threshold criteria of admissibility of the claim. In a crucial paragraph the Committee concluded that the individuals on board of the sinking vessel were placed under Italian jurisdiction as "a special relationship of dependency was already established, in the particular circumstances of the case"¹².

While recognising that both State parties had a shared and concurring jurisdiction, and that the primary responsibility for the rescue operation was upon the Maltese authorities, the Committee recognized that Italy failed to comply both with its responsibility before Malta formally assumed the control of the rescue operation, and with its residual responsibility to cooperate with the Maltese authorities, in order to immediately proceed with the rescue operations.

Italian authorities were not required, nor expected, to take on primary responsibility for the rescue operations, nor the authors of the communication claimed they should. Although the fact of not being the primary responsible of the rescue operation did not exempt Italian authorities from their duty to cooperate and take positive measures in order to protect the lives of those in a situation of immediate danger. Thus, Italian authorities, even though they were not required to coordinate the activities, still had a residual responsibility that they failed to comply with.

4. Controversial aspects.- While the Committee's majority's decision recognized shared and concurring liability for both Malta and Italy, dissenting opinions focused on the inadmissibility of the case, rejecting the notion of concurring jurisdiction. In fact, one danger of recognizing shared jurisdiction is to create further confusion on which State is responsible when it comes to rescue in high seas.

Shany, Heyns and Pazartis' dissenting opinion pointed out that this alleged coincidence between "the ability to engage in a maritime operation in SAR area with the notion of jurisdiction" is inappropriate as it may endanger the legal order established by 1974 Convention for the Safety of Life at Sea (SOLAS Convention)¹³ and SAR Conventions, leading to an unclear division of labour in areas where a responsible State was already identified. They objected that the majority of the Committee failed to see the difference between situations where a State party has the potential to exercise control over individuals, and situations in which there is actual control of the State. In

¹¹ *Hirsi Jamaa and others v Italy*, App No 27765/09, European Court of Human Rights (ECtHR), 23 February 2012.

¹² See *A.S., D.I., O.I. and G.D. v Italy*, CCPR/C/128/D/3042/2017, para. 7.8.

¹³ Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 1861.

that case, even though the State party had the potential to place under effective control the people on the vessel, this fact alone cannot lead to the conclusion that those individuals were subject to its jurisdiction, hence real, actual control.

Moore's dissenting opinion pointed out that the concept of jurisdiction should be interpreted in light of other international obligations of the State parties concerning rescue operations at sea. In fact, as both States are part of the SAR convention, whose aim is to ensure a fair and efficient division of responsibility for search and rescue operations among coastal States, thus their jurisdiction should coherently be limited to their own SAR zones. Otherwise, there is a concrete risk to further increase the level of uncertainty about each State's responsibility, with negative repercussions on the amount of lives lost at sea.

There is little doubt that Italy, by not commanding ITS Libra, the closest ship to the vessel in distress, to immediately intervene in the rescue operations, violated its obligations under Article 98 of the UNCLOS¹⁴, but it is less clear in the present case how this duty entailed in the 1982 Convention should interact with the concept of jurisdiction in deciding upon a violation of a right protected by the ICCPR.

In fact, another controversial aspect of the present case is represented by the interaction between the Covenant and other international instruments governing the law of the sea. In this specific case, the Committee interpreted the State's obligations to respect an individual's right to life under Article 6 of the Covenant linking it with the duty of the state to provide assistance to those in distress at sea, under Article 98 of the UNCLOS, and to the SAR Convention establishing criteria to share responsibility for search and rescue operation outside of a State territorial waters. One critic moved to the Committee's decision was if it had the competence to interpret both the concept of jurisdiction and due diligence of a State party in light of other international instruments outside the Covenant, or whether the Committee in its decision, however desirable, stepped too far, stirring the jurisdiction concept too much.

However, taking into account that the finality of the SAR Convention to ensure that search and rescue operation in the high seas are initiated in a prompt and efficient manner in order to save lives, than it could be argued that such division of responsibility cannot be used to justify inaction that lead to loss of human lives. SAR Convention facilitates the identification of a single competent authority for a given area. But the identification of a primary responsible State does not mean that another State party's authorities having the power to act in order to facilitate the rescue operation might refrain, and be justified, to act promptly to save lives. In the present case, Italian authorities could potentially intervene before the vessel capsized, and that prompt intervention could have saved lots of lives. As recalled in the Italian State observations, indeed, the naval ship ITS Libra eventually intervened before Maltese request. The first distress call to MRCC Rome was received between 11:00 am and 12:26 pm, and until 2:35 pm, when Maltese authorities sent a formal written communication, Italy was the

¹⁴ See Zimmermann's dissenting opinion, *A.S., D.I., O.I. and G.D. v Italy*, CCPR/C/128/D/3042/2017.

sole formal responsible for the rescue operation. Two hours passed, with Italian authorities well aware of the imminent danger of shipwreck and, according to the authors' claim, ITS *Libra* was located about just one hour away from the vessel. Why then, ITS *Libra* did not intervene *before* the vessel capsized?

One possible way to address the issue of the integration of the extra-territorial violation of the Covenant is represented by the Committee jurisprudence on extraditions. In fact, a State could be liable to violations occurring even outside of its jurisdiction if these violations are “a necessary and foreseeable consequence judged on the knowledge the State party had at the time”¹⁵. In an analogic interpretation, it may be noted that the State party in the present case could reasonably foresee the tragedy, and act promptly to prevent it, even if it occurred outside its jurisdiction.

5. Conclusion/What's next?- The issue of the relationship between the safety of life at the sea and the right to life under international law is complex, and jurisprudence on such cases is still scarce. One of the questions still opened is whether the duty of assistance to those in distress at sea is merely an obligation inter-States, or if it could be the basis for the emergence of an individual right to be rescued¹⁶. The Committee ruling aimed to take a first step towards the recognition of such a right to be rescued, by linking the right to life to extra-territorial jurisdiction of States upon vessels in distress in international waters. The right to life is protected under a number of international treaties, but insofar there was only one case concerning extra-territorial jurisdiction in the context of SAR operation, the *Hirsi Jamaa and others v Italy* case of the ECtHR. But on that case, the jurisdictional link had a more solid factual basis given by the fact that people were physically on board of the State's naval unit, thus effectively and exclusively under control of the State parties' authorities, while the one brought before the UN Human Right Committee concerned a case of negligence and delayed intervention.

On one side, as Tigroudja pointed out in her concurring opinion, this decision might lead to the emergence of a new “right to be rescued at sea”. The Committee's interpretation of a State's jurisdiction implies that under specific circumstances, a special dependency relationship might be created as soon as a contact is effectively established between a State's authorities and individuals in distress at sea, and it might be used in further litigations on similar cases of rescue activities in high sea. In her concurring opinion, Tigroudja underscores that this constitutes a first attempt to address some “maritime legal black holes” in the context of extra-territorial jurisdiction and rescue operations at sea. In fact, this decision could be expected to provide a future general applicability of the Covenant for individuals in situations of distress at sea, that find themselves either in a State party's SAR area, or near a ship flying the flag of a State party.

¹⁵ See *A.S., D.I., O.I. and G.D. v Italy*, CCPR/C/128/D/3042/2017, para. 7.5, and *Munaf v Romania*, CCPR/C/96/D/1539/2006, para. 14.2.

¹⁶ S. Trévisanut, “Is there a right to be rescued at sea? A constructive view”, in *QIL, Zoom-in*, 4, 2014, pp. 3-15.

On the other side, there is a risk of a further drop back of coastal States, who might avoid taking distress calls or may order their ships to move away from the vessel in distress in other State's SAR areas, as noted by Zimmermann's dissenting opinion.

By connecting the duty to render assistance (under the Law of the Sea) with the right to life (protected by international human rights treaties) the Committee made a first step towards the recognition of the existence, for people in distress at sea, of an individual right to be rescued. Nonetheless, the jurisdictional link established by the Committee's decision might seem too strained, and may lead to further confusion. In the wishful view of the Committee's majority, this might help, in the future, to enhance compliance and prevent new tragedies. Whether this attempt will end up to strengthen or weaken the duty of assistance from coastal States, it is yet to be seen, also in light of pending cases on similar subject matter¹⁷.

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¹⁷ See for example *SDG v Italy*, Communication to the United Nations Human Rights Committee, or *S.S. and others v Italy*, App. No 21660/18, European Court of Human Rights (ECtHR).