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Beyond Bankovic: Extraterritorial Application of the European Convention on Human Rights

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Beyond Bankovic*: Extraterritorial Application of the European Convention on Human Rights*

Federico Sperotto

Abstract

The obligations set forth in the international and regional instruments on human rights are considered as having a strictly territorial scope. States parties have the duty to guarantee the rights recognized in the treaties to all individuals within their territories. The territorial reach of these obligations is expanding by way of interpretation. In its decision on Bankovic, the European Court reduced the impact of this international trend toward a progressive enlargement of the protection granted by human rights treaties, affirming those attacks conducted by NATO against Yugoslavia in 1999 fell out of the extraterritorial reach of the European Convention. After Bankovic, the Court provided a more articulated interpretation of the issue of extraterritorial acts, previously limited to the European legal space. In examining the case law, this paper deals with the issue of whether and to what extent a State party of the European Convention is accountable for human rights violations perpetrated by its armed forces during military operations conducted abroad.

Introduction

The obligations set forth in the international and regional instruments on human rights have been traditionally considered as having a strictly territorial scope. States parties have the duty to guarantee the rights recognized in the treaties to all individuals *within their territories*. States are obliged to guarantee a *core* of human rights, resulting from customary international law. In addiction, they have to guarantee the rights resulting from treaties they ratified. Individual nationality or citizenship does not prevent the plane enjoyment of those rights. In case of powers exercised abroad, the State shall guarantee the rights in those territories subject to his jurisdiction

([1]) or effective control ([2]). The (negative) obligation of not violating human rights and that (positive) of guaranteeing all necessary action aimed to give effectiveness to such a protection, requiring extensive state outlays ([3]), goes beyond the territory of the State, since it includes those areas in which the State exercises its own authority and control, through State agents or troops deployed abroad ([4]).

The territorial reach of these obligations is expanding by way of interpretation. Stages of this evolution have been some renowned statements. In 1995, the UN Human Rights Committee, in a report concerning the US, tackled the view expressed by the Government that the Covenant (on civil and political rights, ICCPR) lacks extraterritorial reach under all circumstances, holding that, in special circumstances, persons may fall under the jurisdiction of a State party even when outside that State territory ([5]). In its judgement on *Louizidou v. Turkey,* the European Court of Human Rights noted that although Article 1 sets limits to the reach of the European Convention, the concept of jurisdiction is not restricted to the national territory of the Parties, but could also arise when a State exercises effective control of an area outside its national territory ([6]). In *Coard v. US* the Inter-American Commission of Human Rights affirmed that in principle the protection afforded by the 1948 American Declaration is not based on the presumed victim's nationality or presence within a particular geographic area but on whether, in the specific circumstances, the individual is under the *authority and control* of a State ([7]).

In its decision on *Bankovic*, the European Court reduced the impact of this trend toward a progressive enlargement of the protection granted by human rights treaties. The Court held that attacks conducted by NATO against Yugoslavia in 1999 fell out of the extraterritorial reach of the European Convention, stressing its regional character, as a multilateral treaty not designed to

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([1]) See European Convention on Human Rights, Article 56.

([2]) The Supreme Court of Judicature Court of Appeal (Civil Division) *Al-Skeini Ors, R (on the application of) v Secretary of State for Defence* [2005] EWCA Civ 1609 (21 December 2005) §§ 190-197.

([3]) For a comprehensive discussion on the matter see ECtHR, *Hugh Jordan v. the United Kingdom* - 24746/94 [2001] ECHR 327 (4 May 2001), *McKerr v. the United Kingdom* - 28883/95 [2001] ECHR 329 (4 May 2001), *Kelly & Others v. the United Kingdom* - 30054/96 [2001] ECHR 328 (4 May 2001), *and Shanaghan v. the United Kingdom* - 37715/97 [2001] ECHR 330 (4 May 2001).

([4]) European Court of Human Rights (ECtHR), *Loizidou v. Turkey* - 15318/89 [1996] ECHR 70 (18 December 1996), § 52.

([5]) Human Rights Committee, Comments on United States of America, U.N. Doc. CCPR/C/79/Add 50 (1995), § 19.

([6]) European Court of Human Rights (ECtHR), *Loizidou v. Turkey* - 15318/89 [1996] ECHR 70 (18 December 1996), § 52.

([7]) Inter-American Commission on Human Rights (IACHR) *Coard v. US*, Case no. 10.951, Report n. 109/99, 29 Sept. 1999, § 37.

be applying throughout the world. After *Bankovic*, the Court provided a more articulated interpretation of the issue of extraterritorial acts, which demands further consideration and analysis. In recent years, following the 9/11 attacks and the forced regime change in Iraq, some European States joined the US in its "global war on terror". Some complaints alleging violations of human rights obligation during recent military operations, principally in Iraq, have been brought before courts. British soldiers have been charged for murder, torture and mistreatment in two different courts martial.

In examining the case law, this paper deals with the issue of whether and to what extent a State party of the European Convention is accountable for human rights violations perpetrated by its armed forces during military operations conducted abroad.

1. Human Rights Protection during Armed Conflict

During international armed conflicts, States are bound to respect international humanitarian law (IHL). According to the International Court of Justice, IHL includes "The Hague Law", resulted from two conferences, in 1899 and 1907, fixing rights and duties of belligerents in warfare, and the "Geneva Law" (primarily the 1949 Conventions), protecting persons involved in an international armed conflict not taking part in the hostilities. During internal armed conflict, Common Article 3 provides a minimal humanitarian standard to persons not actively involved in hostilities ([8]).

Common Article 1 to the Geneva Conventions issues a general obligation to respect and ensure respect for IHL *in all circumstances* ([9]). Its protection depends on the existence of an armed conflict and involves a specific category of individuals (wounded, sick, shipwrecks, prisoners of war, civilians). Yet the threshold of conflict is not clear. According to some opinions, the provision of Article 2 entails a wide spectrum, including minor cross-border operations. In particular, an authoritative opinion held that

([8]) International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, § 75.

([9]) HENCKAERTS – DOSWALD-BECK, *Customary International Humanitarian Law,* Cambridge, Cambridge University Press, 2005, p. 495.

'the Geneva Conventions apply even to a patrol which penetrates into enemy territory without any intention to stay there with respect to its dealings with the civilians it meets' ([10]).

As issued by the International Criminal Tribunal for the Former Yugoslavia (ICTY), humanitarian obligations do not depend on reciprocity, thus a State has to guarantee their observance apart from the conduct of counterparts ([11]).
In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice held that the protection granted in the International Covenant on Civil and Political Rights (ICCPR) does not cease in time of conflict:

'The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself' ([12]).

This interdependence between IHL and human rights has a particular importance in case of military occupation of foreign territories. In order to clarify any doubt on the contextual application of the two bodies of law, the ICJ, in its recent Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, specified that in those Territories both international human rights law and humanitarian law apply ([13]).
On the interdependence between human rights and international humanitarian law, it is worth to mention *Cyprus v. Turkey*, particularly the dissenting opinion of judges Sperduti and Trechsel,

([10]) PICTET, (Ed.) *Commentary: Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War, Article 6*, Geneve, 1958 in www.icrc.org/ihl.nsf.
([11]) International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Kuprescik et. al.,* IT-95-13, Trial Chamber, Judgement, 14 Jan. 2000, § 511.
([12]) International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, § 25.
([13]) ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, n. 131, 9 Jul. 2004, § 114.

considering international humanitarian law as a useful tool for interpreting the obligations set forth in the Convention:

‘the rules of international law concerning the treatment of the population in occupied territories (contained notably in the Hague Regulations of 1907 and the Fourth Geneva Convention of 12 August 1949) are undeniably capable of assisting the resolution of the question whether the measures taken by the occupying power in derogation from the obligations which it should in principle observe — by virtue of the European Convention — where it exercises (*de jure* or *de facto*) its jurisdiction, are or are not justified according to the criterion that only measures of derogation strictly required by the circumstances are authorized’ ([14]).

The Inter-American system shows a tendency to recognize to the human rights law a specific role during armed conflict. Dealing with the question of the simultaneous application of the two bodies of law, the Inter-American Commission (IACHR), in *Coard et al. v. the United States* (a case raised out of the US invasion of Grenada, in 1983) recalling that in case of violation of the American Declaration both the laws apply, affirmed that in case of simultaneous application, where those bodies of law provide distinct levels of protection, the Commission is bound to apply the normative standard which best safeguards the rights of individuals ([15]). The Inter-American Commission underlines furthermore that the American Convention on Human Rights (ACHR), as well as other international or regional human rights instruments, are not specifically designed to deal with questions arising from situations of armed conflict, due to the fact that they lack of provisions concerning the use of military force and the means and methods of warfare. Nevertheless, during armed conflict, international humanitarian law offers integrating means of interpretation and application of such human rights instruments ([16]).

The Court of Strasbourg holds a different point of view. The European Court is in fact strongly reluctant towards the application of international rules and principles which are not referable to its case-law. In particular, in a case the Court subordinated the issue of the State responsibility for acts of torture to the issue of immunity of States from civil jurisdiction, notwithstanding it

([14]) European Commission on Human Rights, *Cyprus v. Turkey*, Rapport de la Commission de 1998, requêtes no. 6780/74 et 6950/75, European Human Rights Report 4. Opinion dissidente de M. Sperduti et M. Trechsel sur l’art. 15 (6) et (7).

([15]) Inter-American Commission on Human Rights (IACHR), *Coard et al. v. United States*, Case No. 10.951, Report No. 109/99, Annual Report of the IACHR 1999, § 42.

([16]) IACHR, *Abella v. Argentina*, Case No. 11.137, Report No. 5/97, Annual Report of the IACHR 1997, § 158-159.

recognized the peremptory character (*ius cogens*) of the international norm prohibiting torture ([17]).

The Court seems to be extremely cautious in considering "European" rights as part of the current international law. At the same time it seems to apply its principles, without making express mention of the sources, particularly in incidents involving Turkey and concerning law enforcement and counter-terrorism operations against PKK activists in the southeast part of the country. In *Ergi v. Turkey* the Court applied the standards set out in Article 57 of the Additional Protocol (I) to the Geneva Conventions in order to evaluate whether Turkish officials violated the right to life granted in Article 2 of the Convention, notwithstanding Turkey was not part of the Protocol. The case concerned the accidental killing of a woman resulting from misdirected fire during an ambush conducted against PKK operatives. According to the Court's statement, during the operation Turkish agents failed to adopt sufficient precautions in order to guarantee due protection to civilians ([18]).

2. Interpretation of Article 1 of the European Convention on Human Rights

2.1 Regional character of the Convention: Bankovic and Others v. Belgium and other 16 Contracting Parties

According to Article 1 of the European Convention on Human Rights, a State party shall secure the fundamental rights of individuals who are *within its jurisdiction*. This formulation was preferred to the previous one reporting "*residing within*". During a military intervention, the jurisdiction of the State rises from acts performed abroad by its military, in form of accountability for extraterritorial acts. The extraterritorial exercise of jurisdiction is exceptional in nature, and is based on the principle of "overall effective control" issued in *Loizidou v. Turkey.* This principle has been resumed in *Bankovic and Others v. Belgium and Other 16 Contracting Parties,* a case concerning the killing of 16 individuals caused by a NATO air strike during the

([17]) ECtHR, *Al-Adsani v. The United Kingdom* - 35763/97 [2001] ECHR 761 (21 November 2001). SUDRE, *Droit européen et international de droits de l'homme*, Paris, PUF, 2005, p. 203.
([18]) ECtHR, *Ergi V. Turkey* - 23818/94 [1998] ECHR 59 (28 July 1998), § 81. ALTIPARMAK, *Bankovic: An Obstacle to the Application of the European Convention on Human Rights in Iraq* in *Journal of Conflict & Security Law* (JCSL) (2004), Vol. 9 No. 2, p. 213–251.

air campaign against the Federal Republic of Yugoslavia in 1999 ([19]). The applicants complained that the States participant to the campaign under NATO command and control violated Articles 2, 10 and 13 of the Convention, affirming that, by virtue of an absolute control of the airspace over Serbian territory by NATO forces, the victims were within the jurisdiction of the respondent States in the meaning of Article 1 of the Convention ([20]).

The defendants, while stressing the essentially territorial nature of the jurisdiction in international law, excluded that the victims were within the jurisdiction of the allies by virtue of the absolute control of the airspace. Furthermore, they declared that acts of war performed under NATO command and control within the territory of a State that is not part of the Convention could not be ascribed to respondent States ([21]).

The Court assumed it was essential to determine whether the victims were within the jurisdiction of the respondent States ([22]), by virtue of an extraterritorial act. Arguing that such an act depends on the effective control of the relevant territory and its inhabitants abroad, as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of the territory concerned, the Court declared the case inadmissible ([23]). Furthermore, it pointed out that the Convention is not an instrument that applies throughout the world, but a regional treaty aimed to spread its effects essentially within the European legal space and notably in the legal

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([19]) ECtHR, *Banković and Others v. Belgium and 16 Other Contracting States* - 52207/99 [2001] ECHR 970 (19 December 2001).

([20]) The complaint was brought before the Court on Oct. 20, 1999. In June, the ICTY Prosecutor had appointed a Panel of Experts, in charge of verifying whether the air strikes campaign was conducted in accordance with the relevant provisions of international humanitarian law (IHL). In its report, the Panel concluded that no violation of IHL was to ascribe to NATO forces. The broadcasting station was considered a legitimate target, due to the fact that it was part of the Serbian integrated system of command and control. The attack aimed to disrupt the whole system. Furthermore, NATO authorities announced the raid in advance, thus civilians were in the building at their own risk. See in www.un.org/icty/pressreal/nato061300.htm, ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, § 71-79.

([21]) *Contra*, Council of Europe, Report by the Secretary General on the use of his powers under Article 52 of the European Convention on Human Rights, SG/inf 2006/5, 28 Feb. 2006: "*The activities of foreign agencies cannot be attributed directly to States Parties. Their responsibility may nevertheless be engaged on account of either their duty to refrain from aid or assistance in the commission of wrongful conduct, acquiescence and connivance in such conduct, or, more generally, their positive obligations under the Convention*".

([22]) The Court itself sets up a sequence of authorities on the matter: *Loizidou v Turkey* (*preliminary objections*), judgment of 23 March 1995, Series A no. 310, p. 23, § 62; *Loizidou v Turkey* judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2234, § 52; *Cyprus v Turkey* [GC], no. 25781/94, § 76, ECHR 2001-IV; *Drozd and Janousek v France and Spain,* judgment of 26 June 1992, Series A no. 240, p. 29, § 91; OPPENHEIM'S *International Law*, 9th Edition 1992 (JENNINGS AND WATTS), Vol. 1, §§ 136 and 137; BROWNLIE, *Principles of International Law*, 4th Edition 1990, p. 298, 311; and BYERS, *Custom, Power and the Power of Rules*, Cambridge University Press, 1999, p. 53.

([23]) ECtHR, *Bankovic,* § 67 – 73.

space of the contracting parties, and the FRY was simply out of this legal space ([24]). Finally, the Court assumed that:

'Had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949' ([25]).

2.2 Jurisdiction and positive obligations*: Ilaşcu and Others v. Moldova and Russia*

The decision of the Grand Chamber on *Ilaşcu and Others v. Moldova and Russia,* in 2004, represents a significant step in the definition of the exact extension of the phrase "*within the jurisdiction".* Furthermore, it clarified the nexus between positive obligation and State jurisdiction. The case is related to the internal situation of Moldova. Since its independence in 1991, the Moldovan Republic is *de facto* divided in two parts. The east bank of Dniestr River hosts currently the separatist '*Moldavian Republic of Transdniestria*' (MRT) supported by the Fourteenth Army of the USSR, originally based in Odessa, which was deployed in Moldova during the civil war in 1991 – 1992, providing aid to separatists.

Ilascu concerned the arrest and mistreatment of activists belonging to a party in favor of the reunification of the country, imprisoned and systematically tortured by officials belonging to the separatist Government with the substantial sustain of the Russian military ([26]). Following the complaint before the European Court, the government of Moldova declined its responsibility on the case, affirming its inability to guarantee to people living in the territories of the east bank of the Dniestr River the rights set forth in the Convention. The problem was renowned. Joining the European Convention of Human Rights, Moldova made a reservation, holding its inability to exercise an effective control over Transdniestria. A communication was issued also to Russia. Moscow rejected any accusation. The Government affirmed Russian troops are conducting in Moldova a *peacemaking* operation not entailing the Russian jurisdiction as specified in Article 1 of the Convention.

([24]) *Ibidem,* § 80.
([25]) *Ibidem,* § 75.
([26]) ECtHR. *Ilascu And Others v. Moldova And Russia* - 48787/99 [2004] ECHR 318 (8 July 2004).

In its statement the Court affirmed the responsibility of Moldova, for not adopting all the necessary means to drive to an end the violations. In particular, the Court, while admitting Moldova reduced capacity to exercise sovereign powers over Transdniestrian region, has blamed the Government for not adopting all necessary measures to regain the control of its whole territories and to obtain the liberation of the applicants, explicitly assuming that it had been within the power of the Moldovan Government to take measures to secure their rights under the Convention ([27]). In addition, the Court affirmed the responsibility of Russia, for exercising de facto jurisdiction over people living in Transdniestria, through its decisive influence in the area and over the separatist Government ([28]).

2.3 Beyond "l'espace juridique européen": *Öcalan* and *Issa and Others v. Turkey*

Further cases concerning military and security issues engaged the Court in a new path, and what has been defined as a watershed seems to become a simple step back in the current enlargement of the protection granted by the Convention. This new trend entails first of all a progressive acceptation of the principle of "personal jurisdiction", based on *de facto* control over an individual, as in the case of *Öcalan v. Turkey* ([29]). Secondly, in *Issa v. Turkey,* the Court is ready to review its opinion on the strictly regional character of the Convention, ([30]).

In *Öcalan v. Turkey,* the leader of PKK was put under arrest at Nairobi airport and immediately transferred under the authority of Turkish agents. Turkish jurisdiction under Article 1 of the Convention has been affirmed as a consequence of the physical custody of the captured by Turkish agents. Furthermore, the Court referred to Turkey the alleged violation of the rights concerning arrest and detention even if those violations occurred outside the European legal space.

In *Issa v. Turkey,* the applicants were the relatives of Kurdish shepherds brutally assassinated by Turkish forces operating in the north of Iraq. According to the complaints, shepherds were arrested, tortured and then killed by Turkish forces which were conducting a huge cross-border

([27]) ECtHR. *Ilascu,* § 454.
([28]) ECtHR. *Ilascu,* § 392.
([29]) ECtHR, *Öcalan v. Turkey* - 46221/99 [2003] ECHR 125 (12 March 2003).
([30]) ECtHR, *Issa And Others v. Turkey* - 31821/96 [2004] ECHR 629 (16 November 2004).

counter-terrorist operation, using artillery, F16 fighters and helicopters. The Court dismissed the claim assuming petitioners' allegations had not been proved beyond any reasonable doubt. In particular, lacking a concrete proof that Turkish armed forces were conducting operations in the area, the Court has been not satisfied that the applicants' relatives were within the jurisdiction of the respondent State for the purposes of Article 1 of the Convention. However, the Court, in its (barely clear) statement, admits the possibility that acts performed by agents of a State party outside the European legal space entail its responsibility if, in the specific occurrence, an effective overall control has been established:

‘The Court does not exclude the possibility that, as a consequence of this military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey (and not that of Iraq, which is not a Contracting State and clearly does not fall within the legal space (*espace juridique*) of the Contracting States’ ([31]) .

2.4 The jurisprudence of the European Court in some domestic decisions: *Al-Skeini and Others v. the Secretary of State for Defence*

British law includes the European Convention since 1998, when the *Human Rights Act* was approved. The Act, in its Section 3 (1) provides that so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

In December 2004, the Queen’s Bench Division of the High Court examined contextually six cases of alleged violation of the European Convention during the military occupation of the province of Basra, Iraq ([32]). Five complaints concerned violation of the right to life of Iraqi civilians, killed during clashes between UK troops patrolling the streets and militias. The sixth complaint concerned the death of an Iraqi national detained in a British military prison. The preliminary investigation conducted by the Commanding Officer in order to evaluate the

([31]) ECtHR, *Issa,* § 74.
([32]) The High Court of Justice Queen's Bench Division (Divisional Court) *Al Skeini Ors, R (on the application of) v Secretary of State for Defence [2004]* EWHC 2911 (Admin) (14 December 2004).

opportunity to bring the case to the investigation division of the Royal Military Police for further proceedings concluded that the killings were lawful due to the fact that the soldiers acted in accordance with the established rules of engagement (ROE).

Before the High Court, the applicants held that the exercise of the State power abroad depends on two form of authority: a *personal jurisdiction*, as a consequence of acts performed by State agents outside the national territory, or an *overall effective control* upon an area situated outside national borders, as specified by the European Court in *Loizidou v. Turkey* ([33]). According to the claimants, both these exceptions were expression of the same general principle, that of control, over person or land, resulting in the case because of the Government's acceptance that the UK was at that time an occupying power. The defendant considered that Iraq is outside the territorial reach of the Convention, remarking also that the doctrine of personal jurisdiction does not reflect international law.

Considering the degree of control of British troops over the provinces of Basra and Maysan, the High Court held that notwithstanding the number of troops deployed in the area, the United Kingdom did not retain an *effective overall control* on the area, where the situation was extremely fluid, while in the case of Mr Baha Mousa's death in the custody of British forces, there has been a breach of the procedural investigative obligation arising from articles 2 and 3 of the Convention. In the appeal decision, substantially holding that all further proceedings on that issue should be stayed until the conclusion or other disposal of the pending court martial proceedings ([34]), Lord Justice Sedley affirmed significantly that

'the one thing British troops did have control over, even in the labile situation described in the evidence, was their own use of lethal force'

while adding that

([33]) ECtHR, *Loizidou v. Turkey* - 15318/89 [1996] ECHR 70 (18 December 1996), § 52.

([34]) Courts martial alleging ill-treatment, amounting to torture or inhuman or degrading treatment, have been held in Osnabrück and recently at the Bulford Military Court Centre, Salisbury.

‘the Act reaches the same parts of the body politic as the Convention. For my part I also see good grounds of principle and of substantive law for holding that, at least where the right to life is involved, these parts extend beyond the walls of the British military prison and include the streets patrolled by British troops’ ([35]).

Conclusive remarks

Both the European Court and domestic instances have been extremely prudent in enlarging the original reach of the Convention. Considering the humanitarian scope of the intervention against the Federal Republic of Yugoslavia, the restrictive approach in *Bankovic* was perhaps determined also by reasons of political nature. After *Bankovic*, it can be noted a significant trend towards a more effective protection. In *Issa* the Court has expressly declared that the Convention can be applied in Iraq, clearly outside the European legal space. In *Assanidze v. Georgia,* the Court held that

‘In certain exceptional cases, jurisdiction is assumed on the basis of *non-territorial factors*, such as: acts of public authority performed abroad by diplomatic and consular representatives of the State; the criminal activities of individuals overseas against the interests of the State or its nationals; acts performed on board vessels flying the State flag or on aircraft or spacecraft registered there; and *particularly serious international crimes (universal jurisdiction)*’ ([36]).

The link between the jurisdiction and the commission of international crimes entailing universal jurisdiction (such as grave breaches of the Geneva Convention or torture), established by the Court, is not a minor change in the subject that is under discussion in this paper. In *Bankovic* a core argument was State practice. Considering that although there had been a number of military missions but no derogation pursuant to Article 15 ([37]), the Court argued that no State had indicated a belief that its extraterritorial actions involved an exercise of jurisdiction.

([35]) The Supreme Court of Judicature Court of Appeal (Civil Division) *Al-Skeini Ors, R (on the application of) v Secretary of State for Defence* [2005] EWCA Civ 1609 (21 December 2005) §§ 197 and 205.
([36]) ECtHR, *Assanidze v. Georgia* - 71503/01 [2004] ECHR 140 (8 April 2004), § 137 (*Emphasis Added*).
([37]) Article 15 of the European Convention provides as follows: *1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. 3.Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It*

In order to expand the protection granted by the Convention, the Court should assume a more critical approach to State practice. Human rights obligations originate principally from the State practice of trampling the rights of individuals. In a recent publication, the Joint Committee of Human Rights appointed by the House of Lords reported that the Government did not consider that the UK exercised jurisdiction in Iraq or Afghanistan, which were sovereign states. That means that neither the UN Convention against Torture (UNCAT) nor Article 3 ECHR was applied to transfer of prisoners to Iraqi or US physical custody within Iraq, since prisoners taken into custody in Iraq had at all times been subject to Iraqi jurisdiction ([38]). It is a clear symptom of the States' tendency to subordinate human rights protection to political interests or opportunities. This shows that State practice is not a good criterion in interpreting the reach of State obligation in human rights protection. In spite of the interstate nature of the treaties on human rights, the Court should dismiss State practice, when it appears clearly inconsistent with fundamental human rights.

The issue of whether and to what extent a State party of the European Convention is accountable for human rights violations perpetrated by their armed forces abroad, particularly in Afghanistan and Iraq, essentially depends on the Court assumptions on the content of Article 1. These assumptions have a fundamental impact on domestic proceedings. After *Bankovic* the Court firmly held its principal assessment -the jurisdictional competence of a State is primarily territorial- but progressively enlarged the range of the Convention, by introducing *non-territorial factors* and no more considering the territorial reach of the Convention as limited to the European legal space. It means perhaps that the Court is willing to admit the possibility of adopting a dual approach to jurisdiction, giving autonomous relevance to the concept of "personal jurisdiction", now considered a limited exception to a primary doctrine of "territorial jurisdiction". Such a doctrine would have a significant impact on the States behaviour outside their territories, steering to a wider respect for fundamental rights.

shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

([38]) House of Lords, Joint Committee on Human Rights, 19th Report of the Session, 2005-06, Published on 26 May 2006, § 69.