

# CURRENT ISSUES IN EXTRATERRITORIALITY: HOW LONG IS THE LONG ARM JURISDICTION OF INTERNATIONAL HUMAN RIGHTS BODIES?

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## I. EXTRATERRITORIALITY IN GENERAL

One line of cases involving extraterritoriality revolves around the issue of effective control over persons as a result of military occupation and also involves jurisdictional issues. In the European system, the *Cyprus v. Turkey* case developed the doctrine of effective control by Turkish forces of Northern Cyprus as its basis for jurisdiction.<sup>1</sup> In the Inter-American system, the leading case is *Coard*, which involved United States control over seventeen Grenadian petitioners who remained under United States detention and had been involved in the overthrow of the Grenadian government.<sup>2</sup> The United States contested the admissibility of this case, asserting that the Commission lacked the competence to examine the legal validity of its military actions in Grenada as this fell beyond the scope of its mandate. The Inter-American Commission held that the petitioners had been subjected to the extraterritorial authority and control of the United States authorities and declared the United States in violation of the American Declaration.<sup>3</sup>

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1. *Cyprus v. Turkey*, App. Nos. 6780/74 & 6950/75, 2 Eur. Comm'n H.R. Dec. & Rep. 125, 137 (1975).

2. Case 10.675, Inter-Am. C.H.R. 550, OEA/ser. L/V.II. 95 doc. 7 rev. (1997).

3. *Id.*

## II. DEFINING THE ISSUE

The United States has deployed massive military power into Afghanistan to fight against the Taliban regime and al-Qaida. The United States also sent troops to Iraq to attempt an overthrow of Saddam Hussein's regime and the attempted pacification of the country. During this worldwide war against terror, the United States has also taken into custody, hundreds or perhaps thousands of individuals, at various United States Military bases. These bases include the United States military base at Guantanamo Bay, at the Bagram air base in Afghanistan, and at other undisclosed locations. In addition, the United States has turned over captured al-Qaida suspects from United States custody to other countries where they were allegedly tortured, such as the case of Maher Arar, a Canadian citizen of Syrian origin. Further, northern Alliance forces in Afghanistan, allied to the United States in the Afghan armed conflict, reportedly engaged in atrocities as the Taliban was retreating in November 2001. Should any of these cases reach the international human rights bodies, should the human rights bodies take jurisdiction over them?

In January 2002, the United States started bringing individuals it termed enemy combatants to the United States Naval Base at Guantanamo Bay, Cuba. These individuals were not given the status of prisoners of war and they were not charged with criminal offenses, or any other crimes for that matter. At the domestic level, lawyers who were not granted access to the detainees sought habeas relief on their behalf in federal court in order to have their status clarified. It was unclear what legal regime, if any, they were being held under. Two United States federal courts refused to take jurisdiction, with one declaring that the detainees fell under Cuban sovereignty since no United States federal court had jurisdiction over the territory where the Cuban base was located.

Since it appeared that no federal court would or could take jurisdiction, on February 25, 2002, the public interest lawyers requested precautionary measures from the Inter-American Commission on Human Rights to protect the detainees' rights to be treated as prisoners-of-war, to be free from arbitrary, incommunicado and prolonged detention, unlawful interrogations and trials by military commissions in which they could be sentenced to death. On March 12, 2002, the Inter-American Commission granted the request and called upon the United States to "take urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal." The Commission justified its assumption of jurisdiction invoking the authority and control exercised by the United States over these detainees:

Accordingly where persons find themselves within the authority and control of a state and where a circumstance of armed conflict may be involved, their fundamental rights may be determined in part by reference to international humanitarian law as well as international human rights law. Where it may be

considered that the protections of international humanitarian law do not apply, however, such persons remain the beneficiaries at least of the non-derogable protections under international human rights law. In short, no person, under the authority and control of a state, regardless of his or her circumstances is devoid of legal protection for his or her fundamental and non-derogable human rights.<sup>4</sup> The United States ignored the precautionary measures issued by the United States in 2002, but earlier this year, the United States Supreme Court corrected the lower courts' interpretation that federal courts in the United States had no jurisdiction and remanded the cases for reconsideration.

The first hurdle a human rights victim must overcome when presenting a petition to an international human rights body is the jurisdictional hurdle. The petitioner must show that the petition is *prima facie* admissible, *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*.

Admissibility becomes more complicated when looking at the exercise of jurisdiction by a regional human rights body that is requested to extend its jurisdiction to acts that occurred outside the region, as defined by the territorial circumference of the membership of the regional organization. At the regional level, the landmark case in this area is *Bankovic*.

### III. THE BANKOVIC CASE

The *Bankovic* case involved an Application filed before the European Court of Human Rights against seventeen States party to the European Convention that are also members of NATO. The complaint alleges that the NATO bombing in 1999 of a Serbian Radio and TV station (RTS), in Belgrade, violated provisions of the European Convention.<sup>5</sup> The Application was filed on behalf of the victims, both dead and injured, of that bombing. The European Court declared the Application inadmissible because the matter was held not to come within the jurisdiction of the respondent states within the meaning of Article one of the European Convention.

The Application raised important issues of State responsibility under human rights treaties for the killing of civilians during bombing campaigns, with ramifications that extended far beyond this case. Michael O'Boyle, one of the senior lawyers in the court's registry, noted that few inadmissibility decisions [...] have given rise to such adverse comment and controversy as the inadmissibility decision in the *Bankovic* case.<sup>6</sup> One need only contemplate the

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4. Posted on the website for the Center for Constitutional Rights, petitioners in the case: [www.ccrny.org](http://www.ccrny.org).

5. *Bankovic v. Belgium*, 12 Eur. Ct. H.R. 335, 345 (2001).

6. Michael O'Boyle, *European Convention on Human Rights and Extraterritorial Jurisdiction: A comment on 'Life after Bankovic'* In *Extraterritorial Application of Human Rights Treaties 125* (Fons Coomans & Menno T. Kamminga eds., 2004).

possible scenarios: For example, do Iraqi civilian bombing victims have a case under the American Declaration, against the United States, for violation of their human rights before the Inter-American Commission? A similar fact situation was dealt with in an earlier Commission case, involving the United States bombing of Panama, during the December 1989 invasion to remove Manuel Noriega from power. A petition was filed on behalf of Panamanians who were killed, injured, or suffered material damage during the bombing campaign. The petition was declared admissible by the Commission in 1993.<sup>7</sup>

What then is the difference between the European Convention and the American Declaration of the Rights and Duties of Man, to warrant such contradictory decisions on admissibility by the two international human rights bodies? First, the American Declaration, unlike the European Convention, contains no limits on the obligations assumed by states under the Declaration. The European Convention, however, like the American Convention, limits the obligations assumed by states. States must ensure all persons, subject to their jurisdiction, the free and full exercise of the rights and freedoms set forth in the respective treaty.

*Bankovic* was declared inadmissible on December 12, 2001, because the European Court considered that the NATO respondent states did not have the required effective control of Serbia. The Court stated:

In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through *the effective control of the relevant territory and its inhabitants abroad* as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government. (Emphasis added).

Although the respondent States did not exercise public powers normally exercised by the Government, it is a fair but unexplored question to ask of the Court, precisely how much bombing is required to assert effective control of the relevant territory and its inhabitants. Perhaps the bombing of the radio station did not reach such a threshold, but perhaps carpet-bombing of a territory, sustained over an extended period of time, might.

Since the applicants in *Bankovic* were arguing admissibility, *ratione loci*, they never really argued the question of admissibility *ratione personae*, or refuted the incontrovertible fact that the inhabitants of the FRY were outside the system and consequently, outside the scope of jurisdiction of Article one of the European Convention. The applicants stated that they were nationals of the Republic of Yugoslavia and would be left without a Convention remedy, but the respondent states replied that “the FRY was not and is not a party to the

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7. Case 10.573, Inter-Am. C.H.R. 312, OEA/ser. L/VII.85 doc. 9 rev. (1993).

Convention and its inhabitants had no existing rights under the Convention."<sup>8</sup> This is a crucial point since the inhabitants had no rights under the European Convention they could not have had a reasonable expectation of protection or indemnification from the European Court.

Although some human rights activists have advocated that the Inter-American Commission take jurisdiction over victims who were killed or injured by United States firepower in Iraq, similarly one might argue that the inhabitants of Iraq have no reasonable expectations or rights under the instruments of the inter-American system, any more than the Serbs had a reasonable expectation of protection under the European system. This position, however, results in a fundamental unfairness, for why should Iraqis or other aliens, detained by United States forces at Guantanamo, be entitled to protection, whereas Iraqis, detained by United States forces at Bagram or Diego Garcia, are denied the same protection? The only logical response is that regional human rights bodies must draw the lines that circumscribe the limits on the exercise of their jurisdiction somewhere. Perhaps the line should be drawn to coincide with the exercise of authority and control anywhere in the world, or perhaps it should be drawn geographically to limit their jurisdiction to the territorial circumference of the region.

Why this is so is perhaps best explained by the characteristics of a regional arrangement for the protection of human rights. A regional system, like the European system or the Inter-American system, unlike the United Nations Human Rights Committee, which is part of a universal system, is first and foremost defined by geography, i.e. what states and territories comprise the region? The European Court in *Bankovic* defined its *espace juridique*:

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

The United Nations which functions largely through regional groupings, does not conform the composition of these groupings to the composition of the regional organizations. For example, the UN Group of Latin American and Caribbean countries (GRULAC), which most closely corresponds to the Americas region, does not include the United States and Canada, which are members of the Organization of American States (OAS). On the other hand, the

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8. *Bankovic*, 12 Eur. Ct. H.R. at 347, ¶ 42 (2001).

UN Group of Western European and other states (WEOG), corresponds to the European region, but also includes the United States, which is not a member state of the Council of Europe.

Another problem is the fact that regional organizations, such as the Council of Europe, do not include all the states that geographically comprise Europe in their membership. With the tearing down of the Berlin Wall and the end of Communism, states previously defined as Eastern or Central Europe began to be admitted for membership into the Council of Europe. Even Russia was admitted to membership. Other states, geographically within the European region, such as Bosnia and Herzegovina and the Former Republic of Yugoslavia (today Serbia and Montenegro) were considered during the period of armed conflict in former Yugoslavia, not to have reached the requisite threshold of human rights observance required for admission. Absurdly, a regional system created in large part to promote and protect human rights in the region, excluded from its protection and membership within that regional system, the states in which the greatest number of human rights violations were occurring.

#### IV. CONCLUSION

In my view, this is the central problem with *Bankovic*, and it has nothing to do with the reasoning of the Court, but with the unwillingness of the Council of Europe to include all independent states within the European region in its membership. This is now being remedied, as Serbia and Montenegro and Bosnia and Herzegovina are both now members of the Council of Europe, as is Monaco, which joined on October 6, 2004. The only remaining European State that is a member of the United Nations and not of the Council of Europe is Belarus.

The Inter-American system has not pushed the jurisdictional envelope much further than the European system, although the larger question of the Inter-American Commission's exercise of jurisdiction outside the region is still one of first impression, since the Commission has not yet had to confront the issue. Given the charges of torture by United States forces in Abu Ghraib, however, it is not inconceivable that a detainee will file a petition at some point with the Inter-American Commission.