"Functional Approach" on Jurisdiction in the Context of Externalization

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According to international jurisprudence, for a state to be held responsible for its extraterritorial actions or omissions, it must exercise jurisdiction through control or authority over a part of territory (spatial jurisdiction) or over a person (personal jurisdiction). As a result of this jurisdiction based on effective control, states that externalise migration controls—such as through pushbacks, interceptions on the high seas, or operating offshore detention/return centres—have begun to be held responsible for human rights violations arising beyond their territorial jurisdiction (e.g. *Hirsi Jamaa v Italy*; Australia held responsible by the UN in *FKAG and Others v Australia (CCPR/C/109/D/2094/2011)*; and others). In such cases, international bodies—including the ECtHR, CCPR, and CAT—have concluded that extraterritorial jurisdiction is exercised where there is physical or direct control over individuals or territory—for instance, when intercepted persons are handed over by a state's vessels or agents, or where detention arrangements are financed, administered, or orchestrated by that state. Consequently, externalising states have started to develop new migration control methods that avoid direct or physical control and thereby prevent their extraterritorial jurisdiction from being triggered.

Destination states in Mediterranean region such as Italy, Spain, or Greece often delegate or outsource migration control measures to third countries or private actors to avoid international responsibility for human rights violations. By funding, training, or supplying equipment and technological support to third parties to prevent the arrival of irregular migrants at their borders, these destination states give rise to what has been termed "contactless control" [(Moreno-Lax, *The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"*)] or create "meta-borders" [(Moreno-Lax, *Meta-Borders and the Rule of Law: From Externalisation to 'Responsibilisation' in Systems of Contactless Control*)]. Through this model, destination states prevent irregular migrants from reaching their territories when a third country or private actor pulls them back or detains them in offshore centres, departure countries, or return facilities. In doing so, the destination state refrains from exercising direct control or authority over those subjected to externalisation—such as through pullback operations or detention centres managed by third countries or non-state actors—thus avoiding the emergence of extraterritorial jurisdiction based on effective control. As a result, destination states enjoy impunity for human rights violations occurring under these externalised migration control arrangements.

However, the "functional approach" to extraterritorial jurisdiction offers a means of holding destination states accountable for human rights infringements caused by proxies. Under this approach, it is not essential for a state to exercise physical or direct control in order to exercise jurisdiction. Instead, where a state performs specific functions that affect individuals' rights, jurisdiction may be established—even in the absence of territorial control. According to this model, a state exercises jurisdiction over persons where it has the capacity to influence or fulfil its human rights obligations, even without direct contact.

Moreno-Lax significantly expands this understanding of functional jurisdiction, analysing how states exercise authority through remote actions or proxies [(Moreno-Lax, *The Architecture of Functional Jurisdiction*)]. She identifies three interconnected criteria: (1) the impact of the

destination state's actions on individuals; (2) the decisive influence exerted by the state through the exercise of public power via proxies; and (3) the state's operative involvement in extraterritorial activities, such as providing intelligence, equipment, or strategic direction. Taken together, these factors demonstrate that a state may exercise jurisdiction where its indirect conduct significantly shapes the rights and fates of individuals beyond its borders.

In this framework, the functional approach to jurisdiction facilitates the attribution of responsibility to externalising states engaging in indirect migration control. By recognising that jurisdiction may be exercised through the exertion of public powers—even when these are channelled through proxies or managed remotely—the functional model removes the traditional requirement of physical control as a prerequisite for state responsibility. As a result, destination states can no longer claim that delegating enforcement duties to third countries or private actors absolves them of legal obligations. Where there is evidence that the externalising state retains decisive influence over the conduct of operations—e.g., through funding, training, strategic coordination, or operational support—it may still be deemed to exercise jurisdiction under international human rights law. This expanded understanding addresses a major accountability gap, ensuring that states cannot avoid responsibility simply by outsourcing migration control to actors beyond their borders.

One of the most well-documented examples of contactless control is aerial refoulement [(Moreno-Lax, *Meta-Borders*; *The Exercise Of State Power Over Migrants At Sea Through Technologies Of Remote Control*)], where states such as Italy and Malta engage in decisive migration control operations without direct contact. In these cases, surveillance aircraft—operated either under national command or through EU agencies such as Frontex—monitor the Mediterranean Sea and identify vessels carrying migrants departing from Libya. Instead of intercepting the vessels themselves, these aircraft transmit real-time coordinates to the Libyan Coast Guard, which then intercepts and forcibly returns the individuals to Libya. Although the European actors do not physically apprehend the migrants, they effectively initiate the return process. This strategic use of aerial technology to delegate enforcement to a third country—where migrants are known to face inhuman and degrading treatment—demonstrates how destination states retain operational control while formally distancing themselves from the consequences. Such practices epitomise contactless control: state jurisdiction and responsibility are obscured behind the involvement of proxies, despite the central role played by the externalising state.

A key case revealing the limitations of traditional jurisdictional analysis is *S.S. and Others v. Italy*, where the ECtHR examined Italy's role in Libyan interdiction operations that led to serious human rights violations. Despite Italy's coordination efforts—such as sharing real-time data—the Court held that Italy did not exercise effective control over the individuals, due to the absence of direct physical custody, and therefore dismissed the claim. In doing so, the Court overlooked Italy's decisive influence and failed to assess whether this amounted to functional jurisdiction. This narrow focus on physical control prevented recognition of Italy's indirect but significant role. The judgment underscores the need to adopt broader jurisdictional interpretations to account for modern externalisation methods where states act through proxies.

Insisting on effective control as a precondition for jurisdiction risks rewarding states that deliberately avoid direct involvement. This restrictive threshold allows destination states to shield themselves from legal responsibility by orchestrating or outsourcing actions that result

in serious human rights abuses. To address this gap, a shift towards a functional jurisdiction model grounded in causality is needed. Under this model, jurisdiction is triggered not by presence or custody, but by the state's role—through act or omission—in causing or contributing to the harm. The Inter-American human rights system has best articulated this logic. In *Alejandre v. Cuba* [(IACHR, Case 11.589, Report No. 86/99, 29 September 1999, OEA/Ser.L/V/II 106, paras 24–25; IACtHR, *Environment and Human Rights*, Advisory Opinion OC-23/17, 15 November 2017, Series A No. 23, para 104(h))], the Inter-American Commission held that Cuba exercised jurisdiction by shooting down two civilian aircraft in international airspace, as the deaths were a direct consequence of state action. Likewise, the Inter-American Court confirmed that jurisdiction arises where there is a causal link between conduct attributable to a state and a negative impact on human rights—even beyond the state's territory. This reasoning supports the view that responsibility flows from a state's capacity to affect rights, regardless of where or how this influence is exercised. Relying on a state's "capacity" alone risks conflating ability with responsibility. While capacity may support due diligence obligations, it cannot itself establish jurisdiction. In contrast, the functional approach emphasises causal influence—as evidenced by funding, operational directives, and strategic coordination—over physical capacity. [(Mariagiulia Giuffrè, 'A functional-impact model of jurisdiction: Extraterritoriality before the European Court of Human Rights' (2021) QIL, Zoom In 83)]

Although academic discussions of functional jurisdiction often focus on causal links arising from the delegation or outsourcing of state functions—such as in pullback operations—these debates remain underdeveloped in the context of externalisation methods like readmission agreements or cooperation arrangements with third countries. Leading scholars including Violeta Moreno-Lax and Mariagiulia Giuffrè have analysed extraterritorial exercises of public power and the outsourcing of migration control. However, functional jurisdiction theory remains underapplied in the specific setting of third-country reception, detention, or return centres. This is a significant gap, as such centres—established under readmission or cooperation agreements—often result in serious human rights violations, including breaches of non-refoulement and the prohibition of cruel, inhuman or degrading treatment.

The functional approach is especially relevant in this context, as destination states typically retain substantial influence over these centres through funding, operational planning, training programmes, and provision of technology. These forms of support create a causal nexus between destination states and the activities conducted at the centres, thereby constituting decisive influence and operational involvement. Accordingly, where such a causal link is established, the functional approach to jurisdiction provides a compelling legal basis for attributing responsibility to destination states for human rights abuses occurring in third-country facilities. This attribution challenges the territorial limits of traditional jurisdiction, reinforcing the principle that states cannot circumvent their obligations by externalising control to third parties. Expanding the functional analysis to include cooperation with third countries thus reveals a critical dimension of state responsibility in the externalisation of migration control.

In conclusion, the functional approach to extraterritorial jurisdiction offers a vital framework to address the accountability gaps created by the externalisation of migration control. Traditional jurisdictional tests, centred on physical or effective control, have proven inadequate in capturing the complex realities of modern migration governance, where destination states

increasingly rely on third countries or private actors to implement border management measures. By shifting the focus to the exercise of public powers through proxies and recognising the decisive influence and operational involvement of externalising states, the functional approach expands the scope of jurisdiction beyond territorial confines. This evolution is critical in ensuring that states cannot evade their international human rights obligations by outsourcing enforcement tasks or concealing their role behind 'contactless control' mechanisms. The approach's emphasis on causality and the substantive impact of state actions or omissions aligns with emerging jurisprudence, particularly within the Inter-American human rights system, and challenges narrower interpretations endorsed by some regional courts. Moreover, applying this functional framework to cooperation agreements, readmission deals, and the operation of third-country reception or detention centres highlights how destination states maintain effective control and responsibility over extraterritorial sites despite the absence of direct physical control. Ultimately, the functional approach reinforces the principle that states must be held accountable for human rights violations arising from their externalisation policies, closing a significant responsibility gap and advancing protections for vulnerable migrants beyond national borders.

Endnotes

1. *Hirsi Jamaa and Others v Italy* (ECtHR, judgment of 23 February 2012, Application No 27765/09).
2. *FKAG and Others v Australia* (CCPR/C/109/D/2094/2011).
3. *S.S. and Others v Italy* (ECtHR, judgment of 23 February 2012, Application No 60942/12).
4. V. Moreno-Lax, *The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"* (QIL Zoom In).
5. V. Moreno-Lax, *Meta-Borders and the Rule of Law: From Externalisation to 'Responsibilisation' in Systems of Contactless Control* (QIL Zoom In).
6. V. Moreno-Lax, *The Exercise Of State Power Over Migrants At Sea Through Technologies Of Remote Control: Reconceptualizing Human Rights Jurisdiction* (QIL Zoom In).
7. M. Giuffrè, 'A Functional-Impact Model of Jurisdiction: Extraterritoriality before the European Court of Human Rights' (2021) QIL, Zoom In 83.
8. Juxtaposes Italy and Malta rescue/interdiction practices: Israel Law Review, 'Rethinking "Jurisdiction" in International Human Rights Law in Rescue Operations at Sea…' (2022), citing *A.S. and Others v Italy* and *A.S. and Others v Malta* (UN HRC).
9. Banković and Others v Belgium and Others (ECtHR, 2001) App No 52207/99 – introduces the restrictive "effective control over territory" threshold.
10. *Al-Skeini and Others v United Kingdom* (ECtHR, 2011) 53 EHRR 18 – develops personal jurisdiction based on control over individuals.

11. IACHR, *Alejandre v Cuba* (Case 11.589, Report No. 86/99, 29 September 1999); IACtHR, *Environment and Human Rights*, Advisory Opinion OC-23/17 (15 November 2017) Series A No. 23, para. 104(h).