The Role of the European Court of Human Rights in Times of Conflict

By Stefan Kirchner[*]

A. Introduction

Unlike e.g. the Inter-American system, the ECHR[1]-system was not designed to deal with large numbers of Human Rights violations but rather with individual cases. But now that the first cases relating to the conflicts in Kurdistan and Chechnya are being dealt with by the ECtHR,[2] it has been estimated that up to 100,000 new cases could reach Strasbourg every year. Therefore the question whether or not the ECtHR has jurisdiction in cases arising out of armed combat needs to be addressed. Not only do armed conflicts at the outer regions of the CoE-Area contribute to the problem, a factor which holds the potential for more floods of complaints in the future are military activities of parties to the Convention outside their own borders, such as was already the case in the 1999 Kosova War or has been recently when *i. a.* British, Danish and Polish forces were engaged in operations against Iraq.[3] The decision whether or not the Court will have jurisdiction in such cases will to a large extend depend on the question, whether or not Art. 1 ECHR is applicable, *i. e.* whether or not the acts which are claimed to constitute a violation of the Convention are included in the scope of the term "jurisdiction" as used in Art. 1 ECHR. An other factor which will often be problematic will be the lack or collapse of the local court system or problems with access to justice for members of certain groups involved in the situation. Both aspects can impose serious hurdles for the applicant with regard to the requirement that all local remedies need to be exhausted in order for an application be admissible in Strasbourg.

In this article, we will examine the Court's[4] response to these questions in the conflicts in Northern Ireland, Cyprus, Kosova and most recently in Chechnya. Based on the examination of these four cases, we will try to establish - provided that the Court's decisions will be coherent enough to allow for it - a general set of indicators to find out under which circumstances the Court will assume that it has jurisdiction in a case arising out of a situation of armed conflict.

B. *Cyprus v. Turkey*[5]

I. Facts of the Case

On 22 November 1994, the Republic of Cyprus brought a case against Turkey under Art. 24 of the Convention with regard to Human Rights violations during the ongoing Turkish occupation of Northern Cyprus since the invasion of 20 July 1974. In the application, which should turn out to lead not only to the first inter-state case after the 1998 reform but also to the

---

[*] Diploma in International Law (with distinction) (University of Helsinki), Diploma in International Humanitarian Law (ICRC Geneva - DRK Bonn - IFHV Bochum), Justus-Liebig-University, Giessen, Germany.

[1] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 2; 213 UNTS 222, hereinafter: ECHR or the Convention.

[2] Hereinafter: ECtHR or the Court.

[3] Spain, although member of the "coalition of the willing" send troops into Iraq only after the major hostilities were over. Prime Minister-elect Zapatero announced after his election victory in the wake of the 11 March 2004 terrorist attacks in Madrid that Spain would withdraw its troops by 1 July 2004 unless a UN mandate would have been put in place by then.

[4] In one case the then Commission's response.

[5] On the Court's judgment on the merits, albeit primarily on the issue of disappearances, see also Hoffmeister, *Cyprus v. Turkey*, in: AJIL 2002, pp. et seq.

longest ECtHR judgment ever,[6] Cyprus claimed that Turkey was responsible for *i. a.* the unlawful detention of at least 1619 citizens of Cyprus of Greek origin since 1974,[7] not allowing more than 170,000 Greek Cypriots to return to their homes in Northern Cyprus,[8] a campaign of ethnic cleansing aimed at forcing Cypriot citizens to leave the occupied part of Cyprus,[9] the separation of families[10] and the illegal expropriation of said citizens of Cyprus[11] in order to allow for further settlements on Cyprus by citizens of Turkey which are as well planned and organized by the respondent government.[12] Cyprus claimed that Turkey thereby violated Articles 3, 5, 6, 8 and 9 of the Convention and Art. 2 of the First Protocol.

II. The scope of Art. 1 ECHR

Turkey questioned any responsibility of the claimed violations since there is a so-called government installed in Northern Cyprus claiming to exercise control over what is referred to by Turkey as the "Turkish Republic of Northern Cyprus".[13] Turkey is the only nation to recognize this self-proclaimed state. Although recognition has long been considered to be a purely political act with no legal value,[14] the fact that the state which "helped" found the state in question is the only one to recognize[15] will allow for doubts regarding the statehood, especially in since the UN Security Council has recommended not to recognize the "TRNC".[16] In so far, the case of the "TRNC" is very similar to the case of the TBVC-"states"[17] which no longer, not even by South African scholars,[18] are considered to have been states at any time in the past. Therefore the question put before the Commission was whether or not acts committed by organs of *Denktash*-Regime in the so called "TRNC" fall within the jurisdiction of Turkey and therefore form the basis of Turkish responsibility for any violation. Cyprus claims that the administration in Northern Cyprus in completely under the control of Turkey, citing the presence of more than 300,000 Turkish troops and the fact that 90 % of the occupied area are so called "military zones" under the direct control of said Turkish forces as evidence for the degree of dependence of the local administration in the so called "TRNC" from Turkey.[19] Moreover are Turkish forces engaged in the building of fortifications and the laying of mines

---

[6] Including four partly dissenting opinions by Judges Palm (joined by Judges Jungwiert, Levits, Pantîru and Kovler and the Judge ad hoc for Cyprus, Marcus-Helmons), Costa as well as Judges ad hoc Fuad (Turkey) and Marcus-Helmonds (Cyprus).
[7] Commission, *Cyprus v. Turkey*, App. No. 25781/94, Decision on Admissibility, 28 June 1996.
[8] *ibid.*
[9] *ibid.*
[10] *ibid.*
[11] *ibid.*
[12] *ibid.*
[13] Formerly a.k.a. the "Turkish Federated State of Cyprus" (13 February 1974 - 18 November 1983). Hereinafter: "TRNC".
[14] Cassese, *International Law* (2001), p. 48.
[15] Diplomatic relations between the respondent government and the so called TRNC were established on 17 April 1984, thus repeating the pattern used by South Africa in relation to Transkei, Bophuthatswana, Venda and Ciskei.
[16] UN Security Council Resolution 541, 18 November 1983, adopted three days after the "TRNC" declared its "independence".
[17] Transkei, Bophuthatswana, Venda and Ciskei. - KwaZulu, Lebowa, Gazankulu, Qwaqwa and KaNgwane refused the "offer" by the government of South Africa to gain "independence" while efforts to promote the independence of KwaNdebele were ongoing in the late 1980s when the Apartheid system effectively ended. The 2 February 1990 speech in which *de Klerk* announced the end of apartheid implied an end of the Bantustan strategy as well, cf. Dugard, *International Law: A South African Perspective*, 2nd ed. (2000), p. 454.
[18] cf. Dugard, *ibid.*, pp. 454 et seq., Dugard, Failure of the TBVC States, 1992 SAJHR Issue No. V, editorial comment; GUR Corp v. Trust Bank of Africa Ltd. (Government of the Republic of Ciskei, third Party) [1986] 2 All ER 449 (CA) at p. 465 (*per* Sir John Donaldson MR).
[19] Commission, Decision on Admissibility, *Cyprus v. Turkey*, App. No. 25781/94, 28 June 1996.

in Cyprus.[20] Furthermore did the Republic of Turkey establish special bodies, including a ministry for Cypriot Affairs, responsible for the relations with Cyprus which in fact are coordinating the activities of the so called Turkish Cypriot administration in the occupied part of Cyprus: The so called Turkish Ambassador to the "TRNC" is present at Cabinet meetings of the latter's "government" and is instructing the "TRNC government". The occupied area is therefore ruled by a committee which is meeting in Nikosia/Lefkosia once a week, consisting of the commander of the occupation forces of the Republic of Turkey , the commander of the Turkish Cypriot Security Forces, the "ambassador" of Turkey to the "TRNC" and Mr. *Denktash*.

Turkey claimed that the "TRNC" was a state in its own right for the actions of which Turkey could not be held responsible and that responsibility for acts which occurred outside the territory of a party to the Convention can only be based on a special declaration according to Art. 63 of the Convention.[21] The Commission however followed the approach taken by the Court in the 23 March 1995 decision in *Loizidou v. Turkey (Preliminary Objections),*[22] thus examining only, whether or not the acts in question *can* fall within the jurisdiction of the respondent government.[23] Recalling that although Art. 1 ECHR limits the applicability of the Convention,[24] the concept of jurisdiction under Art. 1 of the Convention is not limited to the territory of the states parties to the Convention but that "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 are, the rights and freedoms set out in the Convention derives from the fact of such armed control whether be exercised directly, though its armed forces, or through a subordinate local administration."[25] The degree of involvement by Turkey in the actions taken by the regime in the occupied territory led the commission to conclude that Cyprus has sufficiently demonstrated the possibility of a direct of indirect involvement of Turkish authorities in the alleged violations of the Convention in the occupied areas of Cyprus.[26] The Commission therefore concluded that the case was not inadmissible on the grounds that any act in question was *prima facie* incapable of falling within Turkish jurisdiction within the meaning of Art. 1 ECHR.[27]

III. The exhaustion of domestic remedies[28]

Furthermore will the exhaustion of domestic remedies, which is required under Art. 35 (1) ECHR, often constitute a problem for the applicant, be it that domestic remedies are inviolable for certain persons or unavailable in general due to a breakdown of the civilian administration. Remedies which do not offer a possibility of redressing the alleged injury or damage, whatsoever, are not regarded as effective and therefore need not be exhausted prior to the

---

[20] *ibid.*
[21] *ibid.*; cf. also the 12 March 1990 Decision regarding App. No. 16137 / 90, D.R. 65, p. 630.
[22] ECtHR, *Loizidou v. Turkey*, App. No. 25781/94, Ser. A, No. 310.
[23] ibid., p. 23, § 60; Commission, *Cyprus v. Turkey*, Decision on Admissibility, App. No. 25781/94, 28 June 1996.
[24] Commission, *Cyprus v. Turkey*, Decision on Admissibility, App. No. 25781/94, 28 June 1996.
[25] ECtHR, *Loizidou v. Turkey*, Judgment, Ser. A, No. 310, p. 24, § 62; Commission, *Cyprus v. Turkey*, Decision on Admissibility, App. No. 25781/94, 28 June 1996.
[26] Commission, *Cyprus v. Turkey*, Decision on Admissibility, App. No. 25781/94, 28 June 1996.
[27] In its judgment, the Court found Turkey to be responsible for the human rights violations in Northern Cyprus, why appears to weaken the "TRNC's" claim to statehood, cf. Hoffmeister, *Cyprus v. Turkey*, in: AJIL 2002, pp. et seq. 445 at p. 450.
[28] On the recent positive developments in the judicial system of the so called "TRNC" and "TRNC" Supreme Court decisions in which reference was made to Strasbourg case law cf. Hoffmeister, *Cyprus v. Turkey*, in: AJIL 2002, pp. 445 et seq., at p. 452.

communication of an application to Strasbourg.[29] An other example of a remedy which need not be exhausted is given in the Commission's decision in the case of *Cyprus v. Turkey*:[30] In cases in which it is the objective of the application to determine whether or not a legislative measure or an administrative practice in compatible with the Convention, domestic remedies need not be exhausted unless specific and effective remedies against legislation exist.[31] In *Cyprus v. Turkey*, the question specifically arises with regard to the property rights of the Greek Cypriots. Since they were, until 2003,[32] not allowed to enter the occupied area they were unable to bring a claim before the Courts of the "TRNC".[33] Furthermore were the expropriations based on the "TRNC Constitution" itself.[34] Therefore the Commission held that the local remedies available to the citizens of Cyprus were by no means effective and therefore did not need to be exhausted.

IV. Conclusion

With regard to the question of the scope of Art. 1 of the Convention, it was sufficient for the Commission that no act in question was *prima facie* incapable of falling within Turkish jurisdiction within the meaning of Art. 1 ECHR. The term jurisdiction itself was interpreted as to include areas under occupation, in which a party to the Convention exercises power, either directly of indirectly through a "subordinate local administration".[35] The question of local remedies is closely related with the issue of jurisdiction according to Art. 1 ECHR, so that the Commission decided that it should be considered as well in the merits stage of the proceedings.[36]

C. Chechnya

In late 2002, the Court decided on the admissibility of the first applications relating to the ongoing conflict in Chechnya. We will focus on three cases with a total of six applicants from Chechnya.

I. Facts of the cases before the Court

The case of *Zara Adamova Isayeva v. Russia*,[37] relates to the 4 February 2000 Russian bombardment of Katyr-Yurt after Chechen rebels had entered the village earlier in the day. On this day, Katyr-Yurt was the temporary home to some 25,000 people, including numerous displaced persons from all over Chechnya.[38] Civilians who attempted to leave Katyr-Yurt by car were targeted by Russian Air Force. On one occasion a mini-van carrying eight residents of Katyr-Yurt, who attempted to flee the scene was hit by a missile from a Russian fighter plane, killing three and wounding two others.[39] Among those killed where the Mrs. *Isayeva*'s son and niece.

---

[29] *ibid.*
[30] *ibid.*
[31] *ibid.*
[32] In April 2003, some "border"-checkpoints were opened temporarily to allow for day-trips, causing a flood of Cypriot citizens to enter. Within a week, 10 % of the population of the free part of Cyprus had visited the occupied part of the island. In late April Turkey allowed citizens of Cyprus to visit the occupied area for up three days.
[33] Commission, Decision regarding App. No. 8007/77, D. R. 13, p. 152, §§ 36 - 37.
[34] cf. Commission, *Cyprus v. Turkey*, Decision on Admissibility, App. No. 25781/94, 28 June 1996.
[35] Court, *Loizidou v. Turkey* (Preliminary Objections), Judgment, p. 24, § 62.
[36] This approach has been used before by the Court in similar cases, cf. *Ilascu*.
[37] App. No. 5795/00
[38] ECtHR, *Isayeva v. Russia*, App. No. 57950/00, Decision, 19 December 2002.
[39] *ibid.*

In the case of *Kashiyev and Akayeva v. Russia*,[40] several relatives of Mr. Kashiyev, an Ingush living in Chechnya, and Mrs. Akayeva were tortured, mutilated and killed by Russian forces in Grosny. Attempts to launch an investigation into the murders ended when the military prosecutor in charge dropped the case after a *prokurorskaia proverka* (review by the prosecutor).[41] Attempts to bring the case before the courts if Chechnya and Ingushetia so far have not proven successful. The Supreme Court of Ingushetia concluded *i. a.* that Mrs. Akayeva had failed to explain the reasons for which she brought the case before the courts and remitted the case back to the Town Court in Malgobek.

In the case of *Medka Chuchuyevna Isayeva, Zina Abdulayenva Yusupova and Libkan Bazayava v. Russia*,[42] the applicants' complaint relates to the widely publicized bombing of a 12 km long convoy of refugees at a roadblock at the border between Chechnya and Ingushetia, by Russian fighter planes between the villages of Shami-Yurt and Achkhoy-Martan around noon on 29 October 1999. During a subsequent investigation only few persons involved were asked to give evidence and the investigation was closed soon thereafter due to an alleged lack of evidence cited by the *voennaia prokuratura Severo-Kvkazckogo voennogo okruga*, the Russian military prosecutor for the Northern Caucasus military circuit, military unit No. 20102.

II. Jurisdiction of the Russian Federation

The question whether or not the conflict in Chechnya was within the scope of Art. 1 ECHR was not raised by the respondent in any of the cases since Russia considers Chechnya to be part of the Russian Federation.

III. Exhaustion of domestic remedies

Regarding the exhaustion of domestic remedies the Court came to the conclusion that it did not have sufficient information to make a ruling and since this question is liked closely to the merits of the case, the question will be dealt with in the merits stage of the proceedings.[43]

IV. Conclusion

Therefore we can conclude that the fact that in the fog of war not all facts can be established beyond doubt will not be held against the applicant when the Court decides on the admissibility of a case. In case of doubt with regard to the exhaustion of domestic remedies, the Court will give the applicant the benefit of the doubt and join the respondent's objection to the merits, thereby getting a chance to acquire additional information to make a well-informed decision.

D. Northern Ireland[44]

I. Facts of the Case

---

[40] App. No. 57942/00.
[41] Court, *Khashiyev and Akayeva v. Russia*, App. No. 57942/00.
[42] App. No. 57947 / 00.
[43] Court, *Isayeva v. Russia*, Decision, App. No. 57950/00, 19 December 2002.
[44] *Gerard Donnelly, Gerard Bradley, Edward Duffy, John Carlin, Francis McBride, Anthony Kelly and Thomas Kearns v. the United Kingdom*, App. No. 5577/72, 5578/72, 5579/72, 5580/72, 5581/72, 5582/72, 5583/73, hereinafter: *G. D. et al. v. the United Kingdom*.

The seven applicants, one of them a minor age seventeen, were arrested in Northern Ireland by the R.U.C. and systematically tortured during the interrogation process. The applicants asked the Commission to determine whether or not the specific acts in the case in question as well as the underlying administrative practice of "in depth interrogation" employed by the security forces of the UK in Northern Ireland were compatible with the Convention.

II. Art. 1 of the Convention

Since the respondent considers Northern Ireland to be part of the United Kingdom, an objection that the acts in question did not fall within the jurisdiction of the U.K. was not raised.

III. Exhaustion of domestic remedies

Like in the Cypriot Case, the fact that the actions which are claimed to constitute a violation of the Convention were lawful under the legal system in force for the territory in question came up in the case of *G. D. et al. v. The United Kingdom*, in which the applicants *i. a.* sought a decision by the Court on the abstract compatibility of a domestic administrative practice with the Convention. In earlier decisions the Commission had decided that in cases in which the applicant in effect asks for a decision on the compatibility of an administrative practice with a norm of the Convention, the requirement that all local remedies are exhausted does not apply,[45] since in case there is indeed a practice of non-observance of certain provisions of the convention, the remedies theoretically available will necessarily also become unavailable for the victim of the violation.[46]

E. Kosova

I. Facts of the case

The applicants in *Bankovic*,[47] on behalf of deceased relatives and / or themselves brought before the Court a case relating to the NATO Operation *Allied Force* against Serbia, specifically to the bombing of the RTS (*Radio Televizije Srbije*) Bldg. in Takovska Street, Belgrade, on 23 April 1999. The Court took the opportunity to finally examine the scope of Art. 1 ECHR more closely.

II. The scope of Art. 1 ECHR

1. Submissions by the applicants and respondents

The applicants submitted that the actions by the respondent states, *i. e.* the bombing of the RTS Bldg. in Belgrade, brought them and their deceased relatives within the jurisdiction of the respondent states.[48] Although the travaux préparatoires of Art. 1 ECHR show that the term "within their jurisdiction" was meant to be broader than "persons residing within their territories" and that the term in Art. 1 ECHR replaced the latter expression,[49] the respondent governments, different from the *Issa*, *Öcalan* and *Xhavara* cases, disputed the admissibility of the case on two grounds: Firstly, the respondents maintain that the application is incompatible

[45] cf. the Commission's decisions on admissibility in the *First Cyprus Case*, Yearb'k Vol. 2, pp. 182 et seq. at p. 184; the *First Greek Case*, Yearb'k Vol. 13, pp. 122 et seq., at p. 132 et seq.; the *Northern Ireland inter-state Case*, Collection of Decisions, Vol. 41, pp. 3 et seq. at pp. 86 et seq.
[46] Commission, *G. D. et al. v. the United Kingdom*, App. No. 5577/72, 5583/72, Decision, 5 April 1973.
[47] On the case cf. Rüth / Trilsch, *Bankovic v. Belgium*, AJIL 2003, pp. 168 *et seq.*
[48] cf. Grand Chamber, *Bankovic et al. v. Belgium et al.*, App. No. 52207 / 99, Decision, 12 December 2001, § 31.
[49] Collected Edition of the travaux préparatoires of the European Convention on Human Rights, Vol. III, p. 260.

rationae personae with the provisions of the Convention since the applicants did not fall within the jurisdiction of one of the respondent states within the meaning of Art. 1 ECHR. Secondly, according to the respondents, claim that in accordance with the *Monetary Gold* principle of the ICJ, the Court cannot decide on the merits of the case, as it would be determining the rights and obligations of the U.S., Canada and NATO, none of whom are parties to the Convention, nor to the case at hand.[50] The French government furthermore attempted top avoid state responsibility by bringing forward an interesting concept of responsibility of international organizations,[51] thus attempting to create a cover behind which the states participating in armed combat could hide. International law, though, does not recognize such a cover but leaves the responsibility with the individual states for the actions take by their respective forces.

2. Assessment by the Court

More important nevertheless is the meaning of the term "jurisdiction" in Art. 1 of the Convention. The Court noted that the real connection between the applicants and the respondents was the impugned act which had effects outside the territory of the respondent states[52] and continues by examining the question whether the applicants and their deceased relatives were, as a result of that act, capable of falling within the jurisdiction of the respondent states.[53]

a) The applicable rules of interpretation

The Court stated that the Convention, although of an earlier date, must be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties, which codified the earlier customary law.[54] Art. 31 (1) VCLT which requires that a rule is applied with its ordinary meaning in the context and the light of the object and purpose of the Convention.[55] The Court moreover took into consideration the subsequent practice in the application of the treaty,[56] thereby effectively binding itself to a rule of *stare decisis*. Furthermore did the Court take into account general rules of international law,[57] while keeping in mind the special nature of the Convention[58] as well as the travaux préparatoires.[59]

b) The meaning of the words "within their jurisdiction"

While international law does not exclude a state's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction, such as nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality, are as a general rule, defined and limited by the sovereign territorial rights of the other relevant state.[60] In general, a state

---

[50] cf. I.C.J., *Monetary Gold removed from Rome in 1943*, I.C.J. Reports 1954, p. 19; I.C.J., *East Timor*, I.C.J. Reports 1995, p. 90.
[51] Grand Chamber, *Bankovic et al. v. Belgium et al.*, App. No. 52207 / 99, Decision, 12 December 200, § 32.
[52] Grand Chamber, *Bankovic et al. v. Belgium et al.*, App. No. 52207 / 99, Decision, 12 December 2001, § 54.
[53] cf. ECtHR, *Drozd and Janousek v. France*, Judgment, 26 June 1992, Ser. A, No. 240, § 91; ECtHR, *Loizidou v. Turkey (preliminary objections)*, Judgment, § 64; ECtHR, *Loizidou v. Turkey (merits)*, Judgment, § 56; ECtHR, *Cyprus v. Turkey*, Judgment, § 80.
[54] cf. ECtHR, *Golder v. the United Kingdom*, Judgment, 21 February 1975, Ser. A, No. 18, § 29.
[55] cf. ECtHR, *Johnston et al. v. Ireland*, Judgment, 18 December 1986, Ser. A, No.112, § 51.
[56] cf. Art. 31 (3) (b) VCLT; ECtHR, *Loizidou v. Turkey (preliminary objections)*, Judgment, § 73.
[57] ECtHR, *Al-Adsani v. the United Kingdom*, App. No. 35763, Judgment, § 60.
[58] ECtHR, *Loizidou v. Turkey (merits)*, Judgment, §§ 43, 52.
[59] Grand Chamber, *Bankovic et al. v. Belgium et al.*, App. No. 52207 / 99, Decision, 12 December 2001, § 57.
[60] Mann, *The Doctrine of Jurisdiction in International Law*, RdC 1964 I; Mann, *The Doctrine of Jurisdiction in International Law: Twenty Years later*, RdC 1984 Vol. I; Jennings and Watts, *Oppenheims International Law*, 9th ed., 1992, Vol. 1, § 137; Dupuy, *Droit International Public*, 4th ed., (1998), Brownlie, *Principles of Public*

may not exercise jurisdiction without the consent of the state in the territory of which it wishes to exercise jurisdiction.[61] An exception would only be occupation, in which case the exercise of jurisdiction is based on the actual fact of occupation.[62] Therefore the Court concluded the term "jurisdiction" in Art. 1 ECHR in general refers to a territorial notion of jurisdiction, exceptions requiring special justification in the particular circumstances of each case.[63]

This view seems to be supported by the fact that although several member states have in the past conducted military operations outside their respective territories, they never claimed to exercise jurisdiction within the meaning of Art. 1 ECHR by making a derogation under Art. 15 ECHR[64] and the Court did not find "any basis upon which to accept the [...] suggestion that Article 15 covers all "war" and "public emergency" situations generally, whether obtaining inside or outside the territory of the Contracting state."[65] Art. 15 ECHR itself is to be read subject to the limitation of Art. 1 ECHR.[66] Although the Convention is "a living instrument to be interpreted in light of present day conditions",[67] the Court was reluctant to deviate from the travaux préparatoires since Art. 1 of the Convention is determinative of the scope of the parties' obligations and therefore of the scope to the entire ECHR-system of Human Rights protection.[68] Although the Court emphasizes that the travaux préparatoires are not decisive, they constitute "clear confirmatory evidence"[69] of the ordinary meaning[70] of Art. 1 of the Convention. Therefore the Court repeats the conclusion it had already come to in *Soering*: "Article 1 [of the Convention] sets a limit, notably *territorial*,[71] on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined the 'securing' ('*reconnaître*' in the French text) the listed rights and freedoms to persons within its *own*[72] 'jurisdiction'.[73]

c) Extra-territorial acts recognized as constituting an exercise of jurisdiction

In keeping with this territorial notion of jurisdiction, the Court has a history of accepting that acts performed by states parties to the Convention outside their own respective territories or acts which have an effect outside the territory of the performing contracting state fall under Art. 1 ECHR only in exceptional cases.[74] In the Court's case law, reference has been made to extradition cases,[75] but as the Court noted correctly in the decision at hand,[76] extraditions do

---

International Law, 5th ed. (1998), pp. 287, 301, 312 et seq.; Higgins, *Problems and Process* (1994), p. 73; Nguyen Quoc Dinh, *Droit International Public*, 6th ed., 1999, p. 500.

[61] Oppenheim, *op. cit.*, § 137; Cassese, *International Law* (2001), p. 89; Venice Commission, 48th Plenary Meeting, 19 - 20 October 2001, *Report on the Preferential Treatment of National Minorities by their Kin-States.*

[62] *ibid.*

[63] Grand Chamber, *Bankovic et al. v. Belgium et al.*, App. No. 52207 / 99, Decision, 12 December 2001, § 61.

[64] The only derogations under Art. 15 ECHR referred to Northern Ireland and South-East Turkey.

[65] Grand Chamber, *Bankovic et al. v. Belgium et al.*, App. No. 52207 / 99, Decision, 12 December 2001, § 62.

[66] *ibid.*

[67] *ibid.*, § 64. Cf. ECtHR, *Soering v. the United Kingdom*, Judgment, § 102; ECtHR, *Dudgeon v. the United Kingdom*, Judgment, 22 October 1981, Ser. A, No. 45; ECtHR, *X, Y and Z v. the United Kingdom,* Judgment, 22 April 1997, Reports 1997-II; ECtHR, *V. v. the United Kingdom,* App. No. 24888/94, Judgment, § 72, ECHR 1999-IX; ECtHR, *Matthews v. the United Kingdom*, App No. 24833/94, Judgment, § 39, ECHR 1999-I.

[68] Grand Chamber, *Bankovic et al. v. Belgium et al.*, App. No. 52207 / 99, Decision, 12 December 2001, § 65.

[69] i*bid.*.

[70] cf. Art. 32 VCLT.

[71] Emphasis by the author.

[72] Emphasis by the author.

[73] cf. the ECtHR's judgment in *Soering.*

[74] Grand Chamber, *Bankovic et al. v. Belgium et al.*, App. No. 52207 / 99, Decision, 12 December 2001, § 67.

[75] ECtHR, *Soering v. the United Kingdom*, Judgment, § 91; ECtHR, *Cruz Varas et al. v. Sweden*, Judgment, 20

not constitute extra-territorial acts since the person who is to be extradited is within the territory of the extraditing state.[77] In principle, whatsoever, acts performed by the authorities of a party to the Convention which have been performed outside their territory or produced effects abroad can be attributed to the states parties under Art. 1 of the Convention,[78] the authorities acted in their capacity as organs of the respondent state[79]

An other exception from the territorial notion of Art. 1 ECHR can be found in the Cyprus cases discussed above. The Court now clarifies, that the inclusion of occupied areas under the jurisdiction within the meaning of art. 1 ECHR was both an exception to the general rule[80] and an extension of the territorial notion of jurisdiction.[81]

The Court concludes by accepting that extra-territorial acts fall under Art. 1 ECHR only in cases in which "the respondent state, through the effective control of the relevant territory [thus repeating the territorial notion of jurisdiction[82]] and its inhabitants [...] as a consequence of military occupation or through the consent, invitation or acquiesced of the government of that territory, exercises all or some of the public powers normally to be exercised by that Government."[83]

The Court furthermore clarified that there are indeed other instances in which customary international law or international treaties[84] recognize the extra-territorial exercise of jurisdiction, such as in cases involving the activities of a state's diplomatic or consular agents abroad or involving state acts on board crafts and vessels registered in, or flying the flag of, the state in question.[85]

d) Conclusion

The question therefore arises whether or not the applicants in Bankovic were therefore capable of coming within the "jurisdiction" of the respondent states. The "mere" bombing of the RTS building does not fall under the definition offered by the Court. Therefore the Court denied the applicants' submission and followed the respondent governments which criticized the applicants' submission as a -"cause-and-feel" effect notion of jurisdiction.[86] If, so the Court, the drafters of the Convention had indeed intended the Convention to protected anyone affected by an act attributable to a party to the ECHR they could have adopted a text the same or similar to the common Articles 1 of the Four 1949 Geneva Conventions.[87] Art. 1 of the Geneva Conventions requires the Contracting Parties to undertake "to respect and to endure

---

March 1991, Ser. A, No. 201, § 69 et seq.; ECtHR, *Vilvarajah et al. v. the United Kingdom*, Judgment, 30 October 1991, Ser. A, No. 215, § 103.
[76] ECtHR (Grand Chamber), *Bankovic et al. v. Belgium et al.*, App. No. 52207 / 99, Decision, 12 December 2001, § 68.
[77] ECtHR, *Al-Adsani v. the United Kingdom*, Judgment, § 39.
[78] ECtHR, *Drozd and Janouschek v. France*, Judgment, § 91.
[79] Grand Chamber, *Bankovic et al. v. Belgium et al.*, App. No. 52207 / 99, Decision, 12 December 2001, § 69.
[80] i*bid.,* § 71.
[81] *ibid.*, § 70.
[82] Such a territorial notion of jurisdiction is included e.g. in Art. 2 (1) ICCPR. While e.g. Art. 1 Inter-AmCHR contains a condition similar to Art. 1 ECHR, Art. 2 Inter-AmCHR does not include a limit of jurisdiction.
[83] ECtHR (Grand Chamber), *Bankovic et al. v. Belgium et al.*, App. No. 52207 / 99, Decision, 12 December 2001, § 71.
[84] *ibid.,* § 73.
[85] *ibid.*
[86] *ibid.*, § 75.
[87] *ibid.*, cf. also § 25.

respect for the present Convention *in all circumstances*[88]."[89] In rejecting the applicants' submission that the bombing brought them and their deceased relatives under the jurisdiction of the respondent states, the Court upholds that the jurisdiction of states as required in Art. 1 ECHR and the question of whether the applicant can be considered to be a victim of violations of rights guaranteed in the Convention are two separate and distinct conditions of admissibility.[90] The latter question can only be considered after the question whether the applicants fell under the respondents' jurisdiction has been answered in the affirmative.[91]

The applicants furthermore claimed that any failure to accept that they fell within the respondents' jurisdiction would defeat the *ordre public* mission of the Convention[92] and leave a vacuum in the Convention system of human rights protection.[93] This claim is rejected by the Court on the grounds that (a) the Convention is "a constitutional instrument of *European*[94] public order" and therefore a failure to accept the extra-territorial jurisdiction of the respondent states would not infringe upon the Public order in Europe[95] and that (b) there is no vacuum of Human rights protection in Yugoslavia, since the ECHR did not apply in Yugoslavia at the time of the 1999 Kosovo War anyway. In so far the case is different from the case of Cyprus, where the people in Northern Cyprus effectively lost the protection giving to them by virtue of Cyprus' ratification of the Convention.

The Court therefore came to the conclusion that the applicants did not fall under the jurisdiction of the respondent states.

III. Exhaustion of domestic remedies

The applicants also claimed that their were no effective remedies which they could have exhausted before bringing the case to Strasbourg,[96] while Hungary, Poland and Italy complain that the applicants failed to comply with Art. 35 (1) ECHR by not exhausting the remedies available in the respondent states.[97] This raises the question, how far - literally - an applicant must go in order to fulfill the requirement of Art. 35 (1) ECHR. Is a remedy still "available" if somebody living in Serbia has to go before the Courts in Norway, Iceland, Spain etc. ? The question was not raised by the Court since it had found the applications inadmissible due to a failure of the applicants to provide evidence that the bombing was included in the scope of Art. 1 of the Convention.

IV. Conclusions

Since it was not persuaded of any jurisdictional link between the applicants and the respondent states,[98] it unanimously declared the application inadmissible.[99]

---

[88] Emphasis by the author.
[89] cf. ECtHR (Grand Chamber), *Bankovic et al. v. Belgium et al.*, App. No. 52207 / 99, Decision, 12 December 2001, § 25.
[90] *ibid.*, § 75.
[91] *ibid.*
[92] cf. Art. 19 ECHR.
[93] ECtHR (Grand Chamber), *Bankovic et al. v. Belgium et al.*, App. No. 52207 / 99, Decision, 12 December 2001, § 79.
[94] Emphasis by the Court.
[95] Apparently the Court defines "Europe" as the sum of the territories of the parties to the Convention. In 1999, at the time in question, then-Yugoslavia was of course not a party to the ECHR, cf. decision § 80.
[96] cf. Grand Chamber, *Bankovic et al. v. Belgium et al.*, App. No. 52207 / 99, Decision, 12 December 2001, § 31.
[97] *ibid.*, § 33.
[98] *ibid.*, § 82.
[99] *Ibid.*, § 85.

F. Conclusions

We can conclude that the states' jurisdiction (Art. 1 ECHR) is in essence of a territorial nature and that acts committed outside the territory of a state party to the Convention are only fall under Art. 1 ECHR in cases in which the respondent exercises, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiesced of the government of that territory, all or some of the public powers normally to be exercised by that Government.[100] Only a few exceptions, such as diplomatic and consular matters have been accepted by the Court as exercises of jurisdiction unrelated to any notion of territory.

The Court's view is in s far open to criticism as it restricts the scope of the term "jurisdiction" to the parties' territories as well as to territory under the effective control of a contracting state, if the territory had enjoyed protection under the Convention prior to the change of control. In so far territory outside the CoE-Area which is controlled by contracting states does not enjoy the protection of the Convention. This fault could be compensated by a declaration pursuant to Art. 56 (1) ECHR,[101] but Art. 56 (1) of the Conventions allows for such a declaration only in cases in which one nation is in charge of the foreign relations of an other territory. In case several nations occupy the territory of an other, as it is currently the case for Iraq[102] or do not take over the responsibility for the territories foreign relations when occupying it, Art. 56 (1) ECHR would not be applicable, not to mention that states, in particular states which occupy foreign territory, are not likely to be interested in a close supervision by the ECtHR. Therefore it is unlikely that e.g. the United Kingdom or Poland can and will issue a declaration pursuant to Art. 56 (1) ECHR with regard to "their" respective parts of Iraq.

The view of the Court that jurisdiction is always related to effective control over territory, although at first sight consistent with the established case law of the Strasbourg institution, shows, at closer sight, some incoherences. Not only that the Court essentially fails to provide a dynamic interpretation of the Convention but relies primarily on the *travaux préparatoires*, it also relies on the same case law to support to contradictory assumptions: In *Loizidou v. Turkey*[103] the Court relied on *Soering* and *Drozd* as examples of its "established case law" that jurisdiction is not necessarily confined to the national territory while it now emphasizes that it has in the past already found that what was referred to as "established case law" in *Loizidou v. Turkey* is the exception.[104]

Furthermore the question has to be asked why the Court, which also has to apply the general rules of international law and has done so in the past,[105] applies a notion of jurisdiction different from the one under general international law: under the latter, state jurisdiction concerns the extent of a state's right to regulate,[106] while Art. 1 ECHR is concerned not with the question whether or not a state acted lawfully but with the question whether or not it, when it acts, is bound by the Convention.[107] While it doesn't make a difference for the Court whether or not

---

[100] *ibid.*, § 71.
[101] Currently such declarations exist for Greenland, the British Overseas Territories, Suriname and the Antillan Islands region of the Kingdom of the Netherlands.
[102] It was announced by Poland on 3 May 2003 that the territory of Iraq would be divided into three sectors under the control of the armed forces of the U.S., the U.K. and Poland respectively.
[103] ECtHR, *Loizidou v. Turkey (Preliminary Objections)*, Judgment, § 62.
[104] cf. on this issue Rühl / Trilsch, AJIL 2003, pp. 168 et seq., at p. 171.
[105] ECtHR, *Al-Adsani v. the United Kingdom*, App. No. 35763, Judgment, § 60.
[106] Oppenheim, *op. cit.*, p. 456.
[107] Rühl / Trilsch, AJIL 2003, pp. 168 et seq., at p. 171.

a state acted lawfully under international law when assessing whether an act falls under Art. 1 of the Convention,[108] this distinction is of fundamental importance in general international law.[109] This in turn leads to the question why jurisdiction should not, instead of the Court's territorial understanding of the term, be based on the exercise of state authority as such,[110] if, after all, the legality under general international law of the act in question is of no relevance to the Court anyhow. This approach furthermore would reconcile the international law concept of state responsibility with the applicability of the Convention,[111] making the state accountable under the Convention for all activities or omissions attributable to it under international law and thereby could close the unnecessary gap the Court maintains if it continues to uphold the territorial notion of jurisdiction, thus maximizing the protection flowing from the Convention. A similar approach has already been brought forward by *Meron*[112] and *Nowak*[113] with regard to Art. 2 (1) ICCPR and the formulation "within its territory and subject to its jurisdiction".[114]

But while the Court limits the applicability of the Convention, it also makes it easier for potential applicants, provided they fall under the jurisdiction of the respondent, to successfully bring their case before the Court. The exhaustion of domestic remedies is not necessary in case of an established practice amounting to a violation of guarantees under the Convention, nor in cases in which it is the objective of the application to determine whether or not a legislative measure or an administrative practice is compatible with the Convention, unless specific and effective remedies against legislation exist and are accessible for the applicant. In case of doubt with regard to the exhaustion of domestic remedies, the Court will give the applicant the benefit of the doubt and join the respondent's objection to the merits. The Court's view is regarding jurisdiction is coherent with the prevailing territorial idea of jurisdiction and might somewhat limits the future workload of the Court. Nevertheless will the Court still be in a position to hear a large number of cases relating to armed conflict, especially if parties to the Convention are engaged in military operations within their own borders (as in Turkey or Chechnya) or exercise control abroad (as in Northern Cyprus and parts of Iraq).

---

[108] Grand Chamber, *Bankovic et al. v. Belgium et al.*, App. No. 52207 / 99, Decision, 12 December 2001, § 70; Loizidou v. Turkey (Merits), § 52; Loizidou v. Turkey (Preliminary Objections), § 62; Cyprus v. Turkey, § 76.
[109] cf. Rühl / Trilsch, AJIL 2003, pp. 168 et seq., at p. 171.
[110] *ibid.*
[111] *ibid.*
[112] Meron, *Extraterritoriality of Human Rights Treaties*, AJIL 1995, pp. 78 et seq., at p. 80 et seq.
[113] Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993), pp. 41 et seq.
[114] cf. Rühl / Trilsch, AJIL 2003, pp. 168 et seq., at p. 171.