

ARTICLE

# Rethinking ‘Jurisdiction’ in International Human Rights Law in Rescue Operations at Sea in the Light of *AS and Others v Italy* and *AS and Others v Malta*: A New Right to be Rescued at Sea?

Silvia Dimitrova

Lawyer and member of the Bar, Ontario, Canada  
E-mail: [silvia.dimitrova@graduateinstitute.ch](mailto:silvia.dimitrova@graduateinstitute.ch)

(First published online 9 December 2022)

## Abstract

In January 2021 the Human Rights Committee determined that Italy and Malta had both failed to protect the right to life of more than 200 migrants who perished in a shipwreck in 2013. The Committee tackled for the first time the question of extra-territorial application of the International Covenant on Civil and Political Rights to persons in distress at sea. While finding the decision against Malta to be inadmissible, the Committee engaged in a significant analysis of the concept of jurisdiction in both decisions. This article analyses how the decisions interpret the concept of ‘jurisdiction’ and juxtaposes this analysis against the approaches taken in other international legal regimes. The article then theorises on the impact of these two decisions in helping to crystallise a new ‘right to be rescued at sea’.

**Keywords:** right to be rescued at sea; extraterritorial; ICCPR; law of the sea; jurisdiction

## 1. Introduction

The Human Rights Committee (HRC or the Committee) published on 27 January 2021 two seminal decisions on communications submitted in 2017 against Malta<sup>1</sup> and Italy<sup>2</sup> concerning a tragic shipwreck in the Mediterranean Sea in 2013. While finding the decision against Malta to be inadmissible on account of failure

<sup>1</sup> Human Rights Committee (HRC), *AS and Others v Malta*, Communication No 3043/2017 (27 January 2021), UN Doc CCPR/C/128/D/3043/2017.

<sup>2</sup> HRC, *AS and Others v Italy*, Communication No 3042/2017 (27 January 2021), UN Doc CCPR/C/130/D/3042/2017.

to exhaust domestic remedies, the HRC determined that both Italy and Malta had failed to protect the right to life of more than 200 migrants, who perished in a shipwreck in 2013, 60 of whom were children.<sup>3</sup> A fundamental question addressed by the Committee is the extraterritorial application of the International Covenant on Civil and Political Rights (ICCPR)<sup>4</sup> with regard to the obligations of state parties to rescue at sea. I will analyse how the decisions interpret the concept of 'jurisdiction' and will juxtapose this analysis against the approaches taken by other international bodies and regimes, notably the law of the sea regime, the European Court of Human Rights (ECtHR) and the International Court of Justice (ICJ). I then provide theoretical insights concerning the impact of these two decisions on sea rescue operations and on the emergence of a new 'right to be rescued at sea'. I propose that the decisions significantly extend the application of extraterritorial jurisdiction from previous HRC, ICJ and ECtHR jurisprudence, and effectively crystallise a 'right to be rescued at sea'. Future jurisprudence will clarify the scope and substance of such a right with the potential to strengthen significantly the obligations of state parties to comply with their duty to rescue lives in distress at sea.

## 2. Overview of the *Italy* and *Malta* decisions

The complaints against Malta and Italy arose out of a tragic shipwreck in the Mediterranean Sea on 11 October 2013. The complaints were filed by three survivors of the shipwreck on behalf of themselves and their relatives who had perished.<sup>5</sup> The Committee found that Italy violated the right to life of the individuals on board the vessel in distress in breach of Article 6 of the ICCPR. The communication against Malta was found to be inadmissible on account of the applicants having failed to exhaust local remedies, but the HRC's analysis of jurisdiction in this decision is significant as well. The two decisions, for what is relevant for the present analysis, must be read closely together.

### 2.1. *The facts*

An individual on board the vessel in distress contacted the Italian authorities, stating that the vessel was taking in large quantities of water and provided the vessel's coordinates.<sup>6</sup> It was located, at the time, 112 km south of the Italian island of Lampedusa and 218 km from Malta and within the latter's search and rescue region.<sup>7</sup> No rescue units were dispatched. Shortly after 1:00pm, persons on board the vessel desperately called the Italian phone number for emergencies only to be told that they were within Malta's search and rescue region;

<sup>3</sup> Despite the finding by the HRC that the decision against Malta was inadmissible (para 6.9) on account of the applicants' failure to exhaust domestic remedies, the author will examine this decision for its significance for the broader discussion of jurisdiction.

<sup>4</sup> International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>5</sup> *AS and Others v Malta* (n 1) para 1.1.

<sup>6</sup> *ibid* para 2.1.

<sup>7</sup> *ibid* para 1.1.

they were provided with the number of Malta's Rescue Coordination Centre (RCC) and instructed to call that instead.<sup>8</sup> In the meantime, consultations took place between the Italian air force and Italian navy over whether to dispatch the ITS *Libra* – an Italian navy ship which was about an hour away from the vessel in distress and was initially instructed to sail away from the vessel.<sup>9</sup> Both a patrol boat of the armed forces of Malta and Italy's ITS *Libra* arrived at the scene after the vessel had already capsized, costing the lives of over 200 individuals, 60 of whom were children.<sup>10</sup> The crux of the issues in both decisions was whether Italy<sup>11</sup> and Malta<sup>12</sup> exercised power or control over the victims of the shipwreck for the purposes of establishing jurisdiction, thereby triggering the application of the ICCPR.

## 2.2. *The decision against Italy*

The Committee applied General Comment No 31 of 2004<sup>13</sup> to interpret 'jurisdiction' as applying to situations in which a state party has power or effective control, even if the person is outside the territory of the state party.<sup>14</sup> Significantly, the Committee also drew on General Comment No 36 of 2018<sup>15</sup> on the right to life to find that persons outside a state territory could still be affected by that state, as state parties have an obligation 'to respect and protect the lives of all individuals ... who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea'. This obligation further includes protecting the right to life of persons located outside any territory effectively controlled by the state, 'whose right to life is nonetheless affected ... by other [state] activities in a direct and reasonably foreseeable manner'.<sup>16</sup>

In an attempt to overcome what has been described as predominantly 'Westphalian thinking'<sup>17</sup> of state jurisdiction being confined primarily to states' territories, the Committee determined that a 'special relationship of dependency' was established between the Italian authorities and those on board the vessel in distress. The Committee applied 'threshold criteria'<sup>18</sup> to find this relationship to have developed on the basis of circumstances which included: (a) the duty to respond in a reasonable manner to calls of distress pursuant to

<sup>8</sup> *ibid* para 2.2.

<sup>9</sup> *AS and Others v Italy* (n 2) para 7.7.

<sup>10</sup> *ibid* para 2.3.

<sup>11</sup> *ibid* para 7.7.

<sup>12</sup> *AS and Others v Malta* (n 1) para 6.7.

<sup>13</sup> HRC, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (26 May 2004), UN Doc CCPR/C/21/Rev1/Add 13.

<sup>14</sup> *AS and Others v Italy* (n 2) para 7.4.

<sup>15</sup> HRC, General Comment No 36 on Article 6 of the ICCPR, on the Right to Life (30 October 2018), UN Doc CCPR/C/GC/36.

<sup>16</sup> *ibid* para 7.5.

<sup>17</sup> Nassim Madjidian, 'Mediterranean Responsibilities: Extra-Territorial Jurisdiction of Coastal States in the Context of Maritime Migration', *Verfassungsblog*, 29 February 2021, <https://verfassungsblog.de/mediterranean-responsibilities>.

<sup>18</sup> *ibid*.

the International Convention for the Safety of Life at Sea (SOLAS) regulations;<sup>19</sup> (b) the fact that Italian authorities answered the first call from the vessel and Italy's Maritime Rescue Coordination Centre (MRCC) was involved in an ongoing manner with the rescue; (c) a duty to cooperate appropriately with other states undertaking rescue operations pursuant to the International Convention on Maritime Search and Rescue (SAR Convention);<sup>20</sup> and (d) the close proximity of the Italian vessel to the sinking vessel and the ongoing involvement of the Italian MRCC in the rescue operation.<sup>21</sup> On this basis, the Committee concluded 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*' and determined those individuals to be under Italy's jurisdiction.<sup>22</sup>

After finding that the HRC had jurisdiction over the complaints, the Committee found that Italy had not met its due diligence obligations under Article 6(1) of the ICCPR. Italy had failed to provide 'a clear explanation for what appears to be a failure to respond promptly to the distress call prior to the assumption of responsibility for the search and rescue operation by the Maltese authorities'.<sup>23</sup> Additionally, given the initial receipt of the distress call and the ongoing involvement by way of receipt of information 'about the deteriorating situation and the need for Italian assistance', the Committee found Italy had 'failed to explain the delay in dispatching the ITS *Libra*, which was located only one hour away from the vessel in distress, towards it, even after being formally requested to do so by RCC Malta'.<sup>24</sup> Finally, the Committee found that the failure of Italy to explain or refute the authors' claim that the ITS *Libra* was ordered to sail away from the vessel in distress also demonstrates Italy's failure to meet its due diligence obligations under Article 6(1) of the ICCPR.<sup>25</sup>

### 2.3. The decision regarding Malta

Like the approach taken in the decision against Italy, the Committee cited in the decision regarding Malta both General Comments 31 and 36 to assert the power or effective control test as the applicable test in determining state jurisdiction pursuant to the ICCPR. As in the decision against Italy, the

<sup>19</sup> International Maritime Organization (IMO), International Convention for the Safety of Life at Sea (SOLAS Convention) (entered into force 25 May 1980) 1184 UNTS 3.

<sup>20</sup> International Convention on Maritime Search and Rescue (SAR Convention) (entered into force 22 June 1985) 1403 UNTS.

<sup>21</sup> *AS and Others v Italy* (n 2) para 7.8.

<sup>22</sup> *ibid* para 7.8 (emphasis added); see also Paolo Busco, 'Not All That Glitters Is Gold: The Human Rights Committee's Test for the Extraterritorial Application of the ICCPR in the Context of Search and Rescue Operations', *Opinio Juris*, 2 March 2021, <http://opiniojuris.org/2021/03/02/not-all-that-glitters-is-gold-the-human-rights-committees-test-for-the-extraterritorial-application-of-the-iccpr-in-the-context-of-search-and-rescue-operations>.

<sup>23</sup> *AS and Others v Italy* (n 2) para 8.5.

<sup>24</sup> *ibid*.

<sup>25</sup> *ibid*.

HRC reiterated that when individuals' lives are affected 'in a direct and reasonably foreseeable manner' – such as situations in which state parties have taken 'an international obligation to apply the Covenant' – the extraterritorial jurisdiction of states may be triggered. This would include situations where individuals may 'find themselves in a situation of distress at sea, in accordance with [states'] international obligations on rescue at sea'.<sup>26</sup> The Committee further recalled its jurisprudence that a state party may be responsible for extraterritorial violations of the ICCPR 'where the risk of an extraterritorial violation is a *necessary and foreseeable consequence* judged on the knowledge the state party had at the time'.<sup>27</sup>

The Committee ultimately found that there was a jurisdictional link given that the ship was in Malta's search and rescue region and that Malta had undertaken responsibility to provide for the overall coordination of search and rescue operations, in accordance with the SAR and SOLAS Conventions. As such, given the 'undisputed' fact that the Malta state party authorities formally accepted assuming the coordination of the rescue efforts at 2:35pm, the Committee concluded that Malta had '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'. The complaint was nevertheless found to be inadmissible, despite the existence of jurisdiction, given that the complainants had not exhausted domestic remedies.<sup>28</sup>

### 3. 'Jurisdiction' in the law of the sea regime

In this section, I examine the law of the sea regime before juxtaposing it against the development and meaning of 'jurisdiction' at the ICJ and the ECtHR. Every shipmaster has to render assistance to persons or vessels in distress at sea. This obligation requires no nexus of jurisdiction between shipmasters and the persons they are obliged to rescue,<sup>29</sup> and flows from a long-standing tradition that 'exists throughout the ocean, whether in the territorial sea, in straits used for international navigation, in archipelagic waters, in the exclusive economic zone or on the high seas'.<sup>30</sup> This lack of a territorial link to trigger the duty to rescue was first codified in the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea signed in Brussels on 23 September 1910. According to Article 11 of this Convention, '[e]very master is bound so far as he can do so without serious danger to

<sup>26</sup> *AS and Others v Malta* (n 1) para 6.5.

<sup>27</sup> *ibid* (emphasis added).

<sup>28</sup> *ibid* para 6.9.

<sup>29</sup> Patricia Vella De Fremeaux and Felicity G Attard, 'Rescue at Sea and the Establishment of Jurisdiction: New Direction from the Human Rights Committee? Part I', *Opinio Juris*, 3 March 2021, <http://opiniojuris.org/2021/03/03/rescue-at-sea-and-the-establishment-of-jurisdiction-new-direction-from-the-human-rights-committee-part-i>.

<sup>30</sup> Myron H Nordquist (ed), *United Nations Convention on the Law of the Sea, 1982: A Commentary* (Martinus Nijhoff 1985) 177.

his vessel, her crew and passengers, to render assistance to everybody, even though an enemy, found at sea in danger of being lost'.<sup>31</sup>

The relevant legal framework that imposes such an obligation of rescue is also made up of the United Nations Convention on the Law of the Sea (UNCLOS),<sup>32</sup> the SOLAS and SAR Conventions, several additional treaties relating to maritime traffic and salvage, as well as resolutions and other instruments of international organisations, particularly the International Maritime Organization (IMO).<sup>33</sup>

### 3.1. *Obligation of shipmasters to render assistance*

The law of the sea regime has enshrined an obligation in customary international law to render assistance to those in distress or danger at sea irrespective of a jurisdictional link.<sup>34</sup> The legal obligation is articulated in Article 98 of UNCLOS, which imposes a positive obligation on flag states to require the master of every ship carrying 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 obligation to render such assistance extends both to persons 'found at sea' or to persons 'in distress' when the shipmaster receives a distress call. This duty covers situations pursuant to a procedure under the SOLAS or SAR Conventions, as well as in cases of collision. The High Seas Convention also extends a similar obligation to state parties that are not parties to UNCLOS.<sup>35</sup> This obligation applies in all cases, regardless of whether the vessel is a private or commercial vessel.<sup>36</sup>

Shipmasters are further bound by a specific obligation addressed to them in the SOLAS Convention. This provision requires:<sup>37</sup>

<sup>31</sup> UN High Commissioner for Refugees, Problems related to the Rescue of Asylum-Seekers in Distress at Sea (26 August 1981), UN Doc EC/SCP/18, <https://www.unhcr.org/excom/scip/3ae68ccc8/problems-related-rescue-asylum-seekers-distress-sea.html>.

<sup>32</sup> United Nations Convention on the Law of the Sea (UNCLOS) (entered into force 16 November 1994) 1833 UNTS 397.

<sup>33</sup> *ibid.*

<sup>34</sup> Vella De Fremieux and Attard (n 29).

<sup>35</sup> *ibid.*

<sup>36</sup> Parliamentary Assembly, 'Lives Lost in the Mediterranean Sea: Who is Responsible?', 29 March 2012, [https://assembly.coe.int/CommitteeDocs/2012/20120329\\_mig\\_RPT.EN.pdf](https://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf).

<sup>37</sup> SOLAS Convention (n 19) Ch V, reg 33.

The master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them of the search and rescue service that the ship is doing so.

This direct obligation is also imposed by the International Convention on Salvage, which provides a similar obligation for shipmasters to render assistance to individuals in danger at sea.<sup>38</sup> According to the IMO, an independent obligation on shipmasters exists irrespective of any duty imposed on states.<sup>39</sup>

### 3.2. Coastal state obligation in search and rescue

Article 98 of UNCLOS lays a broad obligation for coastal states 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’.<sup>40</sup> Both the SAR and SOLAS Conventions impose obligations on coastal states to establish and operate search and rescue obligations.<sup>41</sup> The SOLAS Convention establishes minimum safety standards to ensure that contracting states are equipped with the search and rescue facilities that are ‘deemed practicable and necessary’. Contracting states must also ensure that they put in place the requisite ‘distress communication and coordinate in their area of responsibility and for the rescue of persons in distress at sea around its coasts’.<sup>42</sup>

The SAR Convention, on the other hand, aims to establish a search and rescue plan for persons in distress at sea.<sup>43</sup> The Convention has led to the creation of a total of 13 search and rescue regions and national Rescue Coordination Centres (RCCs) tasked with search and rescue in these zones.<sup>44</sup> The location of the rescue operation is subject to a specified member state RCC, which is responsible for carrying out the rescue operation and delivery of the persons in distress to a ‘place of safety’.<sup>45</sup>

Each RCC and Rescue Coordination Subcentre (RCS) has an obligation to arrange for the receipt of distress alerts originating from within its search and rescue region and arrange for communications with persons in distress with search and rescue facilities and with other RCCs or RCSs.<sup>46</sup> RCCs are to

<sup>38</sup> International Convention on Salvage 1989 (entered into force 17 July 1996) 1953 UNTS 163, art 10.

<sup>39</sup> The relevant and equivalent provision in UNCLOS (n 32) is art 98(1b).

<sup>40</sup> UNCLOS (n 32) art 98(2).

<sup>41</sup> SOLAS Convention (n 19) Annex, Ch V, reg 7; SAR Convention (n 20) Annex, Ch 1, para 1.3.3 and Ch 2.

<sup>42</sup> SOLAS Convention (n 19) Ch V, reg 7(1).

<sup>43</sup> Michael Mulqueen, Deborah Sanders and Ian Speller (eds), *Small Navies: Strategy and Policy for Small Navies in War and Peace* (Ashgate 2016) 137.

<sup>44</sup> SAR Convention (n 20) Annex, rule 2.3.1.

<sup>45</sup> *ibid* Annex, rule 1.3.2.

<sup>46</sup> *ibid* Annex, rule 2.3.2.

be operated on a 24-hour basis and constantly staffed.<sup>47</sup> The Convention further imposes an obligation on states parties to cooperate in the development of search and rescue services.<sup>48</sup> Upon receiving a distress-at-sea call, the party 'shall take urgent steps to ensure that the necessary assistance is provided'.<sup>49</sup> Upon receiving a distress call, the party is to give prompt assistance to distress calls<sup>50</sup> and 'take urgent steps to provide the most appropriate assistance available'.<sup>51</sup>

Provisional search and rescue plans have been developed in accordance with the requirements of the Convention in most of the 13 designated regions. Nevertheless, the overlapping search and rescue areas between Italy, Malta and Libya have often caused long delays in addressing rescue calls. The island of Lampedusa is part of both the Maltese and Italian search and rescue area. As is evident in the decisions against Italy and Malta, more than 200 people died as a consequence of the failure of Maltese and Italian authorities to dispatch a rescue vessel until after the vessel had capsized.<sup>52</sup> This and similar incidents have created practical difficulties in implementing the duty to rescue, which also arises when, once rescued, shipmasters are unable to disembark individuals in a timely fashion.<sup>53</sup> The issue of jurisdiction in the law of the sea regime has not managed to resolve this practical difficulty.

The lack of a clear and unequivocal obligation to allow persons to disembark once rescued at sea has tested the limits of the law of the sea regime. Though not explicit in the decisions against Italy and Malta, the issue of disembarkation of rescued persons from distress at sea undermines meaningful implementation of the obligation to rescue in the existing law of the sea. Following the refusal by Australian authorities to allow the *Tampa* Norwegian freighter to disembark on the Australian coast,<sup>54</sup> the IMO Assembly authorised a comprehensive review of safety measures and procedures for the treatment of persons rescued at sea.<sup>55</sup> While substantial

<sup>47</sup> *ibid* Annex, rule 2.3.3.

<sup>48</sup> Silja Klepp, 'A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, a Legal Anthropological Perspective on the Humanitarian Law of the Sea' (2011) 23 *International Journal of Refugee Law* 538, 549; Á Jiménez García-Carriazo, 'Small Island, Big Issue: Malta and Its Search and Rescue Region – SAR' (2019) *Paix et Sécurité Internationales* 299, 310–11.

<sup>49</sup> SAR Convention (n 20) Annex, rule 2.1.1

<sup>50</sup> *ibid* Annex, rules 2.1.8, 2.1.10.

<sup>51</sup> *ibid* Annex, rule 2.1.9.

<sup>52</sup> Enkelejda Koka and Denard Veshi, 'Irregular Migration by Sea: Interception and Rescue Interventions in Light of International Law and the EU Sea Borders Regulation' (2019) 21 *European Journal of Migration and Law* 26, 42–43.

<sup>53</sup> Vella De Fremeaux and Attard (n 29).

<sup>54</sup> After loading 433 survivors on board a rescue ship, the captain was denied entry into Australian territorial waters to disembark the rescued migrants, notwithstanding communication about the grave medical state of several of the rescued migrants and the issuing of repeated distress signals by the *Tampa*. Australia's position was that the rescue by the MV *Tampa* occurred outside the search and rescue region of Australia and, as such, was not Australia's responsibility: Frederick Kenney Jr and Vasilios Tasikas, 'The *Tampa* Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea' (2003) 12 *Washington International Law Journal* 144.

<sup>55</sup> IMO Assembly, IMO Resolution A.920(22), 'Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea', adopted 29 November 2001, IMO Doc A22/Res 920.



amendments resulted in the addition of several chapters to the Annex of the SAR Convention, as well as an accompanying set of Guidelines on the Treatment of Persons Rescued at Sea, adopted by the IMO in 2004,<sup>56</sup> these modifications have left a number of questions unanswered.<sup>57</sup> One prominent area is ongoing ambiguities on the ability of coastal states to refuse disembarkation.

The 2004 SOLAR and SAR amendments impose an unequivocal obligation on the government responsible for the search and rescue region in which the survivors were recovered to provide a place of safety for the rescued persons or to ensure that such a place of safety is provided before the persons are disembarked,<sup>58</sup> including in collaboration with assisting ships.<sup>59</sup> However, certain states continue to reject a legal entitlement to disembark rescued persons at another port without the consent of that state.<sup>60</sup> Malta is located in one of the most volatile regions with regard to migrants rescued at sea, with a crowded search and rescue region of around a quarter of a million square kilometres.<sup>61</sup> While Malta has objected to the amendments, Italy has accepted them, leading to a legal vacuum,<sup>62</sup> which creates serious and life-threatening consequences for migrants at sea in the Mediterranean.

#### 4. 'Jurisdiction' in international human rights law

Extraterritorial 'jurisdiction' is generally limited in most, if not all, human rights universal instruments.<sup>63</sup> For example, an examination of the preparatory work relating to Article 2(1) of the ICCPR indicates that the focus of the drafters was to ensure that the Covenant applied within the territory of a state party, but not beyond.<sup>64</sup> The application of the ICCPR to state parties operating abroad was not taken into account, the only exception being the *sui generis* possibility of military occupation.<sup>65</sup> Similarly, the preparatory work of Article 1 of the European Convention on Human Rights (ECHR) indicates that the drafters understood 'jurisdiction' as a notion very close to, if not synonymous with 'territory', without considering when a state party, by

<sup>56</sup> IMO, Resolution MSC.167(78), 'Guidelines on the Treatment of Persons Rescued at Sea', adopted 20 May 2004 (IMO Guidelines).

<sup>57</sup> For a discussion of issues of concern in relation to rescue and disembarkation of smuggled migrants following the 2004 amendments, see Anne Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 458ff.

<sup>58</sup> IMO Guidelines (n 56) Annex 34 (Preamble); Annex, para 2.5.

<sup>59</sup> *ibid* Appendix, para 2.

<sup>60</sup> Gallagher and David (n 57) 461.

<sup>61</sup> *ibid* (citing Council of Europe, Parliamentary Assembly, Report of the Committee on Migration, Refugees and Population, 'The Interception and Rescue at Sea of Asylum Seekers, Refugees and Irregular Migrants', Doc 12628, 1 June 2011, 16).

<sup>62</sup> Gallagher and David (n 57) 461.

<sup>63</sup> *ibid* Ch 3, 250–51.

<sup>64</sup> Karen da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff 2013) 23.

<sup>65</sup> *ibid* 41.

exercising jurisdiction, may bring the application of the ECHR beyond its borders.<sup>66</sup>

Despite the drafters' initial intention of limiting jurisdiction, there has been a necessary and gradual broadening of the concept of 'jurisdiction' beyond that of a 'territory' in an attempt to increase judicial protection for individuals as a result of state action with extraterritorial effects.<sup>67</sup> This development has been prominent in the jurisprudence of the Committee on the Rights of the Child, driven by considerations of respect for the rights of children.<sup>68</sup> More recently, this Committee applied an expansive interpretation of 'jurisdiction' in determining that France was responsible for the human rights of several children, nationals of France who were detained with their parents in Syria, for failing to repatriate the children or provide other consular responses for their protection. The Committee thereby 'broadened' jurisdiction on account of France's 'capacity' and the 'power' of repatriation or consular services in relation to protection of the children.<sup>69</sup> Furthermore, international bodies have also turned to the object and purpose of the particular convention for a flexible interpretation. For instance, it has long been accepted that the ICCPR applies to every person within the territory of the state party or under its jurisdiction, despite the applicable provision referring to all persons within the state parties' territory and subject to its jurisdiction.<sup>70</sup>

Some commentators have shown caution towards broadening the concept of 'jurisdiction' beyond that of 'territory'. McGoldrick noted the practical need for such a restriction in order to ensure that states are in a position to realise human rights in an effective and meaningful way with the goal of ensuring that governments have 'some degree of government power over individuals'.<sup>71</sup> Shany cautioned against the 'extreme overreaching in treaty interpretation leading to the imposition of burdensome legal obligation on states', with the risk of causing 'political resistance, and to charges of a power grab on the part of [international human rights law] institutions' beyond the initial

<sup>66</sup> Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 *Human Rights Law Review* 411, 434.

<sup>67</sup> UN General Assembly, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Note by the Secretary-General (7 August 2015), UN Doc A/70/303, para 12.

<sup>68</sup> Committee on the Rights of the Child, Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, concerning Communications No 79/2019 and No 109/2019 (2 November 2020), UN Docs CRC/C/85/D/79/2019 – CRC/C/85/D/109/2019, para 9.6; Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 23 (2017) of the Committee on the Rights of the Child on State Obligations regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return (16 November 2017), UN Doc CMW/C/GC/4 – CRC/C/GC/23, paras 17(e) and 19.

<sup>69</sup> Committee on the Rights of the Child, Decision concerning Communications No 79/2019 and No 109/2019, *ibid* para 9.

<sup>70</sup> Gallagher and David (n 57) 251.

<sup>71</sup> Dominic McGoldrick, 'Extraterritorial Application of the International Covenant on Civil and Political Rights' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 41.

intentions of states.<sup>72</sup> Nevertheless, the attempt to strengthen the protection of migrants in distress at sea requires an interpretation of existing international law obligations imposed by the law of the sea that is compliant with human rights.

#### 4.1. UN Human Rights Committee: Power or effective control

‘Jurisdiction’ has been interpreted by the HRC as an obligation on a state party to respect and ensure that the rights in the ICCPR apply to persons who are ‘within the power or effective control of that state party, even if not situated within the territory of the state party’.<sup>73</sup> General Comment No. 31 further affirms that Covenant rights apply to all individuals, irrespective of their nationality or lack thereof.

Prior to the *Italy* and *Malta* decisions, the HRC applied the ‘power or effective control test’ in its Concluding Observations on state parties’ reports.<sup>74</sup> For example, the Committee found that Australia met the ‘power or effective control’ standard given the ‘significant levels of control and influence exercised by the state party over the operation of [offshore immigration processing facilities], including over its establishment, funding and service provided therein’ in Papua New Guinea and Nauru.<sup>75</sup> Similarly, the Committee found Israel to have met the test for jurisdiction with reference to the exercise of effective control by Israeli security forces in the Occupied Palestinian territory.<sup>76</sup>

The Committee has also taken a broad position on jurisdiction with regard to the application of the ICCPR to non-nationals outside the state party’s territory. The potential for broadening even further the extraterritorial reach of the Convention was asserted in a 2009 communication involving Romania in which the HRC held that ‘a State party may be responsible for extraterritorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction’.<sup>77</sup> The state party is responsible for extraterritorial human rights violations when the risk is ‘a necessary and foreseeable consequence’ based on the ‘knowledge the State party had at the time’.<sup>78</sup> Hathaway and co-authors have noted that this qualification has effectively altered the power and control test. A state no longer needs to exercise ‘unilateral control over an individual at the time of the violation’ given the

<sup>72</sup> Yuval Shany, ‘Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law’ (2013) 7 *Law and Ethics of Human Rights* 47, 50.

<sup>73</sup> HRC, General Comment No 31 (n 13) para 10 (emphasis added).

<sup>74</sup> Gallagher and David (n 57) 252.

<sup>75</sup> HRC, Concluding Observations on the Sixth Periodic Report of Australia (1 December 2017), UN Doc CCRP/C/AUS/CO/6, para 35, <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPFPRiCaqhkb7yhsoAl3%2FFsnISQx2VAmWrPA0uA3KW0kpmSGOue15UG42EodNm2j%2FncTYghc1kM8Y%2FLQ4n6KZBdggHT5qPmUYCI8eCslXZmnVlMq%2FoYCNPyKpq>.

<sup>76</sup> HRC, Concluding Observations: Israel (18 August 1998), UN Doc CCRP/C/79/Add.93.

<sup>77</sup> Gallagher and David (n 57) 253 (citing HRC, *Munaf v Romania*, Communication No 1539/2006 (21 August 2009), UN Doc CCRP/C/96/D/1539/2006, para 14.2).

<sup>78</sup> *ibid.*

mere ‘link in the causal chain’.<sup>79</sup> Notably, the dissenting opinion of Committee member, Andreas Zimmerman, in *AS and Others v Malta* distinguished this case from the facts in *Munaf* because in the latter case the author of the complaint was within the Romanian embassy where ‘Romania had full legal jurisdiction over its diplomatic premises and the acts of all persons therein’.<sup>80</sup>

Significantly, the HRC has recently gone a step further and espoused an approach to jurisdiction that assesses the potential ‘impact’ of the state conduct.<sup>81</sup> In its 2018 General Comment No 36, the Committee endorsed an impact approach as complementary to the personal model (power over an individual); this is the so-called ‘functional approach to jurisdiction’.<sup>82</sup> In interpreting the term ‘jurisdiction’ under Article 2 of the ICCPR and in relation to one’s right to life, the Committee has indicated that ‘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*’.<sup>83</sup>

#### 4.2. European Court of Human Rights: Effective overall control

The ECtHR has generally adopted a more conservative approach to jurisdiction, avoiding extending jurisdiction to all state party conduct irrespective of where it takes place. Some authors have called the Court’s approach to extraterritorial jurisdiction ‘inconsistent’ and presenting ‘serious problems stemming from the Court’s ambiguity as to the precise boundaries of the Convention’.<sup>84</sup> Milanovic has provided two models to reconcile the Court’s spanning jurisprudence with regard to ‘jurisdiction’. Article 1 of the ECHR provides both a ‘spatial’ model, which recognises the jurisdiction of the state where the state has ‘effective overall control’ over a particular area, as well as the ‘personal’ model, which views the exercise of authority or control as determinative in establishing jurisdiction.<sup>85</sup>

One of the most authoritative ECtHR decisions on extraterritorial jurisdiction is *Banković* in which the Court was asked to decide whether the victims of the 1999 aerial bombardment of Belgrade by member states fell within its

<sup>79</sup> Oona Hathaway and others, ‘Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?’ (2011) 43 *Arizona State Law Journal* 389, 417.

<sup>80</sup> *AS and Others v Malta* (n 1) para 4.

<sup>81</sup> For further commentary, see Daniel Møgster, ‘Towards Universality: Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR’, *EJIL: Talk!*, 27 November 2018, <https://www.ejiltalk.org/towards-universality-activities-impacting-the-enjoyment-of-the-right-to-life-and-the-extraterritorial-application-of-the-iccpr>.

<sup>82</sup> Efthymios Papastavridis, ‘The European Convention of Human Rights and Migration at Sea: Reading the “Jurisdictional Threshold” of the Convention under the Law of the Sea Paradigm’ (2020) 21 *German Law Journal* 417, 423. According to the functional approach, states must ‘protect (international human rights law) in situations they can do so’: Shany (n 72) 71.

<sup>83</sup> HRC, General Comment No 36 (n 15) para 63 (emphasis added).

<sup>84</sup> Sarah Miller, ‘Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention’ (2009) 20 *European Journal of International Law* 1223–46.

<sup>85</sup> Marko Milanovic, ‘*Al-Skeini and Al-Jedda* in Strasbourg’ (2012) 23 *European Journal of International Law* 121.

jurisdiction for the purpose of triggering state parties' obligations under the ECHR. Holding that the European Convention applies extraterritorially only in 'exceptional circumstances', the Court decided that inflicting harm via control over one's airspace was not enough to establish a jurisdictional link. The Court held that 'Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case'.<sup>86</sup> This narrow approach to the traditional bases of extraterritorial jurisdiction has been criticised as a *carte blanche* for states to operate unlawfully abroad.<sup>87</sup>

While *Banković* has been applied in a number of subsequent decisions, with a narrow interpretation of jurisdiction being endorsed by several ECtHR cases,<sup>88</sup> more recent judgments have attempted a shift away from the strict *Banković* test of 'effective control over territory' to a test of the exercise of power and authority over individuals.<sup>89</sup> For example, the Court confirmed in its 2004 *Ilascu* decision that:<sup>90</sup>

[although] jurisdiction is presumed to be exercised normally through the state's territory ... in exceptional circumstances the acts of [state parties] performed outside their territory, or which produce effects there, may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention.

This shift to an 'effective overall control standard' continued with the famous *Al-Skeini* case, when the Court rejected two of its propositions from earlier ECtHR jurisprudence: that the Convention applied only in the juridical and geographical space created by states parties, and that extraterritorial jurisdiction would apply only in situations in which the state has 'control' over an area outside its territory.<sup>91</sup> *Al-Skeini* reaffirmed the validity both of the spatial model and the personal model, holding, with regard to the latter model, that:<sup>92</sup>

[i]t is clear that, whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.

<sup>86</sup> ECtHR, *Banković v Belgium and Others*, App no 52207/99, 12 December 2001, para 61.

<sup>87</sup> Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, *S.S. and Others v. Italy*, and the "Operational Model"' (2020) 21 *German Law Journal* 385, 398.

<sup>88</sup> Hugh King, 'Extraterritorial Human Rights Obligations of States' (2009) 9 *Human Rights Law Review* 521, 533.

<sup>89</sup> Gallagher and David (n 57) 260; see also Papastavridis (n 82) 422.

<sup>90</sup> ECtHR, *Ilascu and Others v Moldova and Russia*, App no 48787/99, 8 July 2004, paras 312–14.

<sup>91</sup> Gallagher and David (n 57) 261.

<sup>92</sup> ECtHR, *Al-Skeini and Others v United Kingdom*, App no 55721/07, 7 July 2011, para 137; ECtHR, *Carter v Russia*, App no 20914/0, 21 September 2021.

#### 4.2.1. ECHR protection at sea

The European Convention on Human Rights applies on the high seas. However, jurisdiction requires a certain degree of control over the vessel or over the persons that come within the jurisdiction of the boarding state.<sup>93</sup> Such degree of control is met when a vessel is searched and when individuals are detained and transferred to the judicial authority of the state party to the Convention.<sup>94</sup> The ECtHR has found the requisite degree of control for the purposes of jurisdiction when individuals are transferred to a third state, as in the *Hirsi Jamaa* case. In this 2012 case, which involved the high seas interception and pushback of smuggled Somali and Eritrean nationals by the Italian coast guard back to Libya, the Court found that Italy had exercised both de jure and de facto jurisdiction over the individuals on board the intercepted vessels.<sup>95</sup> The Court determined that although the Italian authorities had neither boarded the vessels nor used weapons, and Italy's actions took place outside its territory, Italy had still violated the prohibition of torture and inhuman or degrading treatment or punishment and the prohibition of collective expulsions of individuals. Crucially, the Court found that Italy still exercised jurisdiction despite its argument of having had minimal control over the parties.<sup>96</sup>

Italy cannot circumvent its 'jurisdiction' under the Convention by describing the events at issue as rescue operations on the high seas. In particular, the Court cannot subscribe to the Government's argument that Italy was not responsible for the fate of the applicants on account of the allegedly minimal control exercised by the authorities over the parties concerned at the material time.

The *Hirsi Jamaa* decision represented a significant turning point in the approach taken by European coastal states in search and rescue operations.<sup>97</sup> The practical implications of the ECtHR's delineation of state jurisdiction following *Hirsi* is that member states can no longer return irregular migrants back to their country of departure without determining their individual circumstances.<sup>98</sup> Member states have an additional duty not to return an individual if they know that the asylum and immigration system of the country of departure is short of meeting human rights obligations.<sup>99</sup> The degree of control may also be fulfilled when there is a ship-to-ship operation prior to

<sup>93</sup> *ibid.*

<sup>94</sup> ECtHR, *Medvedyev and Others v France*, App no 3394/03, 29 March 2010, para 67.

<sup>95</sup> ECtHR, *Hirsi Jamaa v Italy*, App no 27765/09, 23 February 2012, para 180.

<sup>96</sup> *ibid* para 79.

<sup>97</sup> Patrick Müller and Peter Slominski, 'Breaking the Legal Link but not the Law? The Externalization of EU Migration Control through Orchestration in the Central Mediterranean' (2020) 1 *Journal of European Public Policy* 8–9.

<sup>98</sup> *Hirsi Jamaa* (n 95) paras 131–33.

<sup>99</sup> *Koka and Veshi* (n 52) 29; CJEU, C-411/10, *NS v Secretary of State for the Home Department*, and C-493/10, *ME v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011, ECLI:EU:C:2011:865, para 94; ECtHR, *MSS v Belgium and Greece*, App no 30696/09, 21 January 2011, para 358.

boarding, which involves some use of force in bringing the vessel to a halt.<sup>100</sup> An example would be the *Women on Waves v Portugal* case in which the Court determined the mere interception, without boarding by a Portuguese warship, to be sufficient to bring about the application of the Convention.<sup>101</sup>

#### 4.3. 'Jurisdiction' at the International Court of Justice: Acts done in the state's jurisdiction

The ICJ has not explicitly adopted the 'power or effective control' test, although it still affirms on limited occasions that human rights treaties will apply extraterritorially to state actions outside their territories. For example, the Court has noted, in relation to the application of the ICCPR, that:<sup>102</sup>

[W]hile the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

The ICJ's determination of the extraterritorial application of the ICCPR has generally failed to stipulate clearly<sup>103</sup> all instances when a state's extraterritorial jurisdiction would be triggered. As such, it sheds limited light on jurisdiction in rescue operations at sea given that the ICJ has not addressed such a set of facts. For example, while in its 2004 advisory opinion in *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ affirmed that the ICCPR is applicable 'in respect of acts done by a state in the exercise of its jurisdiction outside its own territory',<sup>104</sup> some commentators have found the ICJ test of extraterritorial jurisdiction circuitous, triggering human rights jurisdiction where a state has already 'exercised its jurisdiction'.<sup>105</sup> The Court has further failed to articulate its definition of 'acts done by a state in the exercise of its jurisdiction'. Significantly, the ICJ has found the Convention on the Elimination of Racial Discrimination (CERD) to apply in the context of a situation that amounts to less than an occupation. In *Georgia v Russian Federation*, the ICJ found the CERD to apply in the absence of an explicit extraterritorial provision. The Court concluded that the relevant provisions 'generally appear to apply, like other provisions of instruments of that nature, to the actions of a state party when it acts beyond its territory'.<sup>106</sup>

<sup>100</sup> Papastavridis (n 82) 425.

<sup>101</sup> ECtHR, *Women on Waves and Others v Portugal*, App no 31276/05, 13 January 2009, para 23.

<sup>102</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (2004) ICJ Rep 136, [109] (emphasis added).

<sup>103</sup> Gallagher and David (n 57) 256.

<sup>104</sup> *Wall* Advisory Opinion (n 102) para 111.

<sup>105</sup> Gallagher and David (n 57) 256 (citing John Cerone, 'Out of Bounds? Considering the Reach of International Human Rights Law' (2006) New York University School of Law Center for Human Rights and Global Justice Working Paper No 5, 19.

<sup>106</sup> ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v Russian Federation*), Provisional Measures, Order of 15 October 2008, [2008] ICJ Rep 353, [109].



## 5. The impact of the *Italy* and *Malta* decisions on the future of ‘jurisdiction’ in sea rescue operations

### 5.1. *The novelty of the Italy and Malta decisions*

The *Italy* and *Malta* decisions are the first HRC decisions in the context of search and rescue operations following the earlier and only ECtHR decision, *Hirsi Jamaa*.<sup>107</sup> In contrast to this case, where the jurisdictional link was triggered by virtue of the individuals being aboard the state’s naval unit, the HRC decisions against Italy and Malta serve to extend even further the jurisdiction of states in sea rescue operations.

Particularly in respect of the *Italy* decision, the Committee’s interpretation of jurisdiction, as based on threshold criteria,<sup>108</sup> is a novel approach in the context of sea rescue operations. The Committee created the test of a ‘special relationship of dependency [that] was ... established in the particular circumstances of the case’ despite the fact that the incident happened outside Italy’s search and rescue region, but rather within that of Malta. The decisions are interesting from a policy perspective also because the suggestion of de jure control and *ipso facto* jurisdiction over events within a state’s search and rescue region could promote more responsible conduct by states in search and rescue operations. Nevertheless, maintaining that states have jurisdiction when an incident takes place within a state’s own search and rescue area may result in decisions of states relinquishing portions of their search and rescue zones that they are unable to manage.<sup>109</sup> As such, the decisions have not come without significant criticism.

### 5.2. *Controversial aspects*

The majority decisions in the Maltese and Italian cases, when read together, appear to ignore the negative consequences of an expansion of jurisdiction under international human rights law. The language of ‘automatic consequentiality’ of actions that take place within a state’s search and rescue, to ground *ipso facto* control and create the ‘presumption of jurisdiction’ in that zone, fails to take into account the ‘power or effective control’ test of jurisdiction from earlier HRC jurisprudence. This significantly broadens state jurisdiction. The conflating of the notion of jurisdiction in human rights law and in the law of the sea can thus hamper the policy consideration of enforcing state compliance obligations of rescuing lives in distress at sea.<sup>110</sup> Therefore, the outcome in the Maltese and Italian cases is that the ICCPR has been extended to apply in either the ‘SAR zone of a State party or close to a ship flying the flag of a State party’. This could lead state parties to ‘avoid coming close to boats in distress so as to avoid impressions of a “special relationship of dependency” having

<sup>107</sup> *Hirsi Jamaa* (n 95).

<sup>108</sup> *Madjidian* (n 17).

<sup>109</sup> *Busco* (n 22).

<sup>110</sup> *ibid.*



been created'.<sup>111</sup> This is also because ships that are proximate to the incident, as was Italy's ITS *Libra* (just 15 miles from the vessel in distress, according to the Italian Minister of Defence, or less than an hour),<sup>112</sup> would be required to intervene in a sea rescue operation. Commentators have gone further in critiquing the HRC approach as going beyond the scope of the functionalist approach to jurisdiction, endorsed in General Comment No. 36. This is because the Committee failed to distinguish situations in which states have the potential to place individuals under their effective control from situations of the actual placement of individuals under effective state control.<sup>113</sup> Furthermore, the low threshold to establish jurisdiction and control is difficult to reconcile with the Committee presuming that Malta had jurisdiction in its search and rescue region and had undertaken legal responsibility for the situation.<sup>114</sup>

Another legal consequence of an expansion of the test of jurisdiction pursuant to international human rights by relying heavily on the law of the sea regime is that such conflating of the test of jurisdiction is legally incorrect. The duty to rescue in UNCLOS and the SAR and the SOLAS Conventions requires no nexus of jurisdiction between the shipmaster and the persons to be rescued. These authors have indicated that the equating of a search and rescue region to a jurisdictional zone is contrary to Article II(1) of the SAR Convention, which provides that 'no provision of the Convention shall be construed as prejudicing obligations or rights of vessels provided for in other international instruments'. Search and rescue regions are only zones where state parties must ensure cooperation and coordination of search and rescue, irrespective of jurisdiction.<sup>115</sup>

A further negative consequence of the expansion of the test of jurisdiction under international human rights law is that the 'power and control' test for jurisdiction pursuant to the ICCPR in the context of search and rescue operations at sea may now require an individualised assessment. This assessment asks whether the state had acted with 'due diligence' and had 'ma[de] the best efforts within the means available'.<sup>116</sup> Although Italy was alerted to the distress situation, it could not leave the rescue operation entirely to Malta in whose search and rescue zone the incident took place. Italy had a 'residual responsibility ... to provide assistance, especially to those states with limited capacity to render such assistance on their own', such as arguably Malta. According to this interpretation, the jurisdictional link is created by international legal obligations in the law of the sea to render assistance to persons in distress at sea, which require that any search and rescue unit alerted to a situation of distress must take urgent steps to ensure that assistance is provided until the responsible party takes responsibility (in this case, Malta).<sup>117</sup>

<sup>111</sup> *AS and Others v Italy* (n 2) dissenting opinion of Andreas Zimmerman, para 4.

<sup>112</sup> *ibid* concurring opinion of José Santos Pais, para 3.

<sup>113</sup> Madjidian (n 17) (citing *AS and Others v Italy* (n 2) dissenting opinion of Yuval Shany, Christof Heyns and Photini Pazartzis, para 5).

<sup>114</sup> Madjidian (n 17).

<sup>115</sup> Vella De Fremeaux and Attard (n 29); see SAR Convention (n 20) Annex, Cap 2.1.1.

<sup>116</sup> *AS and Others v Italy* (n 2) concurring opinion of Gentian Zyberi, para 3.

<sup>117</sup> IMO Guidelines (n 56).

In addition, according to the decisions against Italy and Malta, such jurisdictional nexus must also be read in the light of Article 6 of the ICCPR and General Comment No. 36, which reaffirms one's right to be free from acts that could cause their premature or unnatural death.<sup>118</sup>

### 5.3. A right to be rescued at sea?

Has 'a new right to be rescued at sea' developed, as pointed out in Hélène Tigroudja's concurring opinion in the decision against Italy? This opinion underscores the potential for making a first attempt to address some 'maritime legal black holes' in the extraterritorial jurisdiction in sea rescue operations. While the *Hirsi Jamaa* decision of the ECtHR confirmed jurisdiction in the context of physical control by state party authorities by virtue of the physical presence of individuals on the state's naval unit, the extension of jurisdiction to another state's search and rescue region is significant. The decisions against Italy and Malta have the potential to strengthen the application of the ICCPR in situations of distress at sea when individuals find themselves either in a state party's search and rescue zone or near a ship flying the flag of a state party. Hence, the main innovation of the decision against Italy is that extraterritorial jurisdiction may require a state to take positive measures 'in response to reasonably foreseeable threats' to rescue individuals whose right to life is at risk.<sup>119</sup> This positive duty covers both acts and omissions,<sup>120</sup> and includes an obligation to adopt appropriate laws or measures to 'protect life from all reasonably foreseeable threats'.<sup>121</sup>

The *Italy* and *Malta* decisions effectively provide the legal basis for the 'right to be rescued at sea', as seen in the opinions of the majority in both decisions. Pursuant to the decision against Italy, if a state party receives a distress call from a vessel and a 'special relationship of dependency' forms, jurisdiction will be triggered for the purposes of the ICCPR. Similarly, where a state party receives a distress call from a vessel within its search and rescue region, the jurisdictional link established will trigger its obligations pursuant to the ICCPR with regard to individuals on board that vessel. In addition, the state in whose search and rescue region are the individuals in distress will need to act with 'due diligence' and make the 'best efforts within the means' available. The *Italy* and *Malta* decisions thus establish that while the jurisdictional link in search and rescue operations is generally based on the international legal obligations of the duty of states to render assistance to persons in distress at sea, these obligations are to be read in the light of Article 6 of the ICCPR and General Comment No. 36, which protect the right to be free from acts that could cause premature or unnatural death. Two of the concurring individual opinions in the decision against Italy reiterate that the right to life in the ICCPR encompasses not simply an analysis of state acts but also omissions

<sup>118</sup> *AS and Others v Italy* (n 2) concurring opinion of Gentian Zyberi, para 3.

<sup>119</sup> *ibid* para 8.3.

<sup>120</sup> *AS and Others v Malta* (n 1) para 6.7.

<sup>121</sup> *AS and Others v Italy* (n 2) para 8.3.

that are intended or may be expected to cause unnatural or premature death.<sup>122</sup>

A further legal basis of the 'right to be rescued at sea' can be found in the law of the sea regime which has led to recognition of the duty to render assistance as a principle of customary law. Article 98 of UNCLOS provides that '[e]very state shall require the master of a ship flying its flag ... to render assistance to any person found at sea in danger of being lost ... and to proceed with all possible speed to the rescue of persons in distress'. This duty of rescue is further regulated in the SOLAS Convention and the SAR Convention, as well as in the 1989 International Convention on Salvage.<sup>123</sup> This obligation requires the first state Rescue Coordination Center (RCC) to be contacted, irrespective of whether the persons in distress are within its search and rescue region, to 'immediately begin efforts to transfer the case to the RCC responsible for the region'. Until the case is transferred, the first RCC contacted is responsible for coordinating 'the case until the responsible RCC or other competent authority assumes responsibility'.<sup>124</sup>

Indeed, by connecting the obligation to render assistance to individuals under the law of the sea regime to the right to life protected by international human rights law, the Committee has made a first, yet seminal step towards recognition of a right to be rescued at sea. Nonetheless, the jurisdictional link established by the Committee's decision may seem too convoluted, leading to a tendency by state parties to avoid becoming implicated in distress calls.<sup>125</sup> While the Committee wished for an expansive definition of jurisdiction, such as to trigger state compliance with rescue obligations, it is unclear whether the HRC's attempt will weaken or strengthen the duty of coastal states to render assistance. Two cases, one pending before the HRC and one before the ECtHR, illustrate the potential for the 'right to be rescued at sea' to crystallise.<sup>126</sup>

## 6. Conclusion

The Committee's decisions against Italy and Malta come in the wake of unprecedented numbers of migrant deaths in the Mediterranean since tracking first began. In 2021 alone, 2,048 migrants perished at sea or went missing in the

<sup>122</sup> *ibid* concurring opinion of José Santos Pais, paras 3, 10; see also *ibid* concurring opinion of Vasilka Sancin, para 3.

<sup>123</sup> International Convention on Salvage (n 38); Seline Trevisanut, 'Is there a Right to be Rescued at Sea? A Constructive View' (2014) 4 *QIL Zoom-in* 3, 5.

<sup>124</sup> IMO Guidelines (n 56) Annex, para 6.7.

<sup>125</sup> *AS and Others v Malta* (n 1) dissenting opinion of Andreas Zimmermann, para 9; see also *AS and Others v Italy* (n 2) dissenting opinion of David Moore, para 4.

<sup>126</sup> *SDG v Italy*, Communication to the United Nations Human Rights Committee (anonimised version), [https://c5e65ece-003b-4d73-aa76-854664da4e33.filesusr.com/ugd/14ee1a\\_e0466b7845-f941098730900ede1b51cb.pdf](https://c5e65ece-003b-4d73-aa76-854664da4e33.filesusr.com/ugd/14ee1a_e0466b7845-f941098730900ede1b51cb.pdf); ECtHR, *SS and Others v Italy*, App no 21660/18, 11 November 2019, Written Submissions, [https://www.icj.org/wp-content/uploads/2019/11/ECtHR-SS\\_v\\_Italy\\_final-JointTPI-ICJCREAIREDCR-English-2019.pdf](https://www.icj.org/wp-content/uploads/2019/11/ECtHR-SS_v_Italy_final-JointTPI-ICJCREAIREDCR-English-2019.pdf).

Mediterranean.<sup>127</sup> On 19 May 2021, several witnesses testified in a case of 52 people suing Malta over their pushbacks to Libya in April 2020 by a Libyan fishing vessel. Carmelo Grech, owner of the Libyan-registered vessel, testified that while his vessel was anchored, he was approached by Armed Forces of Malta (AFM), who provided the coordinates of a distress case. Instead of arranging for the coordination of the sea rescue operation of the dinghy, aboard which five individuals had already perished, the AFM allegedly paid for the fuel for the Libyan fishing vessel to return the individuals in the dinghy back to Tripoli.<sup>128</sup> The fact that the HRC, in *AS and Others v Malta*, assigned weight to the assumption of responsibility by Malta in its search and rescue region to determine that Malta exercised effective control over the rescue operation does not mean that in all cases where responsibility is not explicitly assumed by the coastal state, that state would lack jurisdiction. A ‘right to be rescued at sea’ would extend Malta’s extraterritorial jurisdiction even if this state had not assumed coordination of the rescue operation so long as the vessel in distress was within Malta’s search and rescue region. This is because according to this new right, the persons in distress were located within Malta’s search and rescue region and, given this new right, must be read in the light of one’s right to be free from acts that could cause their premature or unnatural death. As such, while the potential for a ‘right to be rescued at sea’ at this stage may appear dubious and speculative, this right represents a much-needed legal tool to save countless lives in the Mediterranean and beyond.

**Acknowledgements.** The author wishes to dedicate this article to all people fleeing across the Mediterranean whose lives have been tragically lost at sea in an attempt to find freedom, safety and human rights protection. The author would like to thank Professor Yuval Shany, former Human Rights Committee member, whose enlightening discussions during the international human rights module LL.M. in International Law at the Geneva Graduate Institute served as an inspiration for this work. The author also wishes to thank Professor François Crépeau (McGill University), Aninda Sarker and Mx Aidan Johnson, who further inspired and gave meaning to the author’s efforts.

<sup>127</sup> Missing Migrants, ‘Tracking Deaths along Migratory Migrants’, <https://missingmigrants.iom.int/region/mediterranean>.

<sup>128</sup> Matthew Agius, ‘Malta Government Paid for Libya Pushbacks “Three to Four” Times, Shipper Reveals’, *Malta Today*, 19 May 2021, <https://www.maltatoday.com.mt/news/national/109738/malta-government-paid-for-libya-pushbacks-three-to-four-times-shipper-reveals#.YKsP5agzZPb>.

**Cite this article:** Silvia Dimitrova, ‘Rethinking ‘Jurisdiction’ in International Human Rights Law in Rescue Operations at Sea in the Light of *AS and Others v Italy* and *AS and Others v Malta*: A New Right to be Rescued at Sea?’ (2023) 56 *Israel Law Review* 120–139, <https://doi.org/10.1017/S0021223722000140>