

Rescue at Sea and the Establishment of Jurisdiction: New Direction from the Human Rights Committee? Part I

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Introduction

On 27 January 2021, the United Nations Human Rights Committee (HRC or Committee) found that Italy had failed to protect the right to life of more than 200 migrants who had perished in a shipwreck in 2013. The decision in *A.S., D.I., O.I. and G.D. v. Italy* marks a significant development in the interpretation and application of extraterritorial jurisdiction in rescue operations on the high seas. For the first time, a human rights body has affirmed that the relationship of dependency between persons in distress and States receiving calls for assistance is sufficient to trigger extraterritorial jurisdiction and consequent application of the International Covenant on Civil and Political Rights (ICCPR). In this note, we will examine the claims of the complainant, the findings of the HRC, and will close by addressing the ramifications of the decision on human rights protection at sea.

Background to the Decision in *A.S., D.I., O.I. and G.D. v. Italy*

The complaint before the HRC was lodged by three survivors of the shipwreck on behalf of themselves and their relatives who perished in the incident on 11 October 2013 (see para 1.1). In the early hours of the morning, the fishing vessel carrying over 400 migrants left the Libyan port of Zuwarah. Soon after its departure, the vessel was shot at by a boat flying a Berber flag and began to take in large amounts of water. At 11am, an individual

on board contacted the Italian authorities explaining that the vessel was in distress and also provided its coordinates (see para 2.1). It was located 112 km south of the Italian island of Lampedusa and 218 km from Malta, within the latter's Search and Rescue Region (SRR) (para 1.1). Despite further calls for assistance, no rescue units reached the distressed vessel. Shortly after 1pm, persons on board desperately called the Italian number emergencies at sea. The operator informed them that the vessel was within Malta's SRR and provided the number for the State's Rescue Co-ordination Centre (RCC) (para 2.2). In the meantime, consultations took place between the Italian Air Force and the Italian Navy as to whether the *ITS Libra*, an Italian navy ship, reportedly only an hour away from the vessel in distress should be dispatched (para 2.4). The Maltese authorities also requested the assistance of the *ITS Libra*. An Armed Forces of Malta patrol boat reached the migrant vessel at around 5.50pm when it had already capsized. It was at this point that the *ITS Libra* was authorised to intervene and reached the scene soon after. The tragic incident resulted in the loss of over 200 lives, 60 of them children (para 2.3). The complainants *inter alia* argued before the Committee that Italy's failure to expeditiously respond to the distress call violated the right to life of their relatives under Article 6 of the ICCPR (para 1.2).

Extraterritorial Jurisdiction in Rescue Operations on the High Seas and the Application of the ICCPR

The question before the HRC was whether Italy exercised power or control over the victims of the shipwreck for the purposes of establishing jurisdiction and consequent application of the ICCPR (para 7.7). In its decision, the Committee reaffirmed its findings in general comment No. 31 (2004) on the interpretation of the meaning of jurisdiction, where it held that the Convention applies once individuals fall within the power or effective control of a State party, even if they are not situated within the territory of that State (see para 10 of general comment No. 31). The extraterritorial application of human rights obligations in rescue operations in maritime areas beyond national jurisdiction has been judicially recognised by various human rights courts and bodies (see *Hirsi Jamaa and Others v. Italy*, *JHA v. Spain*). This issue is revisited in *A.S., D.I., O.I. and G.D. v. Italy*, where the complainants argue that the although the incident occurred on the high seas, the complaint nonetheless falls under the jurisdiction of both Malta and Italy as:

1. Both States are parties to the 1979 International Convention on Maritime Search and Rescue (SAR Convention) and as Maltese authorities were responsible for the SRR in which the vessel was located, while the Italian authorities were exercising *de facto* control over the Maltese SRR (para 2.7); and

2. Both States were in

“continuous contact with the vessel in distress and activated rescue procedures thus...exercised control in the SAR area over the persons in distress.” The authors further argue the existence of a “causal link” between the lack of prompt rescue activities, the shipwreck and the loss of lives. In particular, they contend that *“...a distress call has been identified as creating a relationship between the state which receives it, and the person who sends it, and that due to this relationship, the jurisdictional link between the person in danger and the state authorities emerges... meaning that the authorities consequently have an obligation to provide emergency services.”* (para 2.7)

We will now examine the legitimacy of the above contentions in light of the findings of the Committee. With respect to the first claim, we argue that the use of law of the sea instruments to assert jurisdiction and consequent applicability of the ICCPR, and admissibility of the case seems to be misplaced. Whilst the duty to rescue reflects a duty to protect life at sea, there is a difference between law of the sea obligations and obligations emanating from human rights law. The duty to rescue under 1982 United Nations Convention on the Law of the Sea (UNCLOS) and other treaties such as SAR Convention and the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention) is a law of the sea obligation, requiring no nexus of jurisdiction between the shipmaster and the persons she/he is obliged to rescue.

Furthermore, we note the various references to the issue of jurisdiction in the SRR throughout the decision (see for example paras 2.7, 4.5, and 7.8 discussed below). The SRR does not in fact equate to a jurisdictional zone. Indeed, Article II (1) of the SAR Convention provides that *“no provision of the Convention shall be construed as prejudicing obligations or rights of vessels provided for in other international instruments.”* SRRs cannot be interpreted as being zones of jurisdiction; they are delimited areas of ocean space where State parties must ensure cooperation and coordination of search and rescue (SAR) activities (SAR Convention, Annex, Cap 2.1.1) (See Malta’s contention in para.4.3 of CCPR/C/128/D/3043/2017). It is therefore difficult to argue that jurisdiction would exist by the simple presence of a vessel in distress in a State’s SRR (see below). In our view basing any jurisdictional argument on such grounds is not only misguided but also dangerous, and could have the effect of dissuading States from exercising SAR duties in the SRRs of other States. Of course, it is more complex than that, however, this manner of thought seems to present itself as an unfortunate implication (see para 5.1). In fact, the dissenting opinion of Yuval Shany, Christof Heyns and Photini Pazartiz demonstrates the same preoccupation:

“...collapsing the ability to engage in a maritime operation in search and rescue areas for which another State is internationally responsible with the notion of jurisdiction over the individuals on vessels in distress might disrupt the legal order which the SOLAS and SAR Conventions attempted to introduce...” (Individual Opinion of Yuval Shany, Christof Heyn and Photini Pazartis (dissenting) para 6).

A similar concern is shared by Andreas Zimmermann who argues that the outcome of this decision will “...eventually have the very unfortunate effect of States parties of the Covenant no longer be willing to undertake such obligations...” (Individual Opinion of Andreas Zimmermann (dissenting) para 4)

This same (mis)understanding regarding SRRs and the issue of jurisdiction is also brought up by the Committee in para 7.8 of the decision, where it held that not only were the individuals subject to Italy’s jurisdiction, but also subject to the jurisdiction of Malta owing to the fact that “they were within the Maltese search and rescue region.” (See also the Individual opinion of Vasilka Sancin (concurring) para 1). We maintain that since the SRR is not a jurisdictional zone, some action or inaction on the part of the SAR State is required in order for human rights responsibility to commence (discussed below). Malta may arguably be responsible for failing in such obligations (as the Committee notes *inter alia* in para 8.5) however, not on the sole basis that the vessel was in its SRR at the time of the incident. The Committee however seems to have taken the view that primary responsibility of Malta existed because “the capsizing occurred in its search and rescue area, and since it undertook in writing responsibility for the search and rescue operation.” Indeed, the dissenting opinion of Andreas Zimmermann makes this point: “...the mere fact that a person did find him – or herself in a SAR zone administered by a given State party of the Covenant does not bring that person within the jurisdiction of such State party for purposes of Art. 2 (1) ICCPR.” (Individual Opinion of Andreas Zimmermann (dissenting) para 1)

With the complainants’ insistence on *de facto* control of another SRR, the message given seems to be that because Italy intervened Italy is thus responsible. This is not what one reads in the relevant International Maritime Organization (IMO) Conventions and Manuals. Indeed, although primary responsibility for coordination of SAR missions in a State’s own SRR lies with that State (SAR Convention, Annex, Cap 3.1.9 and SOLAS, Annex, Cap V, Reg 33.1.1), the SAR Convention is clear that any SAR unit alerted to a situation of distress is obliged to take urgent steps to ensure assistance is provided (SAR Convention, Annex, Cap 2.1.1; Cap 3.1.7; and Cap 4.3). This is also made clear in the Associated Guidelines on the Treatment of Persons Rescued at Sea (see para 6.7) wherein it is repeated that while responsibility lies primarily with RCC in whose region assistance is needed, the first RCC contacted, in this case, Italy, should act have acted as RCC until the responsible RCC assumes responsibility (See also International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual, 3.6.1 referred to in para 5.2). This point is brought out in the concurring opinion of Gentian Zyberi (Individual opinion of Gentian Zyberi (concurring) para 2):

“While a State has primary responsibility for its SAR area, there is a residual responsibility on all States to provide assistance, especially to those States with limited own capacities.” In fact, Italy contends that it cannot assume “...*de facto* responsibility over the area concerned merely due to the fact that Italian authorities organize rescue interventions, in an autonomous and non-obligatory manner, in the Maltese SAR.” (para 4.5).

This has to be correct – what is called for under the IMO Conventions is exactly this – cooperation in the rescue effort, which terminates only on disembarkation of the rescuees at a place of safety (For a discussion of this issue see pages 100 [here](#) and pages 62-66 [here](#)). In this respect, Italy’s argument that *“under the SAR Convention, the responsibility for protecting the lives of persons on board a vessel on the high seas belongs to the competent MRCC of the State responsible for that SAR Area”* (para 4.5) is misdirected. The obligation under the SAR and SOLAS Conventions is an obligation of cooperation in bringing the rescuees to a place of safety and relieving the shipmaster of her/his obligations as soon as possible (SAR, Annex, Cap 3.1.9; SOLAS Annex, Cap V, Reg 33(1-1)). The duty of the SAR State is to take a primary role in the coordination of this exercise – an obligation of conduct therefore, which requires a result. As has been [elsewhere discussed](#) (see page 100) there is no State of disembarkation expressly mentioned in the relevant IMO Conventions. However, this is not the point at issue in this case, due unfortunately to the inaction and/or delay of the States in question, which led to the death of the rescuees prior to rescue.