Externalisation of Migration and the Impact on the Human Rights of Migrants - *QUESTION 7: Responsibility and jurisdiction*

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KEY POINTS

- With regard to the **approaches to jurisdiction**, two main approaches must be considered (i) the territorial approach to jurisdiction and (ii) the functional approach to jurisdiction. The European Court of Human Rights (ECtHR) has traditionally applied the territorial approach, whereby jurisdiction is a synonym of control over the national territory. However, the Court has identified at least two exceptions, namely where a state exercises control over an area outside its territory, and in instances of state-agent control. The functional approach seems to better capture the situation of migrants at sea since it focuses on whether the states were in a position to prevent the rights violations, and whether there was a relationship of dependency between the individual and the state concerned. This requires considering the circumstances of every individual case. Even the ECtHR has increasingly adopted a case-by-case approach introducing more flexibility to the narrow territorial jurisdiction test.
- With Regard to the establishment of **responsibility for extraterritorial rights violations**, the Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA) do not straightforwardly apply to the attribution of responsibility for human rights violations. They are primarily concerned with inter-state relations rather than the relationship between states and individuals. Human rights courts and bodies have assessed the reasonability of states for human rights violations, even in cases involving non-state actors or in cases where the states were not directly involved in the rights violations. The courts have considered whether the states knew or should have known about the real risk that a rights violation might happen and failed to take measures to prevent it. This reasoning is particularly relevant to the context of migrants at sea.

Context and scope of the submission

This submission examines the jurisdiction and responsibility of European states externalising migration border controls, with a particular focus on the engagement of their responsibility for rights violations in the Mediterranean Sea.

During the migration journey migrants are subject to the jurisdiction of different states and the control of different state and non-state actors. This complex reality often jeopardizes the application of human rights law protections, with some referring to the situation in the Mediterranean as one of rightlessness.[1] This submission, however, contends that this condition stems from the different extraterritorial approaches to jurisdiction and the way international law allocates responsibility.

Migrants' shipwrecks at sea do not take place in a vacuum but are the result of a series of deliberate practices, including the criminalization of migrants, the soft-law agreements at EU and national level with third states, the failure to carry out search and rescue (SAR) operations, and the pushbacks aimed at creating conditions of non-arrival and obstructing the success of migrants' journeys. [2]

[1] Itamar Mann, 'Maritime Black Holes: Migration and Rightlessness in International Law' [2018] European Journal of International Law 29, pg. 348.

[2] Valentina Azarova and others, 'The enforced disappearance of migrants' [2022] Boston University International Law Journal 40(1), pp. 133-204, pg. 180. CED, 'General Comment 1 on enforced disappearance in the context of migration' (2023) UN Doc CED/C/GC/1, para.6.

Cases before regional courts and United Nations bodies, normally involve the breach of the right to life,[3] the right to humane treatment and freedom from torture,[4] the right to personal liberty, [5] the right to an effective remedy,[6] the right to freedom of movement and the prohibition of refoulement.[7] A common feature of these cases is the direct involvement of state agents, either through the detention of migrants upon arrival or their interception at sea, indicating that the migrants are under the control, authority, or power of the respective European state. However, this is not always granted. It is often the case that shipwrecks take place before the interception or the arrival of a SAR mission, in international waters, or in the SAR zone of another European or third state. These scenarios complicate the application of the human rights legal framework due to the ambiguity surrounding which actor bears responsibility. It is precisely this situation that this contribution seeks to examine.

What jurisdictional approaches may be invoked to assess the extraterritorial application of human rights obligations in the context of externalisation practices involving migrants?

Under International human Rights Law (IHRL) jurisdiction is a precondition for a state to incur responsibility for any act or omission attributable to it. It is well established that **states have an obligation to secure the rights of persons subject[8] or within[9] their jurisdiction.** There are at least two jurisdictional approaches that must be considered in the context of externalisation of migration in the Mediterranean.

- **Territorial approach to jurisdiction**

This approach is based in the premise that jurisdiction is essentially territorial only extending over the national territory of a state, a premise traditionally upheld by the European Court of Human Rights (ECtHR).[10] Such a rigid approach does not properly capture the reality in which human rights violations take place. In light of that, the ECtHR has identified at least two exceptions. First, state jurisdiction can extend extraterritorially when the state has effective control of an area outside the national territory of the state.[11] Second, in absence of territorial control, jurisdiction can be established when there is effective state-agent control. [12] Applying the state-agent control test, the ECtHR concluded in *Hirsi Jamaa* that obligations under the European Convention on Human Rights apply at high seas.[13]

- **Functional approach to jurisdiction**

This approach is ultimately founded on the premise that an individual is under the jurisdiction of a state when **the state is in a situation to protect** the individual's human rights, regardless of whether the events occurred within the state's territory. This has translated in the United Nations Human Rights Committee (HRCtee), interpreting the effective control test as meaning that individuals are under the state's jurisdiction not only when

[3] See e.g. Bousroual v. Algeria (2006) Decision of the Human Rights Committee, Comm. no. 992/2001, para 9.10; Çakici v. Turkey App. no. 23657/94 (ECtHR, 8 July 1999), para.87.

[4] See e.g. Sarma v. Sri Lanka (2003) Decision of the Human Rights Committee Comm. no. 950/2000 (Sarma), para 9.3.

[5] See e.g ibid, para. 9.3.

[6] See e.g Bousroual v Algeria (n3) para. 9.12.

[7] Convention relating to the status of refugees and protocol relating to the status of refugees (adopted 28 July 1951, entered into force 22 April 1954), Article 33. Hirsi Jamaa and others v. Italy App. no. 27765/09 (ECtHR, 23 February 2012), para. 127.

[8] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), Article 2.1.

[9] European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953), Article 1; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978), Article 1.

[10] Banković and others v. Belgium and other European states App. no. 52207/99 (ECtHR, 12 December 2001), para. 61; Issa and others v. Turkey App. no. 31821/96 (ECtHR, 16 November 2004), para. 67.

[11] Loizidou v Turkey (Preliminary Objections) App.no. 15318/89 (ECtHR, 23 March 1995), para. 62.

[12] Al-Skeini and others v. the United Kingdom App. no. 55721/07 (ECtHR, 7 July 2011), para. 136.

[13] Hirsi Jama v. Italy (n 7).

they are subject to its power or effective territorial control, but also when the **state's conduct has a reasonably foreseeable impact on the rights of individuals outside its territory**.[14]

The Inter-American Court of Human Rights (IACtHR) has affirmed that individuals fall within the state's jurisdiction when the state exercises authority over those individuals or subjects them to effective control, regardless of whether the rights violation takes place beyond the state's territorial boundaries.[15] This has led the IACtHR to conclude that, where a **causal link** can be established between a human rights violation occurring in a third state, and the act or omission that took place within the state territory, the affected individuals are considered to be under that state's jurisdiction.[16]

Rights violations at sea do not always occur in areas within the territorial jurisdiction of states and the case law of human rights courts and bodies reflects it to varying degrees. In *AS and others v Italy*, the HRCtee determined that migrants located outside Italian territorial waters were within Italy's jurisdiction.[17] In reaching this conclusion, the Committee did not rely on the existence of territorial control but instead emphasized the **special relationship of dependency** between the migrants and the Italian state. It found that the risk of rights violation was a foreseeable consequence of Italy's failure to discharge its obligations to protect life at sea and to investigate the incident promptly. [18] Importantly, in that case, Italy had not intercepted the ship, thus no state-agent control could be established. In a similar line, the Inter-American Commission on Human Rights found that the shooting of two aircrafts in international waters fell within the state jurisdiction since there was a **sufficiently direct and immediate link** between the events and the conduct of state agents. [19]

From this derives that the courts are ready to accept that situations may fall under the jurisdiction of states despite a situation has unfolded due to the failure of the state to act rather than due to a direct action as long as the state is in control of the circumstances in which migrants find themselves in. The test applied is whether the state knew or should have known about the risk of rights violations and failed to take reasonable measures that could have reasonably prevented the harm.[20]

How can the responsibility of the externalising State be established in cases of human rights violations?

Multiple actors are involved in the migration journey ranging from state to non-state actors, such as traffickers and smugglers. This reality is not far from the global tendency to depart from the state-centric approach to responsibility for human rights violations.[21] When it is not clear which actor is in control of a situation – as it too often happens in shipwrecks- it is more challenging to hold states responsible for an internationally wrongful act.

To engage state responsibility, the state must have committed an internationally wrongful act, namely an act that is attributable to the state and constitutes a breach of an international obligation. Breach of international

[14] Lopez Burgos v. Uruguay (1981) Decision of the Human Rights Committee Comm.no. 052/1979, para. 12.3; UNHRCtee, 'General Comment 31 on the nature of the general legal obligation imposed on State Parties to the Covenant' (2004) CCPR/C/21/Rev.1/Add. 13, para. 10; UNHRCtee, 'General Comment 36 on the right to life' (2019) CCPR/C/GC/36, para. 22.

[15] The Environment and Human Rights (Advisory opinion) IACtHR OC-23/17 (15 November 2017), para. 79.

[16] ibid.

[17] AS and others v. Italy (2020) Decision of the Human Rights Committee Comm. no. 3042/2017, para. 7.8.

[18] ibid.

[19] Armando Alejandre, Carlos Costa, Mario de la Peña, Pablo Morales v. Cuba, Report No. 86/99, IACommHR (29 September 1999), paras. 23-26.

[20] KU v. Finland App. no 2872/02 (ECtHR, 2 December 2008), para. 48.

[21] Cristina Lafont, 'Accountability and global governance: challenging the state-centric conception of human rights' [2015] Ethics and Global Politics 3(3), pp.193-215, pg.198.

obligations can include a breach of the rights foreseen under the European Convention on Human Rights, the obligations under the UNCLOS, the SAR Convention, or the ICCPR.

Attribution denotes the determination of whether a certain conduct can be characterized as an act of the state.[22] The Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA) establish that the bases for attribution mainly include the conduct of state organs,[23] persons or entities exercising elements of governmental authority,[24] organs placed at the disposal of a state by another state,[25] and non-state actors acting under the direction, control, or instructions the state.[26] In this last case, *control* refers to the control of a concrete operation within which the conduct complained of took place.[27] Moreover, in the context of migrants strained in the Mediterranean, it is relevant that state responsibility under the ARSIWA is extended by the acknowledgement that states can also be internationally responsible when aiding or assisting another state in the commission of internationally wrongful acts,[28] regardless of whether the person is within its jurisdiction and despite the fact that the acts might not be attributable to the state that aids or assists.

The application of the ARSIWA in cases of human rights violations has its challenges and particularities since the instrument covers acts between states and not acts between states and individuals. Thus, it is necessary to explore the developments of the regional human rights courts in this regard.

The ECtHR has normally assessed the existence of an **uninterrupted link of responsibility** between state conduct and the rights violation to decide on the existence of state responsibility. For example, in *Ilascu* the ECtHR found Russia responsible for the rights violation of a Moldovan individual due to the support provided in terms of military equipment and assistance in the arrest of the applicant.[29]

The IACtHR, in *Mapiripan Massacre*, established that state international responsibility can derive from acts of private individuals. [30] This was possible in the context of Colombia, where the Court found that the state had permitted and encouraged the creation of the paramilitary groups that executed human rights violations. The IACtHR has also attributed responsibility to the state in cases in which the state has contributed[31] to the creation of the risk for human rights violations or tolerated it.[32]

This makes evident that attribution can derive from both acts and omissions leading to a breach of human rights.[33] Focusing on the latter, the ECtHR has also made use of the foreseeable and avoidable risk test. Accordingly, a state might be responsible for the conduct of private actors when is aware of the situation of an imminent and real risk, that threatens a specific group, and there are reasonable possibilities to prevent and avoid a risk and failed to do so. [34]

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[22] James Crawford, Alain Pellet, Simon Ollesion, Kate Parlett (eds), the Law of International Responsibility (OSAIL 2010), pg. 221.
[23] International Law Commission, 'Articles on Responsibility of States for Internationally Wrongful Acts' (2001) Res 56/83, Article 4.
[24] ibid. Article 5.
[25] ibid. Article 6.
[26] ibid. Article 8.
[27] Vladislava Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' [2018] HRLR 18(2), pp. 309-346 (Vladislava Stoyanova), pg. 320.
[28] Articles on State Responsibility for Internationally Wrongful Acts (n 23), Article 16.
[29] Ilascu v. Moldova App.no. 48787/99 (ECtHR, 8 July 2004), paras. 317-319.
[30] Mapiripán Massacre v. Colombia (Merits, Reparations, Costs) IACtHR Series C No. 134 (15 September 2005), para. 111.
[31] Ituango Massacres v. Colombia (Preliminary Objections, Merits, Reparations and Costs) IACtHR, Series C No. 148 (1 July 2006), para. 132; Mapiripán Massacre (n 30) paras.122–124.
[32] Pueblo Bello Massacre v. Colombia (Merits, Reparations, and Costs) IACtHR Serie C No.140 (31 January 2006) (Pueblo Bello Massacre), para. 97.c.
[33] Afro-descendant Communities displaced from the Cacarica River (Operation Genesis) v. Colombia IACtHR Series C No.270 (20 November 2013), para.207.
[34] Osman v. the United Kingdom App. no. 2345/94 (ECtHR, 28 October 1998) (Osman), para. 116.

In the context of shipwrecks, rights violations may be attributed to European states when such incidents occur while migrants are under the direct control of state officials. Likewise, when a state intercepts a vessel and fails to adequately conduct its search and rescue obligations, it is also plausible for the state to be held responsible due to its omission. More complex, however, are situations in which the state has failed to detect a shipwreck altogether. In such cases, the attribution test remains applicable, particularly where it can be argued that the state ought to have known of the circumstances giving rise to the violation.

In this sense, it is relevant that, European coastal states, with the support of the European Union, despite knowing of the patterns of shipwrecks taking place in the Mediterranean, have continued to adopt agreements with third states to halt migration flows, setting aside the consideration that those practices could lead to migrants' death.[35] Over the years, despite the alarming numbers of deceased in the Mediterranean, and the risk that pushbacks entail, Spain,[36] Italy,[37] and Greece[38] have promoted and entered into multiple cooperation agreements with third states that have led to the externalisation of southern European border management,[39] and deter migrants from embarking on the migration journey.

Considering the above, the fact that non-state actors are involved in the initial stages of the migration journey by facilitating the crossing of the Mediterranean does not prevent the conclusion that European coastal states acquiesce to this reality by adopting agreements that contribute to creating conditions of endangerment of migrants at sea and pushing them to embark in more dangerous routes, and even placing them at the mercy of such non-state actors. Thus, while in certain circumstances states might not be directly involved in the shipwreck, the indirect impact of their policies could engage state obligations since they acquiesced or **failed to prevent** the violation of migrant's most fundamental rights when they were in a position to do so.

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[35] UNWGEID 'Thematic Report of the Working Group on Enforced or Involuntary Disappearances in the context of migration' (2017) UN Doc. A/HRC/36/39/Add.2, para. 42.

[36] Despite rising numbers of migrants' deaths and going missing, Spain has entered into multiple agreements with Morocco, Senegal, Mauritania, Algeria, or Guinea Bissau. See: Inmaculada González García, 'Immigration in Spain: migratory routes, cooperation with third countries and HR in return procedures' [2019] Journal of International Law and International Relations 201; La Moncloa, 'Spain and Morocco strengthen cooperation on migration' (La Moncloa, 2 February 2023) <https://www.lamoncloa.gob.es/lang/en/gobierno/news/Paginas/2023/20230202_spain-morocco-migration.aspx> accessed 2 July 2024; Ministry of the Interior, 'Firma de dos Memorandos de cooperación policial con Senegal y Mauritania [Signing of two Memoranda on police cooperation with Senegal and Mauritania]' (Press release 3 November 2009).

[37] Italy has historically cooperated with Libya. Such cooperation expanded in 2007 with agreements to conduct joint patrolling operations financed by Italian resources. Moreover in 2008, a treaty of Friendship, Partnership, and Cooperation was signed. Following the suspension of the treaty after Gaddafi's death, Italy entered into a new agreement in 2013, continuing their partnership with a focus on the halt of irregular migration, and in 2017 a memorandum of understanding was signed to fight against illegal immigration, human trafficking, and smuggling. See: Tiziana Torresi, 'An emerging regulatory framework for migration: the Libya-Italy Agreement and the right to exit' [2014] Griffith Law Review 22(3), pp.648-665, pg. 652; Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic (2017) < https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf>.

[38] Greece adopted an integrated border management program to combat illegal immigration with the aim of safeguarding EU borders and reduce illegal migration in 2011. After 2015 Greek border management was characterized by the implementation of return operations and relocation schemes, closure of the western Balkans corridor, and the Joint EU- Turkey statement in 2016 which was implemented at the national level by Law 4375/2016.

[39] Martino Reviglio, 'Externalizing migration management through soft law: memorandum of understanding between Libya and Italy' [2019] Global Jurist 20(1), pg. 1.