State Responsibility for Extraterritorial Human Rights Violations
The Case of Bankovic

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Introduction

As international organisations are engaging in various national and international conflicts[1], the question of the extraterritorial application of the European Convention of Human Rights has never been so relevant.[2] The European Court of Human Rights has recently approached this question in its central decision of *Bankovic and Others v. Belgium and 16 Other NATO Member States*.[3] This decision has attracted great interest not least from legal scholars and practitioners all over the world and it will be of great relevance for the future assessment of extraterritorial human rights violations. The following reflections on the question of extraterritorial jurisdiction focus on the *Bankovic* decision and are organised as follows:

First there will be an outline of the problem and the relevant judicial and international framework to the *Bankovic* decision. Then an analysis of the decision will follow, after briefly outlining the facts of the case, explaining the Court's reasoning and the critique to the Court's approach. Finally the special problem of territorial reservations to the Convention will be discussed and an outlook on the relevance of the *Bankovic* decision for future developments will close these observations.

II. The Scope of "Jurisdiction"

The essential question that had to be addressed by the Court in the *Bankovic* case was whether the claim of the applicants and their deceased family members fell within the scope of jurisdiction of the respondent states in the sense of Article 1 of the Convention, which obliges state-parties to ensure to everyone within their jurisdiction the rights and freedoms defined in the Convention.[4] Before coming to the *Bankovic* case itself, the general notion of the term "jurisdiction" requires some elaboration. The *Bankovic* case is not the first decision of the Court on the interpretation of "jurisdiction" in Article 1 of the Convention and the notion of jurisdiction can be found in other international treaties as well.

1 On these problems in relation to "enforcement action" in general, see *Ress/Bröhmer*, Art. 53(1) Clause 1 UN Charter, in Simma, The Charter of the United nations, A Commentary, 2nd ed.; Oxford University Press, 2002, pp. 854 ss.

2 Even if it is first of all related to the jurisdiction of the Court and not to that of the Committee of Ministers. The Convention speaks of jurisdiction (competence) of the Court in Art. 32 and give the Court the power to decide on disputes about its own jurisdiction (Art. 32 Sect. 2).

3 Decision (admissibility) of 12 December 2001, HRLJ 2001, pp. 453 et seq.

4 See *Ress*, The Duty to Protect and to Ensure Human Rights under the European Convention on Human Rights, in: E. Klein, The Duty to Protect and to Ensure Human Rights, Berlin 2000, pp. 165, 183 ss.

1. The Notion of Jurisdiction in the Jurisprudence of the Convention Organs

In order to properly estimate the Courts reasoning in *Bankovic* it is necessary to briefly outline the development of jurisprudence regarding the term "jurisdiction" in Article 1 of the Convention. Even if there have not been many decisions regarding this to date, some are worth being mentioned.[5]

The Convention organs had to deal with the scope of the term jurisdiction in Article 1 of the Convention in some cases, in which states exercised public functions outside their own territory. Already in 1965, the European Commission of Human Rights assessed that the official 'acts of diplomatic agents' of a Contracting State abroad could engage that state's responsibility under the Convention.[6] Similarly, in 1977, before Liechtenstein had ratified the Convention, the Commission held that 'acts of the Swiss police in Liechtenstein' following a treaty of the two countries constituted the exercise of Swiss jurisdiction on the territory of Liechtenstein.[7] The Court, however, in *Drozd and Janousek* held that the exercise of judicial function by Spanish and French judges in Andorran Courts did not engage the jurisdiction of the Spanish and French government, because they did not sit in these courts in their capacity as French or Spanish judges and the Andorran courts in question functioned in an entirely autonomous manner without any interference from French or Spanish authorities.[8] Lately, in the recent cases of *Issa* and *Öcalan* the Court held that the arrest and detention of applicants outside the territory of the respondent State constituted sufficient state authority over these individuals to constitute the jurisdiction of this state.[9]

In the case of *Soering* the Court found that the extradition or expulsion of a person by a Contracting State was a violation of the Convention, if the fugitive faced a real risk of exposure to inhuman or degrading treatment or punishment in the receiving state.[10] However, this case fundamentally differs from the cases mentioned before, since the act of expulsion itself taking place within the Contracting

5 For a summary of this jurisprudence see *Husheer*, Die völkerrechtliche Verantwortlichkeit der Türkei für Menschenrechtsverletzungen in Nordzypern nach den Entscheidungen der Europäischen Kommission und des Europäischen Gerichtshofs für Menschenrechte im Fall Loizidou ./. Türkei, ZEuS 1998, p. 398 (306 et seq.); *Schöpfer*, Zur Extraterritorialen Wirkung der Europäischen Menschenrechtskonvention, Diss. Salzburg, passim.

6 *X v. the Federal Republic of Germany*, decision of 25 September 1965, Yearbook of the Commission, vol. 8 (1965), p. 159 (169).

7 *X & Y v. Switzerland*, decision (admissibility) of 14 July 1977, DR 9, p. 57 (71 et seq.).

8 *Drozd and Janousek v. France and Spain*, judgment of 27 May 1992, § 96.

9 *Issa and Others v. Turkey*, decision (admissibility) of 30 May 2000; *Öcalan v. Turkey*, decision (admissibility) of 14 December 2000.

10 *Soering v. the* United Kingdom, judgment of 26 June 1989, § 91; see also *Cruz Varas and Others v. Sweden*, judgment of 20 March 1991, SeriesA no. 201, §§ 69 and 70; *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, § 103.

State's territory and not the extraterritorial exercise of state authority forms the base of jurisdiction in *Soering*.

Most relevant for the understanding of the *Bankovic* decision are the decisions on the applications complaining about human rights violations by Turkey in Northern Cyprus. In its decision on the admissibility of the first two applications by Cyprus against Turkey, the Commission of Human Rights assessed that the troops stationed in Northern Cyprus as a result of the Turkish invasion of 1974 and controlled by the Turkish Government exercised jurisdiction over persons and objects in Northern Cyprus.[11] Consequently, the Commission held in *A and others against Cyprus* that the Republic of Cyprus did not exercise jurisdiction in Northern Cyprus.[12] These decisions form the basis of the judgments of the European Court of Human Rights in *Loizidou* and *Cyprus*, that deal with similar circumstances as to the question of Turkey's jurisdiction in Northern Cyprus.[13] In both cases the Court clarified that the responsibility of a Contracting Party could arise when as a consequence of military action it exercises effective territorial control of an area outside its national territory. It stated that 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.[14] Furthermore, the Court argued that, having regard to the Cyprus Government's inability to exercise their Convention obligations in Northern Cyprus, the lack of jurisdiction would result in a regrettable vacuum in the system of human rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court.[15]

11 *Cyprus v. Turkey*, decision (admissibility) of 26 May 1975, DR 2, p. 125 (136 et seq.); see also *Chrysostomos and Others v. Turkey*, decision (admissibility) of 4 March 1991, EuGRZ 1991, pp. 254 et seq. and the comment thereto by *Rumpf*, Türkei, EMRK und die Zypernfrage: Der Fall Chrysostomos u.a., EuGRZ 1991, pp. 199 et seq.

12 *Ahmed Cavit An and Others v. Cyprus*, decision (admissibility) of 8 October 1991, EuGRZ 1992, pp. 470 et seq.

13 *Loizidou v. Turkey*, judgment of 23 March 1995 (preliminary objections), Series A no. 310; *Loizidou v. Turkey*, judgment of 18 December 1996 (Merits), Reports 1996-VI; *Cyprus v. Turkey*, judgment of 10 May 2001; see thereto *Hoffmeister*, Comment on Cyprus v. Turkey, AJIL 96 (2002), pp. 445 et seq.; *Tavernier*, En Marge de l'Arrêt Chypre contre la Turquie: L'Affaire Chypriote et les Droits de l'Homme devant la Cour de Strasbourg, Rev. trim. dr. h. 2002, pp. 807 et seq.; *Loucaides*, The Judgment of the European Court of Human Rights in the Case of Cyprus v. Turkey, Leiden Journal of International Law 15 (2002), pp. 225 et seq.

14 *Loizidou v. Turkey*, judgment of 23 March 1995 (preliminary objections), § 62; *Loizidou v. Turkey*, judgment of 18 December 1996 (Merits), § 52; Cyprus v. Turkey, judgment of 10 May 2001, § 77.

15 *Cyprus v. Turkey*, judgment of 10 May 2001, § 78 (so-called "black hole" theory). Since Northern Cyprus is still part of the Republic of Cyprus there may nevertheless be a positive obligation of Cyprus to ensure the protection of human rights, as far as possible, in Northern Cyprus.

2. The Notion of Jurisdiction in International Law

The interpretation of the Convention also has to harmonise, as far as possible, the relevant provisions with other principles of international law of which it forms part.[16] Thus, according to this line of reasoning of the Court, the notion of jurisdiction in the principles of international law and in the relevant provisions of other international instruments has to be analysed.

In international law, as a general rule, the notion of jurisdiction is primarily based on territory[17]. Jurisdiction cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.[18] Nevertheless, international treaties may reveal a broader approach to the term and either explicitly or implicitly extent the sphere of jurisdiction.

An exceptionally broad notion of jurisdiction can be derived from the Geneva Conventions.[19] According to their first articles the Contracting Parties are obliged to undertake to respect and ensure respect for them "in all circumstances". But even more clearly than these provisions, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[20] reveals a notion of jurisdiction not restricted to a state's territory as it obliges in its Article 2 § 1 each state party to take effective measures to prevents acts of torture "in any territory under its jurisdiction" and even further extends its territorial scope in Article 3. By contrast, the territorial scope of the Convention Relating to the

16 *Al-Adsani v. the United Kingdom*, judgment of 21 November 2001, §§ 55 et seq. One may have doubts whether this is true in every respect because the Convention being an international treaty could well also be interpreted primarily on its own non-respect of international customary law. See *Bröhmer*, State Immunity and the violation of Human Rights, Kluwer 1997.

17 See the very controversial discussion on the report submitted by *Rigaux* on this subject at the Session of the Institute of International Law in Vancouver, August 2001.

18 See inter alia The Case of the S.S. "Lotus", Publications of the Permanent Court of International Justice No. 10, Judgment No. 9; *Hailbronner*, Der Staat und der Einzelne als Völkerrechtssubjekte, in: Vitzthum (ed.), Völkerrecht, 3. Abschn. II 4 a; *Jennings/Watts* (eds.), Oppenheim's International Law, 9th edition 1992, §§ 137 et seq.; *Müller/Wildhaber*, Praxis des Völkerrrechts, 3rd edition, Bern 2001, p. 373; see furthermore the references cited in *Bankovic and Others v. Belgium and 16 Other NATO Member States*, decision (admissibility) of 12 December 2001, at §§ 59-60.

19 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (Geneva Convention I), 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), 75 U.N.T.S. 85; Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention III), 75 U.N.T.S. 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), 75 U.N.T.S. 287; all adopted 12 August 1949 and entered into force 21 October 1950; see also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, adopted 8 June 1977 and entered into force 7 December 1978.

20 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.

Status of Refugees[21] has been interpreted in a rather restrictive way by the Supreme Court of the United States of America, which stated that Article 33 of the Convention did not prohibit actions towards aliens outside its own territory.[22]

Article 2 of the International Covenant on Civil and Political Rights[23] provides that each party "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant." It is controversial whether this provision has to be interpreted in the broad sense that each party has the obligation to respect and ensure the rights in the Covenant both "to all individuals within its territory" and "to all individuals subject to its jurisdiction"[24], or in the narrow sense that the obligation exists only towards individuals within the state's territory and at the same time subject to its jurisdiction[25]. Article 1 of the Optional Protocol[26] rather supports the latter interpretation, as it refers only to "individuals subject to its jurisdiction" and thus apparently does not recognise any necessity of explicitly repeating the reference to territory. Nevertheless, the Human Rights Committee in some cases has sought to establish state responsibility for extraterritorial detention and abduction of the applicant.[27] However, these cases mainly rely on Article 5 § 1 of the Covenant, which provides that "nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein, or at their limitation to a greater extent than is provided for in the present Covenant."[28]

Other international treaties that use an almost identical formula to the European Convention of Human Rights are the Convention on the Rights of the Child[29],

21 189 U.N.T.S. 150, adopted 28 July 1951 and entered into force 22 April 1954.

22 *Sale v. Haitian Centers Council*, Inc., 113 S.Ct. 2549, 125 L. (92-344), 509 U.S. 155 (1993); criticised by *Meron*, Extraterritoriality of Human Rights Treaties, AJIL 89 (1995), pp. 78 ff. with further references, p. 78 (83).

23 G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, adopted 16 December 1966 and entered into force 23 March 1976.

24 See inter alia *Meron*, (fn. 22), pp. 78 ff. with further references.

25 In this sense *Schindler*, Human Rights and Humanitarian Law: Interrelationship of the Laws, Am. U. L. Rev. 31 (1982), p. 935 (939); *Pacifico*, I bombardamenti NATO in Serbia al vaglio della Corte europea dei diritti umani, I diritti dell'uomo, anno XII no. 2-3 (2001), p. 78 (82).

26 Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, adopted 16 December 1966 and entered into force 23 March 1976.

27 See namely *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52 (6 June 1979), U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981), § 12.3; *Lilian Celiberti de Casariego v. Uruguay*, Communication No. R.13/56 (17 Julz 1979), U.N. Doc. Supp. No. 40 (A/36/40) at 185 (1981), § 10.3

28 The identical wording is used in Article 5 § 1 of the International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, adopted 16 December 1966 and entered into force 3 January 1976.

the American Convention on Human Rights[30] and the Universal Declaration of Human Rights[31] as well as the American Declaration on the Rights and Duties of Man[32]. The Inter-American Commission of Human Rights in its report in the case of *Coard*[33], examining complaints about the applicants' detention and treatment by United States' forces in the first days of the military operation in Grenada and referring to the American Declaration on the Rights and Duties of Man, found that the term "jurisdiction" most commonly referred to persons 'within a state's territory', but may, under certain circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state but subject to the authority and control of another state. Thus, just as the European Court of Human Rights in the *Loizidou* and *Cyprus* cases, the Commission determines a qualified exercise of control as the relevant factor to constitute responsibility for an extraterritorial act of the state.

3. Conclusion

From the findings so far, one can conclude that the notion of jurisdiction in the jurisprudence of the Convention organs as well as in international law is primarily based on territory but allows under certain conditions for extraterritorial extensions. However, the findings of the previous outline do not yield enough for a clear definition of the conditions of extraterritorial jurisdiction.

29 G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), adopted 20 November 1989 and entered into force 2 September 1990.

30 O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, adopted 22 November 1969 and entered into force 18 July 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992). The relevant part of Article 1 reads as follows: „The States Parties to this Convention undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination [...]"

31 G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), adopted and proclaimed 10 December 1948. The relevant part of the Preamble of which reads as follows: "[...] to secure their universal and effective recognition and observance, both among the Member States themselves and among the peoples of territories under their jurisdiction". The relevant part of Article 2 reads as follows: "Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [...]"

32 O.A.S. XXX, adopted by the Ninth International Conference of American States, Bogota, Colombia, 1948, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82 doc.6 rev.1 at 17 (1992). Article 2 of this declaration reads as follows: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor."

33 Report No. 109799, case No. 10951, *Coard et al. v. the United States*, 29 September 1999, § 37.

III. The Bankovic Case

After this overview of the notion of jurisdiction in the jurisprudence of the Convention organs and in international law, the examination of the *Bankovic* decision will commence with a brief outline of the facts of the case, then proceed to the Courts reasoning and finally deal with the criticism expressed against the Court's approach.

1. The Facts

Bankovic and her co-applicants complained about deaths of family members and their own injuries, caused by a bombing by a NATO forces' aircraft in the course of the NATO's intervention during the Kosovo crisis. After all efforts to achieve a negotiated, political solution to the Kosovo crisis had failed, the NATO began with air strikes in March 1999. In April 1999 one of the buildings of Radio Televizije Srbije ("RTS") was hit by a missile launched by NATO forces. Members of the applicants' families were killed and one applicant hurt. The applicants complained of a violation of their right to life, their freedom of expression and their right to an effective remedy as guaranteed by Articles 2, 10 and 13 of the Convention and they brought their application against 17 NATO member states.

2. The Court's Reasoning

To answer the essential question of the case, whether the defendant states had jurisdiction over the applicants in the sense of Article 1 of the Convention, the Court first thoroughly examined the meaning of the phrase "within their jurisdiction" in Article 1 of the Convention applying the rules of interpretation found in Article 31 of the 1969 Vienna Convention on the Law of Treaties. Firstly, the Court elaborated the ordinary understanding of the word. Referring to the general notion of the term in international law, it assessed that the jurisdictional competence of a State is primarily territorial and, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States.[34] It found that this was also indicated by the lack of any apprehension on the part of the Contracting States of their extraterritorial responsibility in factual contexts similar to the present case.[35] Finally, the Court confirmed this finding with a reference to the *travaux préparatoires*, which demonstrate that the Expert Intergovernmental Committee replaced the words "all persons residing within their territories" with a reference to persons "within their jurisdiction" not with the aim of a territorial

34 *Bankovic and Others v. Belgium and 16 Other NATO Member States*, decision (admissibility) of 12 December 2001, § 59.

35 Ibid., § 62.

extension of the responsibility of the Contracting States, but with the sole view to expanding the Convention's application to persons who may not reside, in a legal sense, but who are, nevertheless, on the territory of the Contracting States.[36] The Court in this way concluded that Article 1 of the Convention reflects an essentially territorial notion, while other bases of jurisdiction are exceptional and require special justification in the particular circumstances of each case.[37]

The Court proceeded by elaborating the requisite exceptional circumstances under which an extraterritorial act of a state can be recognised as an exercise of jurisdiction. Referring to its previous case-law, which has been summarised above, the court came to the conclusion that extraterritorial jurisdiction can specifically be recognised in cases where a state effectively controls the relevant territory and its inhabitants, whether as a consequence of military occupation or with the consent, invitation or acquiescence of the government of that territory, exercising at least some of the public powers normally exercised by that government.[38] Accordingly, the Court rejected the applicants' claim that the positive obligation under Article 1 extends to securing the Convention rights in a manner proportionate to the level of control exercised in any given extraterritorial situation. It held that the wording of Article 1 did not provide any support for the idea that the positive obligation to secure the rights and freedoms set out in the Convention can be divided an tailored to suit the particular circumstances of the extraterritorial act in question. The Court supported this argument by comparison to the extensive wording of Article 1 of the four Geneva Conventions, that have been cited before, which was not adopted by the drafters of the European Convention on Human Rights.[39] The Court went on to compare similar jurisdiction provisions in other international instruments, that have been outlined before, which support the same notion of the term jurisdiction as Article 1 because they also reflect a basically territorial notion of jurisdiction.[40] Finally, the Court, with respect to the Convention's objective to constitute a 'European public order' for the protection of individual human beings, assessed that the idea of avoiding a gap in human rights' protection could not lead to the establishment of jurisdiction if the territory in question was not one that would normally be covered by the Convention, as the Federal Republic of Yugoslavia.[41] The Court concluded from the fact that the Convention is "a multi-lateral treaty operating, subject to Art. 56 of the Con-

36 § 63; Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights, Vol III, p. 260.

37 *Bankovic and Others v. Belgium and 16 Other NATO Member States*, decision (admissibility) of 12 December 2001, §§ 61, 66.

38 Ibid., §§ 67-73.

39 Ibid., § 75.

40 Ibid., § 78.

41 Ibid., § 80.

vention, in an essentially regional context and notably in the legal space of the Contracting States" (para. 80), that the Convention was not designed to be applied throughout the world.

Consequently, the Court found that the applicants did not fall within the "jurisdiction" of the respondent states and declared the application inadmissible as being incompatible *ratione personae*.

3. Criticisms Expressed Against the ECHR's Approach

The Court's reasoning in the *Bankovic* decision has been criticised on two major points.[42] Firstly, the Court's restrictive interpretation of the term jurisdiction as reflecting an essentially territorial notion has been objected to. Secondly, the Courts assessment of the requisite special circumstances to engage extraterritorial jurisdiction has been disapproved of.

4. The Essentially Territorial Notion of Jurisdiction

The first and central point of critique is the Court's fundamental assumption that the jurisdiction of the states is essentially territorial, whilst an extraterritorial act of a state amounts to jurisdiction of that state only in extraordinary circumstances.[43] This has been criticised for three reasons: for the Court's reference to the *travaux préparatoires*, for the assessment of the notion of jurisdiction in international law and for an alleged contradiction to the prior jurisprudence of the Court. In contrast to the Court the critics would favour the view that the jurisdiction of a state follows the exercise of authority by that state.[44]

Firstly, the Court's interpretation of the term "jurisdiction" has been criticised for the reference to the *travaux préparatoires*, which has been held to disregard the character of the Convention as a living instrument.[45] This opinion turns a blind eye to the fact, that the Court only referred to the *travaux préparatoires* for *confirmation* of the interpretation it had already found by other means, especially the analysis

42 *Cohen-Jonathan*, La territorialisation de la juridiction de la Cour européenne des droits de l'homme, Rev. trim. Dr. h. 2002, pp. 1069 et seq.; *Riou*, Commentaire de l'arrêt Bankovic, L'Europe des Libertés, No. 7 (Janvier 2002), p. 17 et seq.; *Pacifico*, (fn. 25), pp. 78 et seq.; *Flauss*, Actualité de la Convention européenne des droits de l'homme (novembre 2001-avril 2002), AJDA 2002, pp. 500 et seq.; *Laursen*, NATO, the War over Kosovo, and the ICTY Investigation, American University International Law Review 17 (2002), p. 765 (799 et seq.). See also the following comments: *Scheirs*, European Court of Human Rights Declares Application against NATO Members States Inadmissible, Int'l Enforcement L. Rep. 18 No. 4, pp. 154 et seq.; *Karl*, NATO-Bombardements in Jugoslawien und Anwendbarkeit der EMRK, ÖIMR-Newsletter 2002/2.

43 *Riou*, ibid., p. 18; *Cohen-Jonathan*, (fn. 42), pp. 1074 et seq.

44 *Riou*, ibid., p 18.

45 *Cohen-Jonathan*, (fn. 42), pp. 1079 et seq.

of the ordinary understanding of the term. The Convention, being a living instrument, is meanly focussed on the special character of the Convention as an instrument protecting human rights (object and purpose in the sense of Art. 31 Sect. 1 of the VCTL) and does not exclude the application of Art. 32 VCTL. Even if the Convention is a living instrument the Court has to establish the "ordinary" meaning of the notions in the Convention, even if it has the power to take note of developments in the practice of the Contracting States.

Secondly, it has been suggested that the Court wrongly assessed the notion of jurisdiction in international law.[46] This view is probably the result of a misunderstanding of the notion of jurisdiction in international law: The starting point in international law is that jurisdiction is restricted to a state's territory. In contrast to this general rule, some international treaties, especially the Conventions of Geneva and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment reveal a broader notion of jurisdiction. An interpretation of Article 1 of the Convention in a sense as broad as these is already inhibited by its thoroughly different wording. There is no compelling reason that 'all' these treaties, that is also the Convention, have to be interpreted in the broadest sense. In addition, most of the international treaties, that have been set out before, similarly to the Convention and in accordance with the general principle of international law reflect an essentially territorial notion of jurisdiction and have at least in principle been interpreted as such by the competent international institutions. Specifically the Human Rights Committee's establishment of extraterritorial responsibility under the International Covenant on Civil and Political Rights does not support a wider interpretation of the relevant term in Article 1 of the Convention[47], since it draws primarily on the extensive provision in Article 5 § 1 of the Covenant, which is not comparable to the relevant provisions of the Convention.

Finally, it has been claimed that the *Bankovic* decision contradicted the prior jurisprudence of the Court.[48] However, it makes little sense to compare the early decisions of the Commission to *Bankovic* without assessing the further development of the Court's adjudication regarding Article 1. Especially with regard to the Court's findings in the more recent decisions of *Loizidou* and *Cyprus*, its reasoning in *Bankovic* cannot but be judged a logical progression. The Court already stated in these decisions that an extraterritorial act of a state amounted to its jurisdiction under Article 1 of the Convention 'under special circumstances', specifically the existence of "effective control".[49]

46 *Riou*, (fn. 42), p. 18; *Pacifico*, (fn. 25), p. 82.

47 This has been suggested by *Pacifico*, (fn. 25), p. 82 and *Cohen-Jonathan*, (fn. 42), pp. 1077 et seq.

48 *Cohen-Jonathan*, (fn. 42), pp. 1079 et seq.

49 See also *Laursen*, (fn. 42), p. 799.

5. The Special Circumstances of Extraterritorial Jurisdiction

The second point, the Court's evaluation of the requisite circumstances to engage a state's extraterritorial jurisdiction, has been criticised for four reasons. Firstly, it has been suggested that the Court established a closed list of circumstances under which extraterritorial jurisdiction of a state could be engaged.[50] Secondly, the relation of the Court's reasoning with regard to the effective control-requirement on the one hand and its reference to the *ordre public*-character of the Convention on the other hand has been questioned.[51] Thirdly, the it has been held, that the *Bankovic* decision contradicted the Court's reasoning in *Soering*[52] Finally, the Court's assessment of the effective control-criterion has been deemed to be too inflexible.[53]

As to the first point of criticism, the suggestion that the Court has established a closed list of circumstances engaging extraterritorial jurisdiction of the Contracting States[54], one has to point to the fact that *Bankovic* only clarifies the exceptional circumstances of "effective control" during a military intervention in an extraterritorial area. The decision does not limit the possibility of accepting other special circumstances engaging extraterritorial jurisdiction, some of which have already been dealt with by the Court and have also been explicitly noted in the *Bankovic* decision[55]. In the *McElhinney/Ireland* judgment[56] the Court has recently (indirectly) accepted that the exercise of authority by a British solder beyond the border of Northern Ireland came within the jurisdiction of the UK which did invoke its sovereign immunity before the Irish court in that respect. The answer to the question whether only the exercise of "effective territorial control" comes within the special circumstances thus excluding air strikes as in the *Bankovic* case or whether other forms of the exercise of authority, such as in the *McElhinney* case, seems rather to be affirmative.

Secondly, the question has been raised, whether the *Bankovic* requirements of extraterritorial jurisdiction in addition to "effective control" by the Contracting Party required the loss of otherwise held human rights (the "black hole" test).[57] Even in view of the fact that the Court clearly stated that with regard to the *ordre public* objective of the Convention gaps in human rights protection are to be

50 *Riou*, (fn. 42), p. 18.

51 *Laursen*, (fn. 42), p. 799; *Pacifico*, (fn. 25), p. 82; *Cohen-Jonathan*, (fn. 42), p. 1081.

52 *Riou*,(fn. 42), p. 18.

53 *Pacifico*, (fn. 25), p. 82.

54 *Riou*, (fn. 42), p. 18.

55 *Bankovic and Others v. Belgium and 16 Other NATO Member States*, decision (admissibility) of 12 December 2001, §§ 72 et seq.

56 *McElhinney ./. Ireland*, judgment of 21.10.2001, no. 31253/96, ECHR 2001-XI.

57 *Laursen*, (fn. 42), p. 799.

avoided throughout the territory of the Contracting States[58], this must be considered a misunderstanding of the judgment. The relevant passage of the judgment clarifies that the Convention's character as a constitutional instrument of European public order for the protection of individual human beings could not be invoked in favour of applicants in a territory not covered by the Convention. The Court does not go any further in the sense that the territory in question must be necessarily that of a Contracting Party. Considering the facts of *Bankovic* and assuming that the aim of the Convention to form a European public order for the protection of individual human beings does influence the interpretation of the Convention,[59] one may wonder whether the court might have decided differently if the bombing had taken place within the territory of another Contracting Party to the Convention, as also has been suggested.[60] But one has to admit that this is a pertinent question, the answer to which is still open.[61]

As to the third argument, the alleged contradiction to the Court's reasoning in *Soering*[62], one has to clearly point out the differences of the two cases. In *Soering*, the act of expulsion of the applicant could be defined as act of public authority directly affecting the applicant and taking place on the territory of the Contracting State itself and thus engaging State responsibility and thus falling under the UK's jurisdiction. By contrast, in *Bankovic* no act of public authority directly affecting the applicants and exercised on the territory of the Contracting States can be recognised.

Finally, it has been held that the Court's assessment of the effective control-requirement is not flexible enough to take account of the availability and use of modern precision weapons which allow extraterritorial action of great precision and impact without the need for ground troops.[63] Whilst it is indeed deeply regrettable that, because of the Court's assessment, *Bankovic* and the other victims of the NATO air strikes lack any judicial remedy against the violation of their relatives' lives, a broader interpretation of the criterion of effective control would deprive it of its sense and contradict the objective of Article 1 of the Convention which attempts not only to establish but also to restrict the Contracting Parties' responsibility for human rights violations to their proper jurisdiction.

58 *Bankovic and Others v. Belgium and 16 Other NATO Member States*, decision (admissibility) of 12 December 2001, § 80.

59 See inter alia *Soering v. the United Kingdom*, judgment of 26 June 1989, Series A no. 161, § 87 with further references; *O. Jacot-Guillarmod*, Règles, méthodes et principes d'interprétation dans la jurisprudence de la Cour européenne des droits de l'homme, in: Louis-Edmond Pettiti et al., La Convention Européenne des droits de l'homme, Economica, Paris 1999, p. 41 (53).

60 For this suggestion see *Pacifico*, (fn. 25), p. 82; *Cohen-Jonathan*, (fn. 42), p. 1081.

61 The Court might see this differently given that the events then could take place within the regional sphere of the Convention system.

62 *Riou*, (fn. 42), p. 18.

63 *Pacifico*, (fn. 25), p. 82.

6. Conclusion

With respect to these findings one is clearly inclined to conclude, that the view that a state's jurisdiction automatically follows the extraterritorial acts of its authorities, as has been expressed in academia[64], cannot be supported anymore. On the contrary, Article 1 of the Convention provides for a restriction to the Contracting State's responsibility for human rights violations. According to this provision a state's act only falls within the scope of the Convention when it is exercised within a qualified concept of "jurisdiction". The basis of this jurisdiction is generally territorial, but, under special circumstances it can also extent to extraterritorial action of a Contracting State, specifically, if a state exercises effective territorial control in an area outside its territory. On analysis, the NATO air strikes in the *Bankovic* case did not fulfil the requirement of effective control necessary to establish the jurisdiction of the involved Contracting States. In the decision of the Court, effective control necessarily implies that the Contracting State, as a consequence of military occupation or by way of consent, invitation or acquiescence of the Government of that territory, exercises all or at least some of the public powers normally to be exercised by that Government.

IV. Territorial Declarations – The Ilascu Case

A special factor in assessing the territorial responsibility of the Contracting States, are declarations containing a territorial restriction often deemed to be "reservations". The Court had to deal with this problem in the still pending case of *Ilascu and Others against Moldavia and the Russian Federation.*[65]

The instrument of ratification of the Convention deposited by the Republic of Moldova contains a among others the declaration, that the Republic of Moldova would be unable to guarantee compliance with the provisions of the Convention in respect of acts and omissions committed by the organs of the self-proclaimed Trans-Dniester Republic within the territory actually controlled by such organs. Thus the Moldavian Republic tried to limit the "jurisdiction" within the meaning of Article 1 of the Convention to parts of its territory. The Court had to test the admissibility of this reservation in the *Ilascu* case. First it had to determine whether the declaration constituted a reservation as provided for in Article 57 of the Convention. For lack of reference to a specific provision of the Convention the Court held that the declaration was of a general character and thus not allowed as

64 *Cohen-Jonathan*, La Convention Européenne des Droits de l'homme, Economica, Paris 1989, p. 94 et seq; *Riou*, (fn. 42), p. 18.

65 *Ilascu and Others v. Moldova and the Russian Federation*, decision (admissibility) of 4 July 2001.

a valid "reservation" under Article 57 of the Convention. It further reiterated that Article 56 of the Convention did not permit a territorial restriction of the term "jurisdiction" within the meaning of Article 1 of the Convention. Consequently, the Court decided that the declaration as a reservation was invalid.

A recurrence of this problem is to be seen in the conflict between Azerbaïjan and Armenia. Just as the Republic of Moldavia, the Republic of Azerbaïjan in its instrument of ratification of the Convention deposited on 15 April 2002 declares itself unable to guarantee the application of the provisions of the Convention in the territories occupied by the Republic of Armenia until these territories are liberated from that occupation.

V. Conclusion and Outlook

Finally it may be useful to briefly sum up the findings and to give an outlook as to the future relevance of the *Bankovic* decision. Applying the rules of interpretation found in Article 31 of the Vienna Convention the Court stated in the *Bankovic* case that the term jurisdiction in Article 1 of the Convention reflects an essentially territorial notion, while extraterritorial bases of jurisdiction are exceptional and require special justification. As an exception, the exercise of effective control in an area outside its own territory may lead to a state's responsibility under the Convention. The facts of the *Bankovic* case (air strikes) could not qualify as such an exception. The *Bankovic* decision tries to define the boundaries of responsibility of the states for human rights violations under Article 1 of the Convention and in doing so closes a gap that had been left open by the Court in *Loizidou* and *Cyprus*. For this reason, it can be deemed as being of great importance for the future application of the Convention in cases of extraterritorial acts of the Contracting States.

The Court will continue to define the line between the exercise of territorial and extra-territorial jurisdiction more precisely. E.g., the Court has only recently confirmed that States do not exercise jurisdiction in another State, if they invoke before the courts of that state the sovereign immunity to which they are entitled under international law.[66] In this decision the Court referred to the *McElhinney v. Ireland and UK* case[67] where the Court had stated that the fact that the British Government had claimed immunity before the Irish courts in a procedure against it, does not suffice to bring it under the jurisdiction of the UK in the sense of Art. 1 of the Convention. Therefore, the fact that Germany raised the exception of

66 *Aikakterini Kalogeropolu and others v. Greece and Germany* , no. 59021/00, decision of 12 December 2002.

67 GC no. 31253/96 of 9/2/2000.

immunity before Greek courts could not be regarded as an exercise of jurisdiction in relation to the applicants before Greek courts as well. Furthermore if a state is sued before the courts of a foreign state it is in the same position as any private litigant *("à cet égard elle pouvait être assimilée à une personne privée parti au procès")*.

In *Bankovic* the Court did not decide the question whether member states of an international organisation could be held responsible for the acts of the international organisation. This is an entirely different and still open problem, which will be the central issue in the *Senator Lines* case.[68]

The answer of the Court to the question of jurisdiction under Article 1 of the Convention must also be seen in the light of the role of the Court. In the *Bankovic* decision the Court stressed the regional character of the European system of human rights protection. With this the Court also indirectly addressed its own responsibility. In other words the Court expressed a kind of judicial self-restraint. The Court cannot be held responsible to protect against human rights violations universally all around the globe. It would not be able to fulfil this role. Already the extension of its territorial jurisdiction from Iceland to the very eastern end of Russia in Vladivostok should remind not only the Court but also the Member States to the Council of Europe of a realistic answer to what such a system of human rights protection can really achieve.[69]

The criteria of 'effective control' does not only relate to the various capacities of the Contracting States, but must also be seen in the light of this role of the Court. When the Court has to determine whether there was a violation of human rights it must, if there is a need to, be able to establish the facts of the case by on-the-spot-visits and hearings of witnesses as it has done in the interstate case[70] between Cyprus and Turkey on the human rights situation in Northern Cyprus. As this judgment of the Court reveals, the European Commission of Human Rights took extensive evidence in this case and was able to do so with the assistance of the OECE and, indirectly, of Turkey as the responsible state for the exercise of effective control. The intensity of effective control via the local administration established by Turkey was such that the Court came to the conclusion that the courts established in that area provided remedies which should be considered as effective and which had to be exhausted, irrespective of the question whether the presence of Turkey in Northern Cyprus was legal or illegal. This intensity of effective control may serve as an indicator to answer the question when a certain territory

68 See *Cohen-Jonathan*, (fn. 42), p. 1073.

69 See *Petzold*, Epilogue: La réforme continue, in: Protection des droits de l'homme: la perspective européenne/Protecting Human Rights, The European Perspective, Mélange à la mémoire de/Studies in memory of Rolf Ryssdal (ed. P. Mahoney, Franz Matscher, H. Petzold, L. Wildhaber) 2000, pp 1571 ss.

70 *Cyprus v. Turkey*, (GC) no. 25781/94, ECHR 2001-IV, judgment of 10.5.01; see also *Loizidou v. Turkey*, – Rep. 1996-VI, fasc. 26, judgment 18.12.96.

comes under the jurisdiction of a Contracting State, even outside its own territory and when that State can be held responsible for any breaches of the Convention.

Looking to the future, it is safe to conclude that the *Bankovic* decision will be significant for forthcoming decisions on other extraterritorial human rights violations, for example, on whether the Contracting States can be held responsible for possible human rights violations of their troops deployed as United Nations forces or under a UN mandate on the territory of non contracting states. A range of problems arise in this context, such as the relation of the Convention system to that of the UN, or that of the extent to which contracting States really exercise effective territorial control when their forces are part of a larger international effort governed by the United Nations.