



Center for International Human Rights

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Submission to the Office of the High Commissioner for Human Rights

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Overview

This submission tackles the recent developments before the European Court of Human Rights (ECtHR) on externalization policies and migration management by proxy. It illustrates how the Court's application of a narrow jurisdiction interpretation under the Convention risks normalizing migration control by proxy while deepening differences within the European framework itself and between human rights regimes, especially when compared to the recent Human Rights Committee's decision in *A.S. and others v. Italy and Malta*.

On 20 May 2025, after seven years of proceedings, the European Court of Human Rights (ECtHR) declared the case *S.S. and others v. Italy* inadmissible under Article 1 of the European Convention on Human Rights (ECHR) on the ground of lack of jurisdiction. Rather than addressing whether Italy exercised *extraterritorial* jurisdiction in the context of externalized migration control, the Court concluded that Italy lacked the requisite "effective control" to trigger its jurisdiction over a group of irregular migrants whose ship had been wrecked on the high seas near the Libyan coast.

This decision falls within a wider pattern of increased pull-back policies around the world where countries of origin or transit "pull-back" migrants on behalf of destination countries. The practice has been used so far in Mexico, Turkey, Libya, Lebanon, among many others. In addition, the case constitutes a continuation of the narrower interpretation of jurisdiction as followed by the ECtHR while ignoring the cause-effect nexus as a basis for jurisdiction. ECtHR has further

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legitimized externalization policies and control by-proxy to protect State Parties from their responsibility toward migrants and asylum seekers. The narrow interpretation followed by ECtHR risks not only normalizing the by proxy migration regime, but also undermining the purpose and object of the ECHR as an instrument that protects human rights and upholds democratic ideals.

Case Background:

- On 6 November 2017, the Italian Maritime Rescue Coordination Centre (MRCC) received a distress call from a sinking vessel off the Libyan coast. The MRCC signaled to nearby ships and contacted the Libyan Coast Guard (LYCG). The LYCG intercepted the vessel, returned it to Libya, and the applicants assert that the turbulence from these operations caused the death of 20 passengers.
- The applicants argued that by coordinating and enabling the interception and removal, Italy violated its obligations under the Convention (including Article 3), as returning migrants to Libya exposed them to serious risks of ill-treatment and other well-documented human-rights abuses.
- The ECtHR, however, found that at the time of interception, Italy did not exercise “effective control” over the vessel or migrants, hence triggering extraterritorial jurisdiction under the ECHR. It concluded that bilateral cooperation agreements and coordination efforts, even if involving funding, technical support, and operational direction, are insufficient to establish the continuous and exclusive jurisdiction required.

Why the Decision Matters: Functional Jurisdiction, Public Powers, and State Responsibility.

1. From effective control to functional jurisdiction:

- The Court’s jurisprudence previously recognized extraterritorial jurisdiction where there is “effective control” of persons or territory (e.g., *Al-Skeini and others v. the UK*; *Hirsi Jamaa and others v. Italy*).
- In *Hirsi*, for instance, Italy’s use of its naval vessels to intercept and return migrants triggered ECHR obligations because the migrants were under *de facto* and *de jure* control

of Italy. *S.S. and others* presented a different, but increasingly common, scenario: interception and removal carried out by a third country (Libya), and under coordination, support, and operational guidance from Italy (based on a Memorandum of Understanding between both countries).

- This raises the question whether “jurisdiction” ought to be understood functionally as in based on the effective exercise of *public powers*, and not solely on direct physical or territorial control.
 - A functional approach is consistent with the logic of extraterritorial responsibility in international human rights law, including principles found in the doctrine of attribution (codified in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)), and reflects the realities of contemporary externalization arrangements, which rely heavily on policies, capacity-building, technical and material support, and coordination.
 - It is also consistent with the Human Rights Committee’s General Comment n. 36 (para.63) regarding state’s extraterritorial responsibilities
 - This also aligns with the recent Human Rights Committee’s decision in *A.S. and others v. Italy and Malta* where a functional approach was applied
 - However, in the case of *S.S. and others*, the Court applied a narrower understanding of jurisdiction and found the case inadmissible
2. The Court affirmed that the existence of bilateral agreements on migration between Libya and Italy is insufficient to establish a situation of effective control exercised by Italy over Libya (paras. 94-97).
3. ***Exercise of public powers***
- In *S.S.*, Italy provided substantial support to Libya under a coordination framework (the bilateral migration management MoU), which includes direct funds, training, patrol vessels, logistical and technical assistance, and direction via the MRCC.
 - The scale of this support transformed the LYCG from a marginal actor into a central functional entity that is responsible for intercepting, detaining, and returning migrants on Italy’s behalf.

- This form of coordination is part of the externalization of Italy's own by proxy migration enforcement functions... As such, the full constellation of acts, in terms of political, operational, financial aspects, constitutes an exercise of *public powers* that should subsequently trigger the human rights obligations of the supporting State under the Convention.

4. *Attribution and accountability under IL*

- Under ARSIWA, a State that aids or assists another State in the commission of internationally wrongful acts may bear responsibility if such support facilitates the commission of wrongful conduct (e.g., Libya's record of human rights abuses), and the assisting state (Libya) is aware of such conduct.
- In *El Masri v. "The Former Yugoslav Republic of Macedonia,"* the Court considered the knowledge of Macedonian authorities of the risks of torture and ill-treatment at the hand of US authorities (para.218-221) to be sufficient to establish Macedonia's responsibility.
- Similarly, in *M.S.S v. Greece and Belgium,* the Court established Belgium's responsibility on the fact that the Belgian authorities "knew or ought to have known" of the asylum right violation that the applicant would be subject to in Greece (para. 358-9)
- Given Libya's widely documented record of systemic human rights abuses against migrants, including arbitrary detention, torture, extortion and lack of due process, Italy's substantial assistance and coordination arguably renders it complicit and responsible for resulting violations.
- Unlike previous cases such as *El Masri* and *M.S.S,* the Court disregarded the role of knowledge in triggering violations. The full awareness of Italian authorities of possible human rights violations at the hand of Libyan authorities against migrants did not suffice to trigger extraterritorial violations as in the case of *El Masri.*
- The ECtHR's refusal to engage with these issues creates an accountability void, as state parties may continue to evade responsibility under the Convention by outsourcing enforcement to third-party actors.
- Furthermore, this decision risks deepening contradictions within the ECHR framework itself given existing precedents in relation to extraterritorial jurisdiction and state responsibility.

5. *Decision's direct impact on externalization*

- *S.S. and others* decision risks normalizing pull-back and offshoring policies to countries with questionable human rights records. It also shields externalizing states from any form of accountability for the direct consequences of its agreements with third states.
- This encourages and legitimizes migration frameworks in which migration control is outsourced to third States with weaker human rights protections, minimal oversight, with little transparency and accountability.
- The decision further underscores a troubling divergence between different human rights regimes: while the Human Rights Committee adopted a more functional approach to jurisdiction in comparable sea rescue cases, including in Italy and Malta, the ECtHR's narrow reading risks eroding protection and exacerbating differences among human rights frameworks.

Recommendations and Conclusion

In light of the *S.S. and others* development in the European Context, this document recommends the following action points in the upcoming report:

- Recognize and affirm functional jurisdiction and the exercise of *public powers* as applicable in externalization contexts. In this regard, it is important to acknowledge that outsourcing responsibility and enforcement should not shield states from accountability. Hence, the exercise of *public powers* by the externalizing state constitutes effective control and should trigger extraterritorial jurisdiction
- Elaborate on the scope of attribution when it comes to state responsibilities in externalization settings.
- Encourage states to conform to a right-based approach in relation to migration over following a securitization approach. In this regard, states should not simply regard migration as a security threat that necessitates pushbacks and pull-backs policies. Thus, it is important to protect the right to asylum and ensure a safe access to this right. This is particularly important in light of the letter issued last May by nine European governments, led by Denmark and Italy, in which the signatories alleged that the

European Court of Human Rights “has extended the scope of the (European) Convention too far as compared with the original intentions behind the Convention, thus shifting the balance between the interests which should be protected.” According to the signatories, the protection of migrants should not take precedence over the security of their citizens: “in our opinion, safety and security for the victims and the vast majority of law-abiding citizens is a crucial and decisive right. And, as a general rule, it should take precedence over other considerations.” Such an understanding, if adopted within the Council of Europe, would further erode the refugee protection regime.

- Encourage coherence among different human rights regimes: the divergence in decisions within and between different bodies in such high-risk cases could undermine the universality of human rights and create further confusion among practitioners, while encouraging states to disregard decisions that establish their responsibility.
- Encourage states to establish robust accountability mechanisms to monitor the implementation of bilateral agreements in the context of migration, which include ex-ante human rights assessments, bilateral review mechanisms, complaints mechanisms, among others.

The ECtHR’s decision in *S.S. and others v. Italy* shows the growing juridical normalization of externalization and pull-back policies. By refusing to apply a functional reading of jurisdiction, ignoring human rights and civil society reports, and sidelining state responsibility, the Court has effectively reinforced a system in which migrants’ rights can be violated with little to no state accountability. In responding to the OHCHR’s Call for Input on “Externalization of Migration Governance,” it is important to highlight this case as a precedent that erodes norms associated with rights-based policies to migration and asylum in Europe and beyond.