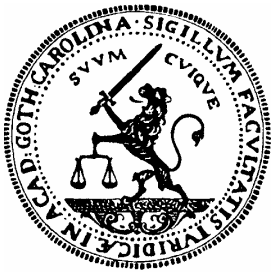

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Master of International Human Rights Law

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Respecting human rights abroad?

On the Extraterritorial Application of the European Convention on Human Rights

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Contents

Summary

Under which circumstances can the European Convention on Human Rights be applied to human rights violations perpetrated abroad by European military forces or other State agents? This question is highly relevant having in mind the European military presence in for example Iraq and Afghanistan. In contrast to the four Geneva Convention, applicable in armed conflict, the European Convention has a jurisdiction clause, which sets out limits on its applicability. Article 1 of the Convention provides that the Convention only applies to individuals *within the State parties' jurisdiction*. What does this mean? Is the Convention's applicability limited to human rights violations taking place on the territory of the acting State?

The meaning of the term jurisdiction in international law is primarily territorial and, as also originally intended with human rights treaties, the Convention *primarily* applies to human rights violation committed on the territory of the acting State. However, it follows from the jurisprudence of the European Court of Human Rights that the Convention exceptionally applies to extraterritorial human rights violations, i.e. violations committed outside the national territory. This is the case when the acting State exercises *effective control* over the territory of another State, or when it exercises *authority over persons* present outside the national territory. There is, however, a controversy on whether the Convention applies extraterritorially only within the boarders of the High Contracting Parties to the Convention, e.g. not in Iraq or Afghanistan, or also in the rest of the world. Drawing conclusions from the Court's case law it becomes clear that the criteria mentioned above create jurisdiction *ipso facto*. The determinant factor is the level of control exercised by the State agents in relation to the victim. Hence, the extraterritorial application of the Convention does not seem to have any geographical constraints.

The conclusion from the analysis of the Court's jurisprudence taken together with the principles of interpretation set out in the Vienna Convention, in particular the 'object and purpose'-principle, shows that the Convention can apply also to human rights violations committed by European soldiers in e.g. Iraq. Drawing from the Court's decision in the renowned *Bankovic* case, dealing with the 1999 NATO air bombings of Belgrade, the Convention is not applicable to air bombings or so called collateral damage, but very well on arrests or e.g. incidents of torture in British-led prisons.

1 Introduction

1.1 Subject and aim of the thesis

'The least one may expect from states who intervene abroad in the name of the great ideals of freedom, democracy and the rule of law, is that they continue to abide by the same universal human rights standards – whether they act at home or abroad'.[1]

Originally, human rights treaties aimed to protect individuals from the arbitrary exercise of power by the authorities of the home State.[2] However, the conduct of States increasingly affects individuals across boarders. The world has faced a number of intra-State military interventions, which have had devastating effects on the human rights of individuals in the invaded State. Are human rights treaties applicable under such circumstances? Are State parties to human rights treaties obliged to respect human rights also when operating abroad or only in relation to individuals present on their own territory? The spontaneous answer would be that a State party cannot perpetrate human rights violations on the territory of another State, which it cannot perpetrate on its own territory. However, from a legal point of view, the answer is rendered complicated by international rules and practice relating to jurisdiction.

From the perspective of international humanitarian law the answer is simple. The four Geneva Conventions have no limitations as to their extraterritorial applicability. The common article 1 proscribes that the Conventions apply 'in all circumstances'. The answer is much more complex when it comes to many human rights treaties, whose applicability is limited as to only apply to individuals 'within the jurisdiction' of a State party.

This thesis focuses on the extraterritorial application of the European Convention on Human Rights. The reason for the limitation to the European human rights system is partly practical (space limits), but it is also particularly interesting to examine the question in relation to the European system as it provides the most efficient supervisory mechanism within the international system of human rights.

Article 1 of the Convention provides that;

'The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention'.

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[1] Lawson, R., "The Concept of jurisdiction and extraterritorial acts of state" in Kreijen, G. (ed.) – *State, sovereignty, and international governance*, Oxford University Press, 2004, p. 297.

[2] i.e. the territorial State; the State, which has *de jure* control over the territory.

Who falls under the jurisdiction of a State party? While the concept of jurisdiction in international public law is a primarily territorial notion, it has been recognised that the Convention may exceptionally be applicable to extraterritorial State violations. This thesis aims to analyse the scope of the extraterritorial application of the Convention. *Under which circumstances can the Convention be applied to human rights violations perpetrated abroad by State agents of the High Contracting Parties?*

The question of extraterritorial application of human rights is highly relevant having in mind the criticised *Bankovic* case from 2001, where the Court declared a case brought by victims of the NATO air bombing of Belgrade in 1999 inadmissible. The victims were, according to the Court, not 'within the jurisdiction' of the defendant States, assumingly on grounds of lacking control over the territory by the NATO States.

Bearing in mind the continuing presence by European forces in Iraq and Afghanistan and the rising threat for further intra-State interventions, the question of the extraterritorial application of the European Convention becomes even more pertinent. Can a State party's maltreatment of prisoners or unlawful deprivations of life on the territory of another State be subject to the examination of the European Court of Human Rights?

After having analysed under which circumstances the Convention can be applied to extraterritorial human rights violations in light of the relevant case law as well as the Vienna Convention on the Law of Treaties, a number of hypothetical cases will be examined. It will be established whether the Convention may apply to alleged violations by British or other European forces in Iraq. Moreover, with the rise of terrorism and the consequent haunt for terrorists with high technology precision weaponry, it is relevant to examine whether the method of so called 'targeted killings' may create jurisdiction, and hence, applicability of the Convention, for the acting State.

The Court has established that an alleged victim, who finds himself on territory under the *effective control* by the acting State, or if he is under the *authority and control* of agents of a State, falls within the jurisdiction of that State party. What remains unclear is the definition of the terms *effective control* and *authority*. How much control or authority must a State exercise in order for jurisdiction to be established?

The question of the extraterritorial application of human rights treaties contains both philosophical, ethical and political aspects. Why would the killing of an individual fall under the jurisdiction of the European Court if it took place on spot *A* but not on spot *B*? The ethical answer appears simple; there are no moral reasons for such a distinction. At a political level, the question of responsibility for human rights violations in wartime is indeed sensitive. If military forces could be held responsible for their actions abroad in the same way as at home, this would perhaps have implications for future decisions on foreign interventions. State parties to the Convention with major European forces operating abroad would not appreciate if the

Court had power to bring them to justice for each and every human rights violations committed in war. There are even legitimate reasons to fear that the Court's interference in such politically sensible matters would undermine the work and effect of the Court. This thesis deals, however, exclusively with the *legal* analysis of the extraterritorial scope of a human rights treaty, or more specifically, the interpretation of Article 1 in the European Convention in light of the law of treaties.

1.2 The international legal context

For clarification purposes, the question of extraterritorial application of the European Convention on Human Rights will first be set in its international legal context. Two questions are particularly relevant to clarify: The question of jurisdiction must be distinguished from the question of State responsibility; and the application of human rights to military operations abroad must be set in relation to the application of rules of international humanitarian law.

1.2.1 State responsibility

The question on whether a State exercises extraterritorial jurisdiction under a treaty or not must not be confused with the question of State responsibility in terms of the ILC Articles on State Responsibility.[3] Jurisdiction shall be seen as a prerequisite to that responsibility.

The conduct of State agents abroad is attributable to the 'sending' State. This is an apparent logic, which was originally contained in the ILC Articles but later left out due to its evident character.[4] However, attribution is not sufficient to create responsibility. In order for a State to be responsible for an internationally wrongful act, it is required that a) the act is attributable to the State under international law and b) constitutes a breach of an international obligation of that State.[5]

The question of a State's jurisdiction as a result of extraterritorial conduct, comes in as an initial criteria to be fulfilled under b). Whether the conduct constitutes a breach of an international obligation, in this case the European Convention on Human Rights, can only be examined by the Strasbourg Court if jurisdiction can been established, i.e. if the case is declared admissible. This is where the topic of this thesis comes in. Under which circumstances does a State exercise jurisdiction as a consequence of its extraterritorial acts? Only if the question of jurisdiction is answered in

[3] Articles on International State Responsibility, United Nations General Assembly Resolution, 12 December 2001, UN Doc. A/RES/56/83.
[4] *Ibid.,* old Article 12. See report of the ILC on the Work of its Fiftieth Session (1998), UN Doc. A/53/10, para 426.
[5] *Ibid.,* Article 2

affirmative, the Court can proceed to answer the question whether the conduct constitutes a violation of the Convention and hence, if the acting State can be held responsible.

1.2.2 International humanitarian law

Can military operations during armed conflict abroad really be placed under the scrutiny of the European Court of Human Rights? Would this not lead to confusion between human rights law and international humanitarian law? According to certain legal scholars there is a danger in that the two bodies of law merge to such an extent that it would be impractical to apply them.[6] The relationship between human rights and international humanitarian law is at present unclear.[7] This chapter will not go into detail in that relationship, but just briefly outline the essentials.

International humanitarian law, the so-called *ius in bellum*, applies during armed conflict.[8] This does, however, not mean that international human rights law discontinues to apply during such situations. Human rights law is applicable *both* in peacetime and in wartime. This is evident from the terms of many human rights treaties, which in themselves provides for a right to derogate from certain obligations in times of war.[9]

The European Court of Human Rights has on a number of occasions dealt with cases of armed conflict, e.g. Turkey's invasion and occupation of northern Cyprus and cases relating to military operations in south east Turkey.[10] This indicates that the Court is competent to examine alleged human rights violations during situations, which are normally governed by international humanitarian law. But, what if a case of killing during a military operation or occupation constitutes a violation of the right to life in terms of the European Convention, but yet might be lawful in accordance with international humanitarian law?

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[6] Report from expert meeting on Multinational Peace Operations – *Applicability of International Humanitarian Law and International Human Rights to UN Mandated Forces*, held in Geneva 11-12 December 2003 by the International Committee of the Red Cross in cooperation with the University Centre for International Humanitarian Law, on-line available at http://www.icrc.org/web/eng/siteeng0.nsf/html/5UPD5E.

[7] See Doswald-Beck, L. and Kalshoven, F. "Human rights and humanitarian law: Are there some individuals bereft of all legal protections?" in *American Society of International Law Proceedings*, proceedings of the ninety-eight annual meeting of the American Society of International Law March 31-April 3, 2004, Ross, J. "Jurisdictional aspects of international human rights and humanitarian law in the war on terror" in Coomans, F. and Kamminga, T. (eds.) - *On the extraterritorial application of human rights treaties,* Intersentia, Antwerp/Oxford, 2004, pp. 9-25 and Provost, René - *International human rights and humanitarian law,* Cambridge University Press, Cambridge, 2002.

[8] See the Geneva Conventions nos. I-IV (see bibliography).

[9] See e.g. Article 15 of the European Convention on Human Rights.

[10] *Loizidou v Turkey* (preliminary objections), ECtHR 23 March 1995, Series A no. 310, *Cyprus v Turkey*, ECtHR 10 May 2001, Appl. No. 25781/94. See also several cases relating to south East Turkey, e.g. *Ergi v Turkey,* ECtHR 28 July 1998, *Reports of Judgments and Decisions* 1998-IV, *Kaya v Turkey*, ECtHR 28 March 2000, *Reports of Judgments and Decisions* 2000-III.

The ICJ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, shed light on the applicability of human rights in armed conflict. The Court dealt with the question whether the use of nuclear weapons violated the right to life, contained in Article 6 of the International Covenant on Civil and Political Rights (ICCPR). The International Court of Justice observed that the ICCPR does not cease in times of war and that no derogations can be made in respect of the right to life.[11] The Court continued;

'The test of what is an arbitrary deprivation of life (..) falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself'.[12]

Hence, human rights and international humanitarian law apply in parallel, the latter in the capacity of *lex specialis*. Conclusively, the European Court is competent to examine a loss of life during armed conflict, however, it must be done in the light of the applicable principles of international humanitarian law.[13]

1.3 Delimitations

This thesis will not deal with extraterritorial jurisdiction during peacekeeping or reconstruction missions. Whether alleged human rights violations during such missions fall under the jurisdiction of the State of nationality of the alleged perpetrator is a much more complex issue than the jurisdiction of States during State-to-State military operations. Peacekeeping missions are often under UN directory and it is a complex issue whether an act of a soldier shall be attributed to his or her State of nationality or to UN itself.[14]

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[11] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, para 25.
[12] *Ibidem.*
[13] For further reading see, McBride, J. - *Study on the principles governing the application of the European Convention on Human Rights during armed conflict and internal disturbances and tensions*, Council of Europe, Committee of Experts for the Development of Human Rights, Strasbourg, 19 September, 2003, online available at: http://www.coe.int/T/E/Human_rights/cddh/2._Theme_files/07._Situations_of_conflict/01._Documents/DH-DEV(2003)001%20E%20McBride%20Study.asp
[14] For further reading see, Report from expert meeting on Multinational Peace Operations – *Applicability of International Humanitarian Law and International Human Rights to UN Mandated Forces*, held in Geneva 11-12 December 2003 by the International Committee of the Red Cross in cooperation with the University Centre for International Humanitarian Law, on-line available at http://www.icrc.org/web/eng/siteeng0.nsf/html/5UPD5E.

Furthermore, this thesis will not deal with situations where State conduct has taken place on State territory but caused effects abroad, see e.g. the *Soering* case[15].

1.4 Disposition, method and material

The analysis contained in this thesis can be divided into two parts. In order to establish the meaning of the term jurisdiction as provided for in Article 1 of the European Convention, reference is made both to relevant Strasbourg case law and to the principles of interpretation enclosed in the Vienna Convention on the Law of Treaties.

The meaning of Article 1 of the Convention is *first* searched for in the relevant case law of the European Court and Commission of Human Rights. The case law is analysed and followed by a conclusion, which in turn lays the ground for the main analysis. It must be emphasised that the analysis of the case law is exclusively based on the text of Court decisions, which are sometimes ambiguous, and on commentaries on the cases in doctrine. Lacking first-hand information from the judges themselves, the analysis takes form of a 'guessing' or rather, from the viewpoint of the author, a logical legal reasoning. What was really the intention with the Court's ambiguous decision in *Bankovic* will only be determined by time and new jurisprudence.

The Vienna Convention on the Law of Treaties provides the *second* basis for the analysis. By applying the Convention's principles of interpretation on the term 'jurisdiction', a second conclusion is drawn. This chapter departs from the renowned *Bankovic* case, which has been criticised for proscribing a restrictive interpretation of jurisdiction. By analysing this case in light of the principles of treaty interpretation set forth in the Vienna Convention, and elaborated on by the European Court, an attempt is made to establish whether jurisdiction can be interpreted in a broader and more human rights friendly manner than allegedly done in the *Bankovic* case.

Taken together, the partial conclusions form the basis for the main conclusion, which ultimately establishes the scope of the extraterritorial application of the European Convention *de lege lata*. This conclusion also constitutes the basis for the examination of a number of hypothetical cases involving extraterritorial human rights violations, dealt with in the last chapter.

Apart from treaty texts and relevant case law, the analysis is established foremost by the use of articles and books.

[15] *Soering v.United Kingdom,* ECtHR 7 July 1989, Series A, vol. 161.

2 Extraterritorial jurisdiction under the ECHR - drawing the line from jurisprudence

2.1 Introductory remark

One of the fundamental parameters of State sovereignty is that the sovereign State has jurisdiction over its own territory and the permanent population living within its boarders.[16] This follows from the fact that it is over its proper territory and population that the State can most efficiently exercise its control. The concepts of jurisdiction and control are obviously closely interrelated; the State exercises jurisdiction where it exercises control and *vice versa*.

According to another parameter of the concept of State sovereignty, namely the duty not to intervene in the area of exclusive jurisdiction of other States, it follows that a State normally exercises control exclusively over its proper territory. Consequently, the primary understanding of the notion of jurisdiction in international law is territorial. States exercise *de jure* jurisdiction over their own territory.

International law, however, recognises that a State exceptionally can exercise its jurisdiction also extraterritorially, then a *de facto* jurisdiction. This has been confirmed in the jurisprudence of the Strasbourg organs. A State party to the European Convention on Human Rights is considered to exercise 'extraterritorial jurisdiction' when its actions abroad involve a certain measure of *de facto* control. However, it remains unclear what level of control is required in order to create jurisdiction. This chapter aims to establish that level and thus, identify which exceptions to the primarily territorial notion of jurisdiction have been recognised by the Strasbourg organs.

2.2 Military occupation: Effective control over territory

A number of Court decisions have established that the jurisdiction of an occupying military power extends to the territory under its occupation. The logic follows from the concept of control; if a State intervenes on the territory of another State, it reduces the possibilities for that State to control its own territory. As jurisdiction and control are two notions tightly tied up, it

[16] Brownlie, I., *Principles of international law*, 6th ed., Oxford University Press, Oxford, 2003, p. 287.

follows that many times 'taking over control' (occupation) means 'to extend its jurisdiction'. It is, however, necessary to differ between *de facto* and *de jure* control.

The cases cited below all relate to situations where a High Contracting Party effectively controls the territory of another High Contracting Party to the Convention. So far, no cases relating to the extraterritorial, effective control of the territory of a *non-party* to the Convention have been declared admissible by the Court. Arguments have been raised that the Convention would not apply in such situations due to its construction as a legal order for Europe, whose states are like-minded and have a common heritage of political traditions, ideals, freedom and rule of law.[17] This, so-called *éspace juridique* (legal space)-argument is highly relevant for this thesis and will be analysed in a separate chapter below.

2.2.1 Loizidou v Turkey

In 1974, Turkey intervened on the territory of Cyprus, another High Contracting party to the Convention, and occupied parts of it. The Turkish military intervention in northern Cyprus, the creation of the Turkish Republic of Northern Cyprus (TRNC) and the continuing presence of Turkish armed forces there have given rise to jurisprudence which is of great significance for the interpretation of article 1 of the Convention.

In the renowned *Loizidou v Turkey*, Ms Loizidou claimed to be the owner of plots of land in northern Cyprus. As a result of the Turkish intervention in 1974 she fled her home and settled in the non-occupied parts of the Republic of Cyprus. In her complaint to Strasbourg, Ms Loizidou *inter alia* claimed that the Turkish military forces prevented her from returning to her property and thus violated article 8 of the Convention and article 1 of the additional protocol 1.

The Turkish government claimed that;

'the question of access to property (within the TRNC) was obviously outside the realm of Turkey's 'jurisdiction'. (…) The mere presence of Turkish armed forces in northern Cyprus was not synonymous with 'jurisdiction' any more than it is with the armed forces of other countries stationed abroad. In fact Turkish armed forces had never exercised 'jurisdiction' over life and property in northern Cyprus'[18]

Turkey claimed that any complaint should be directed to the TRNC, which had been an independent and democratic State since 1983.

However, the Court declared that:

[17] European Convention on Human Rights, Preamble. See also *Al-Skeini and others v Secretary of State for Defence*, EWHC (England and Wales High Court) 2911, 14 December, 2004, para 95.
[18] *Loizidou v Turkey* (preliminary objections), para 56.

'(...) although Article 1 sets limits on the reach of the Convention, the concept of 'jurisdiction' under this provision is not restricted to the national territory of the High Contracting Parties. (...) Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory.'[19]

The threshold criterion for the creation of jurisdiction is the fact that the Turkish government exercises *effective control* over the territory of parts of northern Cyprus, i.e. overall *de facto* control. According to the Court, the Turkish military presence in northern Cyprus clearly amounted to effective control (*inter alia* were 30 000 Turkish armed forces stationed throughout the whole of the occupied area of northern Cyprus, which was constantly patrolled and had check-points on all main lines of communications).[20] Having established that Turkey exercised such control, the Court stated that:

'The obligation to secure, in such an area (over which a State has effective control), the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.'[21]

Hence, it is enough for the Court to verify that Turkey exercises effective control over the occupied parts of northern Cyprus in order to establish jurisdiction. Whether Ms *Loizidou* was *de facto* prevented to return to her property by Turkish forces or TRNC officials is not so relevant.[22] The determinant criterion is the effective control exercised by the respondent State. Once such control is established, the responsibility of the State may be engaged for acts or omissions in relation to all individuals within the territory, no matter its direct interference in the specific act (of course the Court must examine the merits of the case before a violation can be established).

The Court's logic comes to the clearest expression in its decision on the merits in the *Loizidou* case;

'It is not necessary to determine whether (..) Turkey actually exercises detailed control over the policies and actions of the authorities of the 'TRNC'. It is obvious from the large number of troops engaged in active duties in northern Cyprus (..) that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the 'TRNC' (..) Those affected by such policies or actions therefore come within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention. Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.'[23]

Also the more recent case of *Assanidze v Georgia,* which involved the allegedly unlawful arrest of Mr. Assanidze by the authorities of the Ajarian

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[19] *Ibid.,* para 62
[20] *Loizidou v. Turkey*, (merits) ECtHR, 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2223, paras 16-17.
[21] Brackets added. *Loizidou v* Turkey, (prel. obj.), para 62
[22] Lawson, R., "Life after *Bankovic*: On the extraterritorial application of the European Convention on Human Rights" in Coomans, F. and Kamminga, M. (eds.), *The extraterritorial application of the European Convention on Human Rights,* Intersentia, Antwerp/Oxford, 2004, p 98.
[23] *Loizidou v Turkey*, (merits), para 56.

Autonomous Republic, clearly points out the strict link between control and jurisdiction;

'The Court (..) finds that the actual facts out of which the allegations of violations arose were within the 'jurisdiction' of Georgia within the meaning of Article 1 of the Convention and that, even though within the domestic system those matters are directly imputable to the local authorities of the Ajarian Autonomous Republic, it is solely the responsibility of the Georgian State that is engaged under the Convention.'[24]

Despite the internal disturbances in the region of Ajara, Georgia maintained the effective control over its entire territory and therefore had jurisdiction over the violations, although they were committed by agents of the Ajarian Autonomous Republic.

The Court has reiterated its line of reasoning in a number of recent cases concerning northern Cyprus.[25]

2.2.2 Cyprus v Turkey

A number of inter-state complaints have been brought against Turkey by Cyprus owing to the 1974 invasion and the continuing presence by Turkish armed forces in northern Cyprus. The most recent case was decided in 2001.[26]

The Court reiterated its findings in the *Loizidou* case but further elaborated on the level of obligations in relation to the control exercised;

'Having effective overall control over northern Cyprus, its (Turkey's) responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's 'jurisdiction' must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey'.[27]

The Court clarifies that there is an obligation on the part of the 'controlling' State to secure the *'entire range of substantive rights set out in the Convention..'.*

Turkey's obligation to secure the entire range of rights set out in the Convention logically stems from the effective control it exercises. With the control follows a complete take-over, which includes responsibility for the full list of rights and for acts of subordinate puppet-administrations.

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[24] *Assanidze v Georgia*, (preliminary objections), ECtHR 8 April 2004, Appl. no. 71503/01, para 150.
[25] *Djavit An v Cyprus,* ECtHR 20 February 2003, Appl.no 20652/92, *Demades v Turkey,* ECtHR 31 July 2003, Appl. no. 16219/90, *Adali v Turkey,* ECtHR 31 January 2002, Appl. no. 38187/97 (adm. Dec.).
[26] *Cyprus v Turkey*, ECtHR 10 May 2001, Appl. No. 25781/94, para 18.
[27] *Ibid.,* para 77.

The Court confuses the obviousness of this reasoning by adding an argument of *vacuum juris* in the next paragraph of its decision. The argument is tied to the Court's character as a European *ordre public*. The Court reasons that Turkey's effective control of northern Cyprus hinders the Cypriot government to fulfil the obligations it has undertaken under the Convention and thus, deprives the inhabitants of northern Cyprus from the benefits and safeguards that they had previously enjoyed. If Turkey would not be responsible to secure the entire range of rights set out in the Convention the result would be 'a regrettable vacuum in the system of human rights protection in the territory in question'. The inhabitants of Cyprus would be deprived their previous entitlement to the Convention's fundamental safeguards, including their right to bring individual complaints before the Court.

The *vacuum juris* argument has added substantial confusion to the discussion on whether the 'controlling' State also may exercise jurisdiction in a non-party to the Convention, i.e. a State, whose inhabitants would not fall into a vacuum/be deprived rights previously enjoyed. In other words, was it only because Cyprus was within the system of European *ordre public* that Turkey was obliged to secure the entire range of rights to its inhabitants, i.e was it just because any other finding would have created a legal vacuum in the applicability of the human-rights protection system provided for in the Convention?[28] Or, was Turkey obliged to secure the entire set of rights exclusively by reasons of its effective control over the area? This will be further discussed in relation to the *Bankovic* case below, where it will be suggested that the latter hypothesis is the correct one. [29]

It seems logical that an occupying power, who exercises such effective and overall control over a territory that the territorial government officials are a *de facto* puppet regime, must be obliged to secure the entire range of rights set out in the instrument in question. However, there might be cases which are not simply black and white - one State exercising effective control on another State's territory does not necessarily mean that the latter State has no power at all to exert control or influence. The question arises, to what extent, there is a residual responsibility for the 'host State' (territorial State) to protect the rights and freedoms set out in the Convention for the individuals on the occupied territory.

This question is relevant, in particular having in mind the declarations made by some High Contracting Parties, claiming that they are unable to control certain parts of their territory until these territories are 'liberated from occupation'.[30] Are those territories excluded from their jurisdiction on

[28] See *Al-Skeini,* para 276.
[29] See chp. 2.6.
[30] E.g. Azerbaijan, Moldova. Azerbaijan's declaration read; 'it (Azerbaijan) is unable to guarantee the application of the provisions of the Convention in the territories occupied by the Republic of Armenia until these territories are liberated from that occupation', (Declaration of 15 April 2002, attached to ratification instrument).

grounds of lacking ability to control? The issue was brought to the forefront in the recent case of *Ilascu v Moldova and Russia.*[31]

2.2.3 Ilascu v Moldova and Russia

A situation where a separatist movement has taken control over a part of a territory, claiming its right to self-determination, cannot be equalised with a situation of occupation. However, the same problem is at stake; loss of *de facto* control. The situation is further complicated where another State supports the separatist movement.

There are many problems with these so called 'grey zones' (the territorial State is in a state of semi-occupation, semi-control) in particular in the eastern regions of the Council of Europe, e.g. Chechnya, Abkazia and Transdniestria. Few cases involving jurisdiction disputes have been brought to Strasbourg. However, the case of *Ilascu v Moldova and Russia* shed some light on this problem.

The Soviet Socialist Republic of Moldova proclaimed its sovereignty in June 1990 and declared its independence as the Republic of Moldova one year later in August 1991. In September 1990, the strip of land on the left bank of the river Dniester, called Transdniestra, proclaimed its sovereignty under the name of the Moldovan Republic of Transdniestra (MRT). The independence of MRT has never been recognised by Moldova nor the international community.

The headquarters of the Fourteenth army of the USSR's Ministry of Defence was placed on what became the region of Transdniestria, and the Moldovan parliament therefore attempted, soon after its independence, to enter into negotiations with the USSR government in order to put an end to the unlawful occupation of the area. The soldiers of the Fourteenth army have ever since 1991 been accused of distributing military equipment to the Transdniestrian separatists and for having organised them to commit crimes against the civilian population.[32]

Ilie Ilascu and three other Moldovan citizens brought a complaint to Strasbourg about their treatment in Transdniestria, claiming that they had been arrested and convicted by MRT authorities on grounds of their political activities. The complaints concerned unfair trial and inhuman prison conditions. The applicants claimed that Moldova had not taken reasonable measures in order to secure their release from the MRT detention and the responsibility of Moldova could therefore be engaged. Collusively, they claimed the responsibility of Russia, as the territory of Transdniestra was under the *de facto* control of Russian military forces.

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[31] *Ilascu and others v Moldova and the Russian Federation,*(admissibility) ECtHR 4 July 2001, Appl. no. 48787/99.
[32] *Ibid.,* para 1.

Both claims of responsibility are interesting for the purposes of this thesis. How far-reaching is the responsibility of the territorial State (Moldova) when it claims itself to be under occupation or unable to control certain parts of its territory?[33] And, what level of control must Russia exercise in order for the alleged victims to fall 'within its jurisdiction' under article 1 of the Convention?

The jurisdiction of the Republic of Moldova

According to the arguments submitted by the Moldavian government;

'..a State not in effective control of part of its territory could not really exercise territorial jurisdiction and sovereignty. In such a case the concepts of 'jurisdiction' and 'territory' were not interchangeable. For the Convention to be applicable it had to be possible for the State to confer and secure the rights set forth in the Convention.'[34]

Moldova stated that the fact that it was impossible for its authorities to exercise effective control over the territory of Transdniestria was similar to the situation in *Cyprus v. Turkey*, in which the Court declared that Cyprus was unable to exercise effective control over the territory of the TRNC, which Turkey controlled *de facto*.[35]

Was Moldova unable to exercise effective control over its proper territory on grounds of the *de facto* Russian control and if yes, did it as a consequence loose its jurisdiction, which it retains on a *de jure* basis?

The Court begins its assessment by stating that the concept of jurisdiction in article 1 of the Convention must be considered to reflect the term's meaning in international public law.[36] The concept of jurisdiction in international law is primarily territorial, but the scope can be limited under exceptional circumstances, in particular 'where a State is prevented from exercising its authority in part of its territory.'[37] The examples of such exceptional circumstances are military occupation by the armed forces of another State, which effectively controls the territory concerned,[38] acts of war or rebellion or the acts of a foreign State supporting the installation of a separatist State within the territory of the State concerned.[39] The last example describes the circumstances of the instant case.

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[33] Note Moldova's declaration when ratifying the Convention, stating that; 'it will be unable to guarantee compliance with the provisions of the Convention in respect of omissions and acts committed by the organs of the self-proclaimed Transdniester republic within the territory actually controlled by such organs, until the conflict is finally and definitively resolved.'

[34] *Ilascu and others v Moldova and the Russian Federation,* ECtHR 8 July 2004, Appl. no. 48787/99, para 300.

[35] *Ibid.,* para 78, *Ilascu* (merits), para 302.

[36] *Ilascu* (merits), para 312.See also *Banković and Others v. Belgium and 16 other Contracting States*, ECtHR 12 December 2001, Appl. no. 52207/99, *Reports and judgments* 2001-XII, paras 59-61 and *Assanidze v Georgia*, (preliminary objections), ECtHR 8 April 2004, Appl. no. 71503/01, para 137.

[37] *Ilascu* (merits), para 312.

[38] See *Loizidou v. Turkey* (prel. obj.) and *Cyprus v. Turkey*, 2001.

[39] *Ilascu* (merits), para 312.

On the basis of all the material in its possession, including a fact finding mission on spot, the Court concludes that Moldova does not exercise control over part of its territory, namely the part which is under the effective control of Transdniestria. However;

'even in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.'[40]

A State party, which has lost effective control over certain parts of its territory to a rebel movement, does not *cease* to have jurisdiction under article 1 of the Convention. However, the scope of jurisdiction is *limited*;

'such a factual situation (i.e the loss of effective control) *reduces the scope* of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory.'[41]

The nature of the positive obligation incurred is described as a duty to take all appropriate measures, which is still within the State's power to take to ensure respect for the Convention. The Court considered Moldova's positive obligations to relate both to the measures needed to re-establish control over Transdniestrian territory and to measures to ensure respect for the applicants' rights, including attempts to secure their release, and concluded that Moldova had failed to fully discharge those obligations – more could have been done. Consequently, Moldova had jurisdiction over the victims and its responsibility under the Convention was capable of being engaged.

The jurisdiction of the Russian Federation

The applicants further argued that the Russian Federation should be held responsible for the alleged violations as a result of the Russian authorities' continuous political and military support to the Transdniestrian separatists. The applicants submitted that the 'so-called organs of power of the MRT were in fact puppets of the Russian Government'.[42]

The Russian government, however, asserted that it had not exercised and did not exercise jurisdiction over the region of Transdniestria, which was a territory belonging to the Republic of Moldova. In addition; 'there was no causal link between the presence of Russian military forces in the region of Transdniestria and the applicants' situation'.[43]

In its assessment, the Court refers to the principle in international law referred to in the northern Cyprus cases, i.e. the responsibility of a State

[40] *Ibid.,* para 331.
[41] *Ibid.,* para 333 (emphasis added).
[42] *Ibid.,* para 367.
[43] *Ibid.,* 358.

which exercises effective control over an area outside its national territory may be engaged although it did not have factual control over the specific act. According to the Court, Russia's level of control over Transdniestria engages its jurisdiction;

'All of the above proves that the 'MRT', set up in 1991-1992 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the *effective authority*, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.

That being so, the Court considers that there is a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate (..).

Regard being had to the foregoing, it is of little consequence that since 5 May 1998 the agents of the Russian Federation have not participated directly in the events complained of in the present application.

In conclusion, the applicants therefore come within the 'jurisdiction' of the Russian Federation for the purposes of Article 1 of the Convention and its responsibility is engaged with regard to the acts complained of.'[44]

Hence, in the instant case a dual jurisdiction was established – Moldova's based on *de jure* control and Russia's on *de facto* control.

2.2.4 The early case of Cyprus v Turkey

In the Court's jurisprudence relating to jurisdiction in situations of military occupation or similar situations, which entail the overall involvement of a non-territorial State, the determining criterion to establish jurisdiction, seems to be the *effective control over territory* by the intervening State. However, in an early admissibility decision concerning Turkey's invasion in Cyprus, the Commission seems to endorse another standpoint.[45] The Commission did not mention the test of effective control over territory, but instead concentrated on a criterion of *authority over persons*.

'It is clear from the language (..) and from the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad.

(..) authorised agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property 'within the jurisdiction' of that State, to the extent they exercise authority over such persons or property.[46]

Thus, the State's jurisdiction extends to all persons under the *actual authority and responsibility* of a High Contracting Party. This is a criterion,

[44] *Ibid.,* para 392-393 (emphasis added).
[45] *Cyprus v Turkey,* ECommHR 26 May 1975, Appl. nos. 6780/74 and 6950/75. See also ECommHR (admissibility decision) 10 juli 1978, Appl. no. 8007/77.
[46] *Ibid.,* para 8.

which, contrary to the criterion of effective territorial control, emphasise the control over *persons*, and thus departs even further from the primarily territorial notion of jurisdiction.

The instant case was the first complaint relating to the Turkish intervention - could it be so that the violations complained of were committed during the invasion and thus prior to the occupation *stricto sensu*?[47] The criterion of authority will be further discussed below.

An element mentioned by the Commission - *affect* -, brings about confusion. However, as will be seen below, neither the Court, nor the Commission have put any particular emphasis on this element. It would indeed be unrealistic to utilise such a criterion for the determination of whether a person falls within the jurisdiction of the 'affecting' State. This would for example mean that a decision to cut development aid or to reduce quotas for imports would be enough to bring indeterminate number of persons 'within the jurisdiction' of the acting or omitting State.[48] A person who is both outside the territory and the control of the acting State cannot reasonably fall within that State's jurisdiction, although affected.

The actual case is interesting in relation to the *Bankovic* case, where the Court fails to explicitly analyse if the victims were under the authority of defendant States.

2.3 Ad hoc operations: Authority over individuals

The case law cited so far refer to situations where a State effectively controls the *territory* of another State.[49] Such situations are exemplified in the Court's jurisprudence by military occupation by the armed forces of another State or a foreign State supporting the installation of a separatist movement within the territory of another State.[50] Further situations can be imagined, e.g. peace-keeping missions or UN reconstruction missions.

With the rise of terrorism and the development of high technology weaponry, the instances of ad hoc/incidental operations on the territory of another State, as opposed to continuous occupation or continuous separatist support, are likely to augment. Such operations may range from arbitrarily arrests to killings with modern precision weapons. There are also other forms of ad hoc operations involving State agents abroad, such as acts of consular and diplomatic staff or other decisions taken by State agents and affecting individuals' human rights. In those cases, it is difficult to establish

[47] Cohen-Jonathan, G., "Observations – La territorialisation de la jurisdiction de la Cour européenne des droits de l'homme" in *Revue Trimestrielle des droits de l'homme,* 2002, Vol., pp 1069-1082, p. 1077.
[48] Lawson, p 104.
[49] With the exception of the early Commission case of *Cyprus v Turkey*, 1975.
[50] See *Loizidou v. Turkey*, *Cyprus v. Turkey* and *Ilascu*.

effective control over *territory*. What appears more relevant in those instances is the criteria initiated in the early Cyprus case, namely control over *persons*. The latter criterion is controversial but should, according to the author and as will follow from below, be regarded as recognised by the Court.[51] However, it remains to be examined under which circumstances the criterion is applicable.

The Strasbourg jurisprudence on the use of the 'authority test' has remained fuzzy. It has been argued, just as with the criterion on effective control, that a distinction must be made between ad hoc operations on the territory of another High Contracting Party and the same operations on the territory of a non-party to the Convention. In addition, some scholars want to differentiate between the arbitrary arrests of a State's own nationals abroad and the same acts towards non-nationals.[52] This chapter will provide an analysis of the Convention organs' standpoint in relation to those questions and is an attempt to reach clarification on the issue. A narrow and careful interpretation of the criteria of 'authority over persons' is justified as it departs entirely from the territorial notion of jurisdiction in international law, as opposed to the criteria of 'effective control over territory'.[53]

2.3.1 Ad hoc operations on the territory of another High Contracting Party

Only on a few occasions have the Convention organs had the opportunity to examine extraterritorial acts of High Contracting parties occurring on the territory of another High Contracting Party to the Convention.

In the case of *Stocké v Germany,*[54] the Court examined whether Mr Stocké, a German national who had fled to Switzerland and later to France in an attempt to avoid arrest for alleged tax offences, fell within the jurisdiction of Germany. A German private police officer managed to get him back to Germany under a false pretext. In Germany, Mr Stocké was arrested by the German authorities and subsequently detained. Mr Stocké complained to the Strasbourg Court, submitting that he was a victim of unlawful detention and deprived the right to a fair trial. The Court held, in line with the Commission's early admissibility decision in *Cyprus v Turkey*, that the obligation under article 1;

'..is not limited to the national territory of the High Contracting Party concerned, but extends to all persons under its actual authority and responsibility, whether this authority is exercised on its own territory or abroad. Furthermore (..) authorised agents of a State not only remain under its jurisdiction when abroad, but bring any other person 'within the jurisdiction' of that State to the extent they exercise authority over such persons.'[55]

[51] For a crtitical view see *Al-Skeini.*
[52] Lawson, p. 115, Cassel, D., "Extraterritorial application of inter-american human rights instruments" in Coomans, F. and Kamminga, M., *Al-Skeini,* para 271.
[53] *Al-Skeini,* para 253 ff.
[54] *Stocké v. Germany*, ECtHR 12 October 1989, Series A vol. 199.
[55] *Ibid.,* para 166.

In *Hess v United Kingdom* the Commission dealt with a complaint brought by Mrs Ilse Hess concerning the detention of her husband Mr Rudolf Hess, a former Nazi leader, who was held in the German Spandau Prison, set up by the four allied powers; France, the Soviet Union, the United States and the UK. Only the United Kingdom had recognised the individual complaint procedure under the Convention and therefore Mrs Hess directed her complaint towards UK alone.

The Commission, using a criteria of control over the prisoner's situation, considered that Mr Hess did not fall 'within the jurisdiction' of the UK.

> In regard to the administration of the prison, the Commission notes that changes therein can only be made by the unanimous decision of the representatives of the Four Powers in Germany or by the unanimous decision of the Four Governors. (..)
>
> The Commission is of the opinion that the joint authority cannot be divided into four separate jurisdictions and that therefore the United Kingdom's participation in the exercise of the joint authority and consequently in the administration and supervision of Spandau Prison is not a matter 'within the jurisdiction' of the United Kingdom, within the meaning of Article 1 of the Convention.[56]

There seems to be an exceptional recognition of the criteria 'control over persons' also in this case, although UK had no such control. A similar finding was pronounced in *Gentilhomme v France*, a case which involved circumstances in a non-party to the Convention and will be discussed below.

2.3.2 Ad hoc operations on the territory of a non-State party

2.3.2.1 Acts or omissions by diplomatic or consular agents

The Court has recognised that instances of extraterritorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad or on board craft and vessels registered in, or flying the flag of, that State.[57] This principle is also recognised in customary international law and by treaty provisions.

It is irrelevant whether the acts of diplomatic or consular staff etc. occur on the territory of a High Contracting Party or a non-State party to the Convention.

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[56] *Ilse Hess v UK,* ECommHR 28 May 1975, App. No. 6231/73.
[57] *Banković and Others v. Belgium and 16 other Contracting States*, ECtHR 12 December 2001, Appl. no. 52207/99, *Reports and judgments* 2001-XII, *X v Federal Republic of Germany,* ECommHR 25 September 1965, *WM v Denmark*, ECommHR 14 October 1992, Appl. no. 17392/90.

2.3.2.2 Arrest

In a number of instances, the Convention organs have dealt with unlawful arrests/abductions of suspected criminals, which have escaped their homeland and settled in a non-State Party to Convention. The cases differ from *Stocké* in that they occur on the territory of a non-party to the Convention.

In *Freda v Italy*[58] the applicant submitted that he had been deprived of liberty in contradiction to Article 5 of the Convention. The applicant, who was accused for *inter alia* murder committed in Italy, was arrested by the local police in Costa Rica. He was subsequently taken to the airport where he was handed over to officers of the Italian police, who made him enter an Italian air force aeroplane.[59]

The Commission stated that;

'The applicant was (..) from the time of being handed over (to the Italian police) in fact under the authority of the Italian state and thus within the 'jurisdiction' of that country, even if this authority was in the circumstances exercised abroad.'[60]

The Commission reiterated its emphasis on 'under the authority' in *Illich Sànchez Ramirez v France*.[61] The applicant, who was a national of Venezuela and suspected for having detonated explosions causing one person's death and the blessing of seventy others, was allegedly arrested in Sudan and put on an aeroplane to France under allegedly torturous conditions with the involvement of French authorities. He complained of violations of Articles 3 and 5 of the Convention. The Commission held that;

'le requérant, à partir du moment de la remise (aux authoriteés Francaises), relevait effectivement de l'autorité de la France et donc de la juridiction de ce pays, même si cette autorité s'est exercée en l'occurrence à l'étranger'.[62]

The Commission's reasoning in the admissibility decisions above have been confirmed by the Court in the renowned case of *Öcalan v Turkey.*[63] Jurisdiction was not an issue in the decision on admissibility in the *Öcalan* case but was, as a result of the Court's findings in the *Bankovic* case, raised at the merits stage.

Mr Öcalan, the former leader of PKK (the Workers' Party of Kurdistan) and suspected for *inter alia* terrorist acts, was at the time of the arrest residing in Nairobi, Kenya. He was arrested by members of the Turkish security forces inside an aircraft in the international zone of Nairobi Airport. Mr Öcalan

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[58] *Freda v Italy*, ECommHR 7 October 1980, Appl. no. 8916/80, 21 DR (1981) 250.
[59] *Ibid.,* para 3, p. 255.
[60] Brackets added. *Ibid.,* para 3, p. 256.
[61] *Illich Sànchez Ramirez v France*, ECommHR 24 June 1996, Appl. no. 28780/95, DR 86, p. 155.
[62] Brackets added. *Ibid.,* para 2. See also *Reinette v France*, ECommHR 2 October 1989, DR 63, p. 189.
[63] *Öcalan v Turkey*, ECtHR 12 March 2003, Appl. no. 46221/99.

complained to Strasbourg concerning violations of Article 5 of the Convention.

The Court reiterated its previous statement that jurisdiction is a primarily territorial notion but that there is room for exceptions. The situation in the *Öcalan* case constituted a valid exception;

'Directly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the 'jurisdiction' of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory'.[64]

The Court explicitly distinguishes the case from *Bankovic*;

'the circumstances of the present case are distinguishable from those in the aforementioned *Banković and Others* case, notably in that the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey.'[65]

The Court's findings have been confirmed in the most recent *Öcalan v Turkey* decision of the 12 May, which primarily dealt with the right to fair trial.[66]

From the cases cited above it seems clear that the test of *authority and control over persons* have, under exceptional circumstances, been recognised by the Convention organs as a criterion for establishing jurisdiction. The fact that the arrests or abductions occurred outside the territory of the State parties to the Convention does not seem to hamper the Convention's applicability. However, a number of scholars doubt whether it is the fact that the person was forced to *return* to the respondent State, as explicitly pointed out in *Bankovic*, or whether the extraterritorial act in itself engages the jurisdiction of the respondent State.[67] Does it matter that in all instances involving extraterritorial arrest in the Convention jurisprudence, the applicant was forced to return subsequent the arrest, i.e. that the acts have a clear connection to the territory of the defendant State? In other words is it only because Mr Öcalan was 'physically forced to *return*' to the territory of Turkey that he fell within Turkey's jurisdiction? The first cite above; 'directly after he had been handed over (..) to the Turkish forces the applicant was under effective Turkish authority and therefore brought within the jurisdiction of that State' does not indicate support for such an interpretation. According to the Court's statement, Mr Öcalan was under Turkish jurisdiction prior to the return to Turkey. Moreover, the Court referred to the findings in *Ramirez* and *Freda* in direct connection with its

[64] *Ibid,.* para 93
[65] *Ibidem.*
[66] *Öcalan v Turkey*, ECtHR 12 May 2005, Appl. no. 46221/99.
[67] Lawson, p. 115, Cassel, D., "Extraterritorial application of inter-american human rights instruments" in Coomans, F. and Kamminga, M., *Al-Skeini,* para 271. See also discussion by Professor John P. Cerone, Director, Center for International Law & Policy, New England School of Law, Public lecture: "Extraterritorial Application of Human Rights Law. Armed Conflict, Occupation, Peace Operations" on the 12th of April 2005.

pronouncement that the applicant was 'physically forced to return'. In those cases there was no emphasis, or even mentioning, of 'return' to the territory of the arresting State, which speaks against the speculations above.

Moreover, it has been proposed that such an exceptional and narrow criterion as *authority over persons* can only be valid in situations involving nationals of the arresting State.[68] It is noteworthy that the Convention organs never have emphasised the fact that the applicant was a national of the respondent State. Besides, noting that the person arrested in the Ramirez case was not a national of the arresting State, the argument looses its credibility. Or, does the argument also entail the proposition that it is on grounds of the 'legal bond' between the suspected criminal and the arresting State that give rise to jurisdiction?[69]

All scepticism as to the authority criterion have been presented prior to the Court's decision on the merits in *Issa v Turkey*. This case clearly does not concern the return of a national or any other person having 'legal bonds' with the acting State and the author's conclusion is that the fuzziness of the authority test in this respect has lessened.

2.4 Grey zones: Effective control or authority?

The cases provided for below relate to situations, which cannot be placed exclusively under either one of the headings 'effective control over territory' or 'authority over persons'. The Court's examination of the cases seemingly involves both criteria, however, without establishing that the defendant States exercised any of them. On grounds of their grey zone-character, those cases, which are also the most relevant for the purpose of this thesis, are dealt with in a separate chapter.

2.4.1 Arrest and arbitrary killings: Issa v Turkey

The most recent case involving extraterritorial jurisdiction is the Court's decision on the merits in *Issa v Turkey*.[70] The case is of crucial importance and sheds light on some of the unanswered questions regarding the interpretation of Article 1 of the Convention.

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[68] See *inter alia* Kunzli, A., "Current legal developments - Öcalan v. Turkey:Some comments" in *Leiden Journal of International Law*, 2004, Vol. 17, pp. 141-154.
[69] Note *Victor Saldano v Argentina*, IACHR 11 March 1999, Report No 38/99, Ann. Rep. IACHR 1998, 289; "The Commission also finds the petitioner's reliance on the bond of nationality between the Argentine State and Mr. Saldano insufficient to sustain her legal claims. The mere fact that the alleged victim is a national of Argentina cannot, in and of itself, engage that state's responsibility for the allegedly wrongful acts of agents of another state performed wholly within their own national territory".
[70] *Issa and Others v Turkey,* EctHR 16 november 2004, Appl. no. 31826/96.

Six Kurdish women brought complaints to the Strasbourg Court on their own and on their deceased relatives' behalf, claiming that their family members had been arbitrarily killed by Turkish armed forces operating in their village. The Turkish government contested the facts. While confirming that Turkish forces had performed military operations during the actual period in northern Iraq, it refuted that the village was included in the operation zone. Speculations were brought over the fact that the PKK had been active in the region and that there had been confrontations between the deceased men's party, the KDP, and the PKK.

Turkey claimed that the mere presence of Turkish armed forces for a limited time and for a limited purpose in northern Iraq did not amount to effective control over that part of the territory and therefore Turkey did not exercise jurisdiction over the alleged victims.

The Court reiterated that the main understanding of jurisdiction in international public law is territorial. Thereafter it ranges the possible exceptions to this main understanding.

'(A) State's responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – that state in practise exercises effective control of an area situated outside its national territory'.[71]

Two paragraphs later, the Court gives its crucial statement;

'Moreover, a State may also be held accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State. Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'.[72]

The Court seemingly first applies the 'effective control' test. It could not be established that Turkey exercised effective control over the actual part of Iraqi territory – the control was not effective enough, neither in time nor in numbers of checkpoints (as compared to *Loizidou*).[73] Consequently, the responsibility of Turkey could not be engaged automatically, i.e. without establishing direct involvement in the killing of the alleged victims. The Court thereafter seems to continue to examine 'whether at the relevant time Turkish troops conducted operations in the areas where the killings took place', i.e. whether authority over persons/direct involvement in the arrest and killings could be established. As it could not be proved beyond doubt that the Turkish soldiers conducted operations in the area in question, the

[71] *Ibid.,* para 68.
[72] *Ibid.,* para 71.
[73] *Ibid.,* paras 74-75

victims did not fall within the jurisdiction of Turkey and Turkey's responsibility could consequently not be engaged.[74]

In other words, the criterion *authority over persons* by State agents or on State orders was used by the Court in a situation involving neither 'return' to the territory of the respondent State nor nationals of that State and the Court's finding in the *Issa* case seems to have healed the scepticism presented above. Moreover, any argumentation as regards the limitation of the Convention's application to extraterritorial violations inside the boarders of the Council of Europe, i.e. to the territory of High Contracting Parties, appears to be set aside by the Court's findings in Issa. The Convention would have been applicable in Iraq had the involvement of Turkish forces in the alleged violations been established.

2.4.2 Bombing: Bankovic v Belgium and others

In December 2001 the Court delivered its decision in the renowned *Bankovic v Belgium and Others* case[75]. The case has been criticised in doctrine, in particular for the Court's restrictive interpretation of the term 'jurisdiction'. Yet, it has been accepted among a number of scholars, as well as national Courts.[76] Disregarding its disputed character, it has been, and will be, a judgment of crucial importance for the Court's future determination of the extraterritorial application of the Convention. Whether the Court's decision in *Bankovic* is legally questionable will be discussed in chapter 5, while the instant chapter will concentrate on the criterion used for determining jurisdiction.

On the 23 of April, 1999, air forces from NATO member states launched a missile at the building of Radio Televizije Srbije (RTS) in Belgrade, killing sixteen civilian technicians and seriously injuring another sixteen. The air strike was conducted from an altitude of fifteen thousand feet, beyond the range of Yugoslav air defences. Six of the victims, or their relatives, filed suits to Strasbourg against seventeen NATO member States on grounds of violations of article 2 (right to life) and 10 (freedom of expression).

The first question to be examined by the Court was whether victims of air bombing on the territory of a non-party to the Convention (The Federal Republic of Yugoslavia, FRY) could fall 'within the jurisdiction' of the respondent States. It reasoned as follows.

The Court recalled that Article 1 must be interpreted in the light of the principles set out in the Vienna Convention on the Law of Treaties

[74] The question of admissibility (jurisdiction) was inextricably linked to the facts of the case and the Court therefore accepted that the issue was raised on a post-admissibility stage. It appeared that despite declaring the complaint admissible jurisdiction was lacking.
[75] *Banković and Others v. Belgium and 16 other Contracting States*, ECtHR 12 December 2001, Appl. no. 52207/99, *Reports and judgments* 2001-XII
[76] See for example footnotes 107 and 116 below.

(VCLT).[77] In accordance with the relevant provisions of VCLT, the Court must ascertain the ordinary meaning of the term in its context and in the light of the object and purpose of the Convention.[78] In addition, the Court must consider any subsequent practice in the application of the Convention[79] and any relevant rules of international law applicable in the relations between the parties.[80] The Court was mindful of the Convention's character as a human rights treaty but reiterated that the notion of jurisdiction must be interpreted in harmony with the general rules of international public law.[81] Finally, the Court mentioned the possibility to take into account the *travaux préparatoires* of the Convention.[82]

As we know by now, the ordinary meaning of jurisdiction is according to the Court primarily territorial. Other bases of jurisdiction are exceptional.[83]

The subsequent practice in the application of the Convention indicated, according to the Court, 'a lack of any apprehension on the part of the Contracting States of their extraterritorial responsibility in contexts similar to the present case'. If the parties would have believed that extraterritorial bombing campaigns could activate Article 1 of the Convention, they would have made a derogation pursuant to Article 15, not only in the instant situation but also during earlier extraterritorial military operations. Lacking such derogations, the Court drew the conclusion that the parties' understanding of Article 15 must be that it relates to *internal* public emergencies or war.[84]

Finally, the Court found 'clear confirmatory evidence' for the primarily territorial notion of jurisdiction in the *travaux préparatoires* to the Convention. The Court concluded that the reason why the Expert Committee replaced the terms 'all persons residing within their territories' with 'within its jurisdiction' was only to include persons who were not residents of the State but any way present on their territory.[85]

The Court declared that it only in exceptional cases had accepted extraterritorial jurisdiction and then gave examples of such situations. It referred to a number of cases, however none of them explicitly involving the 'authority over persons' test.[86] In sum, according to the Court, exceptions had been allowed when;

'the respondent state through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent,

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[77] See also *Golder v United Kingdom* , ECtHR 21 February 1975, Series A no 18, para 29.
[78] Art 31 § 1 VCLT.
[79] Article 31 § (b) VCLT.
[80] Article 31 § 3 (c) VCLT.
[81] *Bankovic,* para 57.
[82] Article 32 VCLT.
[83] *Bankovic,* para 61.
[84] *Ibid.,* para 62.
[85] *Ibid.,* paras 63-65.
[86] E.g. *Loizidou, Soering, Cyprus v Turkey* and *Drozd and Janousek v France and Spain*, ECtHR 26 June 1992, Series A no. 240.

invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government'.[87]

The question before the Court was then: Did the facts in *Bankovic* fall under those exceptions?

First, it is interesting to note that the Court introduced an elaboration of the criteria of effective control. It added that the State should also exercise 'all or some of the public powers normally exercised by that Government (the territorial Government)'. The element was not mentioned by the Court in the northern Cyprus cases. What constitutes 'the public powers normally exercised by that Government'? Certainly, arrest and detention would fall under those terms, but what about arbitrarily killings? Situations where an area is under occupation but where the occupying State fails to exercise the public powers normally exercised by the occupied Government can be pictured by e.g. the occupation of South of Iraq by British forces in the summer of 2003.[88] Would assumed Iraqi victims not fall under the jurisdiction of the UK on grounds that the British Government did not manage to exercise all or some of the public powers normally exercised by Iraq? Such an interpretation is *prima facie* unreasonable. It remains to be seen what independent meaning this 'silent modification' will be given.

The applicants' line of argument was mainly concentrated to the exception of effective control over territory (northern Cyprus cases) and proposed that if the Court adopted a sliding scale of scrutiny, i.e. the positive obligation under Article 1 should be proportionate to the level of control exercised, the instant case could fall under that exception. In the *Cyprus v Turkey* case, Turkey had effective overall control over territory and was therefore obliged to secure the entire range of rights set out in the Convention. In the *Bankovic* case the control was not as effective as Turkey's control over northern Cyprus (airspace only) and consequently the positive obligations of the respondent States would not be as extensive, but rather be limited to the Convention rights within their control in the actual situation.

The applicants maintained that the argument of a sliding scale was supported by *inter alia* the *Issa*, *Öcalan* and *Ilascu* cases. In those cases the respondent States were not asked to do the impossible but rather to secure the actual human right in question, i.e the right to life, lawful arrest and conditions of detention.

The Court rejected this line of reasoning, and stated that such an interpretation would be;

[87] *Bankovic,* para 71. The Court adds that the extraterritorial exercise of jurisdiction by a State includes acts by consular or diplomatic agents abroad or on board craft vessels registered in, or flying the flag of, that State – this is recognised in customary international law.
[88] Lawson, p. 111.

'tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State (..). (..)

Had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949'. [89]

The Court rejected the parallel made to *Issa, Öcalan* and *Ilascu* on grounds that the issue of jurisdiction was not addressed in the two first cases and in any event, all three cases remained to be decided.

The applicants further emphasised the Convention's character as an instrument for European public order (non-reciprocal obligations to the benefit of the individual) and stressed that 'a failure to find the respondent States responsible would leave these applicants without a remedy and the respondent States' armies free to act with impunity'.[90]

The Court's response to this particular argument has caused much confusion and uncertainty in the debate on the extraterritorial application of the Convention. It reads as follows;

'It is true that, in its above-cited *Cyprus v. Turkey* judgment (..), the Court was conscious of the need to avoid 'a regrettable vacuum in the system of human-rights protection' in northern Cyprus. However, and as noted by the Governments, that comment related to an entirely different situation to the present: the inhabitants of northern Cyprus would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed, by Turkey's 'effective control' of the territory and by the accompanying inability of the Cypriot Government, as a Contracting State, to fulfil the obligations it had undertaken under the Convention.

In short, the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.'[91]

Does this only mean that the argument of European public order is not suitable in the instant case or does it mean that the Convention does not apply outside the boarders of the member states of the Council of Europe? This particular problem of *éspace juridique* is subject to a separate analysis in the chapter 2.6.

After having rejected all arguments submitted by the applicants the Court concluded that it had not been persuaded that there was any jurisdictional

[89] *Bankovic,* paras 75-76. The common Article 1 of the Geneva Conventions provides that state parties shall respect and ensure respect for the Conventions 'in all circumstances'.
[90] *Bankovic,* para 51.
[91] *Ibid.,* para 80.

link between the victims and the respondent States. The case was thus, declared inadmissible.

Interim conclusion

The Court's findings in the *Bankovic* case can be interpreted in different ways:

1) The effective control over territory test failed. The respondent States, by bombing from the air on an altitude of fifteen thousand feet, did not exercise effective control over the territory. The authority test is not recognised by the Court in situations like the instant case, i.e. involving military intervention abroad.

The Court distinguished the case from its earlier case law on military operations by further specifying its effective control-criterion. The 'controlling' State must exercise all or some of the public powers normally to be exercised by the territorial government. This was clearly not the case in *Bankovic*.

The Court in *Bankovic* has been criticised for establishing a closed list of circumstances/exceptions under which the extraterritorial jurisdiction of a state can be engaged.[92] The Court limits its examination to the exception of effective control during a military intervention on another State's territory. As the circumstances in *Bankovic* do not fall within that specific exception, the victims fall outside the jurisdiction of the respondent States. But, why did the Court never examine whether the victims were under the authority of the agents of the respondent States? Why did it not adopt the two-stage test introduced in the *Issa* case? One explanation put forth for the omission of the authority test is that;

'it makes little sense to compare the early decisions of the Commission to *Bankovic* without assessing the further development of the Court's adjudication regarding Article 1. Especially with regard to the Court's findings in the more recent decisions of *Loizidou* and *Cyprus*, its reasoning in *Bankovic* cannot but be judged a logical progression'.[93]

In other words, the recent case law of the Court has turned *effective control over territory* into a necessary criterion to be fulfilled in order to engage the respondent State's jurisdiction in all situations involving military intervention.[94] The authority test is not applicable to circumstances as those involved in the *Bankovic* case. Bankovic involves a situation of military intervention – a seventy-eight day long air bombing campaign. The authority test shall be seen as a narrow exception and does not relate to such military actions.

[92] Ress, G., "The jurisdiction of the European Court of Human Rights: The *Bankovic* case" in *Italian Yearbook of International law*, 2002, p. 62.
[93] Ress, p. 62.
[94] *Al-Skeini,* para 253.

It is interesting to see how the Court also in the recent case of *Assanidze* limits the list of exceptions to exclude situations where armed forces or State agents exercises authority over a person;

In certain exceptional cases, jurisdiction is assumed on the basis of non-territorial factors (i.e. authority over persons), such as: acts of public authority performed abroad by diplomatic and consular representatives of the State; the criminal activities of individuals overseas against the interests of the State or its nationals; acts performed on board vessels flying the State flag or on aircraft or spacecraft registered there; and particularly serious international crimes (universal jurisdiction)'.[95]

The late northern Cyprus cases give the impression that the criterion of *effective control over territory* is a necessary requirement to be fulfilled in order for a State's jurisdiction to be engaged in situations involving military intervention. However, such an interpretation would be to ignore the existing early case law of the Commission.[96] Moreover, post-*Issa*, this interpretation is bizarre as it became clear with that case that the authority test applied also to military intervention-like situations.

2) The effective control test failed. Likewise, the authority over persons test failed.

The Court recognised the criterion of authority over persons but did not find the circumstances in *Bankovic* amount to a situation where the respondent States exercised authority over the victims. Support for this interpretation can be found retroactively in the Court's decision on the merits in *Öcalan*;

'The Court considers that the circumstances of the present case are distinguishable from those in the aforementioned *Banković and Others* case, notably in that the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey (see in this respect the aforementioned decisions in the cases of *Illich Sánchez Ramirez v France* and *Freda v. Italy*)'.[97]

Moreover, it can be noted that the Counsel for the respondent States in the instant case recognised that a State's exercise of 'some form of legal authority' may engage jurisdiction.[98] Classic examples of such situations would be arrest and detention. Counsel Greenwood expressed that;

'a prisoner is the archetypal example of someone who comes within the jurisdiction of the detaining State which exercises the most extreme type of control over him'.[99]

This supports the interpretation that the Court did not mention the authority test because the instant situation did not involve any physical control over the victims on the side of the respondent States.

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[95] *Assanidze,* para 137.
[96] *Cyprus v turkey,*1975.
[97] *Öcalan,* 2003, para 93.
[98] *Bankovic,* para 37.
[99] *Verbatim record* of the hearing held in *Bankovic,* 24 October 2001 (referred to in O'Boyle, M., "The European Convention on Human Rights and extraterritorial jurisdiction: A comment on 'Life after Bankovic'" in Coomans and Kamminga, p. 139.

3) The crucial factor that justified the inadmissibility decision in *Bankovic* was that FRY did not fall within the Convention's *éspace juridique*.[100]

This last issue is subject to a separate analysis below.

* * *

Irrespective of the legal reasons for which the Court declared the *Bankovic* case inadmissible, it is clear that its findings had political connotations.[101] An affirmative admissibility decision would have created considerable ill-feeling among the defendant States, i.e. the greatest powers of Europe and the largest financial contributors to the Court's very existence. Some critics of the *Bankovic* case have pointed out that the Court's decision was influenced by *inter alia* the 11th of September-attack and the consequent ambiance of 'legitimising' interventions in the name of democracy and to combat terrorism.[102]

Although the Court was not asked to determine the legality of the NATO intervention itself, the case was of determining importance for the future recourse to similar methods. Whereas the applicants in *Bankovic* emphasised the importance to combat impunity, many voices have taken the opposite stance and claimed that declaring *Bankovic* admissible would risk undermining the High Contracting parties' participation in military mission for human purposes.[103] In addition, it has been held that it is not the Court's mission to be held responsible for the universal protection against human rights violations all around the globe.[104]

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[100] See *inter alia Al-Skeini*, Cerna, C., "Extraterritorial application of the human rights instruments of the inter-American system" in Coomans and Kamminga, p. 169, "Cour Européenne des Droits de l'homme, Décision du 12 décembre 2001 (recevabilité), Grand Chambre – Affaire Bankovic et al c. Etats Membres de l'OTAN" in *Revue Generale de Droit International,* 2002, Vol 2, 437-449, p. 438 ;'Cette décision solennelle peut être qualifiée d'historique dans ce sens qu'elle souligne avec une fermeté particulière le caractère essentiellement territorial et régional dy système européen de protection des droits de l'Homme. La Convention n'a pas vocation à s'appliquer aux actions internationals auxquelles participant les Etats members du Conseil de l'Euroe en dehors de l'aire géographique définie par leurs territoires'.

[101] Cohen, p. 1082;'On comprend fort bien que la Cour, déjà plus que surchargée, ne veuille pas s'encombrer de contentieux lointains et politiquemment sensibles', Hannum, H., remarks in "Bombing for peace: Collateral damage and human rights" in *American Society of International law Proceedings,* proceedings of the ninety-sixth annual meeting of the American Society of International Law, 16 March 2002; "Is there a difference between killing Kurds with automatic weapons and killing Serbs with bombs unleashed from fifteen thousand feet? Or are human rights forum somehow inherently unsuited to address the explosive mix of politics and violence that is necessarily involved in any military action, whether humanitarian or otherwise?"

[102] Hannum; "*Bankovic* was argued six weeks after September 11. There can be no doubt that the 'War on terrorism' influenced the Court's decision."

[103] *Bankovic,* para 43.

[104] Ress, p. 66.

It is interesting to note some of the words expressed by the President of the Court, Mr Wildhaber, at the Court's opening of the judicial year 2002;

'Our perception of last year is coulored by the tragic events of 11 September and their aftermath. Terrorism raises two fundamental issues which human rights law must address. Firstly, it strikes directly at democracy and the rule of law, the two central pillars of the European Convention on Human Rights. It must therefore be possible for democratic States governed by the rule of law to protect themselves effectively against terrorism; human rights law must be able to accommodate this need. The European Convention should not be applied in such a way as to prevent States from taking reasonable and proportionate action to defend democracy and the rule of law'.[105]

In relation to *Bankovic* the President continued;

'We do not realise that the Convention was never intended to cure all the planet's ill and indeed cannot effectively do so; this brings us back to the effectiveness of the Convention and the rights protected therein. When applying the Convention we must not loose sight of the practical effect that can be given to those rights'.[106]

The Court's decision in *Bankovic* has been confirmed in the recent case of *Markovic v Italy*, involving almost identical circumstances.[107] Likewise, it has been confirmed by the Dutch Supreme Court, who explicitly relied on *Bankovic* to find that the Yugoslav victims where not 'within the jurisdiction' of the Netherlands.[108]

2.5 Éspace juridique

Was *Bankovic* declared inadmissible because the alleged violations occurred on the territory of FRY, a non-party to the Convention? How to interpret the Court's statement that 'the Convention is a multi-lateral treaty operating in an essentially regional context and notably in the legal space (*éspace juridique*) of the Contracting States'? Was this a supportive or fundamental argument?

Many pre-*Issa* commentaries in doctrine on the *Bankovic* case suggest that the Convention applies only to extraterritorial human rights violations allegedly taking place on the territory of the High Contracting Parties.[109] Most authors on the subject, however, conclude that the Court's intention with the above-mentioned statement in *Bankovic* 'remains to be determined'[110]. According to the author, the statement has been much clarified through the *Issa* case, although it yet remains to be ultimately determined.

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[105] Wildhaber, L., President of the European Court of Human Rights, Speech for the opening of the judicial year, 31 January 2002.
[106] *Ibidem.*
[107] *Markovic and others v Italy*, ECtHR 12 June 2003, Appl no. 1398/03.
[108] Dutch Supreme Court, HR 29 November 2002, NJ 2003, 35.
[109] Not least, the Counsel for the seventeen NATO Members supports this interpretation, *Al-Skeini*.
[110] Lawson, O'Boyle.

In *Issa*, the Government of Turkey put forth the legal space argument from *Bankovic* as a reason for the Court to declare the application inadmissible. However, the Court did not tend to support an interpretation that excludes the application of the Convention to acts in Iraq, a non-party to the Convention;

'The Court does not exclude the possibility that, as a consequence of the military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area (under the control of the Turkish forces), it would follow logically that they were within the jurisdiction of Turkey (and not that of Iraq, which is not a Contracting State and clearly does not fall within the legal space (*éspace juridique*) of the Contracting States (see the above-cited *Bankovic* decision, § 80).[111]

The Court seemingly attempts to transform its previous statement in *Bankovic* to mean that victims cannot fall within the jurisdiction of non-parties to the Convention – therefore those States are outside the legal space of the Convention. It is a rather confusing statement, which will not be paid further attention. The relevant point is that the Court does not seem to have any objections to engage the jurisdiction of a respondent State based on alleged human rights violations against non-nationals on the territory of a non-party to the Convention. The crucial determinant factor is the level of control or authority exercised by the defendant State – not the geographical occurrence of the alleged violation.

How, then, to interpret the statement made by the Court in paragraph 80 of the judgment?

The Courts statement concerning *éspace juridique* are presented in relation to the applicants argument that;

'any failure to accept that they (the victims) fell within the jurisdiction of the respondent States would defeat the *ordre public* mission of the Convention and leave a regrettable vacuum in the Convention system of human rights' protection.'[112]

It is in this context that the Court declares that;

'It is true that, in its above-cited *Cyprus v. Turkey* judgment (..), the Court was conscious of the need to avoid 'a regrettable vacuum in the system of human-rights protection' in northern Cyprus. However, and as noted by the Governments, that comment related to an entirely different situation to the present: the inhabitants of northern Cyprus would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed, by Turkey's 'effective control' of the territory and by the accompanying inability of the Cypriot Government, as a Contracting State, to fulfil the obligations it had undertaken under the Convention.

In short, the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*éspace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the

[111] *Bankovic,* para 74.
[112] *Ibid.,* para 79.

conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.'[113]

The Court's intention with the paragraph 80-statement appears to have been to clarify that the arguments on the Convention's character as a constitutional instrument of European public order and the risk for a 'legal vacuum' in the Convention's system protection, could not be invoked in favour of applicants on a territory not covered by the Convention.[114] Serbs could not find themselves in a vacuum where they are deprived of earlier rights. Simply, the Court refutes the suitability of that specific argument in a specific case. The non-mention of a legal space restriction in paragraph 71, where the Court defines the relevant exceptions allowed in respect to the essentially territorial notion of jurisdiction, also lends support to this interpretation;

'it has done so when the respondent state through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government'.[115]

However, it is interesting to note that this proposed interpretation is not at all evident. In a recent case before the High Court of Justice of the United Kingdom, concerning alleged violations by British soldiers, committed during the British occupation of parts of Iraq in 2003, the High Court rejects an interpretation that extends the Convention's scope of application to the territory of non-State parties in cases involving the exercise of effective control.[116] Five of the six applicants were killed by gunfire on the field during British occupation, while the sixth applicant deceased as a result of maltreatment in a prison operated by British forces.

Despite the fact that UK was found to exercise effective control over the territory in question (southern parts of Iraq), the victims were not considered to fall under UK jurisdiction. The reason was clear: the Convention was not aimed to apply outside the legal space of Europe. It is argued that in the earlier jurisprudence involving extraterritorial effective control, most notably the northern Cyprus cases, the European Court of Human Rights had established jurisdiction on the basis of avoiding a legal vacuum in the protection system[117]. Only if the alleged victims were normally entitled to the safeguards entailed in the Convention, they could fall under the jurisdiction of the controlling State, i.e. excluding victims on the territory of Iraq or any other non-State party.

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[113] *Ibid.,* para 80.
[114] Ress, p. 63, Lawson, p 114.
[115] *Bankovic,* para 71.
[116] *Al-Skeini and others v Secretary of State for Defence*, EWHC (England and Wales High Court) 2911, 14 December, 2004.
[117] *Ibid.,* para 276.

As to the second criterion - authority over persons - the UK High Court declared, after a thorough review of the relevant case law that only a very limited number of specific and 'independent' exceptions have actually been allowed for. The specific exceptions allowed for are mainly limited to situations involving the activities of diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of the state. Other exceptions can exceptionally be allowed for, such as abductions *and return* of nationals, but in no way can, according to the Court, the killings in the instant case be included;

'on our analysis of the jurisprudence, the case of deaths as a result of military operations in the field, such as those complained of by the first five claimants, selected as reflecting various broadly representative examples of such misfortunes, do not seem to us to come within any possible variation of the examples of acts by state authorities in or from embassies, consulates, vessels, aircraft, (or, we would suggest, courts or prisons) to which the authorities repeatedly refer'.[118]

However, the death of the sixth applicant was declared admissible on grounds of the authority over persons criterion;

'It seems to us that it is not at all straining the examples of extra-territorial jurisdiction discussed in the jurisprudence considered above to hold that a British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities, and containing arrested suspects, falls within even a narrowly limited exception exemplified by embassies, consulates, vessels and aircraft, and in the case of *Hess v. United Kingdom*, a prison'.[119]

It can be concluded that, according to the High Court, the *éspace juridique* argument is not applicable to the narrow line of exceptions relating to authority over persons, which the High Court has established as recognised in the Strasbourg case law. These exceptions are based on international customary law and are therefore applicable outside the regional sphere of the Convention.

The High Court hence makes a distinction between the two criteria in relation to the legal space argument. The criterion of effective control over territory applies, according to the High Court, only within the legal space of Europe. The criterion of authority over persons has no legal space restraints but is only applicable to a very narrow line of exceptions, most of them based on international customary law. It seems as if British prisons in Iraq, just as a British embassy, can be regarded as falling under British jurisdiction.[120]

How to reconcile the findings above with the *Issa* case (where the Court apparently recognises the criteria of effective control over territory without any legal space restraints, and recognises a broader concept of authority)? The High Court of Justice explicitly declared that the *Issa* case contravened the Court's findings in *Bankovic* and whereas the relevant parts concerning *éspace juridique* in *Issa* was merely *obiter dictum*, more weight should be

[118] *Al-Skeini,* para 284.
[119] *Ibid.,* para 287.
[120] *Ibid.,* paras 284-288.

afforded to the Court's statement in *Bankovic*, paragraph 80, cited above.[121] The *Issa* case was not seen as supportive as it was ultimately declared that the victims did not fall under the jurisdiction of Turkey on grounds of lacking evidence.

The author does not support this line of argumentation. It is not reasonable to discount the *Issa* case on such weak grounds as put forth by the UK High Court of Justice. Together with the northern Cyprus cases and the *Ilascu* case, the *Issa* case lends weighty support to an understanding of the criterion of effective control as a factor which creates jurisdiction *ipso facto*, i.e. based exclusively on the level of control. The 'legal vacuum' argument was not mentioned in the *Loizidou* case, one of the leading cases in the discussion on jurisdiction, and can therefore not be seen as crucial for the Court's determination of jurisdiction in the *Cyprus* case, but rather as a side argument without determinant value.[122] The main fundament for the establishment of extraterritorial jurisdiction in the Strasbourg jurisprudence has *not* been the argument of avoiding legal vacuums. Likewise, the reference to the *European* public order in *Bankovic* shall be seen as a supportive argument, which alone could never constitute the reason for declaring the application inadmissible.

The fact that *Issa* and the other alleged victims were not under Turkey's jurisdiction was based on lacking evidence. This does not mean that the Court's reasoning prior to that conclusion shall be disregarded. Despite it being a loose speculation; why would the Court make statements in clear contrast to the hypothesis on legal space limitations, if such limitations were yet valid? This question is particularly relevant having in mind the at the time ongoing conflict in Iraq, which some mean the Court would prefer to exclude from the Convention's scope of application. One might assume that the Court should have clearly pointed out eventual legal space limitations in *Issa* in order to avoid future possible applications from Iraqi citizens.

As mentioned above, the most likely explanation to the Court's statement on *éspace juridique* in paragraph 80 in *Bankovic* is that it was an indication of the unsuitability of a specific argument. This view has also been supported by one of the sitting judges in *Bankovic*, Judge Ress.[123] It is further noteworthy that two of the Court's judges in *Issa* were also members of the

[121] *Ibid.,* para 265; "However, in our judgment the dicta in *Issa* do not, for the reasons which we have sought to express, follow any 'clear and constant jurisprudence of the Strasbourg court'. On the contrary, we think that they are inconsistent with *Bankovic* and the development of the Strasbourg jurisprudence in the years immediately before *Bankovic*. In a sense *Issa* seems to us to look back to an earlier period of the jurisprudence, which has subsequently made way for a more limited interpretation of article 1 jurisdiction. It may well be that there is more than one school of thought at Strasbourg; and that there is an understandable concern that modern events in Iraq should not be put entirely beyond the scope of the Convention: but at present we would see the dominant school as that reflected in the judgment in *Bankovic* and it is to that school that we think we owe a duty under section 2(1)".
[122] *Ibid.,* para 187 (applicants' counsel Mr Singh).
[123] Ress, p. 66.

Grand Chamber in *Bankovic* (Judge Costa and Judge Thomassen). If paragraph 80 were really aiming at restricting the Convention's application to the territory of the State parties, why did those judges omit to mention it in *Issa*? According to the author, the High Court of Justice misinterpreted paragraph 80 of the *Bankovic* case (to the favour of national politics).

2.6 Miscallenous

One case involving extraterritorial jurisdiction, not falling directly under any of the headings above, deserves a short mention in order to further clarify the Court's interpretation of Article 1 of the Convention.

The case of *Gentilhomme, Schaff-Benhadji and Zerouki v France* concerned the refusal by a French state school in Algiers to continue to enrol three children.[124] The refusal was based on an order from the Algerian State to the school not to offer its services anymore to children with Algerian nationality. The three children had dual nationality. The case concerned the right to education on the part of France. The Court found that the refusal to enrol the children was a consequence of a decision by the Algerian government and was outside the control of the French government.

Again, there are implications for the recognition of the authority over persons test; the French authorities did not exercise control or authority over a decision which led to the exclusion of the three children from their previous school. It is noteworthy that France did not raise the argument that the case related to facts occurring outside the *éspace juridique* of the Convention and that the case should therefore have been declared inadmissible.

It can be mentioned that cases relating to alleged human rights violations of European forces in Kosovo have been lodged against France, Norway and Germany. The first case concerns Kosovar children who was killed, allegedly as a result of French NATO troops failure to mark and/or defuse undetonated cluster bombs dropped during the bombardments in 1999.[125] It will be interesting to note the Court's decisions in those cases and whether they will illustrate a trend away from the 'legal space' reasoning or not.

2.7 Conclusion

The Court and the Commission have dealt with the issue of extraterritorial jurisdiction rather extensively. However, the problem is yet in its infancy. With progressing globalisation, foreign military interventions and peace-

[124] *Gentillhomme, Schaff-Benhadji and Zerouki v. France*, ECtHR 14 May 2002, Appl. no. 48205/99 a.o.
[125] *Behrami v. France*, ECtHR 16 September 2003, Appl. No. 71412/01. The case has been not yet been decided.

keeping missions the problem of determining the territorial scope of the Convention is likely to arise more frequently. Although many question marks remain, the case law so far provides a somehow solid basis for the determination of future cases. The conclusions drawn from the jurisprudence presented above can be summarised as follows.

The notion of jurisdiction in Article 1 of the Convention must be interpreted in harmony with international public law and thus, is a primarily territorial concept. The inalienable link between jurisdiction and territory is supported by a large number of international case law[126] and prominent literature on the subject.[127]

Article 1 of the Convention provides a restriction to the State parties' responsibility for human rights violations. The conduct of a State only falls within the scope of the Convention if the qualified concept of jurisdiction in Article 1 has been fulfilled. Acts within the territory of the acting State clearly falls within the qualification, while extraterritorial acts only qualifies under exceptional circumstances. In line with the Strasbourg jurisprudence on extraterritorial jurisdiction, Article 1 can be interpreted as allowing for the following exceptions:

a) Situations where one State party to the Convention exercises *effective control* in a sense of overall control over the territory of another State party. Jurisdiction is derived from the fact of such control and it is irrelevant whether the alleged violation was perpetrated by the State's armed forces or a subordinate local administration.[128]

b) Same situation as a) but the controlled State is a non-party to the Convention. The only precedents which *could have* corresponded to this situation so far, are *Bankovic* and *Issa*. Many scholars have claimed that the fact that the FRY was not a party to the Convention contributed (or even constituted the main reason) to the Court declaring the case inadmissible. Post-*Issa*, the argument that the Convention only applies within the *éspace juridique* of the Convention has however lost its strength. The most trustworthy explanation for why the Court brought up the argument of the legal space of Europe in paragraph 80 in the *Bankovic* case, is that it must be seen as a (rather elaborated) rejection to why the applicants' argument on European *ordre public* was not suitable in the current case, or in other words an explanation to the reasoning on 'legal vacuum' in the northern Cyprus cases.[129]

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[126] See e.g. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Resolution 276*, (1970) ICJ Reports 53, para 118, *Military and Paramilitary Activities Case (Nicaragua v. United States of America)*, merits, (1986) ICJ Reports 65, para 115, *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territories*, Advisory opinion 9 July 2004.
[127] See literature cited in *Bankovic*, para 59.
[128] See e.g. *Loizidou, Cyprus v Turkey, Assanidze*..
[129] *Bankovic,* para 80; 'Accordingly, the desirability of avoiding a gap or a vacuum in human rights' protection has so far been relied on by the Court in favour of establishing

In any circumstances, neither in *Bankovic* nor in *Issa*, the Court finally established jurisdiction based on effective control. In the *Issa* case, the control was not as extensive as to amount to 'effective'. In *Bankovic*, the defendant States did not effectively control a part of the territory of the FRY, apparently based on NATO's choice of warfare.[130] Only situations involving military occupation or continuous military support to separatist movements have been regarded as effective control in the Court's jurisprudence. Air bombing does not amount to effective control.

In sum, a High Contracting State Party, who effectively controls the territory of a non-State party, exercises jurisdiction over the individuals present on that territory.

c) Situations involving the activities of a State Party's diplomatic or consular agents abroad and on board craft and vessels registered in or flying the flag of the State in question. Those situations have been recognised by the Court who reiterated that this form of extraterritorial jurisdiction is recognised under international customary law.[131]

d) Ad hoc operations on the territory of another State where the acting State party exercises *authority over the individual* in question.[132] A number of distinctions must be made as to the exact recognition of the *authority* test. It is misleading in this respect to make a distinction between ad hoc operations on the territory of another State party and operations on the territory of a non-State party to the Convention. Post-*Issa*, the remaining distinctions are based on types of authority, not on location.

i) *Arrest*

Arrest can be seen as a classic exercise of authority and an arrested individual, hence, falls within the jurisdiction of the arresting State.[133] The Court's reasoning in cases relating to arrests indicates that a State's jurisdiction can be engaged not only when the arrested applicant is returned to the defendant State.

ii) *Arbitrary killings unprecedented by arrest*

It is currently unclear whether an individual who is the alleged victim of an arbitrarily killing unprecedented by arrest would fall within the jurisdiction of the assumed culprit.[134] Does a person who is arbitrarily killed by a long distance missile fall under the authority of the acting State? The answer remains unclear but in the light of *Bankovic* it leans towards a negative response. Lacking arrest and hence, physical control, distance killing is not enough to constitute the exercise of authority.

iii) *Bombing*

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jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.'

[130] *Ibid.,* para 69.

[131] See e.g. *Bankovic,* para 73.

[132] See e.g. *Stocké.*

[133] *Öcalan, Issa.*

[134] See Hannum, ;'simply shooting suspects is apparently immune from scrutiny, so long as you are careful not to arrest them first.'

The reasoning is similar to ii). A person who is killed or injured by bombing from the air is not subject to the *authority* of the bombing State and thus, does not fall within that State's jurisdiction. This seems to be the outcome of *Bankovic*. In other words, the individual must be under the *physical authority* of the acting State in order to fall within its jurisdiction.[135] The victims of the NATO bombing of the Radio Telvisje Srbska were not under any physical authority of the defendant States.

* * *

The main purpose for extending the essentially territorial notion of jurisdiction stems from the fact that Article 1 cannot be interpreted as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.[136] Such an interpretation would defeat the individual oriented purpose of the Convention. Yet, there are situations where such interpretations are feasible.

It appears that an arbitrary killing unprecedented by arrest, e.g. a killing by a long distance missile, would not engage the jurisdiction of the perpetrating State if the violation took place outside its territory. Likewise, victims of States' extraterritorial aggression by air do not fall within the jurisdiction of the acting States – they do not have to fear individual complaints being brought to Strasbourg. The criteria of authority over persons or effective control over territory have not been interpreted as to enclose those situations. If Mr Issa was shot from the air he would perhaps not (at all) have been able to fall under the jurisdiction of Turkey. If Ms Bankovic and the other fifteen persons would have been killed by ground troops the case would perhaps not have been declared inadmissible on grounds of lacking exercise of effective control over territory. Shall we really let the means of killing decide whether the Convention is applicable or not?

As Prof. Scheinin puts it;

'I am troubled by the idea that the choice of method of warfare could result in an advantage for a State resorting to military force as to the non-applicability of human rights law'.[137]

Two alternative suggestions on how to avoid unreasonable interpretations can be distinguished;

The criterion of effective control over territory must necessarily be interpreted in a more flexible way as to include modern weapons technology. This approach was supported by the applicants in the *Bankovic* case;[138]

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[135] Alternatively, a decision by a State/State agent must directly affect the individual, see *Hess* and *Gentilhomme.*
[136] See e.g. *M v Denmark, Illich Ramirez*. See also *Coard, Lopez Burgos*.
[137] Scheinin, M., "Extraterritorial effect of the International Covenant on Civil and Political Rights" in Coomans and Kamminga, p. 75.
[138] See also Ress, p. 60.

'the concepts of 'effective control' and 'jurisdiction' must be flexible enough to take account of the availability and use of modern precision weapons which allow extraterritorial action of great precision and impact without the need for ground troops. Given such modern advances, reliance on the difference between air attacks and ground troops has become unrealistic.'[139]

Moreover, the authority test must be interpreted to include not only situations of *physical* enforcement. It has been proposed that authority should mean *actual* authority, i.e. the possibility for a State to impose its will on an individual.[140] The test should focus on the State's actual authority and control in respect of the facts and events that allegedly constitute a violation of a human right, not on the physical element.[141] Hence, if the agents of a State have factual control over the consequences of for instance an air bombing, that State exercises authority over the alleged victims and thus, those individuals fall within its jurisdiction.[142]

It has been argued that other interpretations would be utterly absurd.[143] However, it must be borne in mind that there is a purpose behind Article 1 – it aims to restrict the application of the Convention to violations against individuals within the State parties' jurisdiction. If the article would aim to cover all individuals wherever present in the world, it would have been worded otherwise. How broad can the exceptional notion of extraterritorial jurisdiction as a part of Article 1, be interpreted? The rule of law must not be jeopardised – there must be clear exceptions and those exceptions may not go further than the wording of the article.[144] The Court cannot invent interpretations that would amount to making new law and hence disrespect the consent of the signatory States.

The rules of the Vienna Convention on the Law of Treaties provides the legal framework for the interpretation of the articles of any treaty, including human rights treaties and it, thus, remains to be established whether the two suggestions above are compatible with the relevant provisions of the Vienna Convention. The suggestions might provide morally legitimate interpretations of the notion of jurisdiction, but can they also be legally motivated? Or the other way around: is the Court's decision in *Bankovic* legally questionable on grounds of the restrictive interpretations of the notions of effective control and authority?

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[139] *Bankovic,* para 52.
[140] See *Ilascu,* dissenting opinion of Judge Loucaides.
[141] Scheinin, p. 75. See alternatively Lawson, p. 104; 'if there is a direct and immediate link between the extraterritorial conduct of a state and the alleged violation of an individual's rights, then the individual must be assumed to be 'within the jurisdiction', within the meaning of Article 1, of the State concerned.
[142] This is an indeed problematic proposal as the Court's examination on admissibility and merits becomes somehow blurred.
[143] See e.g. Hannum, Altiparmak, K., "*Bankovic:* An obstacle to the application of the European Convention on Human Rights in Iraq" in *Journal of Conflict & Security Law*, 2004, Vol. 9, No. 2, pp. 213-251.
[144] Greenwood, C., remarks in "Bombing for peace: Collateral damage and human rights" in *American Society of International law Proceedings,* proceedings of the ninety-sixth annual meeting of the American Society of International Law, 16 March 2002.

3 Bankovic: Right or wrong?

3.1 Introductory remark

It has been argued that the European Court adopted an unnecessary restrictive interpretation of the term jurisdiction by its decision in *Bankovic*. Such interpretation approaches, it is said, endangers the very rationale of the Convention and its ability to effectively benefit those it has been designed to protect. [145] In the light of this debate, it is relevant to examine whether the Court could have come to another conclusion in its decision in the *Bankovic* case.

This chapter aims to assess the Court's decision in *Bankovic* in light of the Vienna Convention on the Law of Treaties. Could the Court have interpreted the concepts of 'effective control over territory' and 'authority over individuals' broader? The criticism in doctrine against the Court's decision points in different directions. There is criticism put forth in almost every aspect of the Court's application and analysis of the principles of treaty interpretation contained in the Vienna Convention, be it the excessive reference to the *travaux préparatoires*, the real ordinary meaning of jurisdiction in international law or the lack of respect paid to the Convention's object and purpose. The principles themselves, as well as the criticism and the author's analysis of the criticism, will be presented below in chapter 3.2, whereas chapter 3.3 presents the evaluation - was the Court's interpretation of jurisdiction in *Bankovic* right seen in the light of the Vienna Convention?

The purpose of this chapter is of course not only to assess whether *Bankovic* could have been interpreted in a more flexible, human rights friendly manner, but also to establish the platform for future interpretations of cases relating to extraterritorial jurisdiction.

3.2 The Vienna Convention on the Law of Treaties

3.2.1 Introductory remark

The Vienna Convention on the Law of Treaties constitutes the general legal framework for the interpretation of the European Convention on Human Rights.[146] On a technical level, this thesis is about the interpretation of

[145] Altiparmak, Orakhelashvili, A., "Restrictive interpretation of human rights treaties in recent jurisprudence of the European Court of Human Rights" in *European Journal of International Law*, 2003, Vol. 14, pp. 529-568.
[146] *Golder v United Kingdom*, ECtHR 21 February 1975, Appl. no. 4451/70, Series A. 18, para 29.

treaties and the principles of the Vienna Convention must therefore be afforded appropriate attention. The answer to the question ‘to what extent the European Convention applies to extraterritorial human rights violations’, can not be established without using methods of treaty interpretation. The meaning of ‘jurisdiction’ is ultimately established by applying the Vienna Convention.

Articles 31-32 of the Vienna Convention contain the general principles of treaty interpretation and read as follows;

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

3.2.2 The special character of human rights treaties

It has been argued that the Vienna Convention is, in certain respects, unsuitable to govern human rights treaties as it was originally construed to suit treaties of a traditional and reciprocal character.[147] Unlike traditional treaties, human rights treaties do not merely create reciprocal relationships between the contracting States, but rather constitute an objective regime of obligations.[148] The mainly non-reciprocal and objective character of human rights treaties have been repeatedly recalled by the Court, as well as by the International Court of Justice, foremost in its renowned advisory opinion in the *Reservations case*. The ICJ stated therein that in relation to human rights treaties, in this case the Genocide Convention, 'the contracting States do not have any interests of their own; they merely have, one and all, a common interest'.[149] The Convention organs have reiterated this standpoint when claiming that the special character of the European Convention aims to 'establish a public order of the free democracies of Europe', i.e. the purpose of the Convention has no reciprocal gain.[150] The Convention aims to protect the individual, disregarding his or her nationality, and not only to benefit individual State interests.

However, human rights treaties set forth obligations not only in respect of the individual but also in between the State parties *inter se* (so-called obligations *erga omnes partes*). For example, the European Convention, as well as most other human rights treaties, allow for inter-State complaints. The very foundation of a human rights treaty is based on the same traditional, construction as non-humanitarian treaties – a State cannot be bound without its consent. Conclusively, there are no reasons for holding that the Vienna Convention should not be applicable to human rights treaties, just as well as to any other treaty. The Vienna Convention takes due regard to the object and purpose of a treaty in its article 31(1) and must therefore be considered as sufficiently flexible to take into account also the special character of a human rights treaty. The jurisprudence of the European Court of Human Rights clearly indicates a frequent exploration of this flexibility in order to cope with the Convention's particular character as a human rights instrument.

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[147] See *inter alia* comments in respect of the issue of reservations to human rights treaties, Lijnzaad, L. *Reservations to human rights treaties – Ratify and ruin?*, Martinus Nijhoff Publishers, Dordrecht, 1995, Goodman, R., "Human rights treaties, invalid reservations and state consent" in *American Journal of International Law*, 2002, vol. 96, pp. 531-561, Schabas, W. A. "Reservations to human rights treaties: Time for innovation and reform" in *The Canadian Yearbook of International Law*, 1994, vol. XXXII, pp 39-83.

[148] The Vienna Convention itself confirms the non-reciprocal nature of human rights treaties in its article 60(5), which provides that the right to reciprocally breach a treaty is not applicable to 'treaties of humanitarian character'.

[149] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May, 1951, ICJ Reports 1951, pp 15-69.

[150] E.g *Temeltasch v Switzerland*, ECommHR May 1982, DR 31, Appl. no. 9116/80, pp. 120-153, paras 62-63, *Loizidou v Turkey* (preliminary objections).

The Court has elaborated on the specific application of the principles of interpretation enclosed in the Vienna Convention. Those 'elaborations', which are next to independent principles, have been applied on routine in the regional context of the Convention and must necessarily be taken into account when determining the meaning of jurisdiction in Article 1 of the Convention. The principles are implicitly enclosed in the overall framework of the Vienna Convention, but give particular weight to the special character of the Convention as a human rights treaty, and hence, the element of object and purpose in article 31(1).[151] Only the principles most relevant for the purposes of this thesis will be mentioned below, i.e. the principle of evolutive/dynamic interpretation and the principle of effectiveness, both elaborations of the element of object and purpose in article 31(1).

The element of 'object and purpose', as well as all other relevant elements of articles 31-32 will be presented below one by one together with criticism and comments proposed in doctrine and relating to the Court's reference to the respective elements in the *Bankovic* case.

3.2.3 Ordinary meaning

Article 31 is entitled 'General rule of interpretation', which implies that the elements enumerated in the article compose all together one and single rule. The elements of 'ordinary meaning', 'context' and 'object and purpose' in paragraph 1 are thus on an equal footing. Likewise, there is no internal hierarchy between the different paragraphs of the article.[152] The three paragraphs represent a logical progression. The natural point of departure is to commence with the ordinary meaning of the text because it presumably most clearly reflects the intention of the parties.[153]

The determination of the ordinary meaning may involve reference to dictionaries,[154]or simply, as in *Bankovic*, reference to the term's meaning in international public law. By referring to a number of academic writings on the subject, the Court in *Bankovic* concluded that the notion of jurisdiction in international public law is primarily territorial, other grounds for jurisdiction being exceptional.[155] However, it has been argued that the notion of jurisdiction under article 1 of the Convention is not necessarily identical to the concept of jurisdiction in international law.[156] The argument

[151] Ovey, C., *Jacobs & White, The European Convention on Human Rights,* 3d ed., Oxford University Press, Oxford, 2002, p. 29.
[152] *Golder,* para 30, Ovey, p.32.
[153] Aust, A., *Modern treaty law and practice,* Cambridge University Press, Cambridge, 2000.
[154] Ovey, p. 31.
[155] *Bankovic*, paras 59-60.
[156] Orakhelashvili, p. 5, Ruth, A., and Trilsch, M., "International decisions – European Convention on Human Rights – NATO military operation in Kosovo – notion of jurisdiction under Article 1 – conditions for extraterritorial applicability of the Convention" (ed. Oxman, B.) in *American Journal of International Law,* Vol. 97, No. 1, 2003, pp. 168-173.

proposes that a distinction must be made between the *substantial* and the *actual* notion of jurisdiction.

Substantial jurisdiction is the criterion for allocating competences between States, i.e. to delimit the scope for freedom of action. A State has jurisdiction over certain territories, either by treaty or by customary law, e.g. a State can board a foreign vessel on its national territory (within its jurisdiction) but not on the High seas. Substantive jurisdiction is hence, a clear legal concept – a title, which determines areas within which individual States may lawfully act.[157] The notion of jurisdiction in Article 1 has another meaning; it aims to identify whether an alleged violation of a Convention right may be attributed to a High Contracting Party. This is a notion of jurisdiction, which tends to provide a remedy for an individual, rather than create a title for a State to act. Jurisdiction in the meaning of whether certain acts are imputable to a contracting State has nothing to do with whether the territory is under the acting State's jurisdiction by title.

The Court's earlier case law on extraterritorial jurisdiction has been referred to as evidence for the *actual* meaning of jurisdiction in Article 1. It is claimed that the view on jurisdiction taken by the Court is rather based on factual control than on sovereignty and legitimacy of a title. A State may exercise control and thus, jurisdiction without substantive jurisdiction.

To sum up, this argumentation proposes that the exercise of jurisdiction under Article 1 of the Convention shall not be seen as corresponding to a State's right or title to act, but instead to whether a State, when acting extraterritorially, is bound to respect its obligations under the Convention. According to this standpoint, jurisdiction shall not exclusively be interpreted as a territorial concept, i.e. depend on control over territory, but rather focus on the State's actual exercise of control or authority – irrespectively if it is exercised over territory or persons. In light of this argument the *Bankovic* case would more likely have been declared admissible.

3.2.4 Context

The determination of the ordinary meaning of a treaty term must according to article 31(1) be done together with the context of those terms. The definition of 'context' is provided for in Article 31(2), which states that in addition to the text, including preamble and annexes, the context relates to any agreement or instrument concluded between the parties in connection with the conclusion of the treaty.

The Court in *Bankovic* did not explicitly mention the element of 'context', which is understandable lacking any explicit agreement or protocol ratified subsequent to the entry into force of the actual treaty.

[157] Orakhelashvili, p. 5.

3.2.5 Object and purpose

In the field of interpretation of traditional treaties, regard to the object and purpose, as well as to the context, is many times had mainly for the purpose of clarifying an already established meaning.[158] However, in relation to the interpretation of human rights treaties, the element of 'object and purpose' has, on the contrary, been given a predominant position. In fact, the element has been the most influential interpretative method in the Court's jurisprudence.[159] It seems as if the Court's purpose-oriented interpretation of the Convention is an accepted unwritten rule.

The Convention constitutes a mainly normative and non-reciprocal treaty, which objective aim is to secure the protection of the individual against human rights violations – an interest that serves the community rather than individual State parties. Hence, unlike traditional treaties the correct interpretation of the Convention provisions is not automatically the one that least restricts the State's sovereignty, freedom or discretion.[160] The general presumption that treaty obligations shall be interpreted restrictively since they derogate from the principle of State sovereignty is not applicable to the Convention.[161] Rather, it follows with the individual-oriented purpose of the Convention that prevalence should be given to the interpretation that best ensures the protection of the *individual*.[162] In this respect the object and purpose-principle, with its' sub-principles' of evolutive interpretation and the principle of effectiveness, has come to play a more central role than it does in relation to traditional treaties. It also follows that limitations or qualifications of the rights set out in the Convention shall be construed narrowly.[163]

The Vienna Convention gives no directives on whether a treaty shall be interpreted static or historical as opposed to evolutive, or restrictive as opposed to broad. Consequently, the purpose-oriented method of interpretation taken by the Court is fully in line with the law of treaties and hence, construes nothing else than a permitted variation in emphasis.[164]

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[158] Aust, p. 188.
[159] Ovey, p. 29.
[160] *Ibid.,* p. 35, *Wemhoff v Germany,* ECtHR 27 June 1968, Appl. no. 2122/64, Series A. 7.
[161] Bernhardt, R., "Thoughts on the interpretation of human rights treaties" in Matscher, F. and Petzold, H. (eds.) Protecting human rights: the European dimension: Studies in honour of Gérard J. Wiarda, Heymann, Köln, 1988, p. 70; 'such a rule would be in plain contradiction to another maxim, occasionally relied on by the European Court of Human Rights, namely that individual liberties need a broad interpretation, whereas restrictions on these liberties require a restrictive interpretation', Ovey, p.35, Cohen p. 328.
[162] *Wemhoff,* para 8.
[163] *Wemhoff, Klass v Germany*, ECtHR 6 September 1978, Appl. no 5029/71, Series A. 28.
[164] Matcher, F., "Methods of interpretation of the Convention" in Macdonald, R. St. J, Matscher, F. and Petzold, H. (eds.), *The European system for the protection of human rights,* Nijhoff publishers, Dordrecht, 1993, p. 66.

The principle of dynamic or evolutive interpretation

With the purpose-oriented interpretation of the Convention it follows that the Convention must be seen as a living instrument and be interpreted in the light of present day conditions. This constitutes the so-called *dynamic* or *evolutive* principle of interpretation.[165] New societal, political and moral attitudes must be taken into account in order to fully respect the object and purpose of the Convention. For example, the protection of sexual minorities was not envisaged at the time of the drafting of the Convention in 1950, but to ignore the rights of such individuals to date would be to breach the Convention's purpose.

The evolutive interpretation of the Convention extends the obligations of the State parties to include undertakings that were not intended at the stage of the drafting process. If the Convention would only protect individuals against the human rights violations that were prevalent in 1950 and not against future imaginable violations, the entire purpose of the Convention, as well as the intention of the drafters, would be defeated.[166] The evolutive interpretation can be justified also by the preamble;

'one of the methods by which the aim (of European unity) is to be pursued is the maintenance and *further* realisation of human rights and fundamental freedoms'.[167]

However, the Court has no power to afford the individuals with new rights, not previously enclosed in the Convention, e.g. the right to divorce (derived from 'the right to marry' in article 12) as examined in the *Johnston* case:

It is true that the Convention and its Protocols must be interpreted in the light of present day conditions. However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset.[168]

The evolutive argument cannot as such override the ordinary meaning to be given to the terms of the Convention provision in its context and in the light of its object and purpose. The only matter that can be interpreted evolutively is a matter which is already implicit (or explicit) in the wording of the text.[169]

There is a limit for the Court not to infringe on the task of the legislature, i.e. treaty interpretation may not amount to treaty revision.[170]

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[165] See e.g. *Tyrer v United Kingdom,* ECtHR 25 April 1978, Appl. no. 5856/72, Series A. 26, *Loizidou, Soering.*
[166] Ovey, p. 35.
[167] Preamble of the European Convention on Human Rights (emphasis added).
[168] *Johnston v Ireland*, ECtHR 18 December 1986, Appl. no 9697/82, Series A. 112.
[169] Prebensen, S., "Evolutive interpretation of the European Convnetion on Human Rights" in Mahoney, P, Matscher, F, Petzold, H and Wildhaber, L. (eds.), *Protecting human rights: The European perspective, studies in memory of Rolv Ryssdal,* Carl Heymann Verlag, Köln, 2000, p. 1131.
[170] Mahoney, P., "Judicial activism and judicial self-restraint in the European Court of Human Rights: Two sides of the same coin" in *Human Rights Law Journal,* 1990, Vol. 11, no. 1-2, pp. 57-87, p. 66.

'It cannot be the task of the interpreter to change the content of a norm; but if the content of a norm has undergone a change in social reality, the interpreter must take into account of this.'[171]

The purpose-oriented methods of interpretation may not lead the Court to engage in exaggerated judicial activism. The rule of law requires respect for the integrity of treaties and set limits for the judges to engage in making new law.[172]

The principle of effectiveness

Moreover, the object and purpose of the Convention requires that its provisions be interpreted so as to make its safeguards practical and effective, not theoretical or illusory.[173] This method of interpretation has led the Court to adopt extensive interpretations of certain provisions, e.g. deriving far-reaching positive obligations from certain treaty provisions.

The principle of effectiveness is used when the textual interpretation would prevent the effective protection of an individual's human rights. However, it does not mean that the text can be ignored. More correct, the principle aims to give the Convention the 'fullest weight and effect consistent with the language used and with the rest of the text and in such a way that every part of it can be given meaning'.[174]

Argumentation

It follows from article 31(1) of the Vienna Convention that the object and purpose must be respected when interpreting any treaty. However, in the context of human rights treaties the object and purpose have been afforded a particularly sacred value, leading the Court's central principles of interpretation to be purpose-oriented more than anything.[175] This is reflected in a large number of case law, but is not at all apparent in the Court's judgment in *Bankovic*, where the main emphasis seems to have been on the element of 'ordinary meaning', i.e. the territorial notion of jurisdiction in international public law.[176]

It has been argued that if the Court would have applied the evolutive principle of interpretation, the concept of 'effective control' could have been broadened to include the NATO air bombing campaign in 1999.[177] The

[171] Matcher p. 70.
[172] Greenwood, p. 6.
[173] See e.g *Airey v Ireland,* ECtHR, 9 October 1979, Appl. no. 6289/73, Series A. 32, *United Communist Party v Turkey,* ECtHR 30 January 1998, Appl. no. 19392/92, Reports 1998-I, *Matthews v. the United Kingdom*, Appl. No 24833/94, ECHR 1999-I*, Loizidou.*
[174] Ovey, p. 36.
[175] Bernhardt, pp 65-66.
[176] Altiparmak, p. 226, Cohen, p. 1080 ; 'la décision Bankovic tend a nier le particularisme de la convention europeenne des droits de l homme'.
[177] Altiparmak, p. 227, Ress, p. 64, Orakhelashvili, p. 8; if, in present day circumstances, action by contrating states leads to prima facie serious violations of the Convention whose extraterritorial applicability is not expressly ruled out either by the text or by subsequent

developments in modern warfare demonstrate that States increasingly make use of air attacks, especially prior to that an occupation in the legal sense is established. This renders, to a certain extent, the fact that only the deployment of ground troops correspond as the traditional concept of 'control', moot.[178] Today, powerful States cause great damage with great precision without the use of ground troops and 'given such modern advances, reliance on the difference between air attacks and ground troops has become unrealistic'.[179] Having regard to the evolution of warfare methods, the criteria of 'effective control' should be interpreted less restrictive so as to include air attacks, despite the lesser control over territory exercised by such attacks. If air attacks are able to cause the same amount of damage as ground troops due to new technology or due to their more current use, it appears to be in contrast to the living instrument character of the Convention to differ between a victim of an air attack and a victim of a ground troop attack. Moreover, the principle of effectiveness does not allow the protection of individuals to be arbitrary in nature.

By use of the evolutive principle of interpretation, the argumentation above is valid also for adopting a more flexible approach to the concept of 'authority'. Having in mind the modern precision weapons of today, e.g the possibility to launch a missile from unmanned drones, so-called smart missiles, it becomes unrealistic to differ between 'physical' and 'distance' authority. It appears absurd to regard a victim of an intentionally launched smart missile as falling outside the authority of the attacking State on grounds of lacking physical authority.

Moreover, if the Court in *Bankovic* would have taken into account the principle of effectiveness in relation to its interpretation of 'authority', one might argue that the victims of the RTS bombing could have fallen under the jurisdiction of the defendant States. An effective interpretation of 'jurisdiction' and the sub-concept of 'authority' would have concentrated on the result which most effectively protects the individual. Such an interpretation would have led the Court to adopt a broader concept of authority, which focused on whether the defendant States had *actual* authority over the individual, i.e. whether they had authority over the consequences which led to the human rights violation, and not only whether they had physical control over the individuals involved.[180] The NATO air bombing of RTS was intentional and the answer would therefore be in affirmative. Whether the *killings* were intentional will be left unspoken and is any way not relevant as the defendant States intentionally launched the bombs and thus realised/had authority over the consequences of the bombing. Any other interpretation of authority would render the terms

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practice, the object and purpose of the convention necessitates a presumption that the convention applies to such action'.

[178] Schorkopf, F., "Grand Chamber of the European Court of Human Rights finds Yugoslavian bombing victims' application against NATO member states inadmissible, German Law Journal, Vol. 3, No. 2-01, February 2002.

[179] *Bankovic,* para 52.

[180] *Ilascu,* dissenting opinion by Judge Locaides.

'jurisdiction' and 'authority' ineffective for the sake of the protection of the individual (i.e. if air bombing/lack of physical control would not amount to authority the protection of the individual would be inconsistent and arbitrary and thus, not effective).

None of the suggested methods of interpretation involves the creation of a new right, but rather makes the concept of jurisdiction more flexible in order to include an interpretation, which effectively safeguard the protection of the individual and which takes into account new technology and methods of warfare within the limits set out by the text.

3.2.6 Subsequent practice

Article 31(3) sub-paragraph (b) provides that, together with the context, there shall be taken into account any subsequent practice in the application of the treaty which establishes agreement of the parties regarding its interpretation.[181] Even though a text may appear clear, the way in which it is actually applied by the parties is usually a good indication of their understanding of the article, provided the practice is consistent and accepted by the parties.[182] Subsequent practice refers to the jurisprudence of the Court as well as any other explicit or implicit conduct on the side of the State parties.

The Court in *Bankovic* examined the State parties practice in relation to Article 15 (the right to derogate) in order to search for indications of the parties apprehension of Article 1. The Court held that State practice since the ratification of the Convention indicated that the State parties did not believe that the Convention applied to situations similar to the actual case. State parties had already been involved in extraterritorial wars, but no State had made a derogation under Article 15 on those occasions and therefore the Court concluded that the State parties did not regard themselves as exercising jurisdiction over victims of their act performed on those occasions. The existing derogations were all lodged in respect of internal conflicts. [183]

This line of reasoning has met with criticism in doctrine. It is questioned whether the Courts apprehension of the lacking derogations can be regarded as conclusive and not only evidential.

The fact that States choose not to derogate for a certain circumstance does not necessarily mean that the States concerned simply do not consider themselves bound by the Convention with regard to the situation in question: it could also mean that the States simply do not expect their action in that specific situation to result in violations of Convention rights. Purely political reasons may also be involved. If a State that is engaged in an armed conflict

[181] Sub-paragraph (a) relates to any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions. Lacking such agreement, paragraph (a) will not be considered further.
[182] *Ibidem.*
[183] *Bankovic,* para 62.

outside its territory lodged a formal declaration under Article 15, the public may feel that it really does intend to violate human rights in the course of its operations'.[184]

3.2.7 Relevant rules of international law

According to Article 31(3), sub-paragraph (c), relevant rules of international law applicable in the relations between the parties, shall be taken into account together with the context. In the *Bankovic* case the Court clearly pointed out that the 'principles underlying the Convention cannot be interpreted and applied in a vacuum' and hence, must be interpreted in harmony with principles of international law.[185] The meaning of jurisdiction in international public law is primarily territorial and consequently, the Court afforded 'jurisdiction' in the terms of Article 1, with the same meaning. For criticism, see above under 3.2.3.

While it is true that human rights treaties has a special object and purpose as opposed to traditional treaties, the Court's case law indicate that the Convention must be interpreted within the limits of general international law.[186] The special character or 'needs' of the Convention cannot lead the Court to overrule or amend existing international law. [187]

3.2.8 Travaux préparatoires

The *travaux préparatoires* of a treaty is a supplementary means of interpretation, to be used in order to confirm the meaning derived from Article 31 or if the meaning is obscure or absurd. In *Bankovic*, the Court relied, *inter alia*, on the *travaux* to prove that jurisdiction was a mainly territorial concept.

'The Assembly draft had extended the benefit of the Convention to 'all persons residing within the territories of the signatory States'. It seemed to the Committee that the term 'residing' might be considered too restrictive. It was felt that there were good grounds for extending the benefits of the Convention to all persons in the territory of the signatory States, even those who could not be considered as residing there. This word, moreover, has not the same meaning in all national laws. The Committee therefore replaced the term 'residing' by the words 'within their jurisdiction' (..)'.[188]

It seems as if the *travaux préparatoires* supports the primary territorial notion of jurisdiction, but the question is how much impact this 'clear and confirmatory evidence' have for determining the scope of the Convention's extraterritorial application? The *travaux* does in no way address the matter

[184] Orakhelsashvili, p. 529.
[185] *Bankovic,* para 57.
[186] See in particular the *Al-Adsani* case.
[187] Ziemele, I., "Case-law of the European Court of Human Rights and Integrity of International Law", unpublished paper presented at *Séminaire sur l'influence des sources sur l'unité et la fragmention du droit international*, Palma, 20-21 May 2005.
[188] See *Collected Edition of the Travaux préparatoires of the European Convention on Human Rights,*Vol III., 15 februari 1950, p. 260.

of extraterritorial jurisdiction – this was simply nothing that the drafters had in mind in 1950, and consequently the *travaux préparatoires* should perhaps not be given too much weight.[189]

It has been observed that *Bankovic* was the first case ever where the Court referred to the drafting history of Article 1.[190] Although it is true that the Court does not take recourse to the *travaux* as a general rule, the method is recognised as a supplementary principle of interpretation in the Vienna Convention, and there is nothing that hampers the Court to rely on it as such. It would, however, be in contrast to Article 32 of the Vienna Convention if the Court relied *mainly* on the *travaux*. The Court, itself, explicitly claims that it referred to the preparatory work merely for confirmation of the interpretation it had found mainly through an analysis of the term's ordinary meaning.

'the Court would emphasise that it is not interpreting Article 1 'solely' in accordance with the travaux préparatoires or finding those travaux 'decisive'; rather this preparatory material constitutes clear confirmatory evidence of the ordinary meaning of Article 1 of the Convention as already identified by the Court'.[191]

However, it has been claimed that the Court implicitly relied on the *travaux* to a larger extent and hence, more than for a confirmation of an already established meaning.[192] The Court refers to the intention of the drafters when stating that the drafters would have adopted a provision similar to article 1 of the four Geneva Conventions if they had wished the Convention to apply unlimitedly. Moreover, reference is had to the *travaux* when stating that the Convention 'was not designed to apply throughout the world'. The Court's approach has been criticised for ignoring the special character of the Convention, and particularly, the principle of dynamic interpretation. [193]

(R)ather than analysing why or even if a dynamic interpretation was prohibited or inappropriate, however, the Court appeared merely to hold that any further analysis was dispensable since the convention's travaux préparatoires confirmed the ordinary meaning of jurisdiction under international public law.[194]

Did the Court really use the *travaux* as a supplementary means of interpretation or did it, in fact, rely on them in order to *determine* the ordinary meaning of 'jurisdiction'? The latter proposition would lead to the conclusion that the Court misinterpreted the term and the *Bankovic* case would consequently be legally questionable.[195]

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[189] O'Boyle, p. 132.
[190] *Al-skeini,* para 96.
[191] *Bankovic,* para 65.
[192] Cohen, p. 1080.
[193] Ress, p. 61, Orakhelashvili, p. 8.
[194] Orakhelashvil, p. 8.
[195] "Cour Européenne des Droits de l'homme, Décision du 12 décembre 2001 (recevabilité), Grand Chambre – Affaire Bankovic et al c. Etats Membres de l'OTAN" in *Revue Generale de Droit International,* 2002, Vol 2, 437-449, p. 440 ; 'la contradiction apparente entre la jurisprudence *Loizidou* et la decision *Bankovic* apparait nettement sur la question du recours aux travaux préparatoires'.

3.3 Evaluation/Analysis

A number of critical arguments in relation to the Court's interpretation of the term jurisdiction in *Bankovic* have been presented above. It is now time to evaluate those arguments in order to analyse whether the Court's interpretation really is dubious in a legal sense. Can the term jurisdiction in Article 1 be interpreted so as to include the two suggestions above, i.e. a more flexible and effective concept of 'effective control' and 'authority'?

The Court has been criticised mainly on four points;

i) the Court's assessment of the notion of jurisdiction in international law was erroneous (and hence, the ordinary meaning of the term was misconceived)
ii) the Court's reference to subsequent practice was random
iii) the Court's reliance on the *travaux préparatoires* was in contrast to Article 32
iv) the Court omitted to pay duly attention to the object and purpose of the Convention

The Court's assessment of the notion of jurisdiction in international law was erroneous. This argument submits that the Court's application of the interpretation rule of establishing the ordinary meaning in Article 31(1) of the Vienna Convention was wrong. However, international case law and doctrine relating to jurisdiction make obvious that the essential notion of jurisdiction *is* territorial. The argument presented under chapter 4.2.3 appears to be a misunderstanding of this notion. Whereas the proponents of the argumentation above are right in distinguishing the two situations – exercise of extraterritorial jurisdiction by title and exercise of extraterritorial jurisdiction without a title – they fail to differ them in categories of main rules and exceptions.

It is correct that the term jurisdiction in Article 1 may be interpreted as referring to a jurisdiction, which is not based on lawful title but rather on the fact of (unlawful) control or authority. Jurisdiction has then been interpreted as aiming to 'identify whether an alleged violation of a Convention right may be attributed to a Convention party' and not to identify to what extent each State is entitled to act or regulate conduct. This is however, an *exception.* The essential meaning of jurisdiction in international law is still territorial. All extraterritorial jurisdictions, including the nationality and universality principles, as well as acts derived from effective control or authority, are exceptions which require justification.[196] The Court's reference to international law, when determining the ordinary meaning of jurisdiction, hence, seems to be correct.[197] It is the Court's interpretation of the possible scope of exceptions that may be questionable.

[196] Higgins, R., *Problems and process: International law and how we use it*, Clarendon Press, Oxford, 1995, p. 73 f.f.
[197] Ress, p. 61.

The Court's reference to subsequent practice was random. It is true that it is chancy to rely on the State parties' lacking derogations to deduce their ideas on the meaning of jurisdiction. There might very well have been other reasons for the State parties not to make derogations during e.g. the first Gulf War. The reasons might, however, just as well have been those proposed by the Court. The Court's assessment on lacking derogations was not decisive, but merely indicative, for the Court's interpretation of Article 1 and therefore no more attention will be paid to this argument.

The Court's reliance on the travaux préparatoires was in contrast to Article 32. The Court has rarely relied so heavily on the *travaux préparatoires* as it did in *Bankovic*. However, there appears to be legal reasons why the Court emphasised the *travaux* instead of the living instrument character of the Convention.

There is a difference in interpreting the standards set out in the provisions containing the actual rights and the procedural and structural provisions of the Convention.[198] The Court has repeatedly broadened notions contained in the substantive rights with the method of evolutive or effective principles of interpretation, but can the same method really be applied to Article 1 to the same extent?[199] It has been held that a differentiation in interpretation ought to be made when it comes to very scope of the Convention. In this case, the intentions of the drafters must remain more relevant.[200]

Or even more radical proposition;

'The concept of object and purpose cannot be used to give to the wording of any of the relevant procedural or structural provisions a meaning which would be different from the subjective understanding of the contracting States of the scope of their undertakings at the time of the drafting of the Convention.'[201]

It has been claimed that when it comes to the structural aspects of the Convention, i.e. the scope as defined in Article 1, *only* the clear meaning of the words as they were understood at the time of drafting should be the overriding interpretative principle.[202] Whether this is correct or not is unclear, however, it is indeed true that there is a difference in interpreting for example the meaning of 'promptly' in article 5 and the meaning of jurisdiction in article 1, not least because the former word lack a corresponding general definition in international public law, which in turn allows the Court to be more 'evolutive' than 'historical'.

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[198] Golsong, H., "Interpreting the European Convention on Human Rights beyond the confines of the Vienna Convention on the Law of Treaties?" in Macdonald, R. St. J, Matscher, F. and Petzold, H., *The European system for the protection of human rights,* Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993, p.150, Bernhardt, p. 66.
[199] Examples of purpose-oriented/evolutive interpretation of the substantial rights see for example footnote 173 above. However, also structural articles have been interpreted in a purpose-oriented manner, see *Loizidou v. Turkey, preliminary objections,* as to the interpretation of Articles 25 and 46.
[200] Greenwood, p.5, *Bankovic,* para 65.
[201] Golsong, p. 150.
[202] *Ibidem.*

Having in mind the living instrument character of the Convention, it might seem as if the Court was excessive in its reference to the *travaux préparatoires*. One might suspect that the Court gave more than only confirmatory worth to them and thus misapplied Article 32 of the Vienna Convention. However, having in mind the structural character of article 1 and its importance for the Convention's entire width of application, the Court's reliance on the *travaux préparatoires* should not be seen as unreasonable. In those circumstances, the Court has more space for referring to the intention of the drafters and the Court's relatively heavy reliance on the *travaux* in *Bankovic* thus, shall not be misread as being in contrast to Article 32 of the Vienna Convention.

The Court omitted to pay duly attention to the object and purpose of the Convention. In *Bankovic* the Court clearly focussed on the ordinary meaning of the term jurisdiction and thereby, as expressed by one of the sitting judges in *Bankovic,* adopted the view 'that the Convention should be interpreted as narrowly as possible in he light of rules and principles of public international law'.[203] It has been held in doctrine that the special character of the Convention as a non-reciprocal human rights treaty requires the 'object and purpose' method of interpretation to be the determinative factor in the Court's interpretation.[204] Although such an approach cannot be given general validity, a row of case law seems to confirm this approach, not least the *Loizidou* case.

It is probable that if the Court would have given prevalence to the object and purpose of the Convention and thus had applied the evolutive and effective principles of interpretations in *Bankovic,* broader concepts of jurisdiction could have been accepted. However, the Court did not seem to take this stance. Two questions arise: Why did the Court in *Bankovic* not apply its well-established purpose-oriented method of interpretation? And, was it right in doing so?

The Court's 'non-evolutive' and 'ineffective' method of interpretation in *Bankovic* has turned out to be the most criticised point in doctrine and also the one that, according to the author, is most solid. As has been shown in the analysis above, none of the other arguments constitute solid grounds for criticism of the case. Consequently, the remaining parts of this chapter will be devoted to an analysis of the so called 'object and purpose-argument'.

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[203] Ress, p. 51.

[204] Wachmann, P., "Conclusions" in *L'interpretation de la Convention Européenne des droits de l'homme,* Droit et Justice, 21 Collection dirigée par Lambert, P. And Sudre, F., actes du colloque des 13 et 14 mars 1998, Brulyant, Bruxelles, 1998, p. 347, Matscher, F., "Les constraintes de l'interprétation jurisdictionelles les méthodes d'interprétation de la Convention Européenne" in *L'interpretation de la Convention Européenne des droits de l'homme*, p. 20.

3.3.1 'Object and purpose-argument'

3.3.1.1 Structural character of Article 1

It has already been shown above that a differentiation ought to be made between the interpretation of individual rights and freedoms and the structural provisions of the Convention. The standards set out by special provisions, such as 'criminal offence', 'fair trial' etc, have no traditional connotation in international law in the same way as has 'jurisdiction'.[205] It is hence, a logical consequence that international law does not need to play the same limitative role in the former context. It has been claimed that when it comes to structural articles such as Article 1 of the Convention it is more common to adopt a textual than an evolutive and purpose-oriented approach. Consequently, the ordinary meaning and also the *travaux préparatoires* becomes more influential. Relying on those methods of interpretation it is easier, and also correct, to emphasis the intention of the drafters or merely to rely on a textual approach.

3.3.1.2 Politically sensible cases

There is certainly a difference in interpreting a notion without connotation in international law and a procedural notion such as jurisdiction. However, does this difference really constitute valid grounds for accepting the Court's narrow and non-evolutive interpretation in *Bankovic*? There is also a political element behind the Court's interpretation. It is certainly also true that the evolutive and effectiveness principles can be limited when this is in line with the general will of the Court; 'il (the principle of dynamic interpretation) n'est convoqué par la Cour que si celle-ci le veut bien.'[206] Or, in other words;

'(L)es interpretations évolutives ne concernaient en realité qu'un domaine très restreint, qu'elles étainent clairement refusées à propos de questions jugées trop sensibles (..) '[207]

Could one argue that the *Bankovic* case was too politically 'sensible' for meriting a dynamic interpretation? Of course, politics play a role in the Court's decisions. What if the Court would have declared *Bankovic* admissible? It would have furiated the NATO-States who are parties to the Convention. Moreover, as Mr Wildhaber has pointed out, the practical effect of the Court might be endangered if the Court begins to interfere in such complex questions.[208] However, nor this argument alone can be determinative for explaining the Court's restrictive interpretation. In the end, it comes back to respecting relevant principles of international law.

[205] Bernhardt, p. 66.
[206] Wachmann, p. 344.
[207] Wachmann, p. 345.
[208] *Ibidem.*

3.3.1.3 Special character of the Convention versus international law

Given that the ever broader and more effective protection of individual rights is the overriding principle governing the action of the Court it frequently holds in favour of a flexible interpretation of certain provisions. But, how far can the Court go in the name of the special character of the Convention? Ultimately, it is about simply weighing the Court's special character as a human rights treaty versus international law.

Colliding with the special character of the Convention is the fact that the Convention is a treaty among any other treaties, subject to the requirement of State consent to become legally binding. Even with respect to the 'special' object and purpose of human rights treaties, an unfettered purpose-oriented approach by which the Court interpret the Convention articles in a manner so as to give them a meaning different from the original understanding of the parties, can only be permitted within certain limits and must be applied with great care. [209] The most relevant limit in the *Bankovic* case is set out by international law. The meaning of 'jurisdiction' in international law can be interpreted in a purpose-oriented way and hence, perhaps be broadened, but may yet not be overridden.

The question is then; does international law hinder the Court to adopt the broad interpretations suggested above? The answer *de lege lata* would most probably be in affirmative. The notion of jurisdiction in international public law is primarily territorial. This can explain why the Court has recognised exceptions of extraterritorial jurisdiction foremost where a State exercises effective control over the *territory* of another State. The suggestions above, however, lack any links whatsoever to territory and is also distanced from the concept of control. To stretch the concept of jurisdiction further away from the primarily territorial concept would demand special justification. Such a justification could be the need to protect the individual, the need to establish the unreasonableness in that a State party can perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.[210] There was, however, no will nor need for the Court to look for such justifications in the particular case of *Bankovic*. In other words, by reference to international public law, the Court was not wrong in interpreting the term jurisdiction as not to include air bombings.

The Court follows its precedents 'in the interest of legal certainty and the orderly development of the Convention case law'.[211] However, the Court ultimately decides cases *in casu* and can depart from its earlier jurisprudence, e.g. in order to reflect societal changes. There might be future cases where the Court declares victims of air bombings abroad or killings unprecedented by arrest, to fall under the jurisdiction of the acting State.

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[209] Golisong, p. 150, Matcher I, p. 70.
[210] *Ibid.,* para 71.
[211] *Cossey v United Kingdom*, ECtHR 27 september 1990, Appl. no. 10843/84, Series A. 184, para 35.

However, at present this is unlikely, at least in relation to politically sensible cases.

3.3.2 Conclusive remark

Three interrelated premises constitute the answer to why the Court did not interpret 'jurisdiction' in a more evolutive and effective manner. Probably, none of them alone would have sufficed to explain the Court's restrictive approach.

a) the structural character of Article 1
b) the political sensibility of the case
c) relevant rules of international law

Taken the three premises together – with emphasis put on relevant rules international law and the principles of legal certainty and rule of law - the Court in *Bankovic* was right in interpreting Article 1 as it did.

However, this conclusion does in no way mean that the Court would have been entirely wrong if *Bankovic* would have been declared admissible. The *Bankovic* case can to a certain extent be compared to the renowned *Tadic* case in the International Criminal Tribunal for Former Yugoslavia (ICTY).[212] The ICTY assessed whether there was an international armed conflict in Bosnia-Herzegovina by showing that certain of the participants in the internal conflict were acting under the control of a foreign power, in this case Yugoslavia. In the *Nicaragua* case, the ICJ established that the foreign power must exercise *effective control* over the 'rebels' (contras) in order for an international armed conflict to be at hand. However, the ICTY opted for a less restrictive criterion and departed from the case law of the ICJ. The case has been criticised for fragmenting international law, but also met with positive reactions and in any way, it has contributed to the positive development of humanitarian law.

The *Tadic* case seems to indicate that the Court *could have* (if brave enough?) elaborated on the exceptions from the territorial notion of jurisdiction. But did it want to? The *Bankovic* case was of a highly sensitive political nature, which certainly contributed to why the Court did not take the 'brave' step as did the ICTY in *Tadic*. A scenario where all air targeting decisions, in all wars over the globe, if involving soldiers of Convention States, would be subject to the human rights obligations set out in the Convention would be politically alarming.

There are other examples of cases where the Court has paid less respect to rules of international law than in the *Bankovic* case (or more correct, where the Court has been brave to develop international law, by stretching already

[212] *Prosecutor v Dusko Tadic,* International Criminal Tribunal for the Former Yugoslavia 15 July 1999, Appeals Chamber, (1999) ICTY 2, IT-94-1.

existing concepts). For example, the Court has been criticised for giving too much weight to the special character of the European Convention in the *Loizidou* and *Belilos* cases.[213] The two cases dealt with the legal effects of reservations to treaties. The Court, who accepted (or even formulated) the so-called severability doctrine,[214] has been criticised for attempting to create a *lex specialis* on the subject, for diverging from the case law of the ICJ and for contributing to the fragmentation of international law.[215]

Another highly relevant example is the fact that the Court has accepted the criterion 'authority over persons' as a criterion which creates jurisdiction. By doing that, the Court has obviously set aside the primarily territorial notion of jurisdiction in international law. This exception has developed with time and has a clear basis in international customary law.

In any way, it is not a valid legal argument to claim that just because the Court has stretched the law once it must do it a second or third time. It is up to the Court to search justifications for each and every case by weighing the Convention's special character versus international law. This time, politics had a major role to play in the Court's unwillingness to stretch already established concepts. In the case of the development of the severability doctrine, it had not. As long as the Court does not contravene international law or apply methods of interpretation in contrast to the Vienna Convention, this 'weighing' is fully allowed.

[213] *Belilos v. Switzerland*, ECtHR, 29 of April 1988, Series A no. 132.
[214] The severability doctrine renders an incompatible reservation void of legal meaning, i.e. separate invalid reservations from the treaty ratification. This method has been criticised for being in contrast to the principle of State consent.
[215] ICJ President Guillaume in his speech before the General Assembly in 2000, online available at: http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident_Guillaume_SixthCommittee_20001027.htm

4 Conclusion

4.1 Introductory remark

Having in mind the influx of reports on civilian deaths and maltreatment of prisoners by the allied forces in Iraq and Afghanistan, the subject of this thesis becomes highly relevant. Thousands of soldiers from State parties to the European Convention are present in Iraq and Afghanistan.[216] British forces effectively controlled the southern parts of Iraq only one year ago.

The scene of foreign military interventions with European involvement is not new and will certainly reoccur in the future, both in respect of peacekeeping missions, UN mandated interventions and unlawful interventions. The European Court of Human Rights is a relatively effective supervisory body within the international human rights system and it is of great importance to establish whether it may examine violations, which occur during situations of military operations abroad or not. At best, the threat of such examinations could work as a deterrent factor and diminish violations/rise vigilance on site. At worst, the Court could loose its practical effect and political support.

Apart from the cases of ongoing European military presence abroad, the question of extraterritorial application of the Convention is of interest also in relation to ad hoc operations by European State agents abroad. This is relevant not least in respect of the increasing numbers of arbitrary arrests and killings in the context of the haunt for terrorist suspects, in particular by the use of so-called targeted killings. European States are yet relatively low-profiled in this aspect, but it is still interesting to bring up this example as a hypothetical case, bearing in mind the ongoing intensification of the 'haunt' and hence, the risk for an increase and spread of unlawful methods.

This conclusion aims to set out a number of hypothetical situations rising from the conflict in Iraq and from the use of arbitrary methods of killing in the haunt for terrorists. Iraq will set example also for human rights violations by European forces in Afghanistan, or for that case; anywhere else in the world. The second hypothesis set example not only for the haunt for terrorists, but for the use of targeted killings or other arbitrarily killings under any circumstances. The Convention's applicability to the hypothetical cases will be examined below after having reviewed the answer to the question on the extraterritorial scope of the European Convention.

[216] The United Kingdom alone has sent over 8000 troops, see Wikipedia Encyclopedia (information updated as of 15 March), online available at: http://en.wikipedia.org/wiki/Coalition_of_the_willing.

4.2 The extraterritorial application of the European Convention on Human Rights: Summary

Under which circumstances can the European Convention be applied to human rights violations perpetrated abroad by agents of the High Contracting Parties?

In light of the existing Strasbourg jurisprudence relating to extraterritorial jurisdiction, it has become evident that it is the link between the acting State and the alleged victim at the time of the violation, which is determinative in order to establish a State's jurisdiction. The European Convention is applicable when the acting State exercises effective control over the territory where the alleged victim is present, or when it exercises authority over the alleged victim. In clear terms; the Convention is applicable when a State exercises either *effective control over territory* or *authority over persons*. It must however be born in mind that these cases are merely exceptions to the primarily territorial notion of jurisdiction.

A second question arises; under what circumstances does a State exercise effective control over territory or authority over persons? And, highly relevant in the debate on the extraterritorial application of the Convention: Does it matter whether the control or authority is exercised on the territory of a High Contracting Party or on the territory of a non-State party?

Drawing conclusions from the renowned *Bankovic* case, concerning the NATO air bombing of Belgrade in 1999, a three months long air bombing campaign does not amount to neither effective control over the bombed territory, nor authority over the victims of the bombing. So far, the Court has only recognised military occupation or continuous military support to separatist movements as amounting to the exercise of effective control over territory. Authority has so far meant only the exercise of *physical* authority, i.e. arrests and abductions but not aerial bombardment and has only been recognised in a very limited number of cases, most of them involving the return of the arrested complainant to the territory of the defendant State. As this criterion is in no way linked to territory, as opposed to the effective control criteria, it must be seen as a very rare exception.

A standing argument in the discussion on the extraterritorial application of the European Convention is that it can only apply extraterritorially within the *éspace juridique* of the State parties to the Convention. This argument has been put forward as a determinant reason for which the Court declared *Bankovic* inadmissible.

With the Court's reasoning in the *Issa* case, which concerned alleged violations by Turkish forces in northern Iraq, it is shown that the Convention could very well apply in respect of victims on the territory of a non-State party. Moreover, the Court's over-all reasoning in its case law

relating to extraterritorial jurisdiction does not indicate support for a legal space restraint in the application of the Convention. The determinant factor is repetitively pointed out as the relation between the alleged victim and the acting State – how much control or authority did the acting State exercise over the alleged victim or the territory where he or she was present?

A major restraint which the Court must take into account in its reasoning, is international public law. It might not elaborate the interpretation of the Convention so that it entirely set aside relevant rules of international law. This principle is set out in the Vienna Convention on the Law of Treaties.[217] The notion of jurisdiction in international law is primarily territorial. Consequently, the recognition of any extraterritorial application of the Convention is exceptional and requires special justification (international law is to a certain extent flexible and leaves room for 'special justifications'). Only a few exceptions have been justified in international law and the Court cannot create new exceptions without bringing forward further justifications – and those justifications must not overrule international law.

In light of the principle of treaty interpretation, which states that regard shall be had to the object and purpose of the treaty (the most influential principle in the case law of the Court), one could expect the Court to adopt an elaborate interpretation of the term jurisdiction. The principles of effectiveness and the principle of evolutive interpretation are much used in the Court's jurisprudence. By applying those principles in the *Bankovic* case, the Court might very well have come to the conclusion that there was justification for a broadening of the concepts of effective control and authority to include also air bombing and killings unprecedented by arrest respectively.

It would, according to the author, not have been unfeasible for the Court to establish such a far-reaching interpretation, but in light of the political sensibility of the case it is not surprising that it did not. In addition, the two principles of interpretation just mentioned are less relevant when it comes to the interpretation of structural (procedural) articles, such as Article 1, than to articles containing the substantive, actual rights. In interpreting structural articles, it is more common to adopt a textual approach of interpretation, rather than a purpose oriented.

In sum, the Court's decision in *Bankovic* can be legally motivated by reference to international public law. Unleashing bombs from an altitude of 15 000 feet does *de lege lata* not amount to neither effective control nor authority.

[217] The Vienna Convention on the Law of Treaties, Art 32.

4.3 Hypothetical cases

Since the military intervention in Iraq by the allied forces in April 2003, the Iraqi conflict has caused the death of approximately 33 000 civilians.[218] Some of them have lost their life as a lawful result of war while others have died in apparent breach of international humanitarian law. Thousands Iraqis are detained in prisons under the direction of the allied forces. The occurrence of widespread maltreatment and torture in the prisons, in clear contrast to the Geneva Convention relative to the Treatment of Prisoners of War as well as human rights treaties, has been confirmed by the involved governments.[219] It is of great interest to analyse whether the European Court of Human Rights is competent to consider a case brought by (or on behalf of) a victim allegedly killed or tortured by European soldiers in Iraq. There are many other unlawful methods of war occurring in Iraq, not least suicide bombings against civilian targets. However, this thesis concerns exclusively alleged violations by State parties to the European Convention on Human Rights.

Twenty-three European States participate or participated in the 'coalition of the willing'.[220] Can cases of alleged Convention breaches be brought against those States? It shall be reiterated that the analysis below does not aim to establish whether the States can be held responsible for their acts under the European Convention or not, but merely whether their jurisdiction can be extended to include also victims in Iraq.

For the purposes of this analysis, the operation of the allied forces can be divided into three phases 1) *aerial bombardment* (initial period of the war), 2) *occupation* (deployment of ground troops), i.e. the exercise of effective control, and 3) *post-occupation period* (continued deployment of ground troops).

1) Did any European contingent exercise effective control over Iraq, or parts of Iraq, during the initial aerial bombardment phase and hence, exercised jurisdiction over alleged victims of that bombardment? In light of the Court's decision in *Bankovic*, the answer will probably be in negative. Aerial bombardment by NATO troops over Belgrade was not considered by the Court to amount to the exercise of effective control, foremost on grounds that one cannot effectively control territory from the air. It is hence, unlikely that e.g. the UK operations of aerial bombardment in Basra in the

[218] El-Mahdi, J., "Flest terroroffer skördas i Irak", *Svenska Dagbladet,* 20 July 2005, with reference to Iraq Body Count.
[219] See *Al-Skeini* (sixth applicant), "Danish agent faces torture claims", BBC News, 2 August 2004, "UK troops beat Iraqi to death", BBC News, 28 July 2004.
[220] Albania, Armenia, Bulgaria, Azerbaijan, Czech Republic, Denmark, Estonia, Georgia, Italy, Latvia, Lithuania, Netherlands, Norway, Poland, Romania, Slovakia, The Former Yugoslav Republic of Macedonia, United Kingdom, Ukraine. Hungary, Moldova, Portugal and Spain participated but have later withdrawn. Poland has announced its withdrawal. See updated list as of 15 March online available at: http://www.globalsecurity.org/military/ops/iraq_orbat_coalition.htm.

initial phase of the war would be regarded as the exercise of effective control over territory. Lacking the criteria of effective control over territory, an alleged victim situated on that territory cannot claim to fall under the jurisdiction of the acting State and consequently, the European Convention on Human Rights is inapplicable.

The question whether a victim of the aerial bombardment can be regarded as falling under a State's jurisdiction based on that State's exercise of authority will, also in the light of *Bankovic*, most probably be answered in negative. Only cases which involve the exercise of *physical* authority, i.e. arrest, have so far been recognised in the Strasbourg jurisprudence.

2) A State's exercise of effective control over another State's territory creates jurisdiction *ipso facto*. The fact that the exercise of control occurs in the territory of Iraq – a none-party to the Convention, is, according to reasons stated above, irrelevant.

It has been established that UK exercised effective control over the southern parts of Iraq during at least a period from the 1 May 2003 until the 28 June 2004, when the UK was recognised as an occupying power.[221] Against the background of the Court's decisions in the *Loizidou, Cyprus* and *Ilascu* cases it follows that alleged violations on the parts of the territory under British effective control falls under British jurisdiction. Consequently, any individual who were killed (no matter preceded or unprecedented by arrest) or tortured or otherwise deprived his or her human rights by British forces during this period, fall under British jurisdiction and can bring cases before the European Court of Human Rights under the condition that the formal requirements are fulfilled.[222]

Due to space limits it will not be examined whether the contingents of any other European forces exercised effective control over parts of Iraq.

3) It is relevant to also ask whether UK forces, or other European forces, exercise jurisdiction over alleged victims in Iraq through their deployment of ground troops when the criteria of 'effective control' is not fulfilled, i.e. *post-occupation*.

Many civilian casualties have occurred as a result of acts by European ground troops without effective control over the specific territory where the violation occurred, having been established. Those civilians have died both as a result of close-up shooting, collateral damage and detention. Did UK forces, or forces from other European contingents, exercise authority over those victims?

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[221] *Al.Skeini*, para 11.

[222] E.g. the exhaustion of domestic remedies. This conclusion conflicts with the High Court of Justice's decision in the *Al-Skeini* case, where it was established that despite the effective control exercised by the British forces the victims were not under UK jurisdiction on grounds of the 'legal space' restraint of the Convention's applicability.

Returning to the Strasbourg jurisprudence relating to extraterritorial jurisdiction, it can be established that no cases involving non-aerial distanced killing have been subject to the Court's assessment. The only non-physical authority situation that can set example is the situation set forth in the *Bankovic* case. The Court established that the criteria of authority did not include a State's aerial bombardment of a specific building. More than that we do not know. All other case law involving a State's exercise of authority abroad deals with arrests. We can thus, come to a somewhat clear conclusion only in respect to the example of detention above.

Many Iraqis are held as prisoners in prisons directed by the United Kingdom,[223] both under lawful and unlawful conditions in light of international humanitarian and human rights law. Incidents of torture or inhuman or degrading treatment have been reported in media and confirmed by the British government. Also soldiers from other European forces have been involved in alleged cases of torture.[224] Against the background of the Strasbourg jurisprudence those cases are clear examples of a State's exercise of authority and hence, fall under the jurisdiction of the acting State.

While the example of a prisoner is a 'classical example of the exercise of authority'[225] the cases of killings in field, i.e. distance shooting, are less clear. As mentioned, Strasbourg jurisprudence gives no indications. Here, it might be useful to use some of the victims dealt with in the *Al-Skeini* case as examples.

One person was shot from ten metres distance and another in a face to face situation. It is difficult to find arguments that distinguish those cases from a case where a person is first arrested and then killed, as for example in the *Issa* case. In such a close-up shooting situation, it lies close at hand to establish that the acting soldier exercises authority over the victim. Other findings would be morally provocative. If it would be feasible from a political perspective the Court could have found justifications for declaring such a case admissible, based on arguments of authority and control.

Another of the *Al-Skeini* victims 'came under a barrage of bullets'. This example, just as cases involving victims of collateral damage, is more difficult to argue. In line with the reasoning above, it is unlikely that cases of State forces' distance killings in field might be recognised as a State's exercise of authority, most probably on grounds of lacking control. Control is a concept which is reflected in all exceptions to the primarily territorial concept of jurisdiction so far.

4) The reasoning just above is valid also for 'targeted killings' or the use of smart missiles. A US-case can set example although the United States is not a party to the Convention. In November 2002 a missile, assumingly launched from an unmanned Predator drone operated by the CIA, hit and

[223] See the *Al-Skeini* –case.
[224] E.g. Danish troops, see footnote 220 above.
[225] Greenwood, C., see footnote 144.

destroyed a jeep driving in a remote desert area in Yemen and the six men, whereof some were Al-Qaeda suspects, in the car were killed.[226]

It is difficult to consider a case where a specific weapon or method is used by a State agent to kill a specific person, not to be an act of authority over that person – this based on the high level of control exercised by the soldier behind the weapon. As said, there is nothing in the Strasbourg jurisprudence that contradicts this reasoning – the definition of authority is yet open for development as long as it remains with in the limits of international law. According to the author, and having in mind the Court's tradition of purpose-oriented interpretations, the Court *should* regard this example as falling under the jurisdiction of the acting State.

4.4 Conclusive remark

The conclusions as to the hypothetical cases above are derived from the legal criteria established through the analysis in this thesis. However, it is important to recognise that political concerns play a role even within the legal room. The boundaries of international law can be stretched (but not overridden) to a certain extent, but only if the Court and the international community have a political interest in doing so. The aim of this thesis has been to concentrate on the *legal* criteria for extraterritorial jurisdiction as set out in the Court's jurisprudence. While it is clear that the Court's decision in the *Bankovic* case, the main focus of this thesis, was results-oriented it has yet been shown that it contained a clear legal motivation. Jurisdiction is a concept with a well-established meaning in international law – a meaning that has been reiterated by the Strasbourg Court. Carefully developed exceptions have been crystallised from the primarily territorial meaning – all of them with roots in international concepts, such as the link between jurisdiction and control. To draw the exceptions as far as to include situations where the link between jurisdiction and control is lame would be a risky venture both legally and politically. However, to not regard a victim of a close-up shooting or a smart missile, as falling under the jurisdiction of the acting State on grounds of lacking physical control would be absurd having in mind the individual-oriented purpose of the Convention.

[226] Coomans, F. and Kamminga, T., "On the extraterritorial application of human rights treaties" in Coomans and Kamminga.

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