# Mediterranean Responsibilities

## Extra-territorial jurisdiction of coastal States in the context of maritime migration

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This week, the UN Human Rights committee issued a long-awaited decision concerning a distress case in the Mediterranean back in 2013. 400 migrants were on board of a vessel which sunk within the Maltese Search and Rescue zone but in vicinity of the Italian island of Lampedusa. At least 200 persons died. The decision of the Committee is somewhat of a milestone. This blog post depicts the most important legal aspects of the Committee's decision, with special regard to the broader setting of maritime migration and States' responsibilities.

In 2013, the Syrian (civil) war had already reached the level of large-scale military operations. In the case at stake, around 400 persons, mostly Syrian nationals, embarked on a fishing vessel in Libya trying to reach European shores. As large quantities of water were entering the fishing vessel, persons on board of the sinking vessel called Italian authorities several times asking for help. At this time, the sinking vessel was within the Maltese Search and Rescue Region (SRR) but in vicinity to Italy (61 miles south of Lampedusa, 118 miles southwest from Malta). The first call took place between 11 am and 12.26 pm. In one of the distress calls, Italian authorities assured that the persons would be rescued. Presumably, the closest vessel was the Italian naval vessel LIBRA which was one hour sailing away from the sinking vessel. At 1 pm, Malta verbally assumed responsibility to coordinate the distress case (para. 7.7) without possessing the exact coordinates of the sinking vessel and the vessels nearby. According to journalists' investigations cited in the decision, the vessel LIBRA was ordered to move further away from the vessel in distress by Italian authorities instead of assisting the persons in distress. Only at 5.07 pm, after being informed of the capsizing of the vessel, did the Italian Maritime Rescue Coordination Centre (MRCC) confirm that the naval vessel LIBRA was dispatched towards the vessel in distress. It arrived on the scene at 6 pm and assumed an onsite coordination role at 6.30 pm. Hence, the Italian vessel arrived at least five, possibly seven hours after Italian authorities were informed of the coordination of the sinking vessel. In the end, 200 migrants on board of the vessel drowned, including 60 children.

Before the UN Human Rights Committee, the plaintiffs in particular claimed that Italy and Malta had violated the right to life by not assisting the persons in distress. The complaint against Malta was declared as inadmissible as domestic remedies had not been exhausted.

### Overcoming Westphalia?

As the case took place on the high seas, the Committee's findings on the admissibility of the case are of utmost interest. State parties to the International Covenant on Civil and Political Rights are bound by these human rights obligations only if they exercise jurisdiction, as prescribed by Article 2(1) of the Covenant. International human rights law is, when it comes to the question of applicability, still predominated by a "Westphalian thinking" which acknowledges States' jurisdiction primarily on States' territories. When it comes to extra-territorial settings, jurisdiction is still conceptualized as exceptional. Thus, the jurisdiction clause is generally interpreted restrictively.

However, in the case at stake, the UN Human Rights Committee overcame this territoriality bias. The approach of the Committee in assessing whether a jurisdictional link was established between Italy and the persons on board of the sinking vessel deserves careful reading and unpacking. The Committee, appar-

ently, draws on a "special relationship of dependency" between Italian authorities and the individuals on board the sinking vessel. Such "relationship of dependency" comprises of factual (and legal) elements. The Committee evokes in para. 7.8:

> *(1) the initial contact between the individuals and the Italian authorities, (2) the close proximity of the Italian vessel ITS Libra to the sinking vessel and the ongoing involvement of the Italian MRCC in the rescue operation, (3) legal obligations incurred by provisions stemming from the Law of the Sea regime such as the duty to respond in a reasonable manner to calls of distress and a duty to appropriately cooperate with other states undertaking rescue operations.*

According to the Committee, the individuals were thus directly affected by decisions taken by Italian authorities, which was reasonably foreseeable in light of the relevant legal obligations of Italy. Hence, the individuals were subject to Italy's jurisdiction (although the shipwreck happened within the Maltese Search and Rescue Region which also establishes the concurrent jurisdiction of Malta).

The Committee's reasoning is rather unsystematic and undogmatic and gives occasion to speculate on the dogmatic underpinning of the argumentation. Each element of the Committee's line of argumentation could be discussed in depth and should be subject to greater attention in the future. It seems, the Committee's overall understanding of jurisdiction is moving away from a mere "defacto control" or "authority" test. Rather, the jurisdictional link between Italy and the individuals on board of the sinking vessel consists of factual and legal elements leading to the circumstance that individuals are "foreseeably" affected by the State's acts or omissions and thus under the State's jurisdiction. The way of reaching the threshold of jurisdiction has been criticised by dissenting and concurring opinions (e.g. Annex 2, para. 4, Annex 7 para. 1 to the decision).

With regard to the merits, the Committee refers to its General Comment 36:"The right to life includes an obligation for States parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats" (General Comment 36, at para. 18). Such due diligence standard requires taking reasonable, positive measures that do not impose disproportionate burdens on States parties in response to reasonably foreseeable threats to life (ibid., at para. 21). It notes that Italy has violated the right to life of the plaintiff's relatives – being in line with its wide reading of the right to life in its General Comment 36.

Furthermore, the Committee finds the State party had failed to show that it has met its duty to conduct a prompt investigation of the allegations relating to the violations of the right to life. As a result, Italy has also violated its obligations under article 6(1) read in conjunction with article 2(3) of the Covenant.

## The time has come

The Mediterranean is a space of shared responsibilities. Coastal States are responsible to provide systematic and effective Search and Rescue efforts. Neighbouring States have a duty to cooperate with the coastal State responsible. The flag State of a vessel is responsible to oblige its masters to render rescue in distress cases. And, ultimately, the master of a vessel is obliged to follow that duty.

These responsibilities gain even more importance as the Mediterranean has become the world's deadliest border as a result of severe border and entry protection policies. These policies leading to all those deaths are often not litigable. One of the reasons for the lack of judicial control is the lack of possibilities of individual "law of the sea" claims. Before human rights courts, the extra-territoriality of those cases and thus the concept of jurisdiction refrains from an extensive judicial control.

Yet, it seems absolutely necessary to reflect and develop the notion of jurisdiction which is the threshold criterion for the applicability of human rights norms and protections. As the exercise of State sovereignty moves from the State's interior towards the State's exterior, the conception of jurisdiction also needs to move and develop along those lines. External border protection policies resulting in human rights

violation currently suffer from this accountability gap. The UN Human Rights Committee now tried to close this gap with its decision.

The decision is far away from being perfect. Legal and dogmatic questions remain open (i.a. the careful assessment whether or why the coastal State does actually exercises jurisdiction only by formally being the State responsible for the coordination). From a dogmatic perspective, the relationship of legal obligations stemming from different legal regimes needs a precise assessment. The Committee has evoked provisions of treaties in the realm of the law of the sea in conjunction with matters of jurisdiction and of human rights violations. The interplay of (material) rights' violations, jurisdiction, and provisions of other regimes of international law deserves further thinking.

## What comes next?

The decision of the UN Human Rights Committee is important in many senses. First of all, it is a huge success in terms of strategic litigation as the plaintiffs and their supporters achieved to overcome the above described accountability gap. The Committee affirms that human rights obligations are applicable in extra-territorial settings of maritime migration and distress. A stronger line of (dogmatic) argumentation would have rendered the decision even more important and valuable. In particular, arguments concerning jurisdiction, State responsibility, and the material violation of a human right seem to be mixed and could be depicted in a more sophisticated manner. Members of the committee have tried to strengthen the Committee's line of argumentation by submitting concurring opinions.

Currently, there are several cases pending before (international) courts and committees related to maritime migration and death in the Mediterranean. The UN Human Rights Committee is concerned with another case against Italy in relation to so-called "privatized push-backs" (*Nivin* case). The former Italian minister Salvini is facing criminal proceedings in Italy for blocking migrants at sea. Human rights advocates are trying to activate the proceedings before the International Criminal Court, the European Court of Human Rights has to decide soon on the interception of migrants at sea (*S.S. and others v. Italy*). The European Court of Auditors might deal with the European Union funding of Libyan authorities leading to interceptions and pull-backs.And, a more technical proceeding might take place before the European Court of Justice which could decide upon the detention of NGO vessel by Italy. All these decisions concern the Mediterranean responsibilities of the European Union and its member States.

Tragically, the decision also possesses one clear drawback. Coastal states, such as Malta or Italy, might ignore distress calls even more often than they currently do, as they might fear to establish a jurisdictional link between migrants in distress and the State authority, as one of the dissenting opinions rightly points out (Annex 2).

The decision of the Committee might be weak in terms of legal argumentation and it might also lead to the perpetuation of an already existing scenario in which coastal States ignore distress calls. Nonetheless, the decision is strong in other terms: The Committee's decision might have an effect on the future interpretation of the jurisdictional clause of human rights treaties, which would allow to bring more cases of human rights violations before national and international courts and committees.

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