

# CREEPING JURISDICTION OF THE EUROPEAN COURT OF HUMAN RIGHTS: THE BANKOVIC CASE VS THE LOIZIDOU CASE\*

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## Introduction

May the European Court of Human Rights ('the Court') review the legality of acts or omissions of military forces of a state party to the European Convention on Human Rights ('the Convention'), which have been committed outside its territory, in light of the Convention's terms? The answer to this question is in the first instance dependent upon whether the Convention has given such competence to the Court. Prior to its decision in the recent Bankovic Case,<sup>1</sup> the European Commission of Human Rights ('the Commission') and the Court had exercised competence in a series of cases that originated from acts the state parties concerned had committed either outside their territories or committed on their territories but that had

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<sup>1</sup> After all the international community's efforts to achieve a political solution to the Kosovo conflict failed, NATO forces began bombing targets in the Federal Republic of Yugoslavia on 23 March 1999. On 23 April 1999, while the bombing continued, a NATO aircraft launched a missile at the Serbian Radio & Television building, which caused the death and injury of several people and heavy damage to the building. On 20 October 1999, the survivors and survivors' representatives applied to the Court to open a case against NATO's European members. See, European Court of Human Rights, Grand Chamber Decision as to the admissibility of Application No. 52207/99 by Vlastimir and Borka Bankovic, Zivona Stojanovic, Mirjana Stoimenovski, Dragana Jaksimovic and Dragan Sukovic against Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom, 12 December 2001 (hereinafter cited as 'the Bankovic Case').



produced effects outside their territories.<sup>2</sup> For example, in the Cyprus Cases<sup>3</sup> and the Loizidou Case<sup>4</sup> the Commission and the Court found themselves competent to examine individual and inter-state applications against Turkey, in which it was alleged that the members of the Turkish armed forces in Cyprus had violated certain provisions of the Convention. After deciding that the Turkish forces were actually in control of Northern Cyprus, both Commission and the Court jumped, in their opinion and judgement respectively, to the conclusion that, through such control of the area in question, Turkey had in fact brought within its jurisdiction persons and property found or situated in the area in question.<sup>5</sup> The Court also found itself competent to hear a case brought by several Iraqi citizens against

<sup>2</sup> See the European Commission of Human Rights, *X v. Federal Republic of Germany*, decision of admissibility in Application No. 1611/62, Yearbook of the European Convention on Human Rights, Vol. 8, pp. 158-169; *Ilse Hess v. the UK*, admissibility decision of 28 May 1975 in Application No. 6231/73, Decisions and Reports (D&R) 2, 125; *X and Y v. Switzerland*, admissibility decision of 14 July 1977 in Application Nos. 7289/75 and 7349/76, D&R 9, p. 57; *W v. the UK*, admissibility decision of 28 February 1983, in Application No. 9348/81, D&R 31, p. 190; European Court of Human Rights, *Soering v. the UK*, Application No. 14038/88, 7 July 1989, European Human Rights Reports (EHRR), Vol. 11, 1989, p. 439; *Cruz Veras v. Sweden*, Application No. 15576/89, 20 March 1991, 14 EHRR 1; *the Vilvarajah and Others v. the UK* judgement of 30 October 1991, Series A, No. 215, p. 34, paragraph 103; *Drozd and Janousek v. France and Spain*, Application No. 12747/87, 26 June 1992, 14 EHRR 745; the European Court of Human Rights, First Section, decision as to admissibility of Application No. 31821/96 by Halima Musa Issa, Beebin Ahmad Omar, Safia Shawan Ibrahim, Fatima Dervish Murty Khan, Fahima Salim Muran and Basna Rashid Omer, see, <http://hudoc.echr.coe.int> ( hereinafter cited as 'the Issa Case'); *Ilescu, Lesco, Ivanto and Petrov-Popa v. Moldova and the Russian Federation*, Application No. 48787/99, 4 July 2001; the European Commission of Human Rights, *Cyprus v. Turkey*, decision of 26 May 1975 on the admissibility of Applications Nos. 6780/74 and 6950/75, D&R , Vol. 2, 1975, p. 125 (hereinafter referred to as 'the first and second Cyprus Cases'); the European Commission of Human Rights, *Cyprus v. Turkey*, decision of 10 July 1978 on the admissibility of Application No. 8007/77, D&R 13, 1979, p. 85 (hereinafter cited as 'the third Cyprus Case'); the European Commission of Human Rights, *Cyprus v. Turkey*, Application No. 25781/94, 4 June 1979, 23 EHRR 244 (hereinafter cited as the 'Commission report in the fourth Cyprus Case'; the European Court of Human Rights, *Case of Cyprus v. Turkey*, Application No. 25781/94, Strasbourg, judgement of 21 March 2001 (hereinafter cited as 'the last Cyprus Case'); European Court of Human Rights, *Loizidou Case (Preliminary Objections)* (40/1993/435/514) judgement, 23 March 1995; *Loizidou v. Turkey (Merits)* (40/1143/435/514), Strasbourg, judgement, 18 December 1996.

<sup>3</sup> Hereinafter the phrase 'Cyprus Cases' shall refer to all inter-states applications made by Cyprus against Turkey, viz. 'the first and second Cyprus cases', 'the third Cyprus case', 'the Commission's Report in the Fourt Cyprus Case', and 'the last Cyprus Case'.

<sup>4</sup> See fn. 2 above.

<sup>5</sup> See the first and second Cyprus Cases, note 2 above, paragraph 8 and the Loizidou Case (Preliminary Objections), paragraph 62).



Turkey alleging that during a 1995 military operation in Northern Iraq Turkish forces violated various provisions of the Convention.<sup>6</sup>

Having examined the Court's case law in the Drozd and Janousek Case and in the Loizidou Case (Preliminary Objections), Harris, Boyle and Warbrick were able to comment in 1995 as follows:

*"It has now been placed beyond doubt that the Convention is applicable to army operations abroad and more subtly to any subordinate administration that results from such activities. The approach is thus of great significance for the writ of the Convention system. The effect of Loizidou v. Turkey (Preliminary Objections) is that the state cannot insulate itself from the Convention scrutiny either by operating beyond state frontiers, by qualifying its acceptance of the optional clauses by a limitation *ratione loci*, or by setting up surrogate administrations."*<sup>7</sup>

Relying on those precedents and writings, several Serbs have brought an application against the European members of the NATO, whose armed forces bombed, among others, the Serbian Radio and Television (Radio Televise Srbije, RTS) building, for having violated various terms of the Convention. They invoked in their efforts to justify their application the above-mentioned precedents, mainly the Cyprus Cases and the Loizidou Case.

The Bankovic Case, which came as a surprise to those who are familiar with the Court's previous case law, is interesting for various reasons. First, the incident that led to the case occurred in the Federal Republic of Yugoslavia (FRY). Second, the FRY is not a member of the Council of Europe or a party to the Convention. In other words, the FRY is a third party to the Convention and is not subject to the jurisdiction of the Court, which is an organ of the Convention. Finally, Article 1 of the Convention requires state parties to secure the Convention rights and freedoms to persons within their jurisdiction. Therefore, persons who are under the jurisdiction of a state party benefit from the protection of the Convention, and they may apply to the Court in cases where the latter has violated their rights under the Convention. The RTS building and the victims of the NATO air strike were on the FRY's territory at the time of the incident. But authorised members of the armed forces of some states parties had caused damage, death and injury.

After a detailed examination of the historical background to the Convention,

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<sup>6</sup> See the Issa Case, fn. 2, above.

<sup>7</sup> See D. J. Harris, M. Boyle, C. Warbrick, *Law of European Convention on Human Rights*, (Butterworths, 1995) p. 643.



the Court declared the Bankovic Case inadmissible on the grounds that the application was not compatible with the provisions of the Convention.<sup>8</sup>

The Court seems to have departed from its previous case law so far as its interpretation of Article 1 is concerned. In fact, the Bankovic Case differs from the previous cases in that: it interpreted the Convention differently; it gave a different meaning to the expression 'within their jurisdiction' in Article 1; and it made a difference between the concept of responsibility and the concept of jurisdiction.

Thus understood, the Bankovic Case is likely to have some bearing on the Court's decisions in similar applications to be decided in future. The Issa Case and the Ilescu Case are two examples in order. Besides, after the Loizidou Case many Greek Cypriots were encouraged to apply to the Court. Immediately below we shall look closely at the Court's case law on Article 1, with special reference to differences between the Court's approaches in the Cyprus Cases, the Loizidou Case and the recent Bankovic Case.

### **Jurisdiction of the State Parties and the Competence of the Court**

In 1950, some members of the Council of Europe adopted the Convention with a view to guaranteeing at a regional level certain rights and freedoms stated in the Universal Declaration of Human Rights.<sup>9</sup> Later, the Convention was supplemented by several additional protocols. Today, alongside the Convention, Protocols No 1, 4, 6 and 7 are in force with respect to states that have acceded to them. The framework of the contractual obligation of the state parties is defined and limited by Article 1 of the Convention:

*"The High Contracting Parties shall secure to every one within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."* (Author's emphasis.)

The limitation is two-fold: 1) only the rights and freedoms as defined in Section 1 shall be secured by the states parties, and 2) such rights and freedoms shall be secured to every one within their jurisdiction.

On the other hand, Article 56(1) of the Convention [(formerly Article 63(1))<sup>10</sup> reaffirms, in a sense, that the state parties' obligation under the Convention extends only to their metropolitan territories and not automatically to any

<sup>8</sup> The Bankovic Case, paragraph 85.

<sup>9</sup> See the preamble to the Convention.

<sup>10</sup> The Convention's provisions were renumbered after Protocol No 11 came into force and Article 63 became Article 56.



other territory for whose international relations they may be responsible. Article 56(1) partly reads as follows:

*“A state may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary-General of the Council of Europe that the present Convention shall extend to all or any of its territories for whose international relations it is responsible.”*

The connection between Articles 1 and 56(1) is interesting. While Article 1 defines the space where the Convention is to be applied, Article 56(1) restricts that space to the metropolitan territories of the state parties, unless the latter make a declaration to extend the Convention regime to their other territories.

The Court is part of the Convention's supervisory mechanism. The Convention's authors certainly had those limitations in mind when they agreed the Convention. It must also be emphasised that the Convention is an intergovernmental agreement; it is not an instrument of supranational nature. The state parties do not have to incorporate it into their national laws. The Convention provisions are, therefore, not as such directly applicable in the territory of the state parties. The state parties' obligation under the Convention is limited to living by the Convention's standards, while they are free as to the ways they effect the Convention's provisions. The Court may examine individual and inter-state applications alleging violation of the Convention after it has satisfied itself as to its competence. It is the exercise of such competence that enables it to supervise the state parties' application of the Convention in the real world. However, the Court is not a court of appeals over and above national courts of the state parties. Neither are its decisions self-executing. Nor do they have the power to quash contradictory national acts or judgements.<sup>11</sup>

The Court is a regional court; it is obviously not a world court. Its jurisdiction is defined and limited with respect to persons (jurisdiction *ratione persone*), with respect to subject matter (jurisdiction *ratione materia*), with respect to place (jurisdiction *ratione loci*) and with respect to time (jurisdiction *ratione temporis*).<sup>12</sup>

More particularly, the law the Court is competent to apply to applications before it is defined by and, in principle, limited to the Convention and its protocols. (Hereinafter the word 'Convention' should be understood as including the protocols.) In the absence of the Convention's express or

<sup>11</sup> See, inter alia, Francis G. Jacobs and Robin C. A. White, *The European Convention on Human Rights*, Second Edition, Clarendon Press, Oxford, 1996, pp. 14-15.

<sup>12</sup> See Harris, Boyle, Warbrick, *op. cit.*, pp. 629-647; Jacobs, White, *op. cit.*, pp. 15-23.



implied reference to international law in general, the Court does not have the competence to apply at will rules of public international law in cases before it. Yet, being a treaty, the Convention is governed by public international law. Its application and interpretation cannot take place in abstract. The Court may refer to such rules of international law as bear upon the interpretation and application of the Convention in a reasonable way. However, the Court was not created to supervise the conformity of the state parties' spectrum of international relations with the Convention. It was not thought of as a regional substitute to the International Court of Justice (ICJ). Nor was it intended to be a European court with jurisdiction over all acts of the state parties everywhere. It derives its competence from the consent of the state parties –from their agreement.<sup>13</sup> However, the Court's jurisdiction is a special one. It penetrates into the very essence of the national jurisdiction of state parties. Therefore, its competence needs to be traced to the consent of state parties themselves.<sup>14</sup> In law, the Court cannot go beyond that. It is not entitled to digress to the extent of taking in through the back door what the parties have already excluded.<sup>15</sup>

In the *Schooner Exchange Case* the Chief Judge Marshall said of this years ago:

*"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by it. Any restriction upon it, deriving validity from an external force, would imply a diminution of its sovereignty to the extent of that power which could impose such restriction.*

*All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can follow from no other legitimate sources."*<sup>16</sup> (Author's emphasis.)

Thus the Court's regional character, coupled with the restrictive effect of Articles 1 and 56(1) of the Convention, set certainly some limit on the Court's competence.

The Court has so far dealt with the issue of its own jurisdiction as well as the jurisdiction of state parties in a series of cases.<sup>17</sup> In terms of the problems they raise, the *Soering Case*, the *Drozd Case*, the last *Cyprus Cases*, the

<sup>13</sup> See Fitzmaurice, Separate Opinion in the *Golder v. the UK*, 1 EHRR 514, p. 566.

<sup>14</sup> See Fitzmaurice, Separate Opinion in the *Golder Case*, pp. 562, 567 and paragraphs 32, 39.

<sup>15</sup> Judge Verdross, Separate Opinion in the *Golder Case*, p. 542.

<sup>16</sup> See the *Schooner Exchange v. McFaddon*, United States Supreme Court, 1812, 7 Cranch, p. 116.

<sup>17</sup> See fn. 2, above.



Loizidou Case and the Bankovic Case each have a special place in that series.

It is strange to observe that it was only in the last case, the Bankovic Case, that the Court took some time to make a detailed examination of the issue of its competence *ratione loci*. It is strange because the Court did not undertake such a detailed interpretation of Article 1 when, for example, it decided the last Cyprus Case and the Loizidou Case. The later case had originated from facts that had taken place in Cyprus, in an area under the jurisdiction of the Turkish Republic of Northern Cyprus (TRNC) while Mrs T. Loizidou had brought the case against Turkey on the grounds that she had been deprived of her right to property because of the acts of members of Turkey's armed forces on the island. In finding itself competent, the Court gave so extensive an interpretation to Article 1, relying on the object and purpose of the Convention, as to carve for itself any power it may need to deal with applications brought under similar circumstances, paying little attention to the place where the impugned act may have taken place. Before the Bankovic Case, the Court had purported to establish its competence on the basis of the act complained of (a kind of act-based jurisdiction). So, in cases where the impugned act was committed abroad and was attributable to a state party, or where a state party committed an act within its territory but produced effects outside its territory or within another jurisdiction, the Court had found itself competent to examine complaints based on such an act.<sup>18</sup> The exercise of the so-called act-based jurisdiction reached its climax when it decided the Loizidou Case:

*"Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting party may also arise as a consequence of military action—whether lawful or unlawful— it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the right 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."*<sup>19</sup>

The Court's approach in this case makes little or no distinction between the conditions under which it should attain its competence to hear a case against a state party and the conditions under which such a state party may incur liability under the Convention.

<sup>18</sup> See X v. the Federal Republic of Germany, 25 September 1965, Yearbook of the European Convention for Human Rights, Vol. 8, p. 158; Hess v. the UK, 28 May 1975, D&R 2, p. 72; the Soering Case, paragraph 96; Cruz Veras Case, paragraph 70; X and Y v. Switzerland, D&R 12, 1977, p. 57; the Drozd Case paragraph 91.

<sup>19</sup> See the Loizidou Case (Preliminary Objections), paragraph 62.



Admittedly, 'jurisdiction' is a term of art. It has several meanings.<sup>20</sup> First, it is an attribute of sovereignty of a state that it may have over its territory.<sup>21</sup> It is a part of that supreme authority that a state has over all persons found and property located within its territory.<sup>22</sup> In this sense jurisdiction certainly refers to powers of a state to affect such persons and property as are within its territory.<sup>23</sup> Thus, it includes the power to legislate, adjudicate and enforce the law.<sup>24</sup> However, the powers that the term 'jurisdiction' implies require the existence of a geographic location in which they would have to be exercised. 'Jurisdiction' in this sense is qualified and limited. A state may not exercise its jurisdiction in the territory of another state. This stems from the cardinal principles of territorial supremacy, equality and non-intervention in international law. In its monumental judgement in the Lotus/Bozkurt Case the Permanent Court of International Justice (PCIJ) stated:

*"Now first and foremost restriction imposed by international law upon state is that –failing the existence of a permissive rule to the contrary– it may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial. It cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention."*<sup>25</sup>

The territory itself consists in land, territorial sea and airspace, and it includes spaces such as ships, aircraft and diplomatic and consular premises that are assimilated to the territory for jurisdictional purposes.

The 'jurisdiction' as referred to in Article 1 of the Convention, on the other hand, has a two-fold meaning: it refers to the competence of the Court to adjudicate and to the power of state parties to affect persons or things or

<sup>20</sup> See, among others, William W. Bishop, *International Law: Cases and Materials*, third edition, Little, Brown and Company, 1962, pp. 531-658; G. von Glahn, *Law Among Nations*, seventh edition, Allyn and Bacon 1992, pp. 145-175; L. Oppenheim, *International Law: a Treatise*, eighth edition, edited by H. Lauterpacht, pp. 325-336; R. Bernhardt, *Encyclopedia of International Law*, 1997 edition, Vol. 3, pp. 55-59; F. A. Mann, 'The Doctrine of Jurisdiction in International Law', *Recueil des Cours*, 1964, Vol. 1; F. A. Mann, 'The Doctrine of Jurisdiction in International Law: Twenty Years Later', *Recueil des Cours*, 1984, Vol. 1.

<sup>21</sup> Rebecca M. M. Wallace, *International Law*, Sweet & Maxwell, London, 1986, pp. 101, 146.

<sup>22</sup> Von Glahn, *op. cit.*, p. 146.

<sup>23</sup> Wallace, *op. cit.*, p. 101.

<sup>24</sup> It may also refer to that part of international law that distinguishes the situation in which a state may lawfully take action with respect to the things, persons or events from those situations in which it is not the one to which may lawfully do so. Bishop, *op. cit.*, p. 531.

<sup>25</sup> *France v. Turkey*, PCIJ Reports, Series A, No. 10.



events within certain defined geography. Thus, the Court's competence is defined by reference to the state parties' jurisdictions. In other words, the 'jurisdiction' as provided for in Article 1 has a geographical dimension that refers to territory on which a state party has sovereignty, and a power dimension that includes but is not limited to the power to adjudicate. The power dimension refers to a bunch of powers to affect persons or things, coming close to sovereignty. The geographical dimension determines the scope of the power-based jurisdiction. The jurisdiction has to have a territorial base; it cannot hang in a vacuum.

Before the *Bankovic* Case, the Court did not seem to follow this pattern. In fact it seemed to have assumed that if a state party had committed an act in a place it controlled but was not necessarily its territory, in violation of a provision of the Convention, its responsibility, was engaged and the Court, thus, would have competence to hear an application against that state. The matter of the fact is that the responsibility and jurisdiction of a state are two distinct concepts; governed by different rules of international law; they serve different functions.

As Judges Gölcüklü and Pettiti stated in their joint dissenting opinion in the *Loizidou* Case:

*"While the responsibility of a Contracting Party may be engaged as a consequence of military actions outside its territory, this does not imply the exercise of its jurisdiction."*<sup>26</sup>

The international responsibility of a state is engaged when it has breached one or more of its international obligations towards another state, arising out of conventional or general law. Oppenheim-Lauterpacht observes that it is the "neglect of an international legal duty" that "constitutes an international delinquency" for which the offending state is responsible.<sup>27</sup> The Draft Article of the International Law Commission on state responsibility suggests a similar definition:

*"Every international wrongful act of a state entails the international responsibility of that state."*<sup>28</sup>

Thus, one state's breach of its international obligations towards another state creates a new legal relationship between those two states. Once such a

<sup>26</sup> See 'Joint Dissenting Opinion of Judges Gölcüklü and Pettiti' in the *Loizidou* Case (Preliminary Objections), p. 32.

<sup>27</sup> Oppenheim-Lauterpacht, op. cit., p. 337.

<sup>28</sup> The International Law Commission's (ILC) text is reproduced in D. J. Harris, *Cases and Materials on International Law*, fourth edition, Sweet & Maxwell, p. 461.



relationship has been established, "it is a principle of international law and, even greater conception of law, that the offending state make reparation to the injured state if any injury has resulted."<sup>29</sup>

In such a relationship, one may observe that two sets of rules are involved: the rule that stipulates the standard conduct and the rule that seeks to determine the consequences of a breach of the former rule, that is, the responsibility.<sup>30</sup>

What is interesting with this formulation is the fact that for the responsibility of a state to arise it is not necessary that it should have committed the wrongful act or omission on its territory. If the state has breached its international obligations, the responsibility shall arise regardless of the place. The commission of the wrongful act or the omission within its jurisdiction is not thus a pre-condition for its responsibility to arise. A state's agents may cause damage to another state, for example, through espionage or sabotage within the jurisdiction of the injured state, which would still engage the responsibility of that state.

The wording of Article 1 of the Convention suggests that the state parties have assumed conventional obligations towards each other for the purpose of securing only such human rights and freedoms as are defined in the Convention only to such persons as are within their jurisdiction. The responsibility of a state party shall be engaged towards other state parties if it violates any of such rights and freedoms of persons within its jurisdiction. Thus, the Convention limits the responsibility of a state party under the Convention to its breaches of rights of persons within its jurisdiction. The state parties have not undertaken to apply the Convention to everyone everywhere in the world, but to persons on their territory. The expression "within their jurisdiction" thus defines and limits the special scope of the responsibility of the state parties.

However, in practice the former European Commission of Human Rights ('the Commission') and the Court have gone some other way; they have not only confused the concept of jurisdiction with that of responsibility but they have also purported to define jurisdiction of a state by reference to its responsibility. In other words, they first found that the state responsibility was engaged in a given situation, and thence jumped to the conclusion that the acts complained of fell within the jurisdiction of the state party concerned. Thus, in as early as 1962, the Commission had said that acts of

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<sup>29</sup> Chorzow Factory Case, PCIJ Reports, Series A, No. 17, p. 29 (1928).

<sup>30</sup> See Yearbook of International Law Commission, 1953-II, pp. 169-170.



functionaries of the German Embassy in Morocco might involve the responsibility of the Federal Republic of Germany.<sup>31</sup>

In *X and Y v. Switzerland*, the Commission said:

*"The Commission first recalls its earlier case law where it has already been established that the Contracting parties' responsibility under the Convention is also engaged in so far as they exercise jurisdiction outside their territory and thereby bring persons or property within their actual authority or control."*<sup>32</sup>

In the first Cyprus Cases, in rejecting the Turkish government's argument that the term 'jurisdiction' was limited to national territory, the Commission said:

*"The Commission finds that this term is not, as submitted by the Respondent Government, equivalent to, or limited to the national territory of the High Contracting Party concerned. It is clear from the language, in particular of the French text, and the object and purpose of this Article, and from the purpose of the Convention as a whole that the High Contracting parties are bound to secure the said rights and freedoms to all persons within their actual authority and responsibility, whether that authority is exercised within their own territory or abroad."* (Emphasis added)<sup>33</sup>

Thus, in the Commission's view, a state party's jurisdiction is equivalent to its actual authority and responsibility over persons or things, whether exercised at home or abroad.

In the Hess Case, the Commission accepted in principle that the UK's responsibility under the Convention could be engaged for its agent's unlawful acts committed in Berlin, outside the UK's territory:

*"In this case, the exercise of authority by the Respondent Government takes place not in the territory of the United Kingdom but outside its territory, in Berlin. As the Commission has already decided, a state is under certain circumstances responsible under the Convention for the actions of its authorities outside its territory. The Commission is of the opinion that there is in principle from a legal point of view, no reason why acts of the British authorities in Berlin should not entail the liability of the United Kingdom under the Convention..."*<sup>34</sup>

<sup>31</sup> *X v. the Federal Republic of Germany*, Application No. 1611/62, 25 September 1965, Yearbook of the European Convention on Human Rights, Vol. 8, p. 158.

<sup>32</sup> See note 2, above, p. 71.

<sup>33</sup> See *Cyprus v. Turkey*, Applications Nos. 6780/74 and 6950/75, D&R 2, pp. 125, 136, paragraph 8.

<sup>34</sup> See *Ilse Hess v. the UK*, Application No. 6231/73, D & R 2, pp. 72, 73.



In the Drozd Case, the Court itself made similar observations:

*“The term ‘jurisdiction’ is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory.”*<sup>35</sup>

However, the majority of the Court did not consider that the impugned acts were attributable to the respondent states; the case was declared inadmissible, as the Court did not find itself competent *ratione loci*.<sup>36</sup>

In the Loizidou Case, the Court further stretched the provisions of the Convention by stating as follows:

*“In addition, the responsibility of Contracting States can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.”* (See the Drozd and Janousek v. France and Spain judgement of 26 June 1992, Series A no. 240, p. 29, paragraph 91.)<sup>37</sup>

In the relatively recent Ilescu Case, the Court continued its previous case law:

*“The Court points out that the concept of ‘jurisdiction’ within the meaning of Article 1 of the Convention is not limited to the High Contracting Parties’ national territory. For example, their responsibility can be involved because of acts of their authorities producing effects outside their own territory.*

*Moreover, regard being had to the object and purpose of the Convention, the responsibility of a Contracting party may also arise when as a consequence of military actions –whether lawful or unlawful– it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it is exercised directly through its armed forces or through a subordinate local administration. (See the Loizidou Case, paragraph 62)”*<sup>38</sup>

<sup>35</sup> See 14 EHRR, 745, 788, paragraph 91.

<sup>36</sup> It is interesting to note that the majority of the Court ignored the substantial degree of the ‘control’ which France and Spain had over Andorra. Two co-princes appointed by France and Spain, respectively, ruled Andorra. The two states placed gendarme forces at the disposal of the Andorran authorities. Judges appointed by France sat the Andorran courts. Even convicts would serve their terms in the prisons of the two guardian states. The Court did not apply the ‘control’ test that the former Commission had previously applied in the Cyprus cases. The Court did not find that acts complained of were attributable to the respondent states. A number of judges dissented, including Rozakis of Greece and Loucaides of the Southern Greek Cypriots. See the Drozd Case, 14 EHRR, pp. 777-781 and 784-785.

<sup>37</sup> The Loizidou Case (Preliminary Objections), paragraph 62/2.

<sup>38</sup> The Ilescu Case, Application No. 48787/99, 4 July 2001, p. 15.



Finally, one must refer to the Issa Case, which had originated from some alleged events that had allegedly occurred in northern Iraq during a Turkish armed forces operation. The alleged events were similar to the facts in the Bankovic Case.<sup>39</sup> Before the Court, the Turkish government did not raise the jurisdictional issue and the Court declared the application admissible. In our view, regardless of the Turkish government's failure to raise the issue, it was the Court's duty to satisfy itself, *ex officio*, beyond doubt that it had the competence before it proceeded to declare the application admissible. The Court would not do it; instead, it took it for granted that it had the jurisdiction. In the Bankovic Case, however, it implied that it might reconsider the Issa Case when it examined it on its merits.<sup>40</sup>

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<sup>39</sup> Since the Gulf War in 1990, northern Iraq is actually under no state's control. Some Kurdish tribes loosely organised around two rival political parties constitute the majority of the inhabitants of the region. A coalition of states actually prevents the Iraqi government from exercising its jurisdiction over the northern part of its territory. The area in question thus constitutes an ideal safe haven for terrorist groups. The PKK did not miss the opportunity. It has used the area as a base from which it launched armed attacks against Turkish targets. After the PKK's presence in the area became a real danger to Turkish security, the Turkish security forces launched military operations between 14 March 1995 and 16 April 1995 against PKK bases in northern Iraq. During the operations, the security forces were on the move chasing the terrorists. The army left. Later, some dead bodies that allegedly belonged to some nearby villagers were found in the mountains. On the very same day, Kerim Yıldız, a representative of the Kurdish Human Rights Project (KHRP) based in London was there. He allegedly took some statements from the survivors of the late villagers. Allegations were that the Turkish forces had detained the villagers. The victims' survivors brought applications, through the KHRP, to the Court alleging violation of various provisions of the Convention. It was undisputed that the villagers were killed in Iraq. It was not proved how they were killed. It was not even clear whether they were not members of the PKK itself. The only proof was the so-called statements, which were allegedly taken by the KHRP representative who was present on the spot on the very day the armed forces left the area! To compare that case with the Bankovic Case, it is useful to have a closer look at the alleged facts:

1. Admittedly, the Turkish army launched an operation between 19 March 1995 and 16 April 1995 and it extended over a very wide mountainous area in northern Iraq. It was designed to chase and catch the terrorists. The army did not establish any structural mechanism in any place during its ongoing operations. It had no administrative or legal structure because it did not intend to establish itself anywhere – it was after the running terrorists. It did not occupy any establishment unit; it was in the mountains. The local tribal or Iraqi authorities were in place as usual.
2. The applicants alleged that some fellow villagers told them that the army was around and that they in fact heard of the sounds of the guns. They were alleged to be shepherds. But shepherds would not take their flock to near an ongoing military operation. It is obvious from what they have argued that the areas where "the shepherds" tended their flock was outside the of the operation area.

<sup>40</sup> See the Bankovic Case, paragraph 81.



What was more interesting in that case was the fact that the Court was prepared to declare the applications in the Issa Case admissible even without requiring the exhaustion of local remedies:

*“Moreover the Court considers that the Turkish authorities’ reaction to in this case must not be seen in isolation, rather it must be seen in the context of their general reluctance to deal with allegations of involvement of state agents in unlawful conduct.”<sup>41</sup>*

So, what the Court actually says is this: “I know you did it because you did it before.”

In short, if the series of cases dealing with the application of Article 1 is looked at carefully, one would see that the Bankovic Case constitutes a U-turn and yet a belated step in the right direction.

What is interesting about the Court’s judgement in that case is the fact that the Court itself came to the conclusion that jurisdiction as provided for in Article 1 is territorial. After having interpreted the expression “within their jurisdiction” as contained in Article 1 according to the primary rule of interpretation in Article 31 of the Vienna Convention on the Law of Treaties (the Vienna Convention). The Court stated, “From the standpoint of public international law, the jurisdictional competence of a state is primarily territorial.”<sup>42</sup> It acknowledged that “while international law does not exclude a state’s exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular premises, effect, protection, passive nationality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant states.”<sup>43</sup> Even “a state’s competence to exercise jurisdiction over its own nationals abroad is subordinate to that state’s and other states’ territorial competence.”<sup>44</sup> Then the Court concluded, “Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction. Other bases of jurisdiction being exceptional and requiring special justification in particular circumstances of each case.”<sup>45</sup> An examination of the Travaux Préparatoires of the Convention also confirmed the conclusions, which the Court arrived at according to the primary rule of interpretation. Indeed, an excerpt which the Court picked up from the Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights (Vol. II, p. 260) indicates beyond any doubt that the ‘jurisdiction’ in Article 1 is territorial:

<sup>41</sup> See, the Issa Case, p.6.

<sup>42</sup> See the Bankovic Case, paragraph 59.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid., paragraph 60.

<sup>45</sup> Ibid., paragraph 61.



*“The Assembly draft had extended the benefits of the Convention ‘to all persons residing within the territories of the signatory states’. It seemed to the Committee that the term ‘residing’ might be considered too restrictive. It was felt that there were good grounds for extending the benefits of the Convention to all persons in the territories of the signatory states, even those who could not be considered as residing there in the legal sense of the word. The Committee therefore replaced the term ‘residing’ by words ‘within their jurisdiction’ which are also contained in Article 2 of the Draft Covenant of the United Nations.” (Author’s emphasis)<sup>46</sup>*

This must make it crystal clear that the Convention makes the state parties responsible for securing the Convention regime to all persons on their territories, and in spaces assimilated to their territories in law, such as ships, aircraft or diplomatic premises. Probably that was why the Court went out of its way to explain away the apparent inconsistencies between its judgement in the *Bankovic* Case and its previous case law. However, the Court’s explanation is not persuasive, as far as, for example, its attempts to explain its judgement in the *Loizidou* Case (Preliminary Objections) is concerned. In that case, the Court had found itself competent on the basis of the language, in particular the French text, and the object and purpose of Article 1 and of the purpose of the Convention as a whole, to hear the application against Turkey, which had originated from acts that occurred in Northern Cyprus. The Court had disregarded the common intentions of the authors of the Convention altogether in interpreting the meaning of the phrase “within their jurisdiction” in Article 1. In dealing with a Turkish reservation to former Articles 25 and 46 of the Convention, it stated its ignorance of the common intention of the authors of the Convention as follows:

*“Accordingly, even if it had been established, which is not the case, that restrictions, other than those *ratione temporis* were considered permissible under Articles 25 and 46 at the time when a minority of the present Contracting States adopted the Convention, such evidence could not be decisive.”<sup>47</sup>*

In the *Bankovic* Case, it found itself incompetent to deal with the Serbian applications mainly on the basis of the common intentions of the parties as contained in the *travaux préparatoires*. The Court purported to explain away the contradiction in the following terms:

*“However, the scope of Article 1, at issue in the present case, is determinative of the very scope of the Contracting parties’ positive*

<sup>46</sup> See the *Bankovic* Case, paragraph 19.

<sup>47</sup> See the *Loizidou* Case (Preliminary Objections), paragraph 71.



*obligations, and as such of the scope and reach of the entire Convention system of human rights' protection as opposed to the question, under discussion in the Loizidou Case (Preliminary Objections), of the competence of the Convention organs to examine a case."*<sup>48</sup>

The Court's explanation falls too short. It was clear that the Court exercised jurisdiction in the Loizidou Case not only with respect to former Articles 25 and 46, but also and primarily with respect to Turkey's positive obligations as covered by Article 1. In other words, in that case too, Article 1 was determinative of the scope of Turkey's positive obligations under the Convention.

The Court's efforts to explain why it had departed in the Bankovic Case from its previous case law on Article 1 are not satisfying. It is a fact that in the last Cyprus Case and the Loizidou Case it did establish its jurisdiction on the 'control' test, which hardly accords with the territorial notion of jurisdiction as it re-discovered in the Bankovic Case.

The contradiction between the Court's previous case law and its judgement in the Bankovic Case appears from the Court's own words in the latter case:

*"In the first place, the applicants suggest a specific application of the 'effective control' criteria developed in the northern Cyprus cases. They 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 extra-territorial situation. The Governments contend that this amounts to a 'cause-and-effect' notion of jurisdiction not contemplated by or appropriate to Article 1 of the Convention. The Court considers that the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that state for the purpose of Article 1 of the Convention."*<sup>49</sup>

Then the Court went on to reject the applicants' argument for the following reasons:

*"Furthermore, the applicants' notion of jurisdiction equates the determination of whether an individual falls within the jurisdiction of a Contracting State with the question of whether that person can be considered to be a victim of a violation of rights guaranteed by the Convention. These are separate and distinct admissibility conditions..."*<sup>50</sup>

<sup>48</sup> The Bankovic Case, paragraph 64.

<sup>49</sup> The Bankovic Case, paragraph 75.

<sup>50</sup> Ibid.



The present author cannot agree more. The Court's reasoning in this case is right. But it does contradict what it had done in the Loizidou Case. Neither is it in accordance with its decision in the Issa Case. Perhaps that is why the Court made about 10 references to the last Cyprus Case and the Loizidou Case, as if it was on the defensive!<sup>51</sup>

### **Article 56(1) of the Convention Territorially Restricts the Court's Competence**

Generally speaking, when a state subscribes to a treaty, the treaty becomes applicable to that state's territory in its entirety.<sup>52</sup> However, the Convention has adopted a different system. Article 56(1) provides in effect that the Convention applies to the metropolitan territory of the state parties only. If the state parties wish to extend the Convention regime to their other territories, territories for whose international relations they are responsible, they may file a declaration to that effect with the Secretary-General of the Council of Europe.<sup>53</sup> Thus, Article 56(1) seems to impose a territorial restriction on the principle of jurisdiction as provided for in Article 1.

The Commission mentioned Article 56(1) only to dismiss any arguments based on it, as if the article in question had not existed:

*"The Commission does not find that Art. 63 [now 56] of the Convention, providing for the extension of the Convention to other than metropolitan territories of the High Contracting parties, can be interpreted as limiting the scope of the term 'jurisdiction' in Article 1 to such metropolitan territories. The purpose of Article 63 is not only the territorial extension of the Convention but its adaptation to the measure of self-government attained in particular non-metropolitan territories and to the cultural and social differences in such territories; Article 63(3) confirms this interpretation. This does not mean that the territories to which Article 63 applies are not within the 'jurisdiction' within the meaning of Article 1."*<sup>54</sup>

This interpretation hardly accords with the principle of interpretation of *ut res magis valeat quam pereat* (the principle of effectiveness), which the former Commission and the Court purport to apply, and which requires that a tribunal should give effect to an existing provision of law, rather than deny any effect to it. The matter of the fact is that the Convention normally may

<sup>51</sup> The Bankovic Case, paragraphs 54, 64, 65, 68, 69, 70, 75 and 80.

<sup>52</sup> See the Vienna Convention, Article 29.

<sup>53</sup> See, among others, Harris, Boyle, Warbrick, *op. cit.*, pp. 644-647; Jacobson-White, *op. cit.*, pp. 21-23.

<sup>54</sup> See First and Second Cyprus Cases, D&R 2, paragraph 9.



only apply to the metropolitan territories of the state parties and not to their other territories without a special declaration. For example, the United Kingdom extended the Convention regime to the Channel Islands, Falklands and Isle of Man by a declaration under Article 56 (formerly 63).<sup>55</sup> Without such a declaration, the United Kingdom would not have been responsible for its acts or omissions under the Convention, for example, in the Falkland Islands, because the Falkland Islands are not part of the metropolitan territory of the UK. Then one may reasonably argue why the Convention should automatically apply to a territory over which the state party may have established its *de facto* control if the Convention may not apply to territories under its *de jure* control without a declaration. According to the Court's case law, the Court will have competence to hear a case against the UK for its military acts, let us say, in country A, which is distinct from the UK's metropolitan territory but over which the UK has effective actual control, but it would not have competence over the Falklands if the UK had not made any declaration extending the Convention regime. The logic is difficult to follow.<sup>56</sup>

It necessarily follows from what we have said above that the Court's creeping jurisdiction in a number of cases, including the *Loizidou* one, was exercised in disregard of Article 56(1). An interpretation of the Convention ignoring the existence of the Article 56(1) in order to give more effect to another Article, Article 1, is very disturbing. The Court derives its competence from the agreement of the state parties, and Article 56(1) is part of that agreement.

The existence of this Article in the Convention must bear witness to the fact that the state parties did not intend the Convention to extend to territories other than the metropolitan ones without a declaration. This is so even when they actually control such territories. It is abundantly clear that they would not have intended to extend the Convention regime to territories that they would control *de facto*. The very existence of Article 56(1) is strong evidence that state party control of a territory other than its own metropolitan one was not intended to bring such areas under the Court's jurisdiction, unless some links with the metropolitan country were established.

<sup>55</sup> See J. E. S. Fawcett, *The Application of the European Convention on Human Rights*, second edition, 1987, p. 22.

<sup>56</sup> Previously the Commission refrained from declaring admissible applications that had originated from acts committed in non-metropolitan territories of Belgium, for example. See *X v. Belgium*, Application No. 1065/61, 30 May 1961, *Yearbook of the European Convention on Human Rights*, Vol. 4, pp. 260, 268.



### Can the Court Judicially Legislate?

Since it decided the *Golder Case*,<sup>57</sup> the Court has apparently interpreted the Convention according to the rules of interpretation as contained in Articles 31 to 33 of the Vienna Convention. However, in practice, the Court has only given lip service to the terms of the Vienna Convention. It has almost always bypassed the textual interpretation approach, viz. ordinary meaning rule, to which the Vienna Convention gives a prominent place. Instead, it has heavily relied on the teleological method of interpretation, which the Vienna Convention has not adopted.

As Sinclair, a renowned authority on the law of treaties, has put it, in the Vienna Convention "reference to the object and purpose of the treaty is, as it were, a secondary or ancillary process of interpretation of the general rule on interpretation." The Vienna Convention gives priority to the textual approach, which requires that in an interpretation process of a treaty the initial search must be for the 'ordinary meaning' to be given to the terms of the treaty to be interpreted; the ordinary meaning so found will be tested in the light of the purpose and object of the treaty, either to confirm or to modify it.<sup>58</sup> This approach has the merits of determining the common intentions of the parties at the same time. The common intentions may only be derived from the text itself on which the parties agreed.<sup>59</sup>

In interpreting the Convention, the Court has so far, however, laid excessive emphasis upon the object and purpose of the Convention at the expense of the primary rule.<sup>60</sup> The Court's approach has caused concerns because placing undue emphasis on the object and purpose of the treaty might amount to giving exclusive effect to the application of the teleological method, which the Vienna Convention has not endorsed.<sup>61</sup> The teleological method is based on the concept that whatever the intentions of the parties may have been, the Convention has an object and purpose of its own and the task of the interpreter is to act in accordance with that object and purpose.<sup>62</sup> The Court seems to have adopted an even more dynamic version of the teleological method, which is called the "emergent purpose".<sup>63</sup> According to that method, the object and purpose of the treaty is not fixed and static; it is variable, so that, at any given moment, the treaty is to be interpreted not so

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<sup>57</sup> See *Golder v. the UK*, Series A, No. 21, February 1975, 1 EHRR 524.

<sup>58</sup> Ian Sinclair, *The Vienna Convention on the Law of Treaties*, second edition, p. 130.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, p. 131.

<sup>61</sup> *Ibid.*

<sup>62</sup> See Fitzmaurice, 33 BYIL 1957, p. 208.

<sup>63</sup> *Ibid.*



much or merely with reference to what its object was when entered into but with reference to what that object has since become and now appears to be.<sup>64</sup>

The evidence of the fact that the Court has given undue emphasis to the theory of the emergent purpose of the Convention is to be found first of all in the Soering Case:

*“In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (Ireland v. the UK, 2 EHRR 25, paragraph 239).”*

*“The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (Artico v. Italy, 3 EHRR 1, paragraph 33) In addition any interpretation of the rights and freedoms guaranteed has to be consistent with the ‘general spirit’ of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society (Kjeldsen, Busk Madsen and Pedersen v. Denmark, 1 EHRR 711, paragraph 53).”<sup>65</sup>*

In the Loizidou Case, the Court decided on the basis of the object and purpose of the Convention that responsibility of the respondent state arose as a result of its military action outside its territory.<sup>66</sup>

Doubts arise as to whether the Court acted on the terms of the Vienna Convention correctly. What the Court failed to see, had been stated by late Judge Fitzmaurice years before:

*“The object and purpose of a treaty are not something in abstract: they follow from and are closely bound with the intention of the parties, as expressed in the text of the treaty or as properly to be inferred from it, these intentions being sources of these objects and purposes.”<sup>67</sup>*

In the opinion of the late judge, the Vienna Convention to which the Court had apparently referred in the Golder Case in interpreting the Convention had established a primary rule of interpretation, viz. the ordinary meaning rule, which the Court ignored. In fact, he was very much concerned about the Court's obsession with the teleological approach:

*“What I find it impossible to accept is the implied suggestion that because*

<sup>64</sup> Ibid.

<sup>65</sup> See the Soering Case, paragraph 87.

<sup>66</sup> See the Loizidou Case (Preliminary Objections), paragraph 62.

<sup>67</sup> See National Union of Belgian Police Case, reprinted in International Law Reports, Vol. 37, pp. 293-94.



*the Convention has a constitutional aspect, the ordinary meaning rule of the treaty interpretation can be ignored or brushed aside in the interests of promoting the objects and purposes not originally included by the parties.*"<sup>68</sup>

He was explicit in pointing out that:

*"There is a considerable difference between the case of 'law giver's law' edicted in the exercise of sovereign power, and law based on convention itself, the outcome of a process of agreement, and limited to what has been agreed, or can properly be assumed to have been agreed. Far greater interpretational restraint is required in the latter case, in which, accordingly, the Convention should not be construed as providing for more than it contains, or than is necessarily to be inferred from what it contains."*<sup>69</sup>

Yet, the Court has not given any heed to the late Judge's caution; it continued its own 'dynamic way' of interpretation to the point of what we may call judicial legislation. The Court's decision in the last Cyprus Case very much suggests that:

*"Having effective control overall control over northern Cyprus, its [Turkey's] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that in terms of Article 1 of the Convention, Turkey's 'jurisdiction' must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violation of those rights are imputable to Turkey."*<sup>70</sup>

In showing how it has arrived that conclusion the Court went on:

*"In the above connection, the Court must have regard to the special character of the Convention as an instrument of European public order (ordre public) for the protection of individual human rights and its mission, as set out in Article 19 of the Convention, 'to ensure the observance of the engagements undertaken by the High Contracting Parties. (See Loizidou Judgement (Preliminary Objections) cited above, p. 31 & 93)"*<sup>71</sup>

In interpreting the Convention, the Court applied, alongside the object and purpose principle, the so-called principle effectiveness (ut res magis valeat

<sup>68</sup> Ibid.

<sup>69</sup> See Fitzmaurice, Separate Opinion in the Golder Case, p. 562, paragraph 32.

<sup>70</sup> The last Cyprus Case, paragraph 77.

<sup>71</sup> The last Cyprus Case, paragraphs 77 and 78.



quam pareat) in a very interesting way. Obviously, the principle was not designed to give the interpreter the right to substitute himself for the states parties, or to legislate for them when there is a gap in a treaty to be interpreted. Nor does the principle justify the fact that a tribunal may give a meaning to a provision of a treaty that is contrary to the spirit and word of the treaty. The International Court of Justice (ICJ) made the limits of that principle crystal clear in the *Interpretation of the Peace Treaties* case.<sup>72</sup>

The Peace Treaties provided that any dispute to arise out of the interpretation and application of the treaties would be submitted to an arbitral tribunal which would be set up by the parties themselves as follows: each party would appoint its own arbitrator, and the two arbitrators so appointed would jointly appoint the third one; if they failed, the UN Secretary-General would appoint the umpire.

A dispute had arisen between the parties, and the procedure for the arbitral settlement was set in motion. But what the treaties had not contemplated had occurred: one of the parties failed to appoint its own arbitrator. The question then was whether the UN Secretary-General might make the appointment himself upon the request of the other side. The ICJ said no. Of course, the purpose of the treaties was the establishment of a mechanism for the solution of the potential disputes. But they did not expressly provide for the creation of a court by the Secretary-General if the parties had failed to appoint their arbitrators respectively. The ICJ decided that it could not include, through the help of the principle of effectiveness, a power in the treaties that the parties had not included. The principle of effectiveness may be used to give effect to the provisions of a treaty in accordance with the intention of the parties.<sup>73</sup>

However on similar matters the Court goes a different way. It says that in interpreting the Convention, being an instrument for the collective protection of human rights, every step must be taken to make its safeguards effective and practical.<sup>74</sup> When, for example, a gap occurs in the application of a treaty, or when the Convention is not clear on certain issues, the Court is not willing to look into the common intentions of the authors of the Convention to see if the Convention was intended to cover the disputed issues. It rather acts like a lawgiver under the guise of the so-called

<sup>72</sup> See International Court of Justice: Reports and Judgements (ICJ Reports), 1950, pp. 221, 226-30.

<sup>73</sup> See M. N. Shaw, *International Law*, fourth edition, Cambridge University Press, 1997, p. 658. See also the *Corfu Channel Case*, ICJ Reports, 1949, pp. 4, 24; the *Ambatielos Case*, ICJ Reports, 1952, p. 28.

<sup>74</sup> See the *Soering Case*, paragraph 89; *Artico v. Italy*, 3 EHRR 1, paragraph 33.



dynamic teleological approach,<sup>75</sup> interpreting the Convention by reference to the 'emergent purpose' of the Convention as a whole and mainly disregarding the drafting history. The Court's approach to the principle of object and purpose of the treaty, coupled with its preoccupation with the strict application of the 'principle of effectiveness,' while enabling it to fill gaps in the Convention, has been occasionally used for naked judicial legislation.

Thus, in the *Loizidou Case*, the Court said:

*"Finally if Turkey was not to be held responsible for conditions in northern Cyprus, no other legal person can be held responsible. However, the principle protection of the Convention rights recognised in the case-law of the Court requires that there be no lacuna in the system of responsibility."*<sup>76</sup>

It took a further step in the last *Cyprus Case*:

*"Having regard to the applicant government's continuing inability to exercise their Convention obligations in northern Cyprus, any other finding would result in a regrettable vacuum in the system of human-rights protection in the territory in question..."*<sup>77</sup>

Actually what the Court says is this: northern Cyprus is part of Cyprus. As the 'Republic of Cyprus' is a party to the Convention, legally, persons living in Northern Cyprus, like those in the South, must enjoy the protection of the Convention. But, as a result of events in 1974, Turkey established its control of the area, with the result the 'Republic of Cyprus' is not able to control the North. The Turkish Republic of Northern Cyprus may control the territory, but it is not recognised as a state. So, the 'Republic of Cyprus' (that is, what we may regard as the Greek State of Southern Cyprus) may not be held responsible for the Convention regime in the North. Consequently, a gap arises. The principle of effectiveness requires that the Court fill it. In the opinion of the Court, Turkey controls the area and it must be held responsible.

The logic is interesting. The manner in which the Court has acted enables to the Court to 'give law' that may not find justification in the very Convention from which it derives its competence.

With all due respect, what the Court fails to see is the fact that if there had occurred a gap in the application of the Convention, it is the state parties which are entitled to deal with it; the Court, as a judicial body that derives its competence from the consent of the states parties, cannot to fill that gap

<sup>75</sup> See, among others, Shaw, *op. cit.*, p. 659.

<sup>76</sup> See the *Loizidou Case*, paragraph 57.

<sup>77</sup> See the *Last Cyprus Case*, paragraph 78.



through interpretation.<sup>78</sup> It cannot legislate for the parties. The principle of effectiveness does not go as far as allowing the interpreter to legislate for the state parties to fill any gap that might have occurred; the Court may not fill a gap which the Convention itself did not envisage.

Another question that the Court's practice raises in the field of interpretation is its invocation of general principles of international law by reference to the provisions of the Vienna Convention in the interpretation. Here we have to make a distinction between a situation where the Convention refers in terms to general principles of law, and a situation where the Court has to apply the Convention in the wider context of international law. With respect to the first situation, we may refer to Article 26 of the Convention and Article 1 of Protocol No. 1, which expressly refer to general principles of international law. In that area, no question should arise. As to the second situation, things are not that clear.

Certainly the Court is right in its discourse that every treaty provision must be read not only in its context but also in the wider context of general international law.<sup>79</sup> Yet questions remain. The first is about the inter-temporal application of law. Should the convention be interpreted in the light of the rules of international law at the time the Convention was concluded or at the time the dispute is to be settled? In that respect, the general rule is that a term or concept of a treaty has to be examined according to the conditions and rules in existence at the time it was made and not at a later date.<sup>80</sup> Max Huber, in the *Island of Palmas Arbitration*, where he decided that the Spanish claim to title by discovery had to be tested in the light of international law in the sixteenth century when the discovery was made enunciated the principle.<sup>81</sup>

Fitzmaurice, too, adopted the same principle in a very clear way:

*"The terms of a treaty must be interpreted according to the meaning which they possessed or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded"*<sup>82</sup>

<sup>78</sup> Fitzmaurice stated this fact years ago: "The point is that it is for the states upon whose consent the Convention rests and from whose consent alone it derives its obligatory force, to close the gap...not for a judicial tribunal to substitute itself for the Convention makers, to do their work for them." Fitzmaurice's Separate Opinion in the *Golder Case*, p. 566.

<sup>79</sup> See, the *Bankovic Case*, paragraph 57.

<sup>80</sup> See Shaw, *op. cit.*, pp. 346-347.

<sup>81</sup> See *Island of Palmas Arbitration (the United States / Netherlands)*, 1928, 22 AJIL 867.

<sup>82</sup> See BYIL (1957), p. 212.



The ICJ has given judgements that could be invoked to support either approach.<sup>83</sup> However, the ICJ would interpret a term of a treaty in the light of the rules of international law in force at the time of the dispute settlement only if the term or concept to be interpreted is an evolutive term by its nature, that is, if it evolves as the society evolves. Then the interpreter must give a meaning to it, which it possesses at the time of the dispute settlement. On the contrary, if the term to be interpreted is not evolutive in nature, then it must be given a meaning that it possessed at the time of the conclusion of the treaty.

The Court has so far decided in so many cases that the Convention is a living instrument to be interpreted in light of present day conditions.<sup>84</sup> It has interpreted, for example, such concept as 'public morals' in the light of the present day conditions, which is correct, because, as society develops and evolves, the expression 'public morals' also evolves and attains new purport. However, the term 'jurisdiction', as it refers to territory, is not that flexible. If the authors of the Convention referred to the term 'jurisdiction' at the time of the conclusion of the Convention as restricted to national territory, it is still the same. The concept of 'public morals' may have changed since 1950, but the term 'jurisdiction' still has the same connotation. It applies to the territory and the spaces assimilated to the territory. It is only where the 'territory' itself has changed in meaning that the term 'jurisdiction' may be considered as following it. By reference to the object and purpose of the Convention alone, the scope of jurisdiction may not be determined.

In that regard, the middle way is shown by what a distinguished authority said some years ago:

*"An international tribunal should not fail to take into account the historical context in which particular treaty provisions may have been negotiated, because that context necessarily embraces the state of international law at the time. On the other hand, while it is not for the interpreter, under the guise of interpretation, to impose upon the parties obligations which were never in their contemplation at the time they concluded the treaty, there is scope for the narrow and limited proposition that the evolution and development of the law can be taken into account in*

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<sup>83</sup> See, for example, Legal Consequences for States of the Continued Presence of South Africa in Namibia, ICJ Reports, 1971, p. 31; the Aegean Sea Continental Shelf Case (Greece v. Turkey), ICJ Reports, 1978, p. 32.

<sup>84</sup> See, among others, the Tyrer v. the UK, European Court of Human Rights, judgement of 25 April 1978, Series A, No. 26, p. 15, 1978; the Marcx Case, *ibid.*, No. 36, p. 14, 1979; the Wemholff Case, *ibid.*, No 7, 1968; the Loizidou Case, p. 23; the Soering Case, paragraph 102; Dudgeon v. the UK, judgement of 22 October 1981, Series A, No. 45; X, Y and Z v. the UK, judgement of 22 April 1997.



*interpreting certain terms in a treaty which are by their very nature expressed in general terms and to lend themselves to evolutionary interpretation. But, this must always be on the condition that such evolutionary interpretation does not conflict with the intentions and expectations of the parties as they may have expressed during the negotiations preceding the conclusion of the treaty.*"<sup>85</sup>

### **The Court is Not a Regional Substitute for the United Nations: The Court's Competence Ratione Materia**

The Court's decision in the Loizidou Case raises the question of whether the Court has exceeded its competence *ratione materiae*. The Cyprus Question has been on the agenda of the United Nations since 1963 when the Greek side overthrew the common government.<sup>86</sup> The current division of the island took place in 1974 when the Turkish government militarily intervened, under the terms of the Guarantee Agreement of 1960,<sup>87</sup> which must show that Turkey is not the only actor responsible for the current situation, after the then Greek military government launched a military coup to unite Cyprus with Greece. Today, the Green Line is drawn between the two sides with the consent of the parties and the UN. The UN peacekeeping forces are deployed on the Green Line.<sup>88</sup> In 1975, with the common consent of the

<sup>85</sup> Sinclair, *op. cit.*, p. 140.

<sup>86</sup> For a detailed history of the events that led to the present situation see, among others, R. R. Denktash, *The Cyprus Triangle: Athens, Ankara, Nicosia*, New York, 1988.

<sup>87</sup> The Guarantee Treaty is one of the founding treaties on which the Republic of Cyprus was established in 1960. Article 3 of the Treaty reads:

"In the event of any breach of the provisions of the present Treaty, Greece, the United Kingdom, and Turkey undertake to consult together, with a view to making representations or taking the necessary steps to ensure observance of those provisions."

"In so far as common or concerted action may prove impossible, each of these guaranteeing Powers reserve the right to take action, with the sole aim of re-establishing the state of affairs established by the present parties."

<sup>88</sup> Judge Pettiti stated this fact in his Dissenting Opinion in the Loizidou Case (Merits) in the following words:

"The decision to station international forces on the line separating the two communities made the free movement of persons between the two zones impossible, and responsibility for that does not lie with the Turkish Government alone." *The Loizidou Case (Merits)*, p. 35.

Likewise Judges Bernhardt and Lopez Rocha opined that:

"The Case of Mrs Loizidou is not the consequence of an individual act of Turkish troops directed against her property or her freedom of movement, but it is the consequence of the establishment of the borderline in 1974 and its closure up to the present day." See *Loizidou Case (Merits, 'Dissenting Opinion of Judge Bernhardt Joined by Judge Lopez Rocha')*, p. 45.



Communities' leaders and with the tacit agreement of the two mother countries,<sup>89</sup> an exchange of populations took place between the two communities with the result that about 70,000 Turks moved from the South to the North and about 120,000 Greeks from the North to the South. The two communities also agreed on the bi-zonality and bi-communality of the state to be established in the future. As a result, many thousands of the Cypriot Turks left their property in the South and many Greek Cypriots in the North. Having been expelled from the common government and persecuted for years, the Turks had to declare their state in 1983 under the name the Turkish Republic of Northern Cyprus (TRNC). They have since established their own democratic state, with all its well functioning institutions. The TRNC is quite different, with its institutions, law and state mechanism as well as style of life, from and independent of Turkey as well. The Turkish military presence is based on the terms of the Treaty of Guarantee, which will end when the constitutional regime on the island is totally restored to the satisfaction of the two communities. The issues of law and order have not been and are not being influenced by such military presence. Both the Turkish Cypriots and the Greek Cypriots have their states in place and are waiting for a final negotiated political solution to the whole problem. The question of settlement and free movement constitutes only one small part of the whole package. The two sides have been negotiating a political solution for years. As the Court's decisions in the *Loizidou Case* and the last *Cyprus Case* bear upon various issues that are also being negotiated by the two sides

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<sup>89</sup> See, Communiqués issued at the end of the First Five Rounds of the Inter-Communal Talks

(...), 3rd Round 31 July- 2 August 1975 (Vienna):

"In addition the followings were agreed.

- 1 The Turkish Cypriots at present in the south of the island will be allowed, if they want to do so, to proceed north with their belongings under an organized programme and with the assistance of UNCYP.
- 2 Mr Denktaş reaffirmed, and it was agreed, that the Greek Cypriots at present in the north of the island are free to stay, and that they will be given every help to lead a normal life, including facilities for education and for the practice of movement in the north.
- 3 The Greek Cypriots at present in the north who, at their own request and without having been subjected to any kind of pressure, wish to move to south, will be permitted to do so.
- 4 UNFICYP will have free and normal access to Greek Cypriots villages and habitations in the north.
- 5 In connection with the implementation of the above agreement, priority will be given to the unification of families, which may also involve the transfer of a number of Greek Cypriots, at present in the south, to the north."

See Necati Münir Ertekün (ed.), *In Search of a Negotiated Cyprus Settlement*, New York, 1981, p. 264.



under the auspices of the UN, they are likely to interfere with the mission of the UN. The Court may have acted in this case *ultra vires* and the Court's decisions utterly disregard the political situation, and what has happened in Cyprus since 1963. It assumes that there exists a Cyprus state of which the Greeks are the representative; it ignores the treaty and constitutional partnership rights of the Turks; it has indulged itself in a highly political issues, serving the interests of one side only.

It is extremely strange to observe that the Court's decisions closely follow the political resolutions of the Security Council taken in 1983 and in 1984. The Security Council stated in those resolutions that, as the independence of the TRNC was declared in violation of the Treaty of Establishment and the Treaty of Guarantee, it was unlawful. It called upon the member states not to recognise it.<sup>90</sup> The Security Council is a political body. Yet, its resolutions were couched in legal terms. It stated therein that the declaration of the independence of the TRNC violated the founding treaties of the Republic of Cyprus. The Council failed to see that the very existence of the Greek state in the South had also violated the founding treaties. The Greek state in the south pushed aside the founding treaties, the Treaty of Guarantee and the original constitution to usurp control of the whole island; it is a pure ethnic Greek state. In other words, today's Greek state was established after the common state of Cyprus was destroyed. The original state of Cyprus went in 1963 when the Greeks expelled the Turks from government. What is stranger is the fact that the Court in Strasbourg, in the capacity of an international human rights judicial body, grafted its own decisions in the most recent Cyprus Case and Loizidou Case on the political decision of the Council. This is regrettable. First the Council took its resolutions under Chapter VI of the Charter, which makes them recommendatory in nature; not binding. It is strange that a legally binding judgement was grafted on such non-binding resolutions. Second, the Court went too far and perhaps acted *ultra vires* when it indirectly decided on the question of settlement, missing persons and property. After the Court's decision, for example, in the Loizidou Case and the last Cyprus Case, one wonders why the Greeks should negotiate with their Turkish counterparts any issue of settlement, property, missing persons and free movement. So, the Court simply ignored the agreements of the two sides on bi-zonality, bi-communality of the state to established, on the exchange of populations, their negotiations on missing

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<sup>90</sup> For the details see Elihu Lauterpacht, 'Legal Opinion, Turkish Republic of Northern Cyprus – the Status of the Two Communities in Cyprus', in Necati Münir Ertekün (ed.), *The Status of the Two Peoples in Cyprus: Legal Opinions*, second edition, pp. 15, 29-30.



persons, on settlement and free movement.<sup>91</sup> It did that *ultra vires*.<sup>92</sup> It is strange that while the Court decided that Turkey must be held responsible for the application of the Convention regime in the Northern Cyprus because the TRNC was a subordinate political body of Turkey, and that all acts committed by the TRNC in Northern Cyprus were attributable to Turkey, it did not apply the same logic when it appraised the legality of the acts of the TRNC, in particular provisions of its constitution relating to expropriation. However, the Court's line of reasoning begs this question: All right, if the TRNC was a substitute of Turkey, then why not giving effect to its acts, which by definition, must be considered as acts of Turkey, whereby the status of the property in Northern Cyprus was rearranged? The Court emphasises that it did not decide on the legality of the questions that divide the parties. Yet, its decisions in the last Cyprus Case and in the *Loizidou Case* speak the other way. The practical effects of the said cases might suggest that while half of the island, the Greeks' half, have the support of the Court, the other half, the Turks' half, are left either to suffer or to submit to the other half.

### Conclusions

The Court's judgement in the *Bankovic Case* raises doubts about the relevance of its prior case law on the meaning of Article 1, on its own competence so far as the decision of similar cases pending before the Court are concerned. The *Bankovic Case* suggests that a state party's jurisdiction as provided for in Article 1 is primarily limited to its national territory. In exceptional cases, its jurisdiction may be considered as extending to its acts that are taken at home but produce results outside its territory or taken in spaces which are assimilated to its territory for the jurisdictional purposes,

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<sup>91</sup> Judges Bernhard and Lopez Rocha stated in their dissenting opinion in the *Loizidou Case* (merits) that:

"A unique feature of the present case is that it is impossible to separate the situation of the individual victims from a complex historical development and no less complex current situation." See the *Loizidou Case* (Merits), p. 25.

<sup>92</sup> Judge Jambrek said in his dissenting opinion in the *Loizidou Case* (merits):

"It also seems beyond this Court's abilities and competence to assess with the required certainty whether Turkey's interference was (in)consistent with agreements, and whether or not it was (in)consistent with general principles of international law." The *Loizidou Case* (Merits), p. 31.

Bernhardt and Lopez Rocha also stated that:

"Turkey can be held responsible for concrete acts done in northern Cyprus by Turkish troops or officials. But in the present case, we are confronted with a special situation: it is the existence of the factual borderline protected by forces under the United Nations command which makes it impossible for Greek Cypriots to visit ... the northern part of the island." See the *Loizidou Case* (Merits), p. 26.



such as on board its ships or aircraft. So, it is still possible to sustain the *Soering* Case and the series following it.

In the *Bankovic* Case, elaborating the issue of jurisdiction, the Court has come to accept the distinction between the concept of responsibility and that of jurisdiction (or competence). It is now clear that the Convention does not follow the state parties wherever they go and it does not hold them responsible, according to its terms, for everything they do or fail to do outside their territories. The state parties are only duty bound to secure Convention rights to all persons on their territories or in spaces assimilated to their territories. The Court's judgements in the last *Cyprus* Case and the *Loizidou* Case, however, have put the Court in a difficult position if its position in the *Bankovic* Case correctly reflects the meaning of the Convention. In the *Bankovic* Case, hard as it tried to explain in at least 10 paragraphs the inconsistencies, it has not been able to persuade us how the mainly territorial notion of jurisdiction of state parties may be extended to cover acts of state parties that have been committed in areas outside their territories but they actually control. The 'control' test is dead now. We may reasonably argue that, if the Court's judgement in the *Drozd* Case was right, then its judgements in the *Loizidou* and the last *Cyprus* Case were not. If the Court was right in its judgement in the last two cases and in the *Issa* Case, it was certainly wrong in the *Bankovic* Case.

The Court's judgement in the *Bankovic* Case unfortunately bypassed the effect of Article 56(1) on the competence of the Court, which is regrettable. Article 56(1) does exist and it sets territorial limits on the scope of Article 1.

In interpreting the Convention, the Court's heavy reliance on the so-called object and purpose principle does not accord with the interpretation rules as contained in the Vienna Convention, which the Court apparently applies. The Court's interpretative approach actually amounts to judicial legislation, which the Convention does not endorse. The Court's efforts to fill the gaps, through stretching rules and concepts, in particular, on politically sensitive issues, only undermines its credibility.

The Court is not a regional substitute for the UN. It has to be cautious about its competence *ratione materiae* as well. In that context, the Court's reference to international law in general is acceptable only where the Convention itself makes reference to international law or where the Convention has to be interpreted in the wider context of international law. The Court has probably exceeded its competence *ratione materiae* in the last *Cyprus* Case and the *Loizidou* Case where it has interfered with a complex international dispute that is in the hands of the UN and is governed by different rules and regulations.