

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

 opiniojuris.org/2021/03/03/rescue-at-sea-and-the-establishment-of-jurisdiction-new-direction-from-the-human-rights-part-ii-committee/

March 3, 2021



Patricia Vella de Fremeaux (Mallia) is Associate Professor and Head of the International Law Department of the Faculty of Laws, University of Malta. Dr. Felicity G. Attard is a lecturer in the Department of International Law at the University of Malta.

The “Special Relationship of Dependency” and Effective Control in Rescue Operations on the High Seas

We find it more plausible to focus on the second claim brought by the complainants which relates to “causal link” created through a delay or failure to act following a distress call. As Trevisanut ably explains in her [article](#), a distress call can be seen to trigger the jurisdictional relationship necessary for grounding human rights responsibility due to the fact that once alerted to a situation of distress, the actions or inaction of the relevant RCC is one upon which the fate of those in distress is based. It is this factor we believe that triggers jurisdiction and thus responsibility for human rights protection. It can be convincingly argued that “effective control” (see, for example, para 7.4) is indeed present in such a case where a boatload of individuals are dependent upon the action of a State alerted to their situation (see the discussion of Moreno-Lax [here](#), Koka and Veshi [here](#), and Moreno-Lax, Ghezelbash, Klein and Opeskin [here](#)).

This indeed is the “special relationship of dependency” mentioned by the Committee, and it is thus created between the individuals on board the vessel and Italy. It states, in para 7.8. that

“...the individuals on the vessel in distress were directly affected by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable in light of the relevant legal obligations of Italy.”

The important holding that a “special relationship of dependency” created by the distress call activated the effective control necessary to kick start jurisdiction is not one which was universally upheld in the Committee. The dissenting opinion of Yuval Shany, Christof Heyns and Photini Pazartiz makes the distinction between:

“situations in which states have the potential to place under their effective control individuals who are found outside their territory or areas already subject to their effective control, and situations involving the actual placement of individuals under effective state control. Only the latter situations establish jurisdiction for the purposes of the Covenant and the Optional Protocol.” (Individual Opinion of Yuval Shany, Christof Heyn and Photini Pazartis (dissenting) para 2).

This however cannot be right in situations of life or death when the “potential” mentioned is rather the certainty of death if assistance is not timely. The concurring opinion of Vasilka Sancin explains this “relationship of dependency” by referring to the individuals being “directly affected” by Italy’s decisions *“...in a manner that was reasonably foreseeable in light of the relevant legal obligations of Italy, and...thus subject to Italy’s jurisdiction...”* (Individual opinion of Vasilka Sancin (concurring) para 1).

Due Diligence Obligations in Rescue at Sea Operations and the Protection of Human Rights

A key factor in determining the extent of Italy’s responsibility for violations of Article 6(1) of the ICCPR was the State’s apparent failure to exercise due diligence to protect the lives of the shipwreck victims (see paras 8.5 and 8.7). Human life at sea faces considerable dangers and risks. It is not only vulnerable to or endangered by perils of nature, but also the risks inherent in irregular maritime migration. As noted by the Committee, a high level of protection is required through the adoption of effective measures designed to safeguard human rights (see para 8.3). As confirmed by the European Court of Human Rights measures to protect the right to life: *“involve the setting up of an appropriate regulatory framework for rescuing persons in distress and ensuring the effective functioning of such a framework.”* (*Furdík v Slovakia*, para 13). The due diligence obligation requires States to take preventive measures to protect life through the provision, operation and maintenance of effective SAR services required under UNCLOS (Article 98(2)) and SOLAS (Annex, Cap V, Reg 7) and SAR (Annex, Cap 2.1.1.) Conventions. It is noteworthy that obligations of due diligence necessitate not only the adoption of appropriate rules and measures under these treaties but also *“...a certain level of vigilance in their enforcement...”* (*Pulp Mills case*, para 197).

The obligation of due diligence translates itself into a duty to take all necessary measures to ensure a particular result, even if that result is ultimately not attained. (See *Genocide case*, para 430, *Seabed Disputes Chamber Advisory Opinion*, para 110, the *IUU Fishing Advisory Opinion*, para 129). The standard of due diligence exercised by a State should

be appropriate and proportional to the degree of the risk of a violation of an international obligation in a particular situation (Seabed Disputes Chamber Advisory Opinion, para 117). It imposes a requirement on the State to take all measures it could reasonably be expected to take to prevent harm or minimizes the risk which may result from a failure to meet its international obligations (see Genocide case para 430, and ILA Second Report on Due Diligence in International Law). This “reasonable measures” element of due diligence is addressed by Gentian Zyberi in the context of the SAR activities: “...*the due diligence requirement is an obligation of conduct, requiring a State to make best efforts within the means available.*” (Individual opinion of Gentian Zyberi (concurring) para 3).

The higher the risk of a violation of an international obligation, the greater the need to apply due diligence (Seabed Disputes Chamber Advisory Opinion, para 117). As affirmed in the in the Genocide case in order to assess that due diligence has been exercised in the implementation of State obligations, it would be necessary to examine the circumstances of the case. For example, the availability of vessels, their distance from the distress incident, and the speed at which they proceeded to scene (see Chapter 6 [here](#)). In this incident, the migrant vessel was sinking with the individuals on board requiring urgent assistance. These circumstances should have prompted Italy to immediately dispatch the closest SAR units (the *ITS Libra* situated an hour away from the migrant vessel) to intervene until the Armed Forces of Malta reached the scene. Instead, the *ITS Libra* was ordered to move away from the distressed vessel. We thus agree with the Committee in that the due diligence obligation was breached by Italy’s delay in action and the failure to cooperate effectively (para 8.5).

Concluding Remarks

This findings of the HRC in *A.S., D.I., O.I. and G.D. v. Italy* are to be applauded, despite the Committee’s treatment of SRRs and jurisdiction. The decision appears as a beacon for future cases and provides a potential new direction in the extraterritorial protection of human rights at sea.