

THIRD PARTY INTERVENTION BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Application no. 5504/19- Y.A. and Others v. Italy

Between

Y.A. and Others

Applicants

And

ITALY

Respondent

Written observations by the

International Human Rights Legal Clinic

Law Department – University of Turin

Pursuant to Article 36 and Rule 44 §3 of the Rules of Court

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A. INTRODUCTION

The present intervention is submitted by the International Human Rights Legal Clinic (hereinafter 'IHRLC')¹ of the Law Department of the University of Turin, pursuant to the leave granted by the Deputy Section Registrar, in accordance with Article 36 §2 of the European Convention of Human Rights and Fundamental Freedoms (hereinafter 'ECHR') and Rule 44 §3 of the Rules of the Court.

The *Y.A. and Others v. Italy* case raises critical issues related to the application of the ECHR in rescue operations at sea. Specifically, the case deals with the situation that occurred in the Libyan SAR zone on 19 January 2019. On this occasion, a boat belonging to a Non-Governmental Organisation flying the Dutch flag required help from the Italian MRCC, so that it could enter a 'place of safety' and disembark the rescued individuals, among whom 15 were unaccompanied migrant children. Italian authorities firstly denied their help. The disembarkation was only authorised on 30 January 2019: this lateness in reply gave rise to significant alleged human rights violations to the detriment of the Applicants.

The Claimants affirmed that Italy had jurisdiction over the reported facts even if they occurred outside its territorial waters. On the other hand, Italy argued that it was under no obligation to protect, since the violations were not committed within its borders.

The IHRLC considers that the case at hand requires a systematic approach to extraterritorial jurisdiction whenever this intertwines with the protection of human rights. The extent of States' jurisdiction under international human rights treaties has been evolving in recent years with new solutions and innovations. This is particularly crucial against the backdrop of the recent evolution of functional jurisdiction both within jurisprudence of the European Court of Human Rights (hereinafter 'ECtHR') and in international case law. To this end, the following observations will briefly discuss how international courts and monitoring bodies interpret jurisdictional links tying victims and governmental authorities.

The section on the doctrinal framework will firstly illustrate a general overview of the academic debate on the matter. Afterwards, it will introduce the main cases within ECtHR jurisprudence regarding the application of functional jurisdiction, relying on the Court's recent pronouncements. The subsequent section will examine the application of functional jurisdiction under other international and regional systems, highlighting how this notion was also developed within them.

B. A FUNCTIONAL APPROACH TO JURISDICTION

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I. Theory of Functional Jurisdiction

The case brought to the attention of this honourable Court raises significant questions on the application of the ECHR outside the territory of a State Party. The concept of extraterritorial jurisdiction has been progressively elaborated in public international law to the point of reaching a so-called functional approach to jurisdiction.² This implies that States are required to respect human rights law whenever they are capable and can be reasonably expected to.³ As explained below,⁴ several international courts and quasi-judicial bodies have already upheld that the existence of ‘a special relationship of dependence’⁵ tying the victims to a State can trigger that State’s accountability. This vision encompasses and overcomes the long-established features of extraterritorial jurisdiction⁶ by transcending the *ratione loci* and *ratione personae* approaches. The functional model, indeed, prioritises human rights observance over any other legal aspect: under this framework, whenever States could reasonably and foreseeably respect human rights, they should be required to. Therefore, extraterritorial becomes a ‘functional capacity’⁷ of States, meaning that whenever they are put in the position to either respect or violate human rights, their responsibility is triggered. The requirement to establish functional jurisdiction is deemed to be the presence of either legal agreements or a condition of dependency connecting the State to the victims,⁸ thus limiting its potential reach. The ultimate utility of applying the functional model to extraterritoriality, therefore, is that it may be employed to the benefit of enhanced human rights protection.

Against this backdrop, the present submission argues that such a functional model is particularly desirable in the case at hand. The IHRLC suggests that considering the functional jurisdiction model in *Y.A. and Others v. Italy* would be particularly convenient, as this case requires an interpretation of extraterritorial jurisdiction so as to enhance human rights protection. It is further subject to controversy whether a condition of dependence, this being one fundamental element for the engagement of functional jurisdiction, was extant between Applicants and Respondent.

For the aforementioned reasons, evaluating this case against the suggestions provided by the idea of functional jurisdiction cannot but result in an ever-auspicious enhancement of the protection of human rights. The following paragraphs are devoted to showing how other notable international tribunals have espoused this approach.

II. Jurisprudence of the Court

² Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' [2013] 7(1) Law & Ethics of Human Rights 47-71.

³ *Al-Skeini and Others v UK* App No 55721/07 (ECHR, Concurring Opinion of Judge Bonello, 7 July 2011).

⁴ Please see Section C, sub-paragraph II, and Section D.

⁵ Human Rights Committee, *S.A. and Others. v. Italy*, Communication No. 3042/2017, Views of 4 November 2020, UN Doc. CCPR/C/130/D/3042/2017 of 27 January 2021 [7.8].

⁶ See Menno T Kamminga, 'Extraterritoriality', Max Planck Encyclopaedias of International Law (2020).

⁷ (n. 2). See also Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' [2008] 8(3) Human Rights Law Review 411-448.

⁸ (n. 2).

This honourable Court already had the chance to deal with critical cases concerning the extraterritorial application of the Convention. The following paragraph will highlight that those rulings have already implemented a definition of functional jurisdiction.

A first elaboration of this concept was made in *Ilascu and Others v. Republic of Moldova and Russia*. This honourable Court acknowledged that the concept of 'jurisdiction' within the meaning of Art. 1 ECHR is not necessarily limited to the national territory of the High Contracting Parties.⁹ It further specified the meaning of 'effective'¹⁰ control, stating that it suffices that 'even overall control of the area' exists as to 'engage the responsibility of the Contracting Party'.¹¹ To determine whether such overall control over an area exists, one shall turn to factual elements, such as the dependence of local governments on monetary support of a member State or the actual presence of armed forces. Those factors amount to a functional interpretation of jurisdiction. It is also noteworthy that States do not only have to refrain from infringing provisions of the Convention, but also to ensure full respect for those rights and freedoms.¹² Applying this interpretation to *Y.A. and Others v. Italy*, this would imply that the Respondent State's duty is not only to make sure that it does not breach its international obligations, but also to ensure that a captain of a vessel does not violate those rights because of insufficient orders from authorities. Furthermore, the well-known¹³ concurring opinion by the honourable Judge Bonello suggested a more precise definition of this doctrine, according to which the question of jurisdiction hinges on whether it depended on the agents of the State that,

- a) the alleged violation would be committed or not; and
- b) it was within the powers of the State to punish the perpetrators and compensate the victims.¹⁴

In total, the Court has thus made conspicuous the purely functional elements that jurisdiction depends on.

The question of extraterritorial jurisdiction is, however, not only a question of factual elements, but also of other 'special features'.¹⁵ In *Hanan v. Germany*, the legal question concerned the Respondent State's duty to investigate potential violations of international humanitarian law as results of an airstrike that occurred in Afghanistan and carried out on Germany's behalf by American fighter jets. Referring to the duty to investigate, this honourable

⁹ *Ilascu and Others v. Moldova and Russia* App No 48787/99 (ECHR, 8 July 2004) [315].

¹⁰ *Banković and Others v. Belgium and Others* App No 52207/99 (ECHR, Admissibility, 19 December 2001) [75].

¹¹ (n. 9).

¹² *Ibid* [313].

¹³ Francesco Messineo, 'Gentlemen at Home, Hoodlums Elsewhere? The Extra-Territorial Exercise of Power by British Forces in Iraq and the European Convention on Human Rights' [2012] 71(1) Cambridge University Press 15-18; Natasha Holcroft-Emmess, 'Life After *Bankovic* and *Al-Skeini v UK*: Extraterritorial Jurisdiction under the European Convention on Human Rights' [2012] 1(1) Oxford University Undergraduate Law Journal 11-17; Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' [2012] 23(1) The European Journal of International Law 121-139.

¹⁴ (n. 3).

¹⁵ *Hanan v. Germany* App No 4871/16 (ECHR, 16 February 2021) [142].

Court held that the existence of the aforementioned ‘special features’ can establish a jurisdictional link, too. Such features can stem from multiple links to other areas of law and obligations originating therefrom, for instance the positive obligation of a State under international law to take action. The aforementioned ‘existence of a duty to investigate under international law [...] reflects the gravity of the alleged offence’.¹⁶ Secondly, even an obligation under domestic law of the Respondent may establish such a feature.¹⁷ Thirdly, the availability of other viable legal arenas for redress is to be determined. If the claimant does not have other ways of access to justice - as the Respondent retains exclusive jurisdiction, or said possibility is rejected because of factual reasons - then a denial of jurisdiction would lead to the inaccessibility to justice as a whole.¹⁸ This honourable Court hence concluded that if a member State has subordinated itself to an obligation, it would, in turn, be *venire contra factum proprium* to deny jurisdiction.

C. INTERNATIONAL CASE LAW

I. Human Rights Committee

The Human Rights Committee released General Comment No. 36 providing fresh insights on Art. 6 of the International Covenant on Civil and Political Rights. The latter, indeed, intertwines with the present case: throughout the report, the Committee endorsed a functional model of jurisdiction. Indeed, pursuant to General Comment No. 36, State Parties must take appropriate measures to protect individuals against deprivation of life by other States, international organisations and foreign corporations operating within both their territory and in other areas subject to their jurisdiction.¹⁹ Moreover, it enshrines that, resembling *Y.A. and Others v. Italy*, States are required to enforce special measures of protection towards unaccompanied migrant children, as these individuals are placed in a situation of vulnerability.²⁰ As paragraph 63 specifies, State Parties must respect and protect the lives of individuals under their effective control, as well that of all human beings located on marine vessels or aircrafts flying their flag, and of those individuals in a situation of distress at sea, in accordance with their international obligations²¹.

More recently, in a recent pronouncement on *S.A. and Others v. Italy*, the Committee has considered that the Respondent State exercised effective control over a maritime rescue operation, resulting in a direct and reasonably foreseeable causal relationship between the State’s acts and omissions and the outcome of the operation. Furthermore, it stated 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’.²² The Committee thus highlighted the relevance of a factual relation between

¹⁶ Ibid [137].

¹⁷ Ibid [142].

¹⁸ Ibid [138].

¹⁹ UNHRC, *General Comment no. 36, Article 6 (Right to Life)*, 3 September 2019, CCPR/C/GC/35 [22].

²⁰ Ibid. [23].

²¹ Ibid. [63].

²² UNHRC, *General Comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13 [13].

states and individuals, one which has repercussions on the enjoyment of rights or the capacity to produce the effects on the latter. Concerning the obligations arising under the law of the sea, both flag State obligations regarding legislating and assistance²³ and coastal State obligations regarding search and rescue²⁴ have been acknowledged to ascertain jurisdiction. The Committee affirmed that the Respondent State had established a 'special relationship of dependency' which consisted on - other than factual elements - 'relevant legal obligations incurred by Italy under the international law of the sea'.²⁵ The Committee further noted that, under the regime of the International Convention on the Law of the Sea, States shall require ships flying their 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'. It goes on to remark that coastal States shall promote adequate and effective search and rescue services via regional arrangements.²⁶ In addition, the coordination of search and rescue operations of ships from different States by the Regional Coordination Centre, together with the duty of States to cooperate in those operations upon receiving information on situations of distress at sea,²⁷ help to nurture the extraterritorial jurisdictional framework under the law of the sea. In light of these considerations, the Committee underlined that the individuals on board 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'. Furthermore, different regimes stemming from several branches of public international law do intertwine for the purposes of establishing jurisdiction - as, for instance, human rights law and the law of the sea do in the present circumstances.

II. Committee on the Rights of the Child

In *L.H. and others v. France*, several French children were held hostage in refugee camps in Syria. Here, a third-party intervention²⁸ presented an interesting notion of functional jurisdiction. Firstly, the attention was on the existence of a special link between the Respondent State and the children, namely citizenship. Indeed, States have a duty to protect their citizens, which is the necessary link to establish that France should have intervened. Moreover, the Committee affirmed the State's responsibility, since the imprisonment of the children was due to France's denial to resort to diplomatic means²⁹ in order to repatriate its own citizens, even if they were minors. From such a perspective, the Committee underlined that the State had, in fact, effective control of the children, hence its intervention could have changed their status of

²³ HRC, *S.A. and Others v. Malta*, Communication No. 3043/2017, Decision of 13 March 2020, UN Doc. CCPR/C/128/D/3043/2017 of 27 January 2021 [6.6]; HRC, *S.A. and Others v. Italy*, Communication No. 3042/2017, Views of 4 November 2020, UN Doc. CCPR/C/130/D/3042/2017 of 27 January 2021 [7.6].

²⁴ Ibid.

²⁵ Ibid.

²⁶ UNGA Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) art. 98.

²⁷ IMO International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) ch. 4.6.

²⁸ UNCRC 'Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communications No. 79/2019 and No. 109/2019' (2019) UN Doc CRC/C/85/D/79/2019–CRC/C/85/D/109/2019 [8.8].

²⁹ Ibid. [8.7].

detainees. Nevertheless, France refrained from helping them and respect their human rights. Secondly, The Committee on the rights of Child mentioned the ECtHR case law³⁰ regarding functional jurisdiction, despite its Convention having no reference to territory. In a similar case,³¹ indeed, the ECtHR decided to condemn a State for its administrative omissions' which caused human rights violations. Furthermore, the Committee established how the damage was foreseeable and therefore the obligations of a State should not be left up to another.

In conclusion, the perspective adopted by the Committee on the Rights of Child is clear: France had effective control upon its citizens, and thus it applied functional jurisdiction³².

III. Inter-American Court of Human Rights

The *IHRLC* also brings to the attention of this honourable Court the recent tendency toward the application of a functional jurisdiction, shown in the following cases both by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (hereinafter 'IACHR'), which has widely implemented the application of functional jurisdiction in several cases.

In *Franklin Guillermo Aisalla Molina*, the Commission established the extraterritorial jurisdiction of States over individuals abroad, who were subject to the control of that State's agents, considering that even though the jurisdiction is usually linked to the territory of the State, 'human rights are inherent in all human beings and are not based on their citizenship or location'.³³

Furthermore, the IACHR applied, as the *Advisory opinion OC 23/17 on The Environment and Human Rights* shows, an impact-based approach to determine whether or not a State is exercising jurisdiction.

The requesting State addresses the IACHR to dispel doubts on the interpretation of the American Convention on the State's obligations related to the environment, specifically in cases concerning big infrastructures with heavy environmental impact, therefore hindering the right to life and personal integrity of the inhabitants of the whole area. In response, the IACHR underlined that the Art. 1(1) of the American Convention on Human Rights³⁴ establishes that the State's jurisdiction applies not only to whom is within its territory, but also to anyone 'who is in any way subject to its authority, responsibility or control'.³⁵ With this statement, the Court specifies that the presence in the State's territory is not a necessary element to recognize find jurisdiction when the person is under an 'effective control'³⁶ by the State.

³⁰ Ibid. [2.13].

³¹ See *Nada v Switzerland* App no 10593/08 (ECHR, 12 September 2012).

³² (n. 28) [8.13].

³³ IACHR *Inter-state Petition IP-02 Admissibility Franklin Guillermo Aisalla Molina (Ecuador-Colombia)*, Report No. 112/10 (21 October 2011) [91].

³⁴ OAS American Convention on Human Rights "Pact of San Jose", (adopted 22 November 1969, entered into force 23 March 1976), art 1[1].

³⁵ *The Environment and Human Rights*, Advisory Opinion OC-23, Inter-American Court of Human Rights (15 November 2003) [73].

³⁶ Ibid. [81].

D. APPRAISAL AND CONCLUSION

In conclusion, the IHRLC submits that the *Y.A. and Others* case presents this honourable Court with the occasion to reflect upon the application of the long-established notion of extraterritorial jurisdiction through a functional-based approach. This model would hold accountable States which, whenever reasonably and foreseeably able to respect human rights, chose not to.

The present intervention showed that there is significant doctrine and case law to support such a development in the Court's jurisprudence. The international community - *inter alia*, the Human Rights Committee with notable emphasis - has explicitly ruled in favor of such a model, with many other regional tribunals issuing similar pronouncements.

In this view, the IHRLC deems that this honourable Court should take into account the relevance of the functional model of extraterritorial jurisdiction in order to assess the Respondent State's responsibility *vis à vis* the rescue operation.

Turin, 14 March 2022

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