

The Increasing Scope of the Obligation to Investigate Human Rights Abuses at Sea



SUMMARY

1. Grave breaches of human rights at sea on British flagged vessels are hopefully relatively few and far between¹. Even so, the UK State is bound by obligations to put in place measures to prevent such breaches and, when they do occur, to investigate them.
2. International law also imposes positive obligations on States to act when they have effective control over a location. Indeed, it is fair to say that the precise extent of the obligations on a State and the associated measures that can and in some cases must be taken against perpetrators of human rights breaches are constantly evolving, including those in the maritime environment.
3. On 22 May 2014, the European Court of Human Rights (the “ECtHR”) handed down a judgment in the case of *Gray v. Germany*² (“Gray”) that could mark a significant step in this evolution. The case involved medical negligence, but its influence may have a much broader scope and may well reach in to the maritime industry, including the maritime security industry.
4. The implications of the Gray case include a potential obligation on the UK authorities to investigate any excessive use of force or improper treatment of individuals by maritime security providers on board a commercial vessel if the alleged perpetrators later return to and reside in the UK. Investigatory obligations could also arise in relation to potential alleged human rights abuses in human trafficking cases and even in relation to the rescuing of refugees and migrants in distress by commercial vessels.

THE CASE

5. The facts are summarised as follows:
 - A German doctor practising in the UK caused the death of an English patient through his professional negligence.
 - Following the death, the doctor returned to Germany.
 - German and UK authorities commenced independent investigatory proceedings.
6. Germany subsequently refused to extradite the doctor in order to face criminal proceedings in the UK and instead prosecuted him for causing the death of the English patient. The case before the ECtHR considered the claim by the applicants, the family of the deceased, that the actions of the German State fell short of the requirements of Article 2 of the European Convention on Human Rights³ (“ECHR”).

¹ Though at the time of writing it should be noted that there is no centralised reporting structure to provide objective statistics in the maritime environment.

² *Gray*, Application no. 49278/09, Fifth Section, Judgment of 22 May 2014.

³ See The European Convention on Human Rights at http://www.echr.coe.int/Documents/Convention_ENG.pdf

7. Article 2, concerning the right to life, creates procedural obligations; a State must put in place an effective judicial system and properly investigate an unintended death. In this case, it was decided by the ECtHR that the German investigation and subsequent conviction had satisfied the requirements of Article 2. Accordingly, the applicants' claim failed.
8. The key point, however, is that it appears that the German authorities were under an obligation to investigate and prosecute the death, simply because the negligent doctor subsequently returned to Germany. This was despite the fact that the death of the patient did not take place in Germany, that it did not occur in an area within Germany's control, nor occur with German State involvement.
9. Surprisingly, neither the German State, nor the ECtHR raised the specific point of whether or not Germany was actually bound by an explicit obligation to investigate the incident. In the alternative, Germany argued that the applicants had instead failed to exhaust domestic remedies as required by Article 35, and that Article 2 had not been breached as Germany had, in any case, carried out an investigation.
10. So what are the potential implications of this decision for the maritime industry?
 - First, the obligation of a State to investigate alleged breaches of human rights should extend beyond unintended deaths, to allegations of torture, slavery, trafficking and forced labour in the maritime environment.
 - Second, there is no requirement for involvement or culpability on the part of the State Party to the ECHR ("State Party").
 - Third, alleged breaches of the ECHR should, if the alleged perpetrators come within the jurisdiction of the courts of a State Party, be investigated by that State regardless of where the alleged breach occurred.
11. So for example, excessive use of force or improper treatment of individuals temporarily deprived of their liberty by maritime security providers on board a commercial vessel in either the Gulf of Aden or worldwide, should be investigated by the UK authorities if the alleged perpetrators later return to and reside in the UK⁴.
12. Further, ship owners whose vessels are used in trafficking or use trafficked crew could also find themselves being investigated if they are later living or working in the territory of a State Party. The same could apply with respect to any of the individuals involved in the organised network of trafficking cases and even may extend to the alleged abuse of human rights by crew on board commercial vessels involved in the rescue of refugees and migrants in distress.

CONTEXT

13. To put Gray in context, one should review three landmark human rights cases.
14. The first is *Banković and Others v Belgium and Others*⁵ ("Banković") in which the ECtHR held that, in exceptional circumstances, the acts of State Parties performed, or producing effects outside their territories "can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention."⁶
15. *Banković* was cited in the 2010 decision, *Medvedyev and Others v. France*⁷ ("Medvedyev") the second case, addressing the application of the ECHR to law enforcement operations at sea. The ECtHR noted that instances of "extraterritorial exercise of jurisdiction by a State" would include "the exercise of effective control of an area outside national territory"⁸ as a consequence of military action as well as the activity of "diplomatic or consular agents abroad and on board aircraft and ships registered in, or flying the flag of, that State."⁹

⁴ The extent of this duty is likely to depend on whether the flag state has carried out investigations and the adequacy of these.

⁵ *Banković*, Application no. 52207/99, Grand Chamber, Admissibility Decision of 12 December 2001.

⁶ *Id.*, para. 67.

⁷ *Medvedyev*, Application no. 3394/03, Grand Chamber, Judgment of 29 March 2010.

⁸ *Id.*, para 64.

⁹ *Id.*, para. 65.

16. The Medvedyev case concerned a Cambodian-registered vessel, Winner, suspected of drug smuggling. The vessel was intercepted and boarded in the waters off Cape Verde by French Special Forces, and subsequently towed under escort to France. In the course of the boarding operation, the Special Forces team were “obliged to use their weapons to defend themselves,”¹⁰ and for the duration of the journey to France, the crew were “confined to their quarters under military guard.”¹¹ It was therefore held that France had “exercised full and exclusive control over Winner and its crew, at least de facto, from the time of its interception.”¹² Accordingly, for the purposes of Article 1, the crew were effectively within French jurisdiction¹³.
17. The third landmark case is *Al-Skeini and Others v. the UK*¹⁴ (“Al-Skeini”), which involved the killings of Iraqi civilians by UK soldiers in occupied Iraq, and the consequent duty under the ECHR for the UK to investigate. The basis for application of the ECHR in this instance was a finding of extra-territorial UK jurisdiction. The ECtHR blended two bases of extra-territorial jurisdiction to reach this finding: effective control over an area outside national territory¹⁵ and the Conventional legal space (“espace juridique”).¹⁶ The former stipulates that extra-territorial jurisdiction may be established where a State Party “exercises effective control of an area outside that national territory.”¹⁷ The latter stipulates that jurisdiction is established when the armed forces of a State occupy the territory of a foreign State.¹⁸
18. In *Al-Skeini*, the ECtHR held that the UK had to conduct an investigation that met the standards required by the ECHR on the grounds that the UK had acquired powers usually reserved for the Iraqi government and also exercised authority and control over the individuals killed in the course of the security operations in question¹⁹. In contrast, in *Gray*, the German government had no control over the individuals or territory in question and instead it sufficed for the perpetrator later to come within the control of the German state. The scope of this is much wider than even the precedent set by *Al-Skeini*.
19. It should be noted that it was held in *Al-Skeini* that the duty to investigate did not oblige the UK to carry out an investigation commensurate with that which would be carried out in its own territory. This will no doubt be the case in *Gray*-type situations and unreasonable burdens should not be imposed on States. Nevertheless, the potential scope of *Gray* is broad and States Parties might find themselves obliged to investigate potential breaches of the ECHR at sea, whether in international waters or the territorial sea of a foreign State.
20. The request to refer *Gray* to the Grand Chamber of the ECtHR for further examination has now been rejected. However, both the ECtHR and domestic courts may still seek to narrow its scope such as requiring the victim or perpetrator to have been resident in a State Party, or the breach to have at least occurred in the territory of a State Party, or the area in which the breach occurred to be under its effective control. For now, however, the *Gray* case appears to expand the reach of the ECHR, including within the maritime environment.

CONCLUSION

21. In conclusion, the findings in *Gray* are potentially good news for victims and their dependents, allowing them potential greater leverage for bringing cases of human rights abuse, including those that have occurred in the maritime environment. It would additionally appear that *Gray* provides a wake-up call for all parties who remain of the view that working in international waters on board vessels, or working in a jurisdiction where human rights enforcement is lax, means that they will not be found accountable for human rights abuses.

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¹⁰ *Id.* para. 66.

¹¹ *Id.*, para. 15.

¹² *Id.*, para. 67.

¹³ *Id.*

¹⁴ *Al-Skeini*, Application no. 55721/07, Grand Chamber, Judgment of 7 July 2001.

¹⁵ *Id.*, para. 138.

¹⁶ *Id.*, para 142.

¹⁷ *Id.*, para. 138.

¹⁸ *Id.*, para. 142.

¹⁹ *Id.*, para. 149.

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