Grand Chamber of the European Court of Human Rights Finds Yugoslavian Bombing Victims' Application Against NATO Member States Inadmissible

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[1] On 12 December 2001, the Grand Chamber of the European Court of Human Rights unanimously found the case *Bankovic et al. vs. 17 NATO and ECHR- Member States* (NATO Bombing Case) inadmissible. (1)

[2] The application had been brought by six Yugoslav nationals, residents of Belgrade in the Federal Republic of Yugoslavia (FRY), on behalf of themselves and their deceased children. The case concerned the bombing, by NATO forces, of the Radio-Television Serbia (RTS) headquarters in Belgrade in the course of NATO's military action against the FRY during the Kosovo conflict. On 23 April 1999, one of the RTS buildings was hit by a NATO-aircraft missile. Sixteen people were killed or seriously injured, among them the applicant's children and one of the named applicants. (2)

[3] The case was brought against the 17 member States of NATO that are also Contracting States to the European Convention on Human Rights (Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and United Kingdom). The applicants argued that the bombardment of the RTS headquarters violated Article 2, (3) Article 10; (4) and Article 13 (5) of the ECHR.

[4] Before it could turn to the merits of the applicants' substantive claims, the Court was obligated to determine the admissibility of the application.

[5] Article 1 of the Convention reads as follows:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of (the) Convention.

[6] Noting that the actions called into question by the application were performed, or had their effects, outside the territory of the respondent States ("extra-territorial act"), the Court considered that the essential question to be examined was whether the applicants and their deceased relatives were, as a result of that extra-territorial act, capable of falling within the jurisdiction of the respondent States, and thus, the protective jurisdiction of the Convention.

[7] The Court employed the rules for treaty interpretation set out in the 1969 Vienna Convention on the Law of Treaties (6) in its effort to determine the jurisdictional scope of the European Convention on Human Rights. (7) The treaty interpretation provisions of the Vienna Treaty Convention establish the following basic priorities regarding the interpretation of treaties:

[8] As to the *ordinary meaning* of the term "jurisdiction," as used in Article 1 of the Convention, the Court was satisfied that, from the standpoint of public international law, the jurisdictional competence of a state was primarily territorial. (8) While international law does not exclude the exercise of extra-territorial jurisdiction, the Court noted that the suggested bases for the exercise of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) were, as a general rule, defined and limited by the sovereign territorial rights of other states. (9) These other forms of jurisdiction, the Court explained, were exceptional and required special justification in the particular circumstances of each case. (10) The Court concluded that Article 1 of the Convention reflects, however, the ordinary and essentially *territorial* notion of jurisdiction. (11)

[9] The Court found that the *practice* of the Contracting States revealed no indication that they understand the Convention to create extra-territorial responsibility in circumstances similar to those of the NATO Bombing case. Although there have been a number of extra-territorial military actions involving Contracting States (*e. g.*, the Gulf War and previous Western interventions in the Balkans), no Contracting State had indicated a belief that these extra-territorial actions gave rise to or constituted jurisdiction within the meaning of Article 1 of the Convention. The Court explained that the best evidence of this belief would have been the invocation of the Convention's "war-time" derogation provisions, which permits the Contracting States to derogate from their Convention obligations "[i]n time of war or other public emergency threatening the life of the nation" but only "to the extent strictly required by the exigencies of the situation." (12)

[10] The Court also observed that, in previous decisions, it had recognized the extra-territorial jurisdiction of the Convention in cases in which a Contracting State exercised effective control of the relevant territory and its inhabitants. (13) In these cases, the Contracting State's control was the result of military occupation or was achieved with the consent of the extra-territorial state. (14) In these cases, the Contracting State exercised all or some of the public powers normally to be exercised by a Government. (15)

[11] The applicants argued, in the alternative, that the Convention's jurisdiction extended to their case (and to other extra-territorial acts of Contracting States) indirectly, through the positive obligation under Article 1 to secure "the rights and freedoms defined in Section I of this Convention." This indirect extension of the Convention's jurisdiction, the applicants argued, required Contracting States to ensure the observation of Convention rights in extra-territorial contexts to a degree proportionate to the level of control exercised by the Contracting States. The Court considered this to be the equivalent of the argument 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, was thereby brought within the jurisdiction of that State for the purpose of Article 1. (16) The Court rejected the applicants' suggestion that the positive obligation in Article 1 could be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question. (17) This part of the applicants' argument completely neglected the words *"Within their jurisdiction"*, which are the centerpiece of Article 1. In fact, this portion of the applicants' interpretation went so far as to render those words superfluous and devoid of any purpose or meaning. The Court concluded that, had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a jurisdictional provision similar to that of Article 1 of the 1949 Geneva Conventions, which was drafted contemporaneously with the European Convention on Human Rights. (18)

[12] Furthermore, the Court found that the applicants' interpretation of the Convention's jurisdictional provisions reduced the analysis, essentially, to the determination whether a violation of the Convention had taken place, with the attending jurisdiction of the Convention assumed. (19) The Court explained, however, that the concepts were separable and distinct, especially in light of the fact that the Convention provides specific admissibility conditions, each of which must to be satisfied before an individual could invoke the Convention provisions against a Contracting State.

[13] As to whether the exclusion of the applicants from the respondent States' jurisdiction would defeat the *ordre public* mission of the Convention and leave a regrettable vacuum in the Convention system of human rights protection, the Court's obligation was to have regard to the special character of the Convention as a constitutional instrument of European public order for the protection of individual human beings and its role was to ensure the observance of the engagements undertaken by the Contracting Parties. (20) The Court held, in this respect, that the Convention is a multi-lateral treaty operating, subject to Article 56, in an essentially regional context and notably in the legal space of the Contracting States. The Court concluded that the Convention was not "designed to be applied throughout the world, even in respect of the conduct of Contracting States." (21)

[14] The Court was therefore convinced that there was no jurisdictional link between the applicants and the respondent States. Accordingly, the Court concluded that the action of the respondent States did not trigger their Convention responsibilities and that it was not, therefore, necessary to consider the application's substantive claims on their merits.

[15] However, one substantive provision of the Convention suggested itself in this case and the Court's failure to consider it should be noted. According to Article 15.1 derogations from the Convention are allowed under certain circumstances in time of war or emergency. Although the right to life (Article 2), in principle, is exempted from this competence, deaths resulting from lawful acts of war are justified under Article 15.2. The clause presupposes that the Convention is applicable to an act of war against foreign combatants, because a State is not allowed to perpetrate *lawful* acts of war against its own people. This exemption acknowledges that the laws of war are *lex specialis* to the Convention. By applying Article 15, the Court would have had an opportunity to reach the same result while declaring the Convention applicable at the same time.

[16] Moreover, the Court's refusal to recognize the exercise of extra-territorial jurisdiction by the respondent States, due to their lack of effective control over the targeted territory and its inhabitants, is not fully convincing. The developments in modern warfare, as can be seen in recent domestic and international armed conflicts, demonstrate that the full control of the air space renders , to some extent, the deployment of ground troops and traditional "control" over an area moot. The approach chosen by the Court to distinguish the "Bankovic-case" from its established case-law, which recognized extra-territorial acts as constituting an exercise of jurisdiction, raises the suspicion that the European Court of Human Rights rejected any further legal involvement in this issue of high politics and human rights. Meanwhile, a case is pending before the ICJ so that the public will remain seized of this matter.

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(1) Grand Chamber, Decision as to the Admissibility of Application no. 52207/99 by Vlastimir and Borka BANKOVIÆ, Živana STOJANOVIÆ, Mirjana STOIMENOVSKI, Dragana JOKSIMOVIÆ and Dragan SUKOVIÆ against Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom, <http://hudoc.echr.coe.int>. See BBC News „Court throws out case against Nato", 19 December 2001 <http://news.bbc.co.uk/hi/english/world/europe/newsid_1719000/1719039.stm>.

(2) *Id.*, paras. 6–11.

(3) Article 2 of the Convention provides a right to life: „Everyone's right to life shall be protected by law."

(4) Article 10.1 of the Convention provides a right to freedom of expression: „Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

(5) Article 13 of the Convention provides a right to an effective remedy: „Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in official capacity."

(6) *See*, Articles 31 and 32 of the Vienna Convention on the Law of Treaties (23 May 1969), 8 ILM 679:

Article 31 -- General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object
and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related
to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 -- Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to
confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

(7) Judgement, note 1 *supra*, para 56.

(8) *Id.*, para. 59.

(9)

(10) Judgement, note 1 *supra*, para. 61.

(11) Judgement, note 1 *supra*, para. 61.

(12) Judgement, note 1 *supra*, para 62 (*citing*, Article 15 of the European Convention on Human Rights).

(13) Judgement, note 1 *supra*, para 71 (*citing*, Loizidou judgement/ Al-Adsani / Soering / Cyprus vs. Turkey).

(14) *Id.*

(15) *Id.*

(16) Judgement, note 1 *supra*, para **.

(17) *Id.*

(18) Judgement, note 1 *supra*, para 74 ff. Article 1 of the 1949 Geneva Conventions reads: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."

(19) Judgement, note 1 *supra*, para **.

(20) Judgement, note 1 *supra*, para 80.

(21) *Id.*

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