



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Decision adopted by the Committee under the Optional Protocol, concerning Communication No. 3043/2017 \*’\*\*\*’\*\*\*

<i>Communication submitted by:</i>	A.S., D.I., O.I. and G.D. (represented by counsel, Mr. Andrea Saccucci)
<i>Alleged victims:</i>	The authors and S.A et al.
<i>State Party:</i>	Malta
<i>Date of communication:</i>	19 May 2017 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee’s rules of procedure , transmitted to the State party on 13 November 2017 (not issued in document form)
<i>Date of adoption of decision:</i>	13 March 2020
<i>Subject matter:</i>	Rescue operations at sea
<i>Procedural issues:</i>	Jurisdiction; exhaustion of domestic remedies; victim status
<i>Substantive issues:</i>	Right to life; inhuman and degrading treatment; right to an effective remedy
<i>Articles of the Covenant:</i>	2 (3), 6 and 7
<i>Articles of the Optional Protocol:</i>	1 and 5 (2) (b)

1.1 The authors of the communication are A.S. a national of Palestine, born in 1958, and D.I., O.I. and G.D., nationals of the Syrian Arab Republic, born in 1983, 1988 and 1977, respectively. They are submitting the communication on their own behalf and on behalf of 13 of their relatives who, on 11 October 2013, were on board a vessel that shipwrecked in

\* Adopted by the Committee at its 128th session (2-27 March 2020).

\*\* The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Christopher Arif Bulkan, Ahmed Amin Fathalla, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.

\*\*\* The texts of individual opinions by Committee members Andreas Zimmermann, Arif Bulkan, Gentian Zyberi, Duncan Laki Muhumuza and Hélène Tigroudja (dissenting) are annexed to the present Views.

the Mediterranean Sea, 113 km south of Lampedusa, Italy and 218 km from Malta, causing the estimated death of more than 200 people. A.S. submits the communication on behalf of 11 members of his family, namely his: brother, born in 1952; son-in-law, born in 1977; niece, born in 1983; son, born in 1987; daughter, born in 1987; daughter-in-law, born in 1992; son, born in 1997; granddaughter, born in 2004; nephew, born in 2005; nephew, born in 2007; and grandson, born in 2008, all nationals of the Syrian Arab Republic. D.I. and O.I. submit the communication on behalf of their brother, a Syrian national born in 1995. G.D. submits the communication on behalf of her brother, a Syrian national born in 1992.

1.2 The authors allege that the State party authorities failed to take appropriate measures to render assistance to their relatives, who were in distress at sea, in violation of their relatives' rights under article 6 of the Covenant. The authors further claim that the State party authorities failed to carry out an effective investigation into the events of the shipwreck, in violation of their relatives' rights under article 6, read in conjunction with article 2 (3) of the Covenant. The authors also claim a violation of their rights under article 7, read in conjunction with article 2 (3) of the Covenant. The Optional Protocol entered into force for the State party 13 December 1990. The authors are represented by counsel.

### **The facts as presented by the authors**

2.1 The authors' note that their relatives attempted to escape from the serious threats to their lives that they and their children were facing in Syria. On 10 October 2013, the authors' relatives arrived in Libya and were transported, together with a large group of people mostly composed of Syrian refugees, to a fishing vessel anchored outside the port of Zuwarah, which set out the following day at around 1.00 a.m. The vessel was reported to have carried over 400 people. A few hours after the vessel had set off, it was shot at by a boat flying a Berber flag. Large quantities of water entered the vessel leading one person on the vessel, M.J., to call the Italian number for emergencies at sea around 11.00 a.m., explaining that the vessel was going to sink and informing the emergency operator that there were children on board the vessel. M.J. also forwarded the geographical coordinates of the vessel to the operator who answered the call.

2.2 The first call was followed by several others. The Maritime Rescue Coordination Centre in Rome (MRCC Rome) stated that it received a first call at 12.26 p.m., a second call at 12.39 p.m. and a third call at 12.56 p.m. In one of the distress calls, the persons aboard the vessel were reassured by the Italian authorities that they would be rescued. As nothing happened, they called the Italian number for emergencies at sea again at 1.17 p.m. This time, the operator explained that their vessel was in the Maltese search and rescue zone and gave them the phone number of the Rescue Coordination Centre of Malta (RCC Malta).

2.3 Several calls were made from the vessel to the Armed Forces of Malta (AFM Malta) between 1 p.m. and 3 p.m., as well as calls made to the MRCC at 2.22 p.m. and 3.37 p.m. The persons aboard the vessel were finally told that their vessel had been identified and that rescue units would arrive within 45 minutes. The authors however note that according to a press statement issued after the events, AFM Malta stated that the vessel was not detected until 4.00 p.m., and that the first rescue boat, an AFM patrol boat, did not reach the site of the shipwreck until 5.50 p.m., with an Italian navy ship *Libra* reaching the location at around 6 p.m. The authors claim that AFM Malta did not contact MRCC Rome for assistance until after the vessel had capsized. They further claim that the Italian naval ship *Libra* did not receive any instructions to assist the persons on board the vessel until after it had capsized, and that it was in fact initially ordered to move away from the vessel, as otherwise it was believed that the Maltese authorities would not have taken responsibility for the rescue efforts. The authors note that, although the exact number of persons who died in the shipwreck has not been established, it has been estimated that over 200 people on board the vessel died, including 60 children.

2.4 The authors claim that the Italian and Maltese rescue centres tried to pass the responsibility for the rescue operation to one another instead of intervening promptly. Given that the vessel was in the Maltese Search and Rescue area, MRCC Rome called RCC Malta at 1.00 p.m. informing RCC Malta of the vessel in order to hand over the operation to AFM Malta. According to MRCC Rome, it provided the identity of the closest assets to the vessel to RCC Malta, including the Italian navy ship *ITS Libra* and two commercial ships. However,

it did not provide RCC Malta with the exact location of the naval ship. At 3.37 p.m. an Italian Air Force officer called the Command of the Italian Navy in order to receive instructions as to what orders to impart to the naval ship, which was closest to the vessel in distress. The authors note that according to interceptions of phone calls<sup>1</sup>, the naval ship was ordered to move further away from the vessel in distress as, had it been seen by Maltese patrol boats, the latter would have avoided taking charge of the rescue operation. At 4.38 p.m. MRCC Rome requested the Command of the Italian Navy to put the naval ship *Libra* in direct contact with Maltese authorities. The Command of the Navy did not authorize the request. At 4.44 p.m. RCC Malta requested MRCC Rome to put the *Libra* at the disposal of the rescue operation. MRCC Rome denied the authorization and invited RCC Malta to look for other solutions, such as the involvement of commercial ships.<sup>2</sup> It was only at 5.07 p.m., after the vessel had capsized, that the naval ship was ordered to intervene and was directed towards the vessel in distress.

2.5 The authors claim that there are no effective remedies available that would enable them to submit their claims to domestic authorities. They note that M.J. submitted a complaint to the Public Prosecutor at the Court of Agrigento about the delayed responses of the Italian and Maltese authorities to his distress calls and the disappearance of two of his sons in the shipwreck. However, neither Italy nor Malta initiated any investigation into the circumstances of the shipwreck and the public prosecutor has requested the criminal proceedings to be discontinued. The authors further note that A.S., submitted a complaint to the Public Prosecutor of the Court of Syracuse on 15 September 2014. He claimed the disappearance of eleven relatives in the immediate aftermath of the shipwreck that occurred on 11 October 2013. From the minutes of the complaint it would seem that following a previous complaint by A.S. on 6 September 2014, criminal proceedings were opened against unknown persons. However, A.S. did not receive any information about the proceedings or their outcome. After the shipwreck, the author O.I. contacted the Red Cross of Malta, the First Secretary of the Italian Embassy in Abu Dhabi, where she was residing at the time, the Italian Red Cross and UNHCR inquiring about the whereabouts of her brother who had been aboard the vessel. As she did not receive any information about her brother she travelled to Malta and Italy to seek information. G.D. lives in Damascus and has therefore no possibility of filing a complaint before State party authorities.

2.6 The authors argue that the failure to open an investigation into the facts that led to the shipwreck and the subsequent death or disappearance of persons on board the vessel, including the authors' relatives, means that they do not have at their disposal an effective remedy in the State party to challenge the authorities' shortcomings during the rescue activities. The authors further argue that they are not obliged to pursue civil remedies in order to exhaust domestic remedies as their aim is to see those responsible for having put their relatives' lives at risk and of having caused their death or disappearance prosecuted and punished. They claim that civil action would not satisfy this aim, as such action would only focus on compensatory damages and would not address the issue of the identification and punishment of those responsible. Even if civil remedies were to be exhausted, these would prove to be ineffective in the absence of any investigation ascertaining the facts surrounding the shipwreck and any related responsibility. The authors argue that without a proper investigation into the shipwreck and the failed rescue operation, they are *de facto* barred from seeking civil remedies. They also submit that there are special circumstances exempting them from the obligation to exhaust domestic remedies given the scale of the tragedy which gave rise to their complaint. They argue that the Optional Protocol should be applied with some flexibility and without excessive formalities and they submit that they do not possess the cultural, linguistic and economic means to pursue legal remedies in the State party.

2.7 The authors note that the shipwreck occurred outside the national territories of both Italy and Malta. They however submit that the complaint falls under the jurisdiction of both Italy and Malta as: a) both States are parties to the International Convention on Maritime Search and Rescue (SAR Convention) and as Maltese authorities were responsible for the

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<sup>1</sup> The authors refer to recordings between the Italian Navy Command and ITS *Libra* published in an article by L'Espresso, 5 June 2017 'La legge del mare: così la Marina ha lasciato affondare il barcone dei bambini'.

<sup>2</sup> The authors refer to an article in the Italian newspaper L'Espresso, dated 11 May 2017.

SAR maritime area in which the vessel was located while the Italian authorities were exercising *de facto* control over the Maltese SAR area, as it is often the only State willing and able to carry out rescue operations in the area; and b) both States parties were in continuous contact with the vessel in distress and activated rescue procedures thus, notwithstanding the severe shortcomings of the operations, exercised control in the SAR area over the persons in distress. The authors argue that, as such, a causal link exists between the lack of prompt rescue activities, the shipwreck and the loss of lives. By acting negligently, or by failing to act, the States parties established a crucial link in the causal chain that caused the shipwreck. The authors note that in this respect it has been argued that a distress call creates 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 as a result of the distress call, meaning that the authorities consequently have an obligation to provide emergency services.<sup>3</sup>

### The complaint

3.1 The authors submit that the duty to render assistance to those in distress at sea is a well-established international rule under the 1982 United Nations Convention on the Law of the Sea and the 1974 International Convention for the Safety of Life at Sea (SOLAS).<sup>4</sup> They claim that the State party violated their relatives' rights under article 6 (1) of the Covenant due to its negligent acts and omissions in connection with the rescue activities it had undertaken at sea, which endangered their relatives' lives and resulted in their death or disappearance. Specifically, the authors claim that the authorities of the State party breached their duty to take all appropriate steps in order to safeguard the lives of their relatives who were in distress by failing to carry out necessary rescue activities and by delaying a request for intervention by the Italian navy until the ship capsized, even though they were aware that Maltese vessels were unable to provide prompt assistance. The authors claim that the State party's authorities did not promptly respond to distress calls, disregarding their obligations under the SAR Convention. They note that the first distress call to AFM was made at 1.34 p.m., during which the persons aboard the vessel in distress were informed that the position of the vessel had been identified and that rescue units would arrive in less than one hour. Further distress calls were made at 3.00 p.m., and the authorities assured that assistance was on its way. However, the AFM aircraft did not detect the vessel in distress until 4.00 p.m. The authors claim that the authorities of the State party knew that they would be unable to rapidly reach the vessel, and that they failed to promptly request assistance from Italian authorities whose vessels were closer to the vessel in distress. They claim that if the Italian naval ship ITS Libra had received a prompt request for intervention, it could have rescued the persons in distress.

3.2 The authors further allege a violation of their relatives' rights under article 6 (1) read in conjunction with article 2 (3) of the Covenant, as the authorities of the State party failed to undertake an official, independent and effective investigation into the shipwreck in order to ascertain the facts and identify and punish those responsible for it.

3.3 The authors also claim that their rights under article 7, read in conjunction with article 2 (3) of the Covenant, have been violated as the failure to investigate the death or disappearance of their relatives has caused and continues to cause them anguish, amounting to inhuman and degrading treatment.

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<sup>3</sup> The authors refer to S. Trevisanut, 'Is there a right to be rescued at sea? A constructive view' in 'Questions of International Law', 2014, p.9.

<sup>4</sup> The authors refer to article 98 (1) of the Convention on the Law of the Sea which stipulates that: "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 or 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, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call." The authors further refer to regulation 33 (1) of the SOLAS Convention.

### State party's observations on admissibility and merits

4.1 On 19 January 2018, the State party submitted its observations on the admissibility of the communication. The State party submits that the communication should be found inadmissible for failure to exhaust domestic remedies; lack of jurisdiction and for lack of victim status.

4.2 The State party notes the authors' argument that due to the failure of the Maltese authorities to investigate the cause of the shipwreck promptly and effectively, they were denied access to an effective remedy. It notes that, as far as Malta is concerned, the authors have not lodged any complaint with State party authorities or instituted any other action. The only action one of the authors has taken was to contact the Red Cross in Malta. The State party notes the authors' argument that it is difficult for them to lodge a complaint in Malta due to the fact that they are not living in the country and are lacking financial means. It however submits that complaints can be lodged by means of a special attorney, meaning that the authors would not have needed to be present in Malta in order to lodge a complaint. In addition, the State party argues that the authors had a number of domestic remedies at their disposal, both in civil and criminal procedures, which they have not availed themselves of. As concerns criminal proceedings, the authors could have lodged a complaint with the Commissioner of Police, requesting the Commissioner to investigate the allegations made by the authors. If the police does not initiate an investigation following such a complaint, an appeal can be made to the Court of Magistrates requesting the Court to issue an order to the police to institute proceedings. Legal aid is available, also for persons who are not Maltese citizens. Additionally, under the Criminal Code, any person may also request a Magistrate to hold an inquest relative to an offence punishable by imprisonment of three years or more. As concerns civil proceedings, the authors also have at their disposal an action for damages in tort, and could request a remedy for any damage the authors may have sustained. The authors could also have instituted a constitutional redress proceeding on the grounds of an alleged violation of their rights under the Constitution, which incorporates the European Convention on Human Rights into domestic law. Constitutional redress proceedings may be instituted by persons who are not present in Malta and legal aid may be requested if the person shows that he or she does not have the financial means to institute such an action. The Constitutional Court has wide ranging powers and can provide access to remedies in order to redress a particular violation. A request can be made for the Court to hear a complaint with urgency.

4.3 The State party further notes that the shipwreck occurred on the high seas. It argues that as the incident took place outside the territorial waters of Malta, the authors have not shown that there existed a requisite jurisdictional link in terms of the Optional Protocol. It argues that search and rescue operations are not tantamount or equivalent to the exercise of jurisdiction. A State is responsible for coordinating search and rescue operations in its SAR area, but this cannot be considered as the territory of that State. The SAR Convention provides that the SAR area should not affect any delimitation of boundaries between States for which reason it follows that it is not correct to interpret the SAR area as forming part of Maltese territory or an area upon which Malta exercises extra-territorial jurisdiction. The State party argues that the fact that it honours its international obligations in the SAR area cannot be construed as founding a jurisdictional relationship. It notes that a SAR area is defined as an area of defined dimensions associated with an RCC within which SAR services are provided and that the definition contains no mention of jurisdiction or territory.

4.4 The State party further submits that the authors have not substantiated their link to the alleged victims of the communication, as no evidence has been provided that would corroborate that they are the next of kin of the alleged victims and have the necessary juridical interest to file a communication on the alleged victims' behalf.

4.5 On 25 May 2018, the State party submitted its observations on the merits of the communication. It notes that the first call from the vessel was made to MRCC Rome by means of a satellite phone and that MRCC Rome thus assumed first coordination of the case.<sup>5</sup>

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<sup>5</sup> The State party refers to the SAR Convention, Chapter 4.5 and the IAMSAR Manual, Vol II, Chapter 2, Section 2.25 and Chapter 3, Section 3.6.5. It notes that the RCC which assumes first coordination a

RCC Malta received a first phone call from MRCC Rome at 1.05 p.m. wherein RCC Malta was informed about the vessel seeking assistance. At that point, the vessel was transiting through and exiting the Libyan SAR area. The information received from MRCC Rome at the initial stage did not indicate a situation of distress.<sup>6</sup> At 2.05 p.m. MRCC Rome sent a fax to RCC Malta requesting it to officially and formally accept the handing over and transfer of the SAR case. RCC Malta accepted the request at 2.35 p.m., which is therefore the time when RCC Malta assumed coordination of the case. It notes that at 1.34 p.m. MRCC Rome, who was still the First RCC responsible for coordinating the case, issued a navigational warning to all shipping in the vicinity to assist and report to MRCC Rome, not RCC Malta. In the time between the receipt of the invitation to assume coordination and when acceptance was transmitted, RCC Malta also took a series of initial actions. At 2.10 p.m., RCC Malta issued instructions to Maltese offshore patrol vessel P61 to proceed towards the area of the vessel. The State party notes the authors' claim that they contacted RCC Malta at 1.34 p.m. It argues that this is incorrect as the first contact between RCC Malta and the vessel in distress was made at 2.22 p.m. when RCC Malta phoned the persons on board in order to update their position and verify the situation on board. It notes that at 2.25 p.m. RCC Malta issued instructions to a Maltese military aircraft to conduct a flight over the area and at 2.30 p.m. RCC Malta issued a Navigational Urgency Warning (NAVTEX) to all shipping in the area to proceed and assist. The State party argues that as navigational warnings had been issued, all ships in the vicinity of the vessel, including ITS Libra, were duty bound to proceed towards the position.

4.6 Upon assuming coordination of the case, RCC Malta requested MRCC Rome to confirm the availability of any Italian vessels in the area which could intervene in accordance with the SAR Convention.<sup>7</sup> MRCC Rome responded at 3.09 p.m. that there were no coastguard units available, but that one Italian Navy ship was available. Still, no mention was made of the ship's name, position or contact details. Following the identification of the ITS Libra by AFM aircraft, RCC Malta requested that the ITS Libra proceed to assist, since it was identified at being the ship closest to the migrants, at a distance of 17 nautical miles. At 4.22 p.m., RCC Malta sent a fax to MRCC Rome requesting it to instruct the ITS Libra to proceed towards the area as the vessel in distress had been observed to be overcrowded and unstable by the AFM aircraft. MRCC Rome responded over phone that ITS Libra was conducting surveillance duties and that if it was dispatched, there would not be any assets to cover the area under surveillance. This exchange was followed by another fax at 4.42 p.m. It was then confirmed by MRCC Rome that ITS Libra would proceed towards the area to render assistance. RCC Malta also contacted commercial ships in the area requesting assistance. At 4.55 p.m., however, ITS Libra was still proceeding on its original course and had not changed course towards the vessel in distress as requested. RCC Malta then instructed the Maltese Patrol Aircraft to call ITS Libra directly by VHF. However, the calls went unanswered. The migrants' vessel capsized at 5.07 p.m. A rigid hull inflatable boat, deployed from the Maltese military vessel P61 in order to reach the area as soon as possible, arrived at the scene at 5.45 p.m. and commenced rescue operations. P61 arrived at the scene at 5.51 p.m. and ITS Libra at 5.57 p.m. P61 confirmed rescue of around 147 persons and ITS Libra of 56 persons. The State party submits that upon assuming coordination of the case, it took all necessary and available options in order to provide timely assistance by dispatching available resources, both public and private, and requesting available Italian resources through MRCC Rome, as RCC Malta did not have jurisdiction or authority to issue orders to a Navy vessel appertaining to another State. The State party further notes that it issued a Navtex warning to all shipping in the area; dropped a life-raft from the military aircraft in order to provide assistance; and diverted the closest commercial shipping towards the area.

4.7 The State party notes the authors' claims that their relatives rights under article 6, read alone and in conjunction with article 2 (3) of the Covenant have been violated. It reiterates

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case is referred to as the 'first RCC' and is to assume coordination of a case until the case is handed over.

<sup>6</sup> The State party refers to a fax sent from MRCC Rome to RCC Malta at 2.05 p.m., in which MRCC Rome requests RCC Malta to assume coordination of the SAR operation. In the fax the vessel is reported to have engine failure.

<sup>7</sup> The State party refers to Chapter 3.1.6 and 3.1.7 of the SAR Convention.

its argument that the authors have not lodged any complaint before any State party authority requesting that an investigation be commenced.

4.8 The State party argues that respect to life pertains first and foremost to the individual to not place his or her life at unnecessary risk and by taking all possible safeguards to limit such risks. It notes that Europe and States at its external borders are facing unprecedented migration flows, with attempted sea crossings on unseaworthy crafts. No matter how diligent, well equipped and dutiful rescue coordination centres are, there may always be an instance when multiple search and rescue cases occur simultaneously or where prevailing weather conditions would prevent rescue operations for safety reasons. It argues that in the present case State party authorities spared no efforts and all due diligence was adopted in order to carry out a successful rescue.

#### **Authors' comments on the State party's observations**

5.1 On 12 April 2018, the authors submitted their comments on the State party's observations on the admissibility of the communication. They claim that the fact that the State party authorities failed to promptly and effectively investigate the shipwreck *ex officio* shows that no effective remedy was at their disposal. They argue that the shipwreck was reported in media around Europe and that State party authorities should therefore have initiated an investigation on its own accord. They argue that to pursue a civil remedy would have been ineffective as it would not have brought redress to the alleged victims of the violation of the right to life. They further argue that a complaint before the Constitutional Court would not be an effective remedy as the Court can only be seized of the matter in second instance and only if the Civil Court at first instance has not declined to exercise its power. They argue that a request for constitutional review of the legality of the facts complained of is an extraordinary and discretionary remedy.

5.2 The authors argue that the fact that the shipwreck occurred outside the Maltese territory is not *per se* sufficient to exclude the existence of a jurisdictional link. They argue that the State party had the primary responsibility to coordinate the search and rescue operation in its SAR area, and failed to exercise its duty of coordination.

5.3 As to the alleged lack of victim status, the authors note that in their comments they are submitting pictures of their relatives, birth certificates and copies of passports in order to establish their family relationship with the alleged victims.

5.4 On 4 October 2018, the authors submitted their comments on the State party's observations on the merits of the communication. They reiterated their claim that there was a delay in the initiation of the rescue operation by the authorities of the State party. They note that RCC Malta issued instructions to Maltese offshore patrol vessel P61 to proceed towards the area of the vessel in distress at 2.10 p.m. They argue that had the patrol vessel been ordered to proceed to the area immediately after RCC Malta received the first call from MRCC Rome at 1.05 p.m. or after the first navigational warning was issued by MRCC Rome at 1.34 p.m., the patrol vessel would have reached the vessel in distress before it capsized.

5.5 The authors further reiterated their claim that their relatives' rights under article 6 (1) read in conjunction with article 2 (3) as well as their rights under article 7 read in conjunction with article 2 (3) of the Covenant were violated as the authorities of the State party failed to undertake an official, independent and effective investigation into the events of the shipwreck. They note the State party's argument that they failed to submit a complaint concerning the incident. They reiterate their argument that it was the duty of State party's authorities to carry out an effective investigation *ex-officio*.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

6.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's submission that the communication is inadmissible under article 1 of the Optional Protocol for lack of jurisdiction as the events occurred outside the territorial waters of the State party. It notes the authors' submission that the complaint falls under the State party's jurisdiction as State party authorities were responsible for the SAR maritime area in which the shipwreck occurred; were in continuous contact with the vessel in distress; and activated rescue procedures thus exercising control over the persons in distress.

6.4 The committee recalls that under article 1 of the Optional Protocol, it has competency to receive and consider communications from individuals subject to the jurisdiction of States parties. It also recalls that in paragraph 10 of its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, it stated that: "States parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party. As indicated in general comment 15 [on the position of aliens under the Covenant] adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons who may find themselves in the territory or subject to the jurisdiction of the State party. This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peacekeeping or peace-enforcement operation."

6.5 The Committee further recalls paragraph 63 of its general comment No. 36 (2018) on the right to life, in which it observed that: "In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes 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. States parties must respect and protect the lives of individuals located in places that are under their effective control, such as occupied territories, and in territories over which they have assumed an international obligation to apply the Covenant. States parties are also required to respect and protect the lives of all individuals located on marine vessels and aircraft registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea.<sup>8</sup> The Committee further recalls its jurisprudence that a State party may be responsible for extra-territorial violations of the Covenant in cases such as those involving extradition and deportations, if it is a link in the causal chain that would make possible violations in another jurisdiction, where the risk of an extra-territorial violation is a necessary and foreseeable consequence judged on the knowledge the State party had at the time.<sup>9</sup>

6.6 The Committee further notes that according to article 98 of the 1982 United Nations Convention on the Law of the Sea, each State shall require the master of a ship flying its flag "to proceed with all possible speed to the rescue of persons in distress, if informed of their

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<sup>8</sup> CCPR/C/MLT/CO/2, para. 17; United Nations Convention on the Law of the Sea, art. 98; International Convention for the Safety of Life at Sea, chap. V, regulation 10. [In its concluding observations on Malta the Committee expressed concern about "alleged instances of collective expulsions of migrants who have been intercepted and rescued at sea, in case of a real risk of ill-treatment, infringing the principle of non-refoulement and regrets that the State party contests its jurisdiction over persons rescued at sea".]

<sup>9</sup> *Munaf v. Romania* (CCPR/C/96/D/1539/2006), para. 14.2.

need of assistance, in so far as such action may reasonably be expected of him” and coastal States “shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose”. In addition, it notes that specific arrangements concerning the provision and coordination of search and rescue services are found in the 1979 International Convention on Maritime Search and Rescue and in the Regulations adopted pursuant to the 1974 International Convention for the Safety of Life at Sea (SOLAS), including on coordination of search and rescue operations of ships from different States by the regional coordination center, and the duty of states to cooperate in search and rescue activities upon receiving information on situations of distress at sea.<sup>10</sup>

6.7 In the present case the Committee notes that is undisputed between the parties that the shipwreck occurred outside the State party’s territory and that none of the alleged violations occurred when the authors’ relatives were on board a vessel hoisting a Maltese flag. The question before the Committee is therefore whether the alleged victims could be considered to have been within the power or effective control of the State party, even though the incident took place outside its territory. The Committee notes that in the present case it is undisputed that the vessel in distress was located in the SAR area for which the State party authorities undertook responsibility to provide for overall co-ordination of search and rescue operations, in accordance with section 2.1.9 of the SAR Convention and Regulation 33 of the SOLAS Convention. It further notes that it is undisputed that the State party authorities formally accepted to assume the coordination of the rescue efforts at 2.35 p.m. on the day of the shipwreck. The Committee therefore considers that the State party exercised effective control over the rescue operation, potentially resulting in a direct and reasonably foreseeable causal relationship between the State parties’ acts and omissions and the outcome of the operation. Consequently, the Committee is not precluded by article 1 of the Optional Protocol from considering the present communication.

6.8 The Committee further notes the State party’s submission that the communication should be found inadmissible for failure to exhaust domestic remedies. It notes the authors’ submission that they did not have at their disposal an effective available remedy in the State party to challenge the authorities’ shortcomings in conducting the rescue activities. The Committee however notes the State party’s submission that there were several domestic remedies available through which the authors could have addressed their claims, including by lodging a complaint with the Commissioner of Police, requesting the Commissioner to investigate the allegations made by the authors; requesting a Magistrate to hold an inquest into the events of the shipwreck; instituting civil proceedings for damages in tort; or instituting constitutional redress proceedings on the grounds of an alleged violation of their and their relatives’ rights under the Constitution, which incorporates the European Convention on Human Rights into domestic law. The Committee further notes the State party’s information that such complaints can be lodged by means of a special attorney, without a need for the complainants to be present in the State party in order to lodge a complaint. It also notes the State party’s information that legal aid is available for persons who can demonstrate that they do not have the financial means to institute domestic proceedings.

6.9 The Committee recalls its jurisprudence that, although there is no obligation to exhaust domestic remedies if they have no prospect of being successful, authors of communications must exercise due diligence in the pursuit of available remedies and it notes that mere doubts or assumptions about the effectiveness of domestic remedies do not absolve authors from exhausting them.<sup>11</sup> The Committee notes that in the present case the authors have not raised their claims before any State party judicial or quasi-judicial authority, including the possibility of submitting a criminal complaint, and have not refuted the State party’s assertions that effective remedies are available. In these circumstances, the

<sup>10</sup> International Convention on Maritime Search and Rescue, 1979, chapter 4.6; 1974 International Convention for the Safety of Life at Sea (SOLAS), chapter V, Regulation 33.

<sup>11</sup> See, inter alia, *V.S v. New Zealand* (CCPR/C/115/D/2072/2011), para. 6.3, *García Perea v. Spain*, (CCPR/C/95/D/1511/2006), para. 6.2; and *Zsolt Vargay v. Canada*, (CCPR/C/96/D/1639/2007), para. 7.3.

Committee is of the view that the authors have failed to exhaust available domestic remedies. The Committee therefore considers that the communication is inadmissible pursuant to article 5 (2) (b) of the Optional Protocol.

7. The Committee therefore decides:

- (a) That the communication is inadmissible under article 5 (2) (b) of the Optional Protocol;
- (b) That the present decision shall be transmitted to the State party and to the authors.

**Annex:****Individual Opinion of Andreas Zimmermann (dissenting).**

1. While I concur with the outcome of the complaint, as adopted by the majority of the Committee, I have to respectfully dissociate myself as far as the question is concerned whether the authors were at the relevant time within the jurisdiction of Malta within the meaning of Art. 2 (1) ICCPR.

2. Hence, I would have rejected the complaint not only for lack of exhaustion of local remedies, but also for being outside the Committee's competence under the Optional Protocol.

3. It is undisputed that the authors were at the relevant time *not* with the territorial waters of Malta; nor were the authors at any point in time on board of ships flying the Maltese flag. The only facts that could have provided for them to be within Maltese jurisdiction for purposes of the Covenant were thus that they did find themselves within a Search and Rescue (SAR) Zone for which Malta had responsibility under applicable rules of the law of the sea, and that Maltese authorities had been in radio contact with the vessel in distress and had activated rescue procedures.

4. At the outset the majority *in abstracto* rightly refers to the correct standard in determining whether a person is within the jurisdiction of a State party, namely whether he or she finds him- or herself within the power or effective control of that State party, even if not situated within the territory of the State party. It is, however, respectfully submitted that the majority's framing of this standard by referring to its own prior decision in *Munaf v. Romania*<sup>1</sup> is misleading since in that case the author was within the Romanian embassy where (obviously) Romania had full legal jurisdiction over its diplomatic premises and the acts of all persons therein – a situation hardly comparable with the high seas.

5. The majority further attempts to rely on article 98 of the 1982 United Nations Convention on the Law of the Sea, which requires each State party of UNCLOS to require the masters of ships flying its flag “to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him” and to promote “the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose”. Yet, as was rightly stated elsewhere, an obligation to protect human rights – eventually arising in the case at hand under the ICCPR – cannot be triggered by a decision not to protect them; the former is logically prior to the latter.<sup>2</sup> And even less can such obligation to protect rights *guaranteed by the ICCPR* arise due to a violation of an obligation *arising under a completely different set of rules*, i.e. applicable norms of UNCLOS.

6. As a matter of fact, the notion of jurisdiction in human rights treaties is not tantamount to the concept of jurisdiction to prescribe provided for in article 98 UNCLOS. While the former is about an entitlement of individuals to human rights vis-à-vis a State party of the Covenant, the latter is about the State's obligation under UNCLOS to regulate certain situations by means of its domestic law.

7. The very same considerations do apply *mutatis mutandis* to the obligations arising under the SAR and the SOLAS Conventions; under those conventions Malta once again had an obligation to eventually bring those person within its jurisdiction by taking appropriate measures to rescue them, but pending such rescue they were not yet subject to Maltese jurisdiction within the meaning of the Covenant.

<sup>1</sup> *Munaf v. Romania* (CCPR/C/96/D/1539/2006), para. 14.2.

<sup>2</sup> Cf. *mutatis mutandis* M. Milanovic *Repatriating the Children of Foreign Terrorist Fighters and the Extraterritorial Application of Human Rights*, EJIL Talk <https://www.ejiltalk.org/repatriating-the-children-of-foreign-terrorist-fighters-and-the-extraterritorial-application-of-human-rights/>

8. This result, that the authors did not find themselves within the jurisdiction of Malta at the relevant time, is confirmed by the Committee's latest concluding observations on Malta, quoted by the majority decision, which observations however exclusively, and rightly so, referred to "instances of collective *expulsions* of migrants who have been *intercepted and rescued* at sea", *i.e.* persons who had come within Maltese jurisdiction only once they had been intercepted and rescued, but not prior to such rescue operation.

9. On the whole, what the majority opinion therefore does it to turn a violation of UNCLOS and/or the SAR and SOLAS Conventions (which in my understanding of the facts underlying the complaint did indeed take place) into violations of the Covenant. In doing so, the majority however might by the end of the day even provide a disservice to the values it aims to protect since State parties of UNCLOS might become even more reluctant to take on law of the sea-related obligations under those latter conventions since this might then make them responsible under the ICCPR for tragic events taking place in their respective SAR zone.

## Annex 2.

### **Individual opinion of Committee members Gentian Zyberi, Arif Bulkan and Duncan Muhumuza (dissenting).**

1. We disagree with the conclusion of the Committee that the communication is inadmissible under article 5(2)(b) of the Optional Protocol, given the failure of the State party to investigate *ex officio* the circumstances of the shipwreck. We also consider the jurisdictional link and the impact on the State party's obligations under article 6(1) of the Covenant.

#### *Search and rescue at sea operations and the jurisdictional link*

2. This case concerns a failed search and rescue operation at sea on 11 October 2013, where although the exact number of casualties is unknown, it has been estimated that over 200 people on board the vessel died, including 60 children (para. 2.3). The obligation of States to cooperate in rescuing people stranded at sea is included in the UN Convention on the Law of the Sea,

the International Convention on Maritime Search and Rescue,<sup>1</sup> and the International Convention for the Safety of Life at Sea<sup>2</sup>. Because of the circumstances of the case at hand, Italy and Malta shared this responsibility, though not in equal measure.<sup>3</sup>

3. The State party has argued that it is not correct to interpret the SAR area as forming part of Maltese territory or an area upon which Malta exercises extra-territorial jurisdiction (para. 4.3). The authors submit that their complaint falls under the State party's jurisdiction, as State party authorities were responsible for the SAR maritime area in which the shipwreck occurred; were in continuous contact with the vessel in distress; and activated rescue procedures thus exercising control over the persons in distress (para. 6.3).

4. In General Comment 36 on the right to life, the Committee has explained that "In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control... States parties are also required to respect and protect the lives of all individuals located on marine vessels and aircraft registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea."<sup>4</sup> The Committee has

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<sup>1</sup> International Convention on Maritime Search and Rescue (SAR 1979, revised).

<sup>2</sup> International Convention for the Safety of Life at Sea (SOLAS 1974, as amended).

<sup>3</sup> For the case against Italy, see *A.S., D.I., O.I. and G.D. v. Italy*, Communication No. 3042/2017.

<sup>4</sup> General Comment 36 (2018) on the right to life, para. 63.

expressed concerns about operations concerning search and rescue at sea with respect to the State party.<sup>5</sup> Due diligence requires taking reasonable, positive measures that do not impose disproportionate burdens on States parties in response to reasonably foreseeable threats to life.<sup>6</sup> As an obligation of conduct, this requires States to do their utmost to try to save persons in distress at sea. In this case, the State party assumed the primary responsibility to coordinate the search and rescue operation in its SAR area. The facts of the case reveal significant shortcomings in the rescue operation coordinated by the authorities of the State party (paras. 4.5 and 5.4), resulting in over 200 people drowned, including 60 children (para. 2.3).

*The duty to investigate the circumstances around the shipwreck*

5. The State party argues that the authors had a number of domestic remedies at their disposal, both in civil and criminal procedures, which they have not used (para. 4.2). The authors argue that it was the duty of State party's authorities to carry out an effective investigation *ex-officio* (para. 5.5). General Comment 36 provides that, "An important element of the protection afforded to the right to life by the Covenant is the obligation on the States parties, where they know or should have known of potentially unlawful deprivations of life, to investigate and, where appropriate, prosecute the perpetrators of such incident."<sup>7</sup> Despite the fact that over 200 people on board the vessel died in this tragic incident, more than seven years after the State Party has not started any legal proceedings to find out the exact circumstances of the shipwreck and to hold those responsible to account.

5. In this communication, the authors do not seek compensation or any other civil remedy for their personal loss, but are interested in holding to account the persons whose failures led to the tragedy which claimed the lives of an estimated 200 people, including their relatives. Where an unnatural death occurs, there is an obligation on the State to investigate the circumstances and prosecute and punish anyone who may be responsible, independent of any claim by relatives of the victim. *A fortiori*, such an obligation is even stronger in the context of an incident of this scale, which likely occurred as a result of failures by the State party to carry out its legal obligations in relation to search and rescue operations. In these circumstances, therefore, we would conclude that there was an *ex officio* obligation on the State party to investigate the events in question, and the authors' claim cannot be prejudiced in light of the failure of the relevant authorities to do so. Accordingly, we disagree with the majority of the Committee that found this communication inadmissible under article 5(2)(b) of the Optional Protocol.

6. Given the lack of due diligence by the State party's authorities in their efforts to rescue the hundreds of people in distress, many of whom ultimately perished, we would have found a violation of the rights of the authors' relatives under article 6(1), in conjunction with article 2.

## Annex3

### Individual Opinion of H el ene Tigroudja (dissenting).

1. I am not convinced by the way the majority dealt with the crucial questions of search and rescue operations and States' responsibility raised by the initial complaint against Malta and Italy. My discomfort with the solution reached by the majority is based on three elements.

2. First, by splitting the communication initially addressed versus Malta and Italy, the majority has made the question of shared responsibility between the two States involved in the shipwreck much more complex. The initial complaint explained clearly the claims against Italy and those against Malta. In addition, the authors based their reasoning on the lack of cooperation and co-ordination between the two States, that led to the dramatic consequence of loss of lives for more than 200 persons. By artificially splitting the complaint in two different cases, the majority has totally eluded the question of shared responsibility of Italy

<sup>5</sup> CCPR/C/MLT/CO/2, para. 17.

<sup>6</sup> General Comment 36, para. 21.

<sup>7</sup> General Comment 36, para. 27.

and Malta in the specific context of search and rescue operations. It has missed the opportunity to elaborate on the articulation of this shared responsibility of cooperation and co-ordination and to provide clarification of paragraph 63 of its General Comment No. 36 on the right to life affirming States' obligations "in a situation of distress at sea". In this specific context where "black holes" or legal vacuum are an argument often used by States in order to minimize their obligations, the Committee should have stuck to the complaint as presented by the authors and responded more rigorously to their arguments.

3. Second, in its General Comment No. 36 referred to in para. 6.5 of the present communication, the Committee affirms that the States Parties' obligation to protect life at sea must be "in accordance with their international obligations on rescue at sea." In their initial complaint, the authors of the communication have rigorously developed this body of international obligations dealing with search and rescue operations. Not only the core Conventions (article 98 of the UN Convention on the Law of the Sea; International Convention for the Safety of Life at Sea of 1974 and the 1979 International Convention on Maritime Search and Rescue) but also the regulations adopted afterwards and developing the content of the obligation of cooperation and obligation to rescue. More precisely, from this vast body of conventions and regulations to which the General Comment No. 36 on the right to life refers, the authors affirmed that the obligations of coordination and cooperation between States involved in search and rescue operations were strengthened. In the present views, the majority mentioned an outdated body of regulations. Therefore, it provided an interpretation of the States' obligations that is not legally convincing.

4. Third - and this point is linked to the previous ones -, the majority focused its reasoning in the present case on the fact that the authors have not exhausted the domestic remedies in Malta. However, in their initial complaint, the authors explained that in 2013, they attempted to get information from the Maltese authorities on the whereabouts of members of their family. The authors recognized that they did not formally bring civil or criminal claims before the Maltese authorities but due to the number of deaths, Malta could not ignore the tragedy. Under these circumstances and based on the fact that the authors attempted to get information on their relatives in Malta, they claimed that the State had an obligation to investigate ex officio. In addition, they considered that the burden to exhaust domestic remedies should not apply in this exceptional context. In its response to the Committee, Malta did not mention any step to investigate on the facts occurred in its SAR zone (paras. 4.2-4.3). On the contrary, Malta argued that the "shipwreck occurred on the high seas" (para. 4.3), where it has no jurisdiction.

5. In its response (para. 6.8), the majority of the Committee accepted the State's argument that the domestic remedies were not exhausted - which is not contested by the authors - but did not address the claim that in these exceptional circumstances, the exhaustion condition did not apply. As a consequence, the Committee did not address the question whether Malta had to investigate ex officio and more broadly, the scope and content of the Malta's due diligence obligation when lives are lost at sea due to its failures to duly and efficiently cooperate and coordinate SAR operations.

6. I consider that these two communications against Malta and Italy should have been examined jointly as requested by the authors. It would have better illustrated that the Malta's failures to protect persons at sea was not remedied by a prompt and ex officio reactions of its authorities. In the present case, the State has not only failed to protect life at sea under Article 6 of the Covenant but its domestic system failed to react ex officio, promptly and efficiently.