ECHR, Bankovic and Others v. Belgium and 16 Other States

> **N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents.** Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.
>
> [**Source**: European Court of Human Rights, Grand Chamber Decision as to the admissibility of Application no. 52207/99, 12 December 2001, available on http://hudoc.echr.coe.int]

The European Court of Human Rights, Grand Chamber

Decision as to the admissibility of Application no. 52207/99by Vlastimir and Borka BANKOVIC, Zivana STOJANOVIC,Mirjana STOIMENOVSKI, Dragana JOKSIMOVIC 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 [...]

THE FACTS [...]

A. The circumstances of the case [...]

2. The bombing of Radio Televizije Srbije (“RTS”)

9. Three television channels and four radio stations operated from the RTS facilities in Belgrade. The main production facilities were housed in three buildings at Takovska Street. The master control room was housed on the first floor of one of the buildings and was staffed mainly by technical staff.

10. On 23 April 1999, just after 2.00 am approximately, one of the RTS buildings at Takovska Street was hit by a missile launched from a NATO forces’ aircraft. Two of the four floors of the building collapsed and the master control room was destroyed.

11. The daughter of the first and second applicants, the sons of the third and fourth applicants and the husband of the fifth applicant were killed and the sixth applicant was injured. Sixteen persons were killed and another sixteen were seriously injured in the bombing of the RTS. Twenty-four targets were hit in the [the Federal Republic of Yugoslavia] FRY that night, including three in Belgrade. [...]

COMPLAINTS

28. The applicants complain about the bombing of the RTS building on 23 April 1999 by NATO forces and they invoke the following provisions of the Convention: Article 2 (the right to life), Article 10 (freedom of expression) and Article 13 (the right to an effective remedy).

THE LAW [...]

30. As to the admissibility of the case, the applicants submit that the application is compatible ratione loci with the provisions of the Convention because the impugned acts of the respondent States, which were either in the FRY or on their own territories but producing effects in the FRY, brought them and their deceased relatives within the jurisdiction of those States. They also suggest that the respondent States are severally liable for the strike despite its having been carried out by NATO forces, and that they had no effective remedies to exhaust.

31. The Governments dispute the admissibility of the case. They mainly contend that the application is incompatible *ratione personae* with the provisions of the Convention because the applicants did not fall within the jurisdiction of the respondent States within the meaning of Article 1 of the Convention. [...]

32. The French Government further argue that the bombardment was not imputable to the respondent States but to NATO, an organisation with an international legal personality separate from that of the respondent States. The Turkish Government made certain submissions as regards their view of the position in northern Cyprus. [...]

A. Whether the applicants and their deceased relatives came within the “jurisdiction” of the respondent States within the meaning of Article 1 of the Convention

34. This is the principal basis upon which the Governments contest the admissibility of the application and the Court will consider first this question. 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.” [...]

1. The submissions of the respondent Governments [...]

37. They maintain that they are supported in this respect by the jurisprudence of the Court which has applied this notion of jurisdiction to confirm that certain individuals affected by acts of a respondent State outside of its territory can be considered to fall within its jurisdiction because there was an exercise of some form of legal authority by the relevant State over them. The arrest and detention of the applicants outside of the territory of the respondent State in the Issa and *Öcalan* cases (*Issa and Others v. Turkey*, (dec.), no. 31821/96, 30 May 2000, unreported and*Öcalan v. Turkey*, (dec.), no. 46221/99, 14 December 2000, unreported) constituted, according to the Governments, a classic exercise of such legal authority or jurisdiction over those persons by military forces on foreign soil. Jurisdiction in the *Xhavara* case which concerned the alleged deliberate striking of an Albanian ship by an Italian naval vessel 35 nautical miles off the coast of Italy (*Xhavara and Others v. Italy and Albania*, (dec.), no. 39473/98, 11 January 2001, unreported) was shared by written agreement between the respondent States. [...]

38. The Governments conclude that it is clear that the conduct of which the applicants complain could not be described as the exercise of such legal authority or competence. [...]

2. The submissions of the applicants [...]

52. Alternatively, the applicants argue that, given the size of the air operation and the relatively few air casualties, NATO’s control over the airspace was nearly as complete as Turkey’s control over the territory of northern Cyprus. While it was a control limited in scope (airspace only), the Article 1 positive obligation could be similarly limited. They consider that the concepts of “effective control” and “jurisdiction” must be flexible enough to take account of the availability and use of modern precision weapons which allow extra-territorial action of great precision and impact without the need for ground troops. Given such modern advances, reliance on the difference between air attacks and ground troops has become unrealistic. [...]

3. The Court’s assessment [...]

(d) Were the present applicants therefore capable of coming within the “jurisdiction” of the respondent States?

74. The applicants maintain that the bombing of RTS by the respondent States constitutes yet a further example of an extra-territorial act which can be accommodated by the notion of “jurisdiction” in Article 1 of the Convention, and are thereby proposing a further specification of the ordinary meaning of the term “jurisdiction” in Article 1 of the Convention. The Court must be satisfied that equally exceptional circumstances exist in the present case which could amount to the extra-territorial exercise of jurisdiction by a Contracting State.

75. 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.

The Court is inclined to agree with the Governments’ submission that the text of Article 1 does not accommodate such an approach to “jurisdiction”. Admittedly, the applicants accept that jurisdiction, and any consequent State Convention responsibility, would be limited in the circumstances to the commission and consequences of that particular act. However, the Court is of the view that the wording of Article 1 does not provide any support for the applicants’ suggestion that the positive obligation in Article 1 to secure “the rights and freedoms defined in Section I of this Convention” can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question and, it considers its view in this respect supported by the text of Article 19 of the Convention. Indeed the applicants’ approach does not explain the application of the words “within their jurisdiction” in Article 1 and it even goes so far as to render those words superfluous and devoid of any purpose. Had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949 [...].

4. The Court’s conclusion

82. The Court is not therefore persuaded that there was any jurisdictional link between the persons who were victims of the act complained of and the respondent States. Accordingly, it is not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question. [...]

For these reasons, the Court unanimously

Declares the application inadmissible.

Paul MAHONEY, Registrar

Luzius WILDHABER, President

Discussion

[**N.B**.: The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) is available on http://conventions.coe.int]

1. a. Did the Court declare the application inadmissible because the applicants could not assert their human rights vis-à-vis the respondent States, or because it simply did not have jurisdiction to take cognizance of any violation of these rights?
   b. Did the respondent States have human rights obligations vis-à-vis the applicants? Did they have IHL obligations vis-à-vis the applicants?
2. a. Who is protected *ratione personae* by the ECHR against a State Party?
   b. Who is protected *ratione personae* by IHL against a State party to the IHL treaties? (GC III, Art. 4; GC IV, Art. 4; P I, Arts 49(2), 50 and 51)
   c. Do Art. 1 common to the Conventions and Art.1(1) of Protocol I deal with the scope of IHL? Do they influence the scope of protection *ratione personae*?
3. a. Is France's argument that the bombing attacks were attributable to NATO, not the member States (which carried them out), tenable as regards human rights? As regards IHL?
   b. If Belgrade had been occupied in the course of the war, would the conduct of the occupation troops have been attributable to all NATO member States? Only to those that sent occupation troops? Only to the State that sent the troops whose conduct was at issue? Only to NATO itself?
   c. Is NATO bound by IHL?
4. a. Would the application have been admissible if the respondent States had carried out the bombing attacks within their own territories? If the FRY had been party to the ECHR? In that case, could the application have been lodged against the FRY?
   b. If the application had been admissible, would the Court have applied IHL? On what grounds? Is it competent to do so? (Art. 2 of the ECHR guarantees the right to life and Art. 15 provides that:

"1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2 [protecting the right to life], except in respect of deaths resulting from lawful acts of war [...], shall be made under this provision. [...]")

1. a. Is it likely that the Court would have found a violation of the ECHR if it had found the application admissible? By reason only of the fact that civilians were killed? Owing to the fact that the principle of proportionality was not respected? Or that precautionary measures were not taken? Or that the target of the attack was not a military objective? Can a radio station be a military objective? If it incites the population and the armed forces to war? If it incites to genocide? If it is used for military communications? (P I, Arts 49(2), 50, 51, 52 (2) and 57) [**See** Federal Republic of Yugoslavia, NATO Intervention]
   b. Could the Court have jurisdiction to rule on the lawfulness of air strikes in time of armed conflict? How could it have established the necessary facts in order to issue a ruling? Is the ECHR the appropriate instrument for such a ruling? Is a Court ruling a possible and appropriate means for protecting victims of bombing attacks in time of armed conflict? What other courts might offer recourse to the victims?