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## International Covenant on Civil and Political Rights



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### Human Rights Committee

#### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning Communication No. 3042/2017<sup>\* \*\* \*\*\*</sup>

<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>	Italy
<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 14 November 2017 (not issued in document form)
<i>Date of adoption of views:</i>	4 November 2020
<i>Subject matter:</i>	Rescue operations at sea
<i>Procedural issues:</i>	Jurisdiction; Exhaustion of domestic remedies
<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

\* Adopted by the Committee at its 130th session (12 October – 6 November 2020).

\*\* The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Duncan Laki, Muhumuza, David Moore, Photini Pazartzis, Hernán Quezada, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Héléne Tigroudja, Andreas Zimmermann and Gentian Zyberi.

\*\*\* The text of individual opinions by Committee members Yuval Shany, Christof Heyns, Andreas Zimmermann, Photini Pazartzis, David Moore (dissenting) Gentian Zyberi, José Manuel Santos Pais, Vasilka Sancin and Héléne Tigroudja (concurring) are annexed to the present Views.



*Articles of the Optional Protocol: 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 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 on 15 December 1978. The authors are represented by counsel.

**The facts as presented by the authors**

2.1 The authors submit 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 to sea 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 were entering the vessel and one person on the vessel, M.J., called the Italian number for emergencies at sea around 11.00 a.m., explaining that the vessel was going to sink and also 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 on board 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 on board 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 ITS *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 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 vessels to the vessel in distress 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 identified 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

1 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'.

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

Agrigento about the delayed responses of the Italian and Maltese authorities to his distress calls and the death or 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 discontinued the criminal proceedings. 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<sup>1</sup> 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 on board 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 the authorities of the State party. The authors also note that on 17 May 2017, the Italian Government was called to answer questions on the facts which led to the shipwreck in Parliament. However, the Government, represented by the Ministry of Defence, did not address the matter and only stated that MRCC Rome had acted in accordance with international regulations.

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 in their 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

1 It is noted in the complaint that A.S. claims the disappearance of 11 relatives in the shipwreck. While reporting their disappearance to the public prosecutor's office, he was requested to view photographs of victims from the shipwreck. He stated that none of his relatives were among the victims in the photographs. He further stated that he recognized his brother, sons and his brother's grandchildren among survivors photographed on board a fishing boat. He further claimed that he had received a text message from an unknown Italian number after the shipwreck, according to which his youngest son was in prison and prevented from contacting his family. A.S. stated that he believed the text message was from his son as it was signed with a nickname only he and his wife knew.

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 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 has often been 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 has been identified as creating a relationship between the state which receives it, and the person who sends it, and that due to this relationship, the jurisdictional link between the person in danger and the state authorities emerges as a result of the distress call, meaning that the authorities consequently have an obligation to provide emergency services.<sup>1</sup>

### The complaint

3.1 The authors note 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>2</sup> The authors claim that the State party violated their relatives' rights under article 6 (1) of the Covenant due to the State party's negligent acts and omissions in the rescue activities at sea, which endangered their relatives' lives and resulted in their death or disappearance. Specifically, they claim that the State party authorities breached their duty to take all appropriate steps in order to safeguard the lives of their relatives by: failing to promptly pass the distress calls from the vessel to the competent SAR authorities, i.e. the Maltese Rescue Center; failing to promptly inform the alleged victims that they should contact the Maltese authorities, thereby delaying the rescue operation; and failing to send the coast guard vessels from Lampedusa or the Italian naval ship located closest to the vessel to rescue the persons onboard, despite a request from the Maltese authorities. The authors submit that by failing to promptly inform the Maltese authorities, the Italian authorities delayed the rescue

1 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.

2 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."

operation by two hours. They further submit that had the Italian authorities directed the Italian naval ship and coast guard boats to rescue the persons onboard the vessel, these boats would have reached the vessel at 3 p.m. at the latest, i.e. two hours before the vessel sank. They argue that the naval ship ITS Libra could have covered the distance to the vessel in distress in one hour. They further argue that as the vessel was in imminent danger and in need of imminent assistance, and being aware that no other authority was taking action, the Italian authorities should have assumed responsibility for initiating suitable action and should have conferred with neighboring Rescue Centres with the objective of designating one Centre to assume responsibility, in accordance with Chapter 5.3.4.1 of the SAR Convention.

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 they claim that 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.

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

4.1 On 15 June 2018, the State party submitted its observations on the admissibility and merits of the communication. The State party submits that the communication should be found inadmissible for lack of jurisdiction, as the shipwreck took place outside the State party's territory. It also notes that domestic judicial proceedings are currently pending.

4.2 The State party notes that, in recent years, a large number of migrants have arrived in Italy. It notes that according to the records of a parliamentary hearing held on 3 May 2017, 23 rescue operations were carried out simultaneously on the day of the shipwreck in question.<sup>1</sup>

4.3 The State party further notes that from judicial investigations, telephone records and interviews with witnesses and defendants, the following facts have been established concerning the events of the shipwreck of reference. Once the first inbound phone call, recorded at 12.26 p.m., to MRCC Rome was made from the vessel, MRCC Rome started localizing the satellite telephone from which the call had been made. Following the second phone call from the vessel, and after having received basic information, MRCC Rome informed RCC Malta, at 1.00 p.m., about the incident as the vessel was located in the Maltese SAR area. At 1.05 p.m., RCC Malta responded positively to MRCC Rome's request to formally coordinate the rescue operation. MRCC Rome requested RCC Malta to also provide the said confirmation in writing. This confirmation was received at 2.35 p.m. RCC Malta thus formalized its coordination role, and it informed MRCC Rome that it was sending a patrol boat to the area the vessel had

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The State party refers to hearing No. 44 before the bicameral parliamentary Committee To Oversee Schengen Agreements, held on May 3, 2017. See: [http://documenti.camera.it/leg17/resoconti/commissioni/stenografici/html/30/indag/c30\\_confini/2017/05/03/indice\\_stenografico.0044.html](http://documenti.camera.it/leg17/resoconti/commissioni/stenografici/html/30/indag/c30_confini/2017/05/03/indice_stenografico.0044.html).

been reported to be in. In the meantime, MRCC Rome also collected information, tried to localize the vessel in distress, kept contact with RCC Malta, and informed the migrants to contact RCC Malta so as to ensure a more direct, immediate and effective rescue operation. Upon RCC Malta's request, MRCC Rome informed the former that it did not have coast guard vessels in the area concerned. However, it informed RCC Malta that an Italian Navy vessel and two merchant ships were present in the area. At 5.07 p.m., RCC Malta informed that the vessel had capsized and it requested the participation of Italian rescue assets. MRCC Rome informed the navy vessel ITS Libra, which was already on its way towards the area concerned, about the shipwreck. It also informed another Italian vessel, the Espero, which headed towards the rescue area. At 6.00 p.m., ITS Libra reached the rescue area and it actively participated in the rescue operation. At 6.30 p.m., RCC Malta appointed Libra as on-scene coordinator of the rescue operation.

4.4 The State party notes that the SAR Convention on Maritime Search and Rescue, provides for the obligation to rescue and assist persons at sea, regardless of nationality or legal status. It notes that the SAR convention sets delimitations between States and their respective SAR areas, so as to include - in addition to the respective territorial waters of each State - portions of the high seas, with the identification of a single competent SAR authority for said area. As such, in all circumstances, a single Rescue Centre, which is responsible for coordinating operations in its own area and to which operational choices are reserved must be identifiable. Under the SAR convention, only one authority is responsible for the coordination of rescue interventions in each SAR area. The choice of the most suitable naval vessels and aircrafts mandated to carry out search and rescue operations falls within the prerogatives of the responsible Rescue Centre. The State party notes that in the present case the shipwreck occurred outside its SAR area.

4.5 The State party submits that as the alleged violation of the duty to protect the lives of the alleged victims took place outside Italian territorial waters and outside its SAR area, the facts under review do not fall within its jurisdiction under article 2 of the Covenant and article 1 of the Optional Protocol. It notes that under the SAR Convention, the responsibility for protecting the lives of persons on board a vessel on the high seas belongs to the competent MRCC of the State responsible for that SAR area. The State party argues that in the present case, that responsibility belonged to RCC Malta and it submits that it cannot be argued that Italy would have *de facto* responsibility over the area concerned merely due to the fact that Italian authorities organize rescue interventions, in an autonomous and non-obligatory manner, in the Maltese SAR area. The State party argues that by establishing its own SAR area, Malta has assumed the power and responsibility to fulfil its own obligations in its own area and it submits that the vessel carrying the migrants was not under the jurisdiction, understood as power and control, of Italy. The State party further notes that the Maltese authorities had made a formal undertaking of coordinating the rescue operation. Malta had also sent, although informed by MRCC Rome that there was an Italian Navy ship in the area, rescue assets to intercept the vessel in distress. The State party argues that Malta had therefore formalized its intention to exercise its jurisdiction of the rescue operation and had in

fact exercised it. The State party notes that the Italian Navy vessel ITS *Libra* also intervened in the rescue operation, even before a formal request from Malta, and it became the focal point of the rescue operations, thus saving many lives.

4.6 As concerns the merits of the communication, the State party notes that a very complex judicial investigative procedure has been opened into the incident. It notes that the process has involved different tribunals and has been carried out with the aim of “verifying the *modus operandi* of all the assets involved in the general international scenario, including over six months before the tragic events and thus, not only with specific regard to the case under reference”. The intervention at the level of the Supreme Court has also been necessary, in order to establish whether the investigation should fall under the competence of military or ordinary courts. The Supreme Court has determined that the investigation falls under ordinary jurisdiction before the Rome ordinary Tribunal.

4.7 The State party notes that investigations into the events of the shipwreck were initiated after a complaint was filed on 11 April 2014, at the Consulate of Italy in Frankfurt, Germany, which was transmitted to the Palermo Public Prosecutor’s Office in Sicily. Additional complaints have subsequently been lodged by family members of victims of the shipwreck and by some of the persons who had survived the shipwreck. The Siracusa Public Attorney’s Office filed a motion of dismissal with regard to one complaint on 27 February 2017. Following transfer of proceedings from the Agrigento and Palermo Public Attorney’s Offices to Rome, the Rome Public Attorney’s Office has filed motions of dismissal concerning two complaints on 3 April and 18 July 2017. Following an additional complaint, a third criminal proceeding has been initiated in Rome. This proceeding is ongoing and the complainants were notified about their right to participate in a pre-trial hearing that, at the time of the submission of the present observations, was to take place on 29 October 2018. In the course of the proceedings, charges have been brought against officers from the Italian Navy, the Harbour Master Corps-Coast Guard and personnel on duty at MRCC Rome. The charges include the criminal offense of failure to provide assistance and negligent homicide. The State party notes that the authors of the communication are not parties to the pending proceeding as they did not file this complaint. It notes that the investigation into the shipwreck has been complex due to the high number of stakeholders involved and the difficult reconstruction of facts. The State party argues that the investigations undertaken by the domestic authorities have been thorough, prompt, and effective, and it notes that the aim of the ongoing proceeding is to determine the responsibilities, if any, of persons involved in the events of the shipwreck.

#### **Authors’ comments on the State party’s observations on admissibility and the merits**

5.1 On 15 October 2018, the authors submitted their comments on the State party’s observations. They maintain that the communication is admissible. They reiterate their argument that the Italian authorities are exercising *de facto* control over the Maltese SAR maritime area and that it therefore bears responsibility for the failed rescue operation that occurred on



13 October 2013. Regarding the State party's information that judicial proceedings are ongoing, the authors argue that these have been unduly delayed considering the fact that, at the time of the submission of their comments, five years have passed and the investigations have not yet been completed. They also argue that the State party authorities have failed to involve them, as next of kin, in the criminal proceedings. They note that the initial complaints regarding the incident were dismissed by State party's authorities and they claim that it was only after a newspaper published information on the events of the incident that two officers have been charged with criminal offences.

5.2 The authors note the State party's claim that the first distress call was received by MRCC Rome at 12.26 p.m. on 11 October 2013. They reiterate their claim that the first call from the vessel in distress was made at 11.00 a.m. They however note that, in any event, it is undisputed that MRCC Rome received the first distress call from the vessel and that under section 3.6.1 of the International Aeronautical and Maritime Search and Rescue Manual (IAMSAR Manual) it was under the duty to immediately notify the appropriate RCC about the incident and to take all necessary action to coordinate the response until the responsible RCC had assumed responsibility. The authors note that RCC Malta did not formally assume the duty to coordinate the rescue operation until 2.35 p.m. The authors further claim that the coordinates of the vessel in distress had already been provided to MRCC Rome in the first distress call at 11.00 a.m., and that the Italian authorities did not therefore need to spend any time localizing the vessel.

5.3 The authors reiterate their claims that MRCC Rome failed to promptly inform RCC Malta of the vessel in distress and that it failed to provide them with assistance as it only informed RCC Malta of the presence of an Italian naval ship and two commercial ships in the area, but failed to provide RCC Malta with the name and position of the naval ship. They also reiterate their claim that the naval ship was ordered to move away from its position in order to avoid participating in the rescue operations.<sup>1</sup> When the Maltese authorities had identified the presence of the naval ship in the area and sent a request to MRCC Rome for the ship to proceed towards the vessel in distress, this request was refused by MRCC Rome which informed the Maltese authorities that the naval ship was conducting surveillance operations in another area and was therefore unable to reach the requested area. Radio calls made minutes before the shipwreck from AFM to the naval ship also remained unanswered. The authors submit that the State party authorities therefore failed in their duty to cooperate with Maltese authorities in order to save lives in distress at sea.

5.4 The authors note that they do not claim that the Italian authorities should have assumed coordination of the rescue operations, rather their complaint is focused on the Italian authorities' failure to provide assistance to the Maltese coordinating authorities, by not putting the ITS Libra naval ship immediately at the disposal of the rescue operation, thereby failing to provide prompt aid to persons in distress at sea.

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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.' available at <http://m.espresso.repubblica.it/video/tutti-i-video/la-legge-del-mare-cosi-la-marina-halasciato-affondare-il-barcone-dei-bambini/10396/10497>.

### **State party's further observations**

6. On 4 July 2019, the State party submitted further observations on the communication. It referred to its submission of 15 June 2018 and informed that the judicial proceeding concerning the events of 13 October 2013 are still ongoing. It notes that the latest pre-trial hearing was held on 24 June 2019, and that the next one had been scheduled for 9 July 2019.

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

#### *Consideration of admissibility*

7.1 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.

7.2 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.

7.3 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 exercising *de facto* control over the Maltese search and rescue area; were in continuous contact with the vessel in distress; and had activated rescue procedures, thus exercising control over the persons in distress.

7.4 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.

7.5 The Committee further recalls paragraph 63 of its general comment No. 36 (2019) 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>1</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 or deportation, 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>2</sup>

7.6 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 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>3</sup>

7.7 In the present case, the Committee notes that it 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 an Italian 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, initial contact was made between the vessel in

1 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”.]

2 *Munaf v. Romania* (CCPR/C/96/D/1539/2006), para. 14.2.

3 International Convention on Maritime Search and Rescue, 1979, Art. 4.6.

distress and State party authorities in Rome on 11 October 2013, sometime between 11.00 a.m. and 12.26 p.m., and that the authors' claim that in one of the distress calls, the persons on board the vessel were reassured by the Italian authorities that they would be rescued. The Committee also notes that it is uncontested that only after 1 p.m., did Malta inform the Italian MRCC that it accepted to coordinate the rescue operation and that such acceptance was formally confirmed in writing at 2.35 p.m. Furthermore, even after Malta accepted responsibility the Italian authorities remained involved in the rescue operation, due to the close location of the Italian navy ship ITS *Libra* to the vessel in distress. Between 1 p.m. and 5 p.m. consultations took place between the Italian Air Force and Navy as to whether or not to dispatch the ITS *Libra* to assist in the rescue operation, and such dispatch was requested by the Maltese authorities on more than one occasion. At 5.07 p.m. after being informed of the capsizing of the vessel, the Italian MRCC confirmed that the ITS *Libra* was dispatched towards the vessel in distress. It arrived on the scene at 6 p.m. and assumed an on-site coordination role at 6.30 p.m.

7.8 The Committee considers that in the particular circumstances of the case, a special relationship of dependency had been established between the individuals on the vessel in distress and Italy. This relationship comprised of factual elements – in particular, the initial contact made by the vessel in distress with the MRCC, the close proximity of ITS *Libra* to the vessel in distress and the ongoing involvement of the MRCC in the rescue operation and – as well as relevant legal obligations incurred by Italy under the international law of the sea, including a duty to respond in a reasonable manner to calls of distress pursuant to SOLAS Regulations<sup>1</sup> and a duty to appropriately cooperate with other states undertaking rescue operations pursuant to the International Convention on Maritime Search and Rescue<sup>2</sup>. As a result, the Committee considers 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, and that they were thus subject to Italy's jurisdiction for the purposes of the Covenant, notwithstanding the fact that they were within the Maltese search and rescue region and thus also subject concurrently to the jurisdiction of Malta.<sup>3</sup> The conduct of criminal investigations in Italy regarding the conduct of various naval officers involved in the incident further underscores the potential legal responsibility (albeit under domestic law) of Italian officials vis-à-vis the victims of the incident. Consequently, the Committee finds that it is not precluded by article 1 of the Optional Protocol from considering the present communication.

7.9. The Committee notes the claims of the authors about the long duration of the domestic investigation in Italy and it observes that it has not been contested by the State party that no further domestic remedies are available to the authors. Accordingly, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from considering the present communication.

1 See in particular, SOLAS Regulation 33.

2 See in particular, International Convention on Maritime Search and Rescue, art. 4.6.

3 See *A.S., D.I., O.I. and G.D. v. Malta*, (CCPR/C/128/D/3043/2017), para. 6.7.

7.10 The Committee considers that the authors have sufficiently substantiated their claims under article 6 and 7 read alone and in conjunction with article 2 (3) of the Covenant for the purposes of admissibility. Accordingly, it declares the communication admissible, and proceeds with its consideration of the merits.

*Consideration of the merits*

8.1. The Committee has considered the present communication in the light of all the information made available to it by the parties, as provided under article 5 (1) of the Optional Protocol.

8.2. The Committee notes the claims by the authors that the State party violated their relatives' rights under article 6 (1) of the Covenant due to the State party's negligent acts and omissions in the rescue activities at sea, which endangered their relatives' lives and resulted in their death or disappearance. The Committee notes, however, the State party's claims that in the present case responsibility belonged to RCC Malta and that the Italian Navy vessel ITS Libra did intervene in the rescue operation, even before a formal request from Malta, that it became the focal point of the rescue operations, and that it saved many lives.

8.3. The Committee notes that 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.<sup>1</sup> It also notes that such due diligence require taking reasonable, positive measures that do not impose disproportionate burdens on States parties in response to reasonably foreseeable threats to life.<sup>2</sup>

8.4 In the present case, the authors maintain that the Italian authorities have failed to respond promptly to the initial distress call, and have greatly delayed the dispatch of ITS Libra towards the vessel in distress. They further claim that the naval ship was ordered to move further away from the vessel in distress as, had it been identified by Maltese patrol boats, the latter would have avoided taking charge of the rescue operation. The Committee also notes the authors' claim that had the Italian authorities directed in good time the ITS Libra and other coast guard boats to rescue the persons onboard the vessel, these boats would have reached the vessel before it sank. The Committee notes however that the State party claims to have informed promptly the Maltese authorities of the distress call and that it advised the callers from the vessel in distress to establish a direct contact with the Maltese RCC. Furthermore, it notes the State party's claim that 23 rescue operations were carried out simultaneously on the day of the shipwreck in question, and that ITS Libra was dispatched to the vessel in distress even before information about it was notified that it had capsized.

8.5 The Committee notes that the principal responsibility for the rescue operation lies with Malta, since the capsizing occurred in its search and rescue area, and since it undertook in writing responsibility for the search and rescue operation. The Committee however considers that the State party has not provided a clear explanation for what appears to be a failure to promptly respond to the distress call, prior to the assumption of responsibility for the search and rescue operation by the Maltese authorities.

1 General Comment 36, at para. 18.

2 Id, at para. 21.

It also notes that the State party has not provided any information about measures taken by State party authorities to ascertain that the RCC Malta was informed of the exact location of the vessel in distress and that it was effectively responding to the incident, despite the information about the deteriorating situation and the need for Italian assistance. In addition, the State party 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. Finally, the Committee notes that the State party has not clearly explained or refuted the authors' claim that intercepted phone calls indicate that the ITS *Libra* was ordered to sail away from the vessel in distress. In light of these facts, the Committee considers that Italy has failed to show that it has met its due diligence obligations under article 6 (1) of the Covenant.

8.6 The Committee notes the authors' claims that 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, and that this failure constituted a violation of the victims' rights under article 6 read in conjunction with article 2 (3), as well as a violation of the authors' rights under article 7 read in conjunction with article 2 (3) of the Covenant. The Committee also notes the State party's explanation that the investigation into the shipwreck is still ongoing and that the investigation has been complex due to the high number of stakeholders involved and the difficult reconstruction of facts.

8.7 The Committee considers that the State party has not provided a clear explanation for the long duration of the ongoing domestic proceedings, other than a general reference to their complexity. Nor has the State party indicated what is the anticipated timeline for their completion. In these circumstances, the Committee considers that the State party has failed to show that it has met its duty to conduct a prompt investigation of the allegations relating to a violation of the rights to life, and that, as a result, it has violated its obligations under article 6 (1) read in conjunction with article 2 (3) of the Covenant.

8.8 Having found a violation of article 6 of the Covenant, read alone and in conjunction with article 2 (3), the Committee decides to not separately examine the claim under article 7 of the Covenant read in conjunction with article 2 (3).

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 6, read alone and in conjunction with article 2 (3).

10. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant's rights have been violated, bearing in mind the potential responsibility of other States for the same incident. Accordingly, the State party is obligated, *inter alia*, to proceed with an independent and effective investigation in a prompt manner and, if found necessary, to prosecute and try those who are responsible for the death and disappearance of the authors' relatives. The State party is also

under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them widely in the official languages of the State party.

## Annex: 1

### **Individual Opinion of Yuval Shany, Christof Heyns and Photini Pazartzis (dissenting)**

1. We do not agree with the majority's decision that the tragic events described in the communication fell within the jurisdiction of Italy for the purposes of establishing its obligations under the Covenant and admissibility under the Optional Protocol.

2. Paragraph 7.8 of the Views explains that a "special relationship of dependency" had been established between the victims found on the vessel in distress and Italy, which engaged Italy's obligations under the international law of the sea pursuant to Safety of Life at Sea (SOLAS) Regulations<sup>1</sup> and the International Convention on Maritime Search and Rescue (SAR)<sup>2</sup>. As a result, the majority considered "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, and that they were thus subject to Italy's jurisdiction for the purposes of the Covenant, notwithstanding the fact that they were within the Maltese search and rescue region and thus also subject concurrently to the jurisdiction of Malta". We are of the opinion that the majority Views fails to distinguish 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.

3. As the Views explain in paragraphs 7.7-7.8, the vessel in distress was located throughout the relevant period of time (between the initial call for rescue and capsizing) outside Italy's territorial waters and inside the search and rescue area of Malta. The preliminary question before the Committee in the case at hand was whether the victims on the vessel could be considered to have been within the power or effective control of Italy, even though the incident took place on the high seas, in an area for which Malta assumed search and rescue legal responsibilities. It has not been claimed before the Committee that Italy formally accepted legal responsibility for the search and rescue mission before the capsizing nor that it assumed *de facto* control over the operation.

4. Although initial contact was made between the vessel in distress and the MRCC in Rome, this fact alone, in the absence of additional information showing acceptance of legal responsibility, is not sufficient to conclude that the State actually exercised jurisdiction over the individuals on board the vessel from that moment onwards or was legally obliged to do so. In particular, it is significant that Italy did not actually coordinate the search and rescue operation, but rather referred the distress call to the competent

1 In particular, International Convention for the Safety of Life at Sea (SOLAS), 1974, Regulation 33.

2 In particular, International Convention on Maritime Search and Rescue, 1979, art. 4.6.



authorities in Malta, and that the latter confirmed in writing Malta's coordinating role with respect to the search and rescue operation undertaken. While the Italian authorities supported the search and rescue efforts of the Maltese authorities by sending an Italian Navy vessel, ITS *Libra*, to the area (albeit too late), the vessel in distress did not become under the effective control of an Italian Navy party before 6:30 pm on the day of the sinking (more than an hour after it had capsized), at which time ITS *Libra* arrived at the scene and became the on-site coordinator of the rescue operation.

5. While there may have been critical failures in the response of the MRCC in Rome and the Italian Navy to the distress calls and to the Maltese requests for assistance that contributed to the tragic loss of life of large numbers of victims, such failures do not establish in and of themselves effective control by Italy over the individuals on the vessels in distress, regardless of whether or not such failures entail criminal responsibility under Italian law or a violation of Italy's law of the sea obligations vis-a-vis Malta and other states. This is especially the case in circumstances where the said individuals are located in an area for which another state has assumed legal responsibility – and by implication, jurisdiction<sup>1</sup> - under the law of the sea for search and rescue operations. Since Malta, and not Italy, was responsible *de jure* or *de facto* for the overall conduct of the operation, we do not consider it appropriate to hold Italy accountable under the Covenant for failing to deploy more quickly Italian vessels which would enable it to assume earlier *de facto* responsibility over the search and rescue operation.

6. We further consider that the approach taken by the majority of collapsing the ability to engage in a maritime operation in search and rescue areas for which another state is internationally responsible with the notion of jurisdiction over the individuals on vessels in distress might disrupt the legal order which the SOLAS and SAR Conventions attempted to introduce, with a view to minimizing the “tragedy of the global commons”, generated by the lack of a clear division of labor between coastal states over search and rescue operations. So, while the approach taken by the majority could be suitable to govern the obligations of states in areas for which no state is internationally responsible for search and rescue operations (so as to avoid ‘negative’ jurisdictional conflicts), it is inappropriate for areas where such a responsible state is available and is in fact assuming its responsibilities (and might generate ‘positive’ jurisdictional conflicts).

7. As a result, we are of the view that given the primary responsibility of Malta for the search and rescue operations in the relevant maritime area and the mere supportive role of the State party, the Committee should not have concluded that that the victims on board of the capsized vessel fell before, or at the time of capsizing, under the jurisdiction of Italy for the purposes of the Covenant and the Optional Protocol, and that the Committee should have therefore considered the communication to be inadmissible pursuant to article 1 of the Optional Protocol.

<sup>1</sup> See Communication No. 3043/2017, *A.S. et al v. Malta*, Views of the Committee of 13 March 2020, at para. 6.7.

## Annex: 2

### Individual Opinion of Andreas Zimmermann (dissenting)

1. This dissenting opinion has to be read in conjunction with my separate opinion in the parallel case 3043/2017 against Malta involving the same facts. The contents of said separate opinion are therefore to be considered incorporated hereinafter unless otherwise stated. At the outset it must be reiterated, however, that the mere fact that a person did find him- or herself in a SAR zone administered by a given State party of the Covenant does not bring that person within the jurisdiction of such State party for purposes of Art. 2 (1) ICCPR. This result must then *a fortiori* be reached where there does not even exist such a legal bond which, in the perspective of the majority, had triggered the applicability of the Covenant vis-à-vis Malta at the first place.

2. It is my clear understanding that Italy, by refusing to have its naval ship ITS Libra undertake a rescue operation to save the lives of the persons in distress at sea, was violating its obligations under applicable rules of the law of the sea. Yet, this was neither the question that was before the Committee nor what the Committee had to decide, nor indeed could the Committee have decided this very issue. Even less is it, contrary to what the majority seems to at least imply, of any legal relevance for purposes of Art. 2 (1) ICCPR whether Italy is exercising criminal jurisdiction on the basis of the Italian nationality of the naval officers on board the ITS Libra or any other Italian officials.

3. What is more, and what adds to the *problématique* of the majority decision, is that the majority also finds *in this case against Italy* that the authors were “subject concurrently to the jurisdiction of Malta” despite having found the complaint against Malta inadmissible. At the same time, Italy is now required to provide *full* reparation to individuals whose Covenant’s rights have been violated despite the fact that another State may have caused the tragic loss of lives and despite the fact that, as the majority also finds, the *principal* responsibility for the rescue operation (and hence in the majority’s view also the violation of the rights protected by the Covenant) had been lying with Malta rather than with Italy. Besides, the determination as to Italy’s obligation to pay compensation further leaves open the difficult issue which form of responsibility is incurred by both States, if at all, i.e. whether it is proportionate liability only or rather joint and several liability.

4. Finally, the Committee attempts to limit its holding when stating “that *in the particular circumstances of the case*, a special relationship of dependency had been established between the individuals on the vessel in distress and Italy” which then triggered, in the majority’s view, the applicability of the Covenant. It is however safe to assume that the outcome of both cases, i.e. the Maltese and the Italian case, when read together, will be perceived as providing for a general applicability of the Covenant as far as persons are concerned that find themselves in distress at sea either in the SAR zone of a State party or close to a ship flying the flag of a State party. This might, as I have already mentioned, eventually have the very unfortunate effect of States parties of the Covenant no longer be willing to

undertake such obligations, respectively might even try to avoid coming close to boats in distress so as to avoid any impressions of a ‘special relationship of dependency’ having been created.

### Annex: 3

#### **Individual Opinion of David Moore (dissenting)**

1. The admissibility determination in this case presents two key questions. The first, and primary, one concerns the scope of States parties’ Covenant obligations. Under the Covenant’s text, a State party’s obligations extend to “individuals within its territory and subject to its jurisdiction.” Art. 2(1). The Committee has interpreted this phrase in the disjunctive. *See* General Comment No. 31 (2004). While strong arguments exist for a conjunctive interpretation, it is unnecessary to revisit those to resolve this case. No one contends that Italy’s territory extends to the high seas. The question thus becomes whether those shipwrecked were within Italy’s jurisdiction.

2. That question raises a secondary issue: the propriety of relying on international instruments beyond the Covenant in Covenant interpretation. Policy reasons, such as harmonization, support interpreting the Covenant consistently with other sources of international law. Yet the Committee’s jurisdiction only extends to interpreting a particular treaty to which States have consented. In my view, the principles of the Vienna Convention on the Law of Treaties, whether as treaty or customary international law, should inform the Committee’s resort to non-Covenant sources in Covenant interpretation.

3. The Vienna Convention instructs consideration of “[a]ny relevant rules of international law applicable in the relations between the parties.” Art. 31(3)(c). Here, many States parties to the Covenant, including Italy and Malta, are also parties to the SAR Convention, which provides for division of the high seas into search and rescue regions assigned to particular states. This arrangement, specifically focusing on the division of responsibility and control, suggests that Italy’s Covenant jurisdiction should extend, at most, to individuals within its region.

4. The Committee’s decision to find jurisdiction outside that region in this tragic case reflects noble intent, particularly given Italy’s questionable actions. Yet I fear the decision adds a layer of uncertainty, and even apprehension, regarding responsibility on the high seas that may hinder, rather than sharpen, the response to future emergencies. I would find the communication inadmissible.

### Annex: 4

#### **Individual opinion of Gentian Zyberi (concurring)**

1. While agreed with the decision of the Committee, I want to clarify the jurisdictional link and the legal obligations on the part of States regarding

search and rescue at sea (SAR) operations, especially concerning refugees and migrants.

2. This specific case and the relevant legal framework demonstrate the shared responsibility among States for SAR operations. While a State has primary responsibility for its SAR area, there is a residual responsibility on all States to provide assistance, especially to those States with limited own capacities.

3. The jurisdictional link in SAR operations is generally based on the international legal obligations of States to render assistance to persons in distress at sea, read in light of article 6 of the Covenant. Paragraph three of General Comment 36 states that the right to life “concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death.” The concepts of “power and control” which are commonly used regarding extraterritorial jurisdiction have to be construed and interpreted in light of the specific circumstances at sea. When assessing issues of State responsibility concerning SAR operations aimed at saving persons in distress at sea, the due diligence requirement is an obligation of conduct, requiring a State to make best efforts within the means available.

4. In failed SAR operations that result in lives lost, the State has a procedural obligation under article 6 of the Covenant to start ex officio a prompt and effective investigation to find out what happened and where necessary hold those responsible to account.

## Annex: 5

### **Individual opinion of José Santos-Pais (concurring)**

1. I agree with the decision reached by the Committee finding a violation by Italy of article 6 (1) read in conjunction with article 2 (3) of the Covenant.

2. This is a complex case, involving concurring and shared international jurisdiction by several States (Italy, Malta and possibly Libya). However, the main question is whether victims were within the power or effective control of Italy, even though the incident took place outside its territory (para 7.7). Also, whether, under relevant international instruments<sup>1</sup>, Italy failed to provide assistance to rescue of persons in distress at sea.

3. Vessel in distress was 61 miles south of Lampedusa and 118 miles southwest from Malta, so closest to Italian shore. According to Italian Minister of Defense,<sup>2</sup> ITS navy ship *Libra* was just 15 miles away from the vessel (less than 1-hour distance). So, *Libra* was the closest ship, but instead of offering to provide direct assistance or to place itself at the disposal of the competent Rescue Coordination Centre (RCC Malta), it omitted to do so.<sup>3</sup>

1 The 1982 United Nations Convention on the Law of the Sea, the 1979 International Convention on Maritime Search and Rescue and the Regulations adopted pursuant to the 1974 International Convention for the Safety of Life at Sea (SOLAS)

2 Hearing before Camera dei deputati, on 17 May 2017

3 Cfr. available public information at :

<https://video.espresso.repubblica.it/inchieste/cosi-l-italia-ha-lasciato-annegare-60-bambini-in-esclusiva-le-telefonate-del-naufragio/10267/10368>; <https://m.espresso.repubblica.it/video/tutti-i->

4. MRCC Rome received a first call at 12.26 p.m. and a second at 12.39 p.m. and was then informed the vessel was going down, there were children on board and there was a need for urgent intervention. Exact position of the vessel was given to Italian authorities. Several other contacts ensued with increasingly more urgent requests (at 1.17, 1.38, 2.22, 3.37 p.m.).
5. Contact with RCC Malta by MRCC Rome was established at 1.00 p.m. but no information was given either about the dangerous situation of the vessel and its exact location or of the close location of Libra and its contacts. Maltese authorities only located the vessel around 4 p.m.
6. At 1.34 p.m. MRCC Rome issued a navigational warning to all shipping in the vicinity to assist. At 2.30 p.m. RCC Malta did the same. Libra did not respond to either warning.
7. Italian navy command was informed at 1.35 p.m. of the position of the vessel and number of people on board. However, at 3.34 p.m., navy command instructed Libra not to come close to the vessel and avoid being spotted in the area. Same order was repeated at 3.41 p.m.
8. Following identification of Libra by AFM aircraft, after 4 p.m., RCC Malta requested Libra to proceed and assist since vessel had been observed to be overcrowded and unstable. Libra however did not answer emergency calls by Maltese airplane which went on for 2 minutes.
9. At 4.38 p.m. MRCC Rome requested Command of Italian Navy to put Libra in direct contact with Maltese authorities, which was authorized at 4.41 p.m.. At 4.44 p.m. RCC Malta again requested MRCC Rome to put Libra at the disposal of the rescue operation. MRCC Rome denied authorization. It was only at 5.07 p.m., after vessel had capsized, that Libra was ordered to intervene (5h30 after the first emergency call), arriving there at 5.57 p.m., after AFM patrol boat, which arrived 6 minutes earlier.
10. So, not only did Italian naval authorities refuse to act when they were still the First RCC responsible for coordinating the case and issued the first navigational warning, they consistently omitted valuable information to Maltese authorities and kept deliberately Libra, the closest ship, away from intervening in rescue operations until after the shipwreck.
11. I therefore consider individuals on the vessel in distress were under Italy's jurisdiction for the purposes of the Covenant (paras 7.5-7.8). Furthermore, there was a failure by Italian authorities to explain convincingly motives for not providing timely assistance under such pressing circumstances, thus affecting lives of so many people (para 8.5).
12. Charges were brought against officers from Italian Navy, Coast Guard and MRCC Rome, involving at least 7 officers, for failure to provide assistance and negligent homicide. Seven years after events, trial before domestic courts has yet to be completed, an excessive time delay for an effective and prompt justice. State party has provided no clear explanation for such delay, other than a general reference to complexity of the case and gave no anticipated timeline for its completion (paras 8.6 and 8.7).

## Annex: 6

### Individual opinion of Vasilka Sancin (concurring)

1. I agree with the Views of the Committee that the individuals on the vessel in distress were directly affected by Italy's decisions in a manner that was reasonably foreseeable in light of the relevant legal obligations of Italy, and that they were thus subject to Italy's jurisdiction (concurrently to the jurisdiction of Malta) for the purposes of the Covenant, and that the Committee was therefore not precluded by article 1 of the Optional Protocol from considering the present communication. I also fully agree with the Committee's finding of a violation of article 6, read alone and in conjunction with article 2 (3).

2. However, I wish to emphasize that in my view, since the tragic events took place in the high seas, where, according to the law of the sea, neither Italy nor Malta may exercise any territorial jurisdiction, other than over the vessels flying their flags (and in circumstances exhaustively envisaged in the Law of the Sea Convention, e.g. in a case of piracy), the issue of compatibility of the communication under article 1 of the Optional Protocol 1 *ratione loci*, establishing whether the individuals were subject to State Party's jurisdiction, applying the maxim of 'power or effective control', is intrinsically linked to the right engaged - the right to life. The Committee emphasized (para. 7.5), referring to its general comment No. 36 (2019), that States parties must respect and protect the lives of individuals who find themselves in a situation of distress at sea, *in accordance with their international obligations on rescue at sea* (emphasis added).

3. It is for this reason, that I find in this complex case, that the communication is admissible, although events occurred in the area of the high seas, considering the facts and particular circumstances of this case (para. 7.7), as the authors sufficiently demonstrated that Italy had a power to act upon its international duties (to render assistance to a vessel in distress under article 98 UNCLOS and to assist Maltese authorities in its SAR area), led the victims to believe (particularly within the first hour(s)), that it will comply with these duties, and that such necessary activities could have directly and in a reasonably foreseeable manner impacted the events. By this assumption of its obligation to exercise the existing power in the concrete case, in my view, Italy subjected the victims to its jurisdiction, but due to its omission to act accordingly failed to protect their lives, and, later on, properly investigate the incident, which resulted in a violation of the authors' rights.

## Annex: 7

### Individual Opinion of H el ene Tigroudja (concurring)

1. I fully support the solution reached by the majority. The views are a first contribution of this Committee aiming at addressing some "Maritime Legal Black Holes."<sup>1</sup> They may provide some substance to a new "right to

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I. Mann, "Maritime Legal Black Holes: Migration and Rightlessness in International Law," *EJIL* (2018), Vol. 29 No. 2, 347-372. See also the Recommendations adopted by the Council

be rescued at sea”.<sup>1</sup> However, as developed in my concurring opinion of the communication No. 3043/2017, the legal reasoning followed by the majority is not perfectly rigorous. I will not repeat what I have written on the unreasoned decision to split the two cases and on the use of a body of law that is not updated. My main remark on these views is focused on the question of the *extraterritorial jurisdiction* exercised by Italy (para. 7.8). I am not fully convinced by the way the majority solved the question (para. 7.8). There is a mix up between substantive obligations and the existence of a jurisdictional link with Italy. More importantly, the grounds for establishing this jurisdictional link are unclear and I regret that the majority did not respond clearly to the arguments presented by the authors in their complaint, based on the *Munaf v. Romania* jurisprudence, which were more convincing than what is retained in paragraph 7.8.

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of Europe Commissioner for Human Rights, *Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean*. 2019.

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S. Trévisanut, “Recognizing the right to be rescued at sea”, *Ocean Yearbook* 31: 139–154.