

A 'CONSTITUTION' IN SEARCH OF ITS LIMITS: THE GRADUALLY EXPANDING REACH OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS

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§ Introduction

To witness the process of European integration must be a startling experience for any foreign observer. A high degree of economic integration goes hand in hand with an incoherent foreign policy; a sophisticated system for the protection of human rights exists in the absence of a clear constitutional framework. There is no single federation-like structure, but instead several regional organisations coexist – such as the European Union (EU), the Council of Europe, the Organisation for Security and Cooperation in Europe (OSCE), the NATO and so on. Co-operation between these organisations exists, but at the same time each seems determined to defend its mandate and strengthen its own position, if necessary at the expense of others.

Against this confused background, the present contribution will concentrate on one particular instrument: the European Convention on Human Rights (ECHR). As is well-known, the ECHR was adopted in 1950 in the framework of the Council of Europe. It contains a fairly limited set of 'classic' human rights and fundamental freedoms, such as the right to life, the prohibition of torture and the right to a fair trial.¹ Its main asset is the European Court of Human Rights in Strasbourg, which is competent to rule on individual complaints and which delivers binding judgments. What started as a project between ten mainly Western European States was joined by States in Central and Eastern Europe after the fall of the Berlin Wall. The Convention now embraces 46 States such as the Russian Federation, Armenia and Azerbaijan – that is, all European States except Belarus (which does not satisfy the Council's requirements in terms of democracy and respect for the rule of law). Hence, over 800 million individuals enjoy the protection offered by the Convention, from Reykjavik to Vladivostok.

What is perhaps less well known is that the Strasbourg Court described the ECHR in 2005 as "a constitutional instrument of European public order (ordre public) for the protection of individual human beings".² The launch

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1 For general information see www.echr.coe.int. For a recent academic analysis see Van Dijk & Van Hoof et al., *Theory and Practice of the European Convention on Human Rights* (Intersentia, 2006).

2 ECtHR, 30 June 2005, *Bosphorus Airlines v. Ireland* (Appl. No. 45036/98), § 156. All ECtHR cases cited are judgments unless indicated otherwise. For the sake of convenience, only reference is

issue of the Indian Journal of Constitutional Law seems to be an excellent place to dwell on this statement: where does it come from and what does it signify? In paragraph 2 we will seek to answer that question.

The central question of this article, however, is a different one – although it is quite related to the constitutional nature of the ECHR. Does the Convention actually protect more than the 800 million individuals from Reykjavik to Vladivostok? Is it conceivable that persons in Iraq, Afghanistan, Sierra Leone and East Timor can rely on the ECHR? This question arises as a consequence of various military operations carried out by European States in recent years. Both UN led peace-keeping operations and the ‘fight against terrorism’ have brought European forces to all quarters of the world. It is clearly of great practical significance to analyse the rules of law by which the relevant forces are bound. Indeed there has been a heated debate in recent years about the question to what extent the ECHR applies to extra-territorial acts of its signatory States. The case of *Bankovic* (2001) offered an occasion for the Strasbourg Court to address this matter in considerable detail.³ Since then academic writing on this issue – which had been almost non-existent prior to *Bankovic* – has been quite prolific.⁴

In this contribution, I will try to analyse the Strasbourg case-law on this issue. Although the jurisprudence is still in a state of development,⁵ some trends may be discerned. I will argue that the Court is gradually distancing itself from *Bankovic*; that the more recent case-law suggests that the Convention does apply to extra-territorial acts of States parties, also in times of armed conflict; and that future discussions should concentrate on the question what it actually means to say that the Convention applies.

To avoid misunderstanding I should mention at the outset that I was involved in the *Bankovic* case, as legal advisor to the applicants. Since the case ended – in the applicants’ perspective at least – in a glorious defeat, I may not be well-positioned to give an objective account of the case and the

made to the application numbers of cases, and not to their official publication in *Series A* (until 1996) or the *Reports* (thereafter). All cases cited are easily accessible, in full text, at www.echr.coe.int by using the ‘HUDOC’ search engine.

3 ECtHR, 12 Dec. 2001, *Bankovic a.o. v. Belgium and 16 Other Contracting States* (Appl. no. 52207/99; adm. dec.). All decisions and judgments of the Court can be found on www.echr.coe.int.

4 See esp. F. Coomans & M. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004); D. Lorenz, *Die territoriale Anwendungsbereich der Grund- und Menschenrechte* (Berliner Wissenschafts-Verlag, 2005); M. Gondek, “Extraterritorial application of the ECHR: Territorial focus in the age of globalization?”, in *Neth. Int’l Law Rev.* vol. 52 (2005), p. 349-387; S.I. Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation* (Intersentia, 2006); L. Loucaides: “The influence of factual situations on the evolution of jurisprudence: The *Bankovic* case”, in *Eur. Human Rights Law Rev.* 2006, p. 397.

5 On 15 November 2006, the Court’s Grand Chamber heard oral argument in two highly relevant cases: *Behrami & Behrami v. France* and *Saramati v. France, Norway and Germany*.

Court's subsequent case-law. Of course I like to believe that the Court is moving away from *Bankovic*. Yet, it seems difficult to arrive at any other conclusions.

2. The European Convention legal order: a network, a family, a community, a zone?

As was mentioned above, the Strasbourg Court described the ECHR in 2005 as “a constitutional instrument of European public order”. This statement invites all sorts of questions. Does “a constitutional instrument” effectively mean “the constitution”? What is meant with “European public order”? Is that the same as a common legal order? The beginning of an answer may be found in the famous case of *Ireland v. the UK* (1978), in which the Court considered:

Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a ‘collective enforcement’.⁶

The Court did not explain what exactly is “above” this “network”. But the quote seems to echo the seminal *Van Gend & Loos* judgment of the Court of Justice of the European Communities (ECJ), delivered 15 years before:

The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is *more than an agreement which merely creates mutual obligations between the Contracting States*. This view is confirmed by the Preamble which refers not only to Governments but to Peoples. (...) The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals, but is also intended to confer upon them rights which become part of their legal heritage.⁷

A comparison of *Ireland v. UK* with *Van Gend & Loos* immediately shows the differences between Strasbourg and Luxembourg. The Strasbourg Court did *not* speak of “a new legal order”, although the precedent was there. It did *not* oblige Contracting Parties to incorporate its provisions into

⁶ ECtHR, 18 January 1978, *Ireland v. UK* (Appl. No. 5310/71), § 239, emphasis added.

⁷ ECJ, 5 February 1963, *Van Gend & Loos* (case 26/62), emphasis added.

national law.⁸ Only in 2006 – i.e. at the time that the ECHR had finally been incorporated by all Contracting States – did the Court state that the Convention “directly creates rights for private individuals within their jurisdiction”.⁹ Only in one case the Court stated that Article 10 ECHR is “directly applicable” in Greece, but this was probably a slip of the pen.¹⁰

So what is the European Convention? If it did not establish “a new legal order” in the *Van Gend & Loos* sense, then what did it create? In the case-law we do not find a straightforward answer. Instead we come across poetic expressions such as the “European family of nations”. In *Tyrer* the argument was made that local public opinion was in favour of retaining judicial corporal punishment. The Court noted that this type of punishment was not used elsewhere in Europe:

If nothing else, this casts doubt on whether the availability of this penalty is a requirement for the maintenance of law and order in a European country. The Isle of Man not only enjoys long-established and highly-developed political, social and cultural traditions but is an up-to-date society. Historically, geographically and culturally, the Island has always been included in the European family of nations and must be regarded as sharing fully that “common heritage of political traditions, ideals, freedom and the rule of law” to which the Preamble to the Convention refers.¹¹

It is great from a rhetorical point of view, but it is hard to maintain that the “European family of nations” is a clearly defined legal notion.

To make matters worse, the Court is not very consistent in its poetry. In its 1971 *Vagrancy* judgment the Court observed that scrupulous scrutiny is necessary “when the matter is one which concerns *ordre public* within the Council of Europe”¹² – without explaining what this *ordre public* is. But only a few years later the Court, referring back to the *Vagrancy* case, mentioned “the public order (*ordre public*) of the member States of the Council of Europe”.¹³ So to whom does the public order belong? To the Council of Europe, to its Member States, to the Member States collectively?

8 See, e.g., ECtHR, 27 September 1995, *McCann v. UK* (Appl. No. 18984/91), § 153.

9 ECtHR, 8 March 2006, *Blečić v. Croatia* (Appl. No. 59532/00), § 90. As an authority for this statement the Grand Chamber referred to “*inter alia*” *Ireland v. UK*, cited above, § 239, but there the Court was actually more cautious: “the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States [...]. That intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law [...]”.

10 ECtHR, 15 November 1996, *Ahmet Sadik v. Greece* (Appl. No. 18877/91), § 31.

11 ECtHR, 25 April 1978, *Tyrer v. UK* (Appl. No. 5658/72), § 38.

12 ECtHR, 18 Juni 1971, *De Wilde, Ooms & Versyp v. Belgium* (Appl. No. 2832/66), § 65.

13 ECtHR, 18 Juni 1980, *De Weer v. Belgium* (Appl. No. 6903/75), § 49.

In *Loizidou* the Court elaborated upon this theme and described the Convention as “a constitutional instrument of European public order (*ordre public*)”.¹⁴ The expression “European public order” is a clever way to avoid the difference between the *Vagrancy* formula and subsequent variations. In addition *Loizidou* was the first time that the Court referred to the Convention as a “constitutional” instrument. The same turn emerged, as we saw, in 2005. But it was, again, unclear what the Court actually meant. The fact that the *same* judgment also described the Convention as “an instrument of European public order (*ordre public*)”¹⁵ (i.e. without the adjective “constitutional”) only served to increase the confusion.

Yet another concept entered the stage in the final phase of the *Loizidou* case, when the Court gave a separate judgment on just satisfaction. The Government of Cyprus, which had intervened in the case, had asked for reimbursement of its costs. The Court dismissed that request with the following consideration:

The Court recalls the general principle that States must bear their own costs in contentious proceedings before international tribunals (...). It considers that this rule has even greater application when, in keeping with the special character of the Convention as an instrument of European public order (*ordre public*), High Contracting Parties bring cases before the Convention institutions (...). In principle, it is not appropriate, in the Court’s view, that States which act, *inter alia*, in pursuit of the interests of the Convention community as a whole, even where this coincides with their own interests, be reimbursed their costs and expenses for doing so. Accordingly the Court dismisses the Cypriot Government’s claim for costs and expenses.¹⁶

On the one hand it is interesting to note that the adjective “constitutional” was again left aside. On the other hand, a new concept was introduced: “the Convention community as a whole”. The credit for the discovery of this notion – the contents of which is yet to be revealed – goes to former Bulgarian judge Dimitar Gotchev, who mentioned it in a dissenting opinion in 1997.¹⁷ It is somewhat peculiar that, since *Loizidou*, “the

14 ECtHR, 23 March 1995, *Loizidou v. Turkey* (Preliminary Objections) (Appl. No. 15318/89), § 75. This expression was repeated by the Grand Chamber in *Bosphorus*, cited above, § 156.

15 *Loizidou*, § 93.

16 ECtHR, 28 July 1998, *Loizidou v. Turkey* (Just satisfaction) (Appl. No. 15318/89), § 48.

17 Judge Gotchev dissenting in ECtHR, 28 November 1997, *Mentes v. Turkey* (Appl. No. 23186/94): “The above considerations have gained particular importance in the light of the recent expansion of the Convention community and the resultant need to establish a relationship of cooperation between the Strasbourg Court and the courts in the Contracting States which have recently acceded to the Convention”).

Convention community” has only featured in cases involving Norway, a country which is, coincidentally, *not* an EU member.¹⁸

Evasive expressions continue to pop up. In 2003 the Court, when dealing with the death penalty, observed that “*the territories* encompassed by the member States of the Council of Europe *have become a zone* free of capital punishment”.¹⁹ This cautious language may be contrasted with the more confident assertions of other Council of Europe organs, which do not hesitate to speak of a “death penalty-free continent”.²⁰

The most recent, and most outspoken, passage to date can be found in the *Bankovic* case. This deserves special attention, because it also of key importance to the discussion on the extraterritorial reach of the ECHR. The case originated in an attack, in April 1999, on a building of *Radio Televizije Srvije (RTS)* in Belgrade, Federal Republic of Yugoslavia (FRY). The television station was hit by a cruise missile launched from a NATO forces’ aircraft in the context of ‘Operation Allied Force’. Sixteen people were killed and another sixteen were seriously injured. Five relatives of the deceased and a survivor of the bombing brought a complaint before the Strasbourg Court against the NATO member states, in so far as they were bound by the ECHR. The applicants argued that the television station had not been a legitimate target; they alleged breaches of notably Article 2 (the right to life) and Article 10 (the freedom to impart information). The respondent states primarily contended that the applicants and their deceased relatives were not, at the relevant time, within their ‘jurisdiction’ and hence did not enjoy the guarantees offered by the Convention.

As it happened the hearing in this case took place in October 2001, i.e. weeks after the terrorist attacks on the United States. It was clear at the time that military reactions, notably in Afghanistan, were bound to follow. The applicants realised the potential impact on their case: if the Court were to accept the *Bankovic* claim, then possibly the next person to lodge an

18 Judges Palm, Fuhrmann and Baka dissenting in ECtHR, 20 May 1999, *Bladet Tromsø v. Norway* (Appl. No. 21980/93) (“the Court has played an important role in laying the foundations for the principles which govern a free press within the Convention community and beyond”). And see: ECtHR, 11 February 2003, *Ringvold v. Norway* (Appl. No. 34964/97), § 38 (“Such an extensive interpretation would not be supported either by the wording of Article 6 § 2 or any common ground in the national legal systems within the Convention community. On the contrary, in a significant number of Contracting States, an acquittal does not preclude the establishment of civil liability in relation to the same facts.”). A similar passage was included in ECtHR, 11 February 2003, *Y v. Norway* (Appl. No. 56568/00), § 41.

19 ECtHR, 12 March 2003, *Öcalan v. Turkey* (Appl. No. 46221/99, Chamber judgment), § 195 (emphasis added), confirmed by the Grand Chamber in its judgment of 12 May 2005 in the same case, § 163.

20 See Recommendation 1187 (*Europe: a death penalty-free continent*) of the CoE Parliamentary Assembly, adopted on 26 May 1999. “The Council of Europe is a death penalty free area”, the CoE website asserts (<http://www.coe.int/T/E/Com/Files/Themes/Death-penalty/>, accessed 22 Sept. 2005).

application might be Osama bin-Laden. This might not be an incentive for the Court to accept *Bankovic*. In an attempt to convince the Court that it should ignore recent events, the applicants reminded the Court of the *public ordre* mission of the Convention. The Court did not agree:

In short, the Convention is a multi-lateral treaty operating (...) 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.²¹

Two conclusions may be drawn. The first time that the Court came close to circumscribing a legal order of its own, it primarily defined it by stating what it was *not*: the ECHR was not designed to be applied throughout the world. Secondly, the Court did not actually refer to the legal space of the Convention: it spoke about the legal space *of the Contracting States*.

3. The basics of extra-territoriality: Article 1 ECHR and *Loizidou*

Before we analyse *Bankovic* in greater detail, it seems useful to recapitulate a number of basic concepts. The key question in all discussions on the territorial reach of the ECHR is how one should interpret the word "jurisdiction" in Article 1 ECHR. Article 1 provides that the Contracting Parties shall secure to everyone "within their jurisdiction" the rights and freedoms defined in the Convention. Accordingly, for an individual to be able to rely on the Convention, he must demonstrate that he was "within the jurisdiction" of the State concerned at the relevant time. In the vast majority of cases, this is not even an issue: if someone complains that his trial before the Dutch courts was unfair, no-one will even think of the possibility that the applicant was not "within the jurisdiction" of the Netherlands. But the question becomes crucial when a State conducts a military operation abroad and is alleged to have violated human rights in the process. Was the alleged victim "within the jurisdiction" of the State concerned? Can he rely on the Convention?

21 ECtHR, 12 December 2001, *Bankovic a.o. v. 17 NATO Member States* (Appl. no. 52207/99, adm. dec.), § 80. It should be noted that the present author acted as legal advisor to the applicants in this case.

In the case of *Loizidou*, which we also encountered in the previous paragraph, the Strasbourg Court made clear that the notion of “jurisdiction” is not identical to the territory of a State. The facts of the case are well-known: Ms Loizidou owned land in northern Cyprus but left her property following the Turkish intervention in 1974. She brought a complaint in Strasbourg against Turkey, arguing that Turkish forces prevented her from returning to her property. Turkey rejected all responsibility for the situation. It advanced many arguments, the most relevant of which is for present purposes that the question of access to property 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.

Any complaints, Turkey argued, should be directed against the ‘Turkish Republic of Northern Cyprus’ (‘TRNC’) which was established in 1983. The Court rejected this preliminary argument as follows: [...] 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. The obligation to secure, in such an area, 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.²²

Thus the Court’s test focused on *effective control over territory*. For the Court’s assessment it was not so relevant whether the Turkish military presence on Northern Cyprus was lawful under international law or not; nor did the Court examine whether Ms Loizidou was actually prevented from returning to her property by Turkish forces or by ‘TRNC’ officials. The Court avoided difficult questions of proof by emphasising the fact that Turkey was in control anyhow.

The *Loizidou* ruling has been consistently confirmed.²³ In its *Bankovic* decision the Court summarised its own jurisprudence as follows:

²² ECtHR, 23 March 1995, *Loizidou v. Turkey (prel. obj.)* (Appl. No. 15318/89), § 62.

²³ See e.g. ECtHR (GC), 10 May 2001, *Cyprus v. Turkey* (Appl. No. 25781/94), § 77; ECtHR, 20 Feb. 2003, *Djavit An v. Cyprus* (Appl. No. 20652/92), §§ 18-23; ECtHR, 6 April 2005, *Xenides-Arestis v. Turkey* (Appl. No. 46347/99), § 22.

In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: 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.²⁴

It may be noted that the Court on this occasion silently introduced a new element: the exercise of “all or some of the public powers normally to be exercised by [the] Government” of that territory – an element that was not mentioned in *Loizidou* or in any of the cases that followed it. It is not entirely clear what the Court has in mind – some sort of surrogate “jurisdiction”? What if a Contracting Party occupies a territory and secures effective control over it, but fails to exercise normal public powers, for instance at the early stages of the occupation?

4. A closer look at the *Bankovic* decision

Even if we leave aside this particular aspect of *Loizidou*, it will be clear that this branch of case-law did not answer all questions. What about extra-territorial operations in a situation where the State concerned does not exercise prolonged “effective control” over foreign territory? Here one may think for example of ad-hoc operations on foreign territory, or of hostilities in the course of an armed conflict.

The *Bankovic* case, which was already briefly described above, seemed destined to become the landmark case for this category of cases. In order to argue that the very bombing of the RTS building had brought them “within the jurisdiction” of the NATO Member States, the applicants developed a ‘gradual’ and context-related approach to “jurisdiction”. In the context of military operations it would certainly go too far to expect the respondent States to secure all rights and freedoms included in the ECHR, the applicants argued – but at the very least one could expect these States to refrain from acts that endangered their right to life beyond the limits set by the European Convention.²⁵ It may be noted that the applicants did not express any view on the legality of ‘Operation Allied Force’ under public international law; they confined their complaint to the bombing of the RTS building. Similarly, they did not dispute that in times of war the substantive norms of the Convention may have to be adapted. Even in the absence of a formal

²⁴ *Bankovic* (*supra* note 1), § 71.

²⁵ For a more elaborate discussion of this approach, see my contribution to the Coomans/Kamminga volume mentioned in footnote 2.

derogation under Article 15 ECHR, it is quite conceivable, for instance, that the Court leaves the States a wide margin of appreciation.²⁶ But these are issues related to the merits of the complaint; the first hurdle was to pass the admissibility test.

This first hurdle was never passed, however. The Court rejected the idea of a context-related understanding of “jurisdiction”. In a lengthy admissibility decision it stated that the applicants position was “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 for the purpose of Article 1 of the Convention”. With some caution, the Court said it was “inclined to agree” with the defending Governments that the text of Article 1 does not accommodate such an approach to “jurisdiction”. But without much caution it continued: the Court is of the view that the wording of Article 1 does not provide any support for the applicants’ suggestion that the positive obligation in Article 1 to secure “the rights and freedoms defined in Section I of this Convention” can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question.²⁷

Apparently the Court favoured a ‘digital’ approach: one is either within the jurisdiction of a Contracting State (and consequently entitled to full protection of his rights and freedoms), or one is outside the jurisdiction altogether (and hence not protected at all). *Tertium non datur*.

It was on this occasion that the Court also stated, as we have seen above, that “the Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States”.²⁸ At first sight this statement gives an uneasy feeling: is the Court really saying that it is not prepared to review complaints concerning conduct which is allegedly in breach of human rights, if it takes place in non-European countries – no matter how deliberate the acts or heinous the violations? But a closer look reveals that the Court does *not* say this. The Convention was not *designed* to be applied throughout the world, but that does not mean that its application outside Europe is *excluded*.

Yet one cannot deny that the Court took a restrictive approach. A likely explanation may be found in a speech of the Court’s President, Mr Wildhaber, on the occasion of the opening of the judicial year 2002 of the European Court of Human Rights:

26 Cf. ECtHR, 26 March 1987, *Leander v. Sweden* (Series A, vol. 116), § 59; ECtHR, 26 May 1993, *Brannigan and McBride v. the UK* (Series A, vol. 258-B), § 43.

27 *Bankovic* (*supra* note 1), § 75.

28 *Id.*, § 80, emphasis in original.

Our perception of last year is coloured 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 be 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.²⁹

Referring more specifically to *Bankovic*, President Wildhaber continued:

We do have to realise that the Convention was never intended to cure all the planet's ills 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 lose sight of the practical effect that can be given to those rights.

The quotes give the impression that the Court may have been afraid, in the days immediately following '9/11', to be sidelined in the struggle against terrorism. It was only after a lapse of time that the discourse changed: by the summer of 2002 the Council of Europe had developed its official position into the view that the struggle against terrorism must be waged, but always within the bounds set by the European Convention.³⁰

5. Moving beyond *Bankovic*: *Öcalan*, *Issa* and *Ilascu*

On a number of occasions the Court reconfirmed *Bankovic*: for instance in December 2002, when deciding the cases of *Kalogeropoulou* (which concerned a number of Greek citizens who brought a claim for damages against Germany, before Greek courts, in connection with a Nazi massacre in World War II)³¹ and *Gentilhomme* (which originated in a refusal by a French State school in Algiers to continue to enrol three children).³² None of these cases, however, related to the kind of situations under review here.

4.1 *Öcalan*

The case of *Öcalan* seemed more relevant. Former PKK leader Mr *Öcalan*'s complained, *inter alia*, that his arrest in Kenya by Turkish security forces was in breach of Articles 3 and 5 of the Convention. The key question

²⁹ Speech of 31 Jan. 2002.

³⁰ See esp. the *Guidelines on Human Rights and the Fight against Terrorism*, adopted by the Committee of Ministers in July 2002.

³¹ ECtHR, 12 Dec. 2002, *Kalogeropoulou a.o. v. Greece and Germany* (Appl. No. 59021/00; adm. dec.).

³² ECtHR, 14 May 2002, *Gentilhomme a.o. v. France* (Appl. no. 48205/99 a.o.).

in this respect was of course whether Mr Öcalan was “within the jurisdiction” of Turkey at the moment of his arrest. In a somewhat ambiguous passage a 7-judge Chamber of the Court distinguished the case from *Bankovic*.

In the instant case, the applicant was arrested by members of the Turkish security forces inside an aircraft in the international zone of Nairobi Airport. *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.* The Court considers that the circumstances of the present case are *distinguishable from* those in the aforementioned *Bankovic 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 (...)*.³³

The Court then proceeded to review the circumstances of Mr Öcalan’s arrest under Articles 3 and 5 ECHR. But the passage quoted here begs the question: does it matter, for the purposes of Article 1 of the Convention, that Mr Öcalan was forced to return to Turkey following his arrest? Two opposite answers seem possible:

- (a) No, the first sentence suggests: “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”; or
- (b) Yes, the second part argues: the present case is distinguishable from *Bankovic* because Mr Öcalan “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”.

The practical importance of this ambiguity may be clear if one thinks of the hypothetical case of a ‘hit and run’ operation: forces penetrate into the territory of another country, seize a person and kill him on the spot – i.e. without bringing him over to their own territory. Would the Convention apply to the event? Yes, if we follow the first sentence. Or no, if the second sentence is relied upon.

Unfortunately the issue was hardly clarified by the Grand Chamber, which delivered judgment in *Öcalan* case in 2005: directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the “jurisdiction” of that

33 ECtHR, 12 March 2003, *Öcalan v. Turkey* (Appl. No. 46221/99), § 93 (emphasis added).

State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey (see, in this respect, ... by converse implication, the *Banković and Others v. Belgium and 16 Other Contracting States* decision).³⁴

Again the two consecutive sentences seem to radiate a very different message. But one thing is clear: the Convention may not have been *designed* to be applied throughout the world, as the Court stated in *Banković*, but *Öcalan* demonstrated that its application outside Europe is certainly not *excluded*. After *Öcalan* it is safe to say that there are at least two situations where the forces of a Contracting State continue to be bound by the Convention, even when operating abroad: (a) the *Loizidou* situation, where forces exercise “effective control” of an area, and (b) the *Öcalan* scenario where forces arrest a person. In the latter case it may be of relevance whether the person was subsequently forced to return to the territory of the State concerned.

4.2 *Issa*

Meanwhile the Court had delivered judgment in the case of *Issa*. The case is about the conduct of – again – Turkish forces, which this time had crossed into northern Iraq during an operation that lasted for approximately four weeks. The Turkish forces had allegedly arrested and killed a number of Iraqi shepherds. The Turkish government confirmed that an operation of Turkish military forces had taken place in northern Iraq at the relevant time, but denied that Turkish soldiers had been present in the area indicated by the applicants. In the end it was indeed the element of proof that decided the case: the Court did not find it established beyond reasonable doubt that Turkish forces were actually accountable for the death of the applicants’ relatives.

Yet *Issa* contains a very intriguing passage. After reconfirming its *Loizidou* judgment (which was probably not applicable to the case at hand, as the element of effective overall control of the region was arguably lacking), the Court continued: a State may also be held accountable for violation 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 (see, *mutatis mutandis*, *M. v. Denmark*, application no. 17392/90, Commission decision of 14 October 1992, DR 73, p. 193; *Illich Sanchez Ramirez v. France*, application no. 28780/95, Commission decision of 24 June

34 ECtHR (GC), 12 May 2005, *Öcalan v. Turkey* (Appl. No. 46221/99), § 91.

1996, DR 86, p. 155; *Coard et al. v. the United States*, the Inter-American Commission of Human Rights decision of 29 September 1999, Report No. 109/99, case No. 10.951, §§ 37, 39, 41 and 43; and the views adopted by the Human Rights Committee on 29 July 1981 in the cases of *Lopez Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay*, nos. 52/1979 and 56/1979, at §§ 12.3 and 10.3 respectively). 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 (*ibid.*).³⁵

This passage too is not devoid of ambiguity – when is one “under a State’s authority and control”? But it is the last sentence that is most striking: in passing the Court refers to “the fact” that Article 1 ECHR 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. How should we reconcile this with the finding in *Bankovic*? Assuming that it is not permissible to bomb a television station in the State’s own territory, why did the Court refuse to review the attack on the RTS station?

What is also interesting about the passage is Court’s extensive reference to earlier case-law and the jurisprudence of other international human rights bodies. Each of these authorities had been cited by the applicants in *Bankovic* in support of their argument, but on that occasion the Court did not find it necessary to mention them expressly.³⁶

A last remark about *Issa* relates to the consequences of the Court’s new position (if that is what it is). If the Court still rejects the ‘gradual’ and context-related approach to “jurisdiction” as advocated by the applicants in *Bankovic*, it seem unavoidable that the European Convention applies across the board as soon as an individual finds himself “under” a Contracting State’s “authority and control through its agents”. One may wonder about the consequences: is the Court really saying that the Turkish forces operating at the time in northern Iraq – under difficult circumstances, one may presume – were bound to secure the entire set of rights and freedoms (including the right to a fair trial, the right to marry, positive obligations and so) to those who found themselves under their authority?

³⁵ ECtHR, 16 November 2004, *Issa v. Turkey* (Appl. No. 31821/96), § 71.

³⁶ See § 26 of *Bankovic*: “the Human Rights Committee has sought to develop, in certain limited contexts, the Contracting States’ responsibility for the acts of their agents abroad”, as well as § 48 “Citing one case of the Human Rights Committee...”.

4.3 *Ila^ocu* and *Treska*

Finally the case of *Ila^ocu* merits discussion here. In this case four Moldovan citizens brought a complaint about their treatment in the 'Moldovan Republic of Transdnistria' ('MRT'), a region of Moldova that is led by separatists. They claimed that they had been arrested and convicted and that their property had been confiscated, because of their political activities in support of unification of Moldova and Romania. The applicants complained that they had not had a fair trial and that they were subjected to inhuman prison conditions.

The applicants considered that Moldova was responsible for the alleged violations since the Moldovan authorities had not taken adequate measures to put a stop to them. In their submission, the Russian Federation shared that responsibility as the territory of Transdnistria was *de facto* under Russia's control owing to the stationing of its troops and military equipment there and the support the Russian Federation gave to the 'MRT'.

In a lengthy judgment, delivered in 2004, the Court's Grand Chamber essentially accepted these arguments. Both Moldova and the Russian Federation were found responsible, albeit it to different degrees, for a number of violations of the European Convention. With respect to Moldova, the Court observed: even in the absence of effective control over the Transdnistrian 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.³⁷

Given our present topic – the applicability of the Convention to *extraterritorial* acts – it is highly interesting to note that the Court repeated this passage in its 2006 *Treska* decision with a small but significant change:

Even in the absence of effective control of a territory outside its borders, the State 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 (see *Ila^ocu and Others v. Moldova and Russia* [GC], no. 48787/99, § 331, ECHR 2004-VII).³⁸

The obligation which the Court in *Ila^ocu* had accepted to exist as regards a territory *within* a State's border, was thus exported to a territory *outside* its borders!

37 ECtHR (GC), 8 July 2004, *Ila^ocu and Others v. Moldova and Russia* (Appl. No. 48787/99), § 331.

38 ECtHR, 29 June 2006, *Treska v. Albania* (26937/04, adm. dec.), p. 13.

5. Reading between the lines: *Saddam Hussein*

If cases like *Issa* and *Ila^ocu/Treska* suggest that the Court is moving away from its *Bankovic* decision, some indirect support for that theory was offered in the spring of 2006. This we owe to no-one less than Saddam Hussein, the former dictator of Iraq. After his arrest by American troops, in December 2003, Mr Hussein brought a complaint against 21 States Parties to the European Convention, challenging his arrest, detention, handover to the Iraqi administration and the trial to which he was subjected.

As a preliminary point Mr Hussein argued that he fell within the jurisdiction of the 21 States: since the ‘coalition States’ were the occupying powers, they were and continued to be responsible for respecting human rights in Iraq. The case was rejected on this very point: the Court considered that these “jurisdiction arguments” were not substantiated. The Court noted that Mr Hussein did not address each respondent State’s role and responsibilities or the division of labour/power between them and the US. Nor did he indicate which respondent State (other than the US) had any influence or involvement in his impugned arrest, detention and handover.

What makes the case interesting for present purposes, is the way in which the *Bankovic* decision was dealt with. When summarising Mr Hussein’s argument, the Court included the following:

Bankoviæ and Others v. Belgium and 16 Other Contracting States ((dec.) [GC], no. 52207/99) was, he argued, incorrect and had to be reconsidered.

Now that in itself is not very persuasive: Mr Hussein has never enjoyed a reputation as a human rights expert. But it is revealing to see that the Court, after having mentioned this statement, does not bother to reconfirm of its *Bankovic* decision. Apparently the Court preferred to refer to its *Issa* and *Öcalan* judgments, which, as we have seen, have a very different emphasis:

The Court considers that he [i.e. Mr Hussein] has not demonstrated that those States had jurisdiction on the basis of their control of the territory where the alleged violations took place (*Loizidou v. Turkey*, judgment of 18 December 1996, *Reports of decision and Judgments* 1996 VI and *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001). Even if he could have fallen within a State’s jurisdiction because of his detention by it, he has not shown that any one of the respondent States had any responsibility for, or any involvement or role in, his arrest and subsequent detention (*Issa and Others v. Turkey*, no. 31821/96, §§ 71-82, 16 November 2004 and *Öcalan v. Turkey* [GC], no. 46221/99, § 91, ECHR 2005 ...).

6. Conclusions

A number of conclusions may be drawn from the foregoing. There are contradictory trends in the case-law of the European Court of Human Rights. On the one hand the Court is well-known for its progressive interpretation of the Convention and its efforts to ensure that rights are practical and effective. The Court's contribution to the development of international human rights law and to the strengthening of the rule of law in Europe cannot be overestimated. On the other hand the Court has left a degree of uncertainty as to what it actually seeks to achieve. The question whether the Convention has established a 'legal order' of its own is difficult to answer as the case-law is evasive and inconsistent. But at any rate it is clear that the Court never developed a consistent and purposive doctrine in the way that the ECJ did.

As to the extraterritorial reach of the ECHR, it would seem that the Strasbourg Court is distancing itself from *Bankovic*. In that case the Court found that the applicants, despite their having been bombed by Contracting States, could not rely on the Convention: they had never been "within the jurisdiction" of the States concerned. Behind that technical argument there was a clear reluctance to be involved in cases about extraterritorial operations: "The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States".

In hindsight, it would seem that *Bankovic* was an immediate reaction to '9/11': the Court heard the case in October 2001 and defined its position at a time when the 'war on terrorism' was about to start. It is conceivable that the judges did not want to be drawn into that context.

But it did not take long before the attitude changed. *Öcalan* (2004-2005) shows unambiguously that the Convention may indeed apply "throughout" the world. There are at least two situations where the forces of a Contracting State continue to be bound by the Convention, even when operating abroad: (a) the *Loizidou* situation, where forces exercise "effective control" of an area, and (b) the *Öcalan* scenario where forces arrest a person. In the latter case it may be of relevance whether the person was subsequently forced to return to the territory of the State concerned.

If *Öcalan* was fairly specific, the cases of *Issa* (2004) and *Ila'cu* (2004)/*Treska* (2006) contain more general language. In *Issa* the Court referred to "the fact" that Article 1 ECHR 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; in *Ila'cu* and *Treska* reference was made of a positive obligation to take the diplomatic, economic, judicial or other measures that it is in a State's power to take to secure the

rights guaranteed by the Convention. Both statements are evidently hard to reconcile with the outcome of *Bankovic*.

The Court did not say with so many words that *Bankovic* needs to be reconsidered – it left it to Saddam Hussein to say that – but cases like *Issa* and *Treska* clearly suggest that *Bankovic* would be decided differently when reviewed by the Court today.

This brings us to a final observation. It is one thing to say that the Convention applies to overseas operations – but it is quite another thing to define what this actually means. It is high time that the debate focuses on the latter question. The present state of the case-law clearly does not offer a sensible answer. Remember that the Court in *Bankovic* rejected the idea of a gradual, context related approach: ... Article 1 does *not* provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure "the rights and freedoms defined in Section I of this Convention" can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question

If one does not "divide and tailor" the obligations under the Convention when States are conducting military operations abroad, how can one comply with the very sensible proposition that President Wildhaber made early 2002: "When applying the Convention we must not lose sight of the practical effect that can be given to those rights"?