
THE NATO BOMBING CASE (*BANKOVIC ET AL. V. BELGIUM ET AL.*) AND THE LIMITS OF WESTERN HUMAN RIGHTS PROTECTION

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Abstract

Under colonial rule, European law was designed to maintain a sharp distinction between Europeans and non-Europeans. European citizens were not subjected to “native” law; at the same time, subject populations held few (if any) rights against the colonial power. The advent of the human rights revolution post-World War II heralded human rights as universal. The Convention for the Protection of Human Rights and Freedoms, more commonly known as the European Convention of Human Rights, explicitly states in the Preamble that one of its purposes is to “take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.”

*The problem is that European human rights law continues to demarcate “insiders” and “outsiders.” This article examines how this separation was preserved in the NATO bombing case (*Bankovic et al. v. Belgium et al.*). In our view, *Bankovic* is the most egregious decision in the history of the European Court of Human Rights. In arriving at its conclusion that the Convention’s rights in principle end at the territorial boundaries of “Europe,” the Court both reconstructed the Convention itself and misconstrued its own previous case law in this area. Beyond that, the decision evinces a vision of human rights that, ultimately, is inimical to the very purpose of human rights.*

I. INTRODUCTION

In *Bankovic et al. v. Belgium et al.* (“*Bankovic*”) the Grand Chamber of the European Court of Human Rights (“the Court”) held inadmissible a claim brought by six citizens of the Federal Republic of Yugoslavia (FRY) against seventeen European countries that were members of the North Atlantic Treaty Organization (NATO).¹ The claim revolved around a NATO bombing mission conducted in the early morning hours

¹ *Bankovic, Stojanovic, Stoimedovski, Joksimovic and Sukovic v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the*

of April 23, 1999 that struck the radio and television station Radio Televizije Srbije (RTS) in Belgrade.² This raid was part of the much larger NATO response to the conflict in the Kosovo region of Serbia.³ The bombing of RTS resulted in the death of sixteen people and injuries to that same number.⁴ “The daughters 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.”⁵ The claimants alleged violations of Article 2 (Right to Life), Article 10 (Freedom of Expression) and Article 13 (Right to an Effective Remedy) of the European Convention (“the Convention”).⁶

The facts of this case raise several interesting and complex questions, including the question of European Convention responsibility for an action taken by several Contracting States in concert with a non-contracting state, and the question of the appropriate standards for reviewing Contracting States’ observance of the right to life in armed conflict. However, the sole question addressed and determined by the Court – and the question that we shall examine in this article – is whether Article 1 of the Convention places a territorial limitation on Contracting States’ general duty to secure the rights and freedoms set forth in the Convention. Article 1 states in full: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”⁷

It should be noted from the onset that the case concerned responsibility for something that the Contracting States had done as opposed to something they had not done – i.e., it concerned an act as opposed to an omission. Although the act/omission distinction begs several vexing questions, it is significant in examining the meaning of Article 1’s terms. Thus, the principal question raised by the case may be stated as follows: May a Contracting State “do” things to human beings outside its territorial borders that it is prohibited from doing to human beings inside its territorial borders?

In an increasingly interconnected world, and especially with the advent of the global “War on Terror,” this question is of great immediate interest. A case in point is the conduct of certain Contracting States’ soldiers

United Kingdom, App. No. 52207/99, Eur. Ct. H.R. (2001), *available at* 41 I.L.M. 517 [hereinafter *Bankovic v. Belgium*].

² *Id.* ¶ 10.

³ *Id.* ¶ 8.

⁴ *Id.* ¶ 11.

⁵ *Id.* ¶ 11.

⁶ *Id.* ¶ 28; *See also* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter *European Convention*].

⁷ European Convention, *supra* note 6, Art. 1.

in the occupation of Iraq.⁸ One question that arises in this connection is whether European human rights standards will rule these activities. Beyond its more immediate practical implications, the question being raised by this case goes to the very heart of what human rights mean and why human rights treaties exist in the first place.

A. *Two views*

The parties to the *Bankovic* case revealed two diametrically opposing views on Article 1, and more fundamentally, two diametrically opposing conceptions of human rights. Referring to the Strasbourg organs'⁹ long-standing case law on extraterritoriality, the applicants argued that the notion of jurisdiction in Article 1 does not refer to the territorial boundaries of a Contracting State. Rather, in their view, the notion of jurisdiction, properly understood, provides that a Contracting State must secure the rights and freedoms to persons within or subject to their actual power.¹⁰ In other words, a Contracting State is bound to act in a manner that respects these rights and freedoms not only when it exercises authority or power within its own territory, but also when it does so abroad. This understanding of the notion of jurisdiction is situation specific: the extent of a Contracting State's obligations vis-à-vis individuals outside of its borders is commensurate with the extent of its actual authority or control over such individuals (or, more correctly, their human rights).¹¹ This also means that for the purpose of determining Convention responsibility, the question whether or not a particular extraterritorial act was within the "jurisdiction" of the acting State(s) must be determined with reference to the specific facts and circumstances of each case.¹² Applicants' essential position in this case was, then, that whether the impugned act took place outside of the respondent states' territories had no bearing on the question whether the respondent states, by taking this act, had violated their obligations under the Convention. Instead, the actions of the respondent states should be judged by the same standards as those that would apply to an analogous situation occurring within a Contracting State's own territory (such as the situation where a Contracting State

⁸ At its height in the spring of 2003, the "European" States represented in what the Bush administration termed the "coalition of the willing" fighting in Iraq included: Bulgaria, the Czech Republic, Denmark, Georgia, Hungary, Italy, Latvia, Lithuania, Macedonia, the Netherlands, Poland, Romania, Slovakia, Spain, Turkey, United Kingdom and Uzbekistan. See Operation Iraqi Freedom, available at <http://www.whitehouse.gov/news/releases/2003/03/20030321-4.html>.

⁹ The "Strasbourg Organs" are the European Commission on Human Rights (now defunct) and the European Court of Human Rights.

¹⁰ *Bankovic v. Belgium*, ¶¶ 46-53.

¹¹ Replies of the Applicants to the Observations of the United Kingdom Regarding the Admissibility of the Application, *Bankovic v. Belgium*, ¶¶ 93-103.

¹² *Id.*

would bomb an unfriendly television station in territory controlled by insurgents).

The respondent governments argued that Article 1 had to be interpreted in accordance with what they professed to be its “ordinary meaning” in public international law.¹³ In their arguments before the Court, they maintained that the term “jurisdiction” in Article 1 referred to the “assertion or exercise of legal authority, actual or purported, over persons owing some form of allegiance to that State or who have been brought within that State’s control.”¹⁴ Furthermore, the respondent governments argued that the term “generally entails some form of structured relationship normally existing over a period of time.”¹⁵ Thus, according to the respondent governments, although a Contracting State’s obligations under the Convention extend equally to all individuals within its territory, its obligations to persons outside of its recognized borders are limited to individuals who have some kind of pre-existing relationship with the Contracting State.¹⁶ Because such a relationship did not exist between the applicants and the respondent states, their claims were inadmissible *ratione personae* (because of the person’s character).¹⁷

This proposition should give pause, at least if one assumes that the Convention protects human rights and that human rights rest on a foundational commitment to the equal dignity of every human being. Surprisingly, however, the Court’s opinion closely tracks the rationales of the respondent governments.

The Court began its opinion by defining the question before it, first observing that “the real connection between the applicants and the respondent States is the impugned act which, wherever decided, was performed, or had effects, outside of the territory of those States (“the extra-territorial act”),¹⁸ and then proceeding to question “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.”¹⁹ In answering this question, the Court ruled “As to the ‘ordinary meaning’ of the relevant term [jurisdiction] in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial.”²⁰

To support the contention that this was indeed the “ordinary meaning” of the term in international law, the Court pointed to usage among inter-

¹³ Bankovic v. Belgium, ¶ 36.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* ¶¶ 35-45.

¹⁷ *Id.* ¶ 45.

¹⁸ *Id.* ¶ 54.

¹⁹ Bankovic v. Belgium, ¶ 54.

²⁰ *Id.* ¶ 59.

national law scholars.²¹ It concluded its analysis in this respect by repeating its basic ruling that Article 1 had to be understood “to reflect this essentially territorial understanding of jurisdiction.”²²

There is, of course, a great deal of ambiguity and vagueness in this language. Unfortunately, the Court never carried the process of clarification much further and one never quite learns what standard the Court’s interpretation yields. However, what one does learn is that, according to the *Bankovic* Court, this interpretation – that Article 1 has to be understood to reflect an essentially territorial understanding of jurisdiction – plainly follows from previous case law and the *travaux préparatoires* (preparatory work). In an attempt to give some content to its interpretation, the Court observed that previously it had recognized the exercise of extraterritorial jurisdiction by a Contracting State in cases where (i) the respondent state, as a consequence of a military occupation, effectively controlled the relevant territory (and only when that territory belonged to another Contracting State) or (ii) the respondent state did in fact have the right, under international law, to exercise extraterritorial jurisdiction.²³ After characterizing previous case law this way without much rationale, the Court then declared it had to 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.”²⁴

Exactly what standard the Court ultimately relied on in determining the *Bankovic* case is uncertain. What is clear is that, according to the Court, an extraterritorial act, no matter how deliberate or heinous, can never in and of itself give rise to Convention responsibility. This follows from the way the Court framed the question before it and its concluding remarks.²⁵ It also follows from the Court’s assertion that the question whether an individual falls within the jurisdiction of a Contracting State is separate from the question whether an individual can be considered to be a victim of a violation of rights guaranteed by the Convention. These were, the Court stated, “separate and distinct admissibility conditions each of which has to be satisfied in the aforementioned order, before an individual can invoke the Convention’s provisions against a Contracting State.”²⁶ For Convention responsibility to arise, there must be some other pre-existing relationship – a “jurisdictional link” – between the alleged victim and the Contracting States.²⁷ This, of course, is precisely what the governments had claimed. In holding the case inadmissible, the

²¹ *Id.* ¶¶ 59-61.

²² *Id.* ¶ 61.

²³ *Id.* ¶¶ 68-73.

²⁴ *Id.* ¶ 74.

²⁵ *Bankovic v. Belgium*, ¶ 54.

²⁶ *Id.* ¶ 75.

²⁷ *Id.* ¶ 82.

Court apparently was not satisfied that the required “jurisdictional link” existed between the applicants and the respondent states.

B. *Flaws in the Court’s Approach*

This article argues that the Court’s opinion in *Bankovic* is deeply flawed and displays a troubling misconception of the nature of the Convention’s rights and the Court’s own responsibilities under the Convention. To be clear, our criticism of *Bankovic* is not meant to suggest that we believe that the bombing of RTS and the deaths that ensued were necessarily violations under the Convention. Nor do we oppose NATO’s military intervention in FRY *per se*, although we do find some of the actions taken by NATO in this campaign, including the bombing of RTS, to be, at a minimum, morally disconcerting. This, however, has no bearing on the substance of our critique here. Further, we do not deny that this case, involving a military attack conducted by NATO in an international armed conflict, presented some rather complex and sensitive questions; questions, which, one might reasonably argue, the Court is not well equipped to decide. In particular, we would not have been entirely unsympathetic had the Court candidly admitted, or at least had given some indication, that it was unsuitable to determine whether the deaths resulting from this attack violated the applicants’ right to life and thus deferred the matter to the democratic political process of the Contracting States.

Such an approach would have called attention to the fact that the Court’s role in securing Convention rights – and the role of judicial review in the Convention system – is not without boundaries and that the primary responsibility for doing so lies with the Contracting States themselves. These considerations are, of course, at the heart of the “margin of appreciation” doctrine,²⁸ to which the Court has resorted in arguably less compelling circumstances. Whether it would have been appropriate for the *Bankovic* Court to resort to this approach is debatable. We are inclined to answer that question in the negative. In our opinion, human rights issues raised by the intended actions of states, especially when concerning the life and death of civilians, should ideally never be deferred to political discretion alone, regardless of any distinction drawn between national and international politics.

Finally, we do not consider the question of Contracting States’ obligations to persons outside of their territories to be a simple matter. It is not. Had the Court recognized the complexity of this matter and made a sincere and thoughtful attempt to resolve it, but nonetheless reached a similar holding (which on this assumption we doubt it would have), we would be more understanding.

²⁸ For an account on the “margin of appreciation” doctrine see D.J. HARRIS, M. O’BOYLE & C. WARBRICK, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 12-15 (1995).

Rather, what we object to is how the *Bankovic* Court, in fact, approached and decided the question of Contracting States' Convention obligations vis-à-vis persons outside of their territories. Although there might be some room for disagreement as to what Article 1 says in this respect, few can seriously deny the importance of this issue. After all, to use the language of the Court, the question raised in this case concerns "the scope and reach of the entire Convention system of human rights' protection."²⁹ One might legitimately expect that the Court, when determining an issue of this magnitude, would not only write an opinion that clearly states the reasons underlying the holding but that would also demonstrate that the outcome was based on logical and coherent reasons firmly rooted in relevant legal material – in short, an opinion that assures its audience that the Court is speaking for the law. Unfortunately, the Court offered no such opinion.

The deeper and more troubling aspect of the *Bankovic* Court's opinion is the values that underpin it. Rather than using the case to underscore the principle of the universality of human rights and to strengthen the idea that human rights inhere in all individuals (or, for that matter, simply declaring the claim nonjusticiable), the Court took the exact opposite approach. It introduced the perverse idea that human rights can somehow be limited and parcelled out depending on membership in a particular class of persons.

C. Ironies Raised by the Case

It is hard to miss the many ironies produced by this case. While the European Court of Human Rights is widely viewed as the pre-eminent supranational human rights adjudicatory body in the world, in *Bankovic* the Court issued a decision that rests on moral values anathema to the very idea of human rights. It is also ironic that the entire purpose for NATO's involvement in Yugoslavia was to defend the human rights of people in this foreign land.³⁰ However, the Contracting States maintained the position that in their defense of these human rights they are

²⁹ *Bankovic v. Belgium*, ¶ 65.

³⁰ The NATO states were engaged in a humanitarian intervention, which, by definition, indicates that the war was carried out for humanitarian and human rights purposes. For example, Prime Minister Tony Blair justified the military action this way: "No one in the West who has seen what is happening in Kosovo can doubt that NATO's military action is justified[.] This is a just war, based not on any territorial ambitions but on values. We cannot let the evil of ethnic cleansing stand. We must not rest until it is reversed. We have learned twice before in this century that appeasement does not work. If we let an evil dictator range unchallenged, we will have to spill infinitely more blood and treasure to stop him later." Prime Minister Tony Blair, Address on the Doctrine of the International Community at the Economic Club, Chicago (Apr. 24, 1999), available at <http://www.number-10.gov.uk/output/page1297.asp>

under no legal obligation to observe these rights. Another notable irony is that one of the stipulations in the settlement of the earlier conflict in Bosnia was the adoption of the provisions of the European Convention by the warring parties.³¹ Yet, in *Bankovic* the Court held that the Convention “was not designed to be applied throughout the world,”³² but essentially only applied in what the Court referred to as “the legal space (*espace juridique*) of the Contracting States,”³³ which notably did not include Bosnia-Herzegovina until 2002.³⁴ A similar irony lies in the fact that the Council of Europe views the consolidation of democracy and human rights in the countries of the Balkans as a crucial task. One final level of irony is the enormous contrast between the territorial-based holding in *Bankovic*, at the same time that many European states (Spain³⁵ and Belgium³⁶ in particular) have invoked the principle of uni-

³¹ The General Framework Agreement for Peace in Bosnia and Herzegovina Annex 6, Chapter 1, Article I:

The Parties shall secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the other international agreements listed in the Appendix to this Annex.

Available at http://www.ohr.int/dpa/default.asp?content_id=380; see also, Resolution 1244 (1999), Adopted by the Security Council at its 4011th meeting, on 10 June 1999. The resolution announced the Security Council’s decision to deploy an international civil and security presence in Kosovo under U.N. auspices. It states that the main responsibilities of the international community’s presence include “protecting and promoting human rights.” *Id.* ¶ 11(j), available at <http://www.nato.int/kosovo/docu/u990610a.htm>.

³² *Bankovic v. Belgium*, ¶ 80.

³³ *Id.*

³⁴ See <http://www.echr.coe.int/Eng/EDocs/DatesOfRatifications.html> for the dates on which the agreements went into force.

³⁵ Undoubtedly the most famous case to date of the extraterritorial enforcement was the effort to extradite and prosecute former Chilean dictator Augusto Pinochet. On the surface the case involved only three states – Chile, Great Britain and Spain. In fact, a number of other European states (including Italy, Germany, France, Switzerland, Sweden, Belgium Luxembourg and Denmark) also were involved. See generally, Richard J. Wilson, *Prosecuting Pinochet: International Crimes in Spanish Domestic Law*, 21 HUM. RTS. Q. 927, 942 (1999).

³⁶ Belgium has been the single most aggressive country in invoking the principle of universal jurisdiction. In fact, the list of those indicted under Belgian law read like a “Who’s Who” of world leaders, past and present. In 2002, the International Court of Justice tempered Belgium’s actions (at least with respect to sitting heads of state) when it ruled that Abdulaye Yorodia Ndombasi, the Minister of Foreign Affairs of the Democratic Republic of the Congo, enjoyed Head of State Immunity from prosecution in Belgium. *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* 2002 I.C.J. 121.

versal jurisdiction in order to prosecute non-Europeans for violations of human rights that have taken place outside of Europe.³⁷

D. *Or Is It Hypocrisy Instead?*

Perhaps what is at work here is not so much irony but hypocrisy. Whether the Court realizes it or not, *Bankovic* sends a very disturbing message: human rights are universal, but only when powerful Western states determine that they are universal.

Moreover, many people in the defendant states have been very critical of the manner in which the United States government has been conducting the so-called “War on Terror,” and one of the most frequently expressed concerns has been the creation of a “legal free zone” in Guantanamo Bay, Cuba, where hundreds of suspected Al-Qaeda operatives have been held (including some European nationals).³⁸

Criticism of U.S. policy has been well directed, and this situation has been rectified, at least to some degree, in a case (*Rasul v. Bush*) that raises many of the same kinds of issues that *Bankovic* does.³⁹ Yet at the same time that charges of American lawlessness were being made, what was ignored was the manner in which European Governments have operated on the very same premise, namely, that they can apply one set of human rights standards at home, but a different set of standards outside of their borders. And one of the more unsettling aspects of all this is the way in which *Bankovic* has hardly elicited any response, notwithstanding the enormous importance of the case (especially in light of the worldwide “War on Terror”) and despite the dangerous precedent that it establishes.⁴⁰

³⁷ See generally, Menno Kamminga, *Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses*, 23 HUM. RTS. Q. 940 (2001).

³⁸ See e.g., Meg Bortin, *European Distrust of U.S. Role Sharpens; No Healing of the Wounds' a Year After Iraq War, Global Survey Finds*, THE INTERNATIONAL HERALD TRIBUNE, Mar. 18, 2004 at 1 (listing the treatment of prisoners at the U.S. naval base at Guantanamo Bay, Cuba as one ground for the growing resentment in Europe of the U.S.).

³⁹ *Rasul v. Bush*, 124 S. Ct. 2686 (2004). *Rasul* is a consolidated case brought by nationals of Australia, Great Britain and Kuwait, challenging their detention as “enemy combatants” at Guantanamo Bay, Cuba. In his majority opinion, Justice Stevens presented the question before the Court as “whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ‘ultimate sovereignty.’” *Id.* at 2693. After noting the absolute and near-permanent control that the U.S. government has exercised over Guantanamo, the Court answered this question in the affirmative. Our concern is whether the holding will come to be limited to this one military base.

⁴⁰ The case has received little if any attention in mainstream media. As far as we know none of the major news media has drawn any parallels between the Court’s

We provide such a critique. The thrust of our argument is that the Court not only misread the Convention and much of international human rights law, but that it misinterpreted some of its own previous case law as well. As a consequence, the Court has added very little clarity – but a great deal of confusion – to the meaning of Article 1 and, more importantly, international human rights.

In Part II, we focus on various aspects of the *Bankovic* decision. The opinion itself is quite brief, which is very telling given the enormous importance of the issue that the case raises. Despite its brevity, however, the Court throws out a number of underdeveloped and flawed arguments that need to be untangled because of the strained (and strange) view of human rights they evince, and because they demonstrate just how haphazardly the Court examined the important issues before it. In this section we present an alternative interpretation, one which we feel better corresponds to the object and purpose of the Convention.

Part III addresses some of the broader implications that follow from the case. One relates to Europe's conception of human rights. Notwithstanding nearly unanimous proclamations of the universality of human rights, the Court's ruling reflects a centuries-old demarcation between the rights of European citizens and the "rights" of those outside of "Europe."

The final issue we address relates to the Court's role as a human rights institution. There is no denying that the Court has surpassed what its framers could have imagined. However, as Menno Kamminga pointed out a decade ago in a seminal article entitled *Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?*, while the Court has been able to address particular kinds of human rights violations, it is by no means certain that it has the institu-

holding in *Bankovic* and the issue of Guantanamo Bay. When the case does receive some mention in legal doctrine it is seldom criticized. A good example of this is Dinah Shelton's description of the ruling as exhibiting "a very narrow view of jurisdiction that does not appear consistent with most international law doctrine." Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT'L L. 95, 128 (2003). However, she goes on to defend the ruling: "but it is understandable that the Court would seek to limit its jurisdiction to exclude the extra-territorial military operations of its contracting states." *Id.* To us, it is not understandable why this action is so "understandable." No doubt, the most insightful critique of the case has been given by Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EJIL 529 (2003); see also Rick Lawson, *Life after Bankovic: On the Extraterritorial Application of the European Convention in EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* (Fons Coomans & Menno Kamminga eds., 2004).

tional capacity to take on more “serious” human rights abuses, especially those that arise from war and civil strife.⁴¹

This particular issue is still being answered and there is no question that the Court will be further tested in this regard with the inclusion of the Russian Republic.⁴² We are asking a related, but slightly different, question: Can the European Court of Human Rights remain a viable human rights institution when it so readily and casually forgoes the foundational idea behind these rights?

II. THE *BANKOVIC* CASE

A. *Textual Analysis*

The Court began its analysis by stating that it would interpret the key terms of Article 1 in accordance with the principles of treaty interpretation enshrined in Article 31 and 32 of the Vienna Convention on the Law of Treaties.⁴³ These articles establish sources of interpretation as well as their internal hierarchy. Article 31(1) sets forth the general rule of treaty interpretation: “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 light of its object and purpose.”⁴⁴

Article 32 concerns the usage of supplementary means of interpretation, restricting reliance on such sources as follows:

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.⁴⁵

Unfortunately, the Court’s analytical paradigm was hardly grounded in these principles. There are a number of problems with the Court’s methodology, the most important of which is the Court’s failure to examine the validity of its textual analysis in light of the object and purpose of the treaty.

⁴¹ Menno Kamminga, *Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?* 12 NETH. Q. HUM. RTS. 153 (1994).

⁴² Aisling Reidy, Françoise Hampson and Kevin Boyle, *Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey*, 15/2 NETH. Q. HUM. RTS. 161 (1997).

⁴³ *Bankovic v. Belgium*, ¶ 55: “The Court recalls that the Convention must be interpreted in the light of the rules set out in the Vienna Convention[.]”

⁴⁴ Vienna Convention on the Law of Treaties, May 23, 1960, 1155 U.N.T.S. 331 [hereinafter *The Vienna Convention*].

⁴⁵ *Id.*

Implicit in the Court's approach was that the answer to the interpretive question raised in *Bankovic* rests squarely in the conceptual limitations suggested by the international law usage of the term "jurisdiction." However, the Court's analysis of international law usage, which underpins its entire decision, consists of a handful of excerpts taken from general treaties on international law (and which deal with the subject matter of state jurisdiction).⁴⁶ The underlying assumption of this approach is that the meaning of the term jurisdiction in international law necessarily will be the same wherever it might appear; so that to understand its intended meaning in a human rights treaty one can simply take any general treaty on international law, turn to a section entitled "state jurisdiction," look to see how the author uses the term, and then simply plug that meaning in.⁴⁷ What the Court did not seem to seriously contemplate was the possibility that the term "jurisdiction" in international law might take on a different meaning depending on the context and purpose of inquiry.

To illustrate the shallowness of the Court's analysis on international law usage, consider its treatment of Antonio Cassese's work, *Interna-*

⁴⁶ *Bankovic v. Belgium*, ¶¶ 59-60.

⁴⁷ Notice that the Court maintained that its understanding of Article 1 reflects the original understanding of the drafters. This follows *inter alia* from the Court's position on the Convention's preparatory work: "the Court finds clear confirmation of this essentially territorial notion of jurisdiction in the travaux préparatoires" *Bankovic v. Belgium*, ¶ 63. It also follows from its rejection of a dynamic interpretation of Article 1: "It is true that the notion of the Convention being a living instrument to be interpreted in light of present-day conditions is firmly rooted in the Court's case-law[.]" *Bankovic v. Belgium*, ¶ 64. However, the scope of Article 1, at issue in the present case, is "determinative of the very scope of the Contracting Parties' positive obligations and, as such, of the scope and reach of the entire Convention system of human rights protection[.]" *Bankovic v. Belgium*, ¶ 65. Finally, the Court held: "the extracts from the travaux préparatoires detailed above constitute a clear indication of the intended meaning of Article 1 of the Convention which cannot be ignored." *Id.*

The unarticulated assumptions underlying the Court's interpretation, then, were that (i) at the time of the drafting of the Convention the term jurisdiction had, through widespread and uniform international usage, acquired a particular international law meaning and (ii) the drafting states were aware of this usage and chose this usage over any other competing meaning of the term. Yet, the *Bankovic* Court did not undertake any kind of inquiry into common usage of the term jurisdiction at the time the Convention was being drafted. This is not an insignificant omission. In view of the strong influence of voluntaristic/positivistic theories of international law during the first half of the 20th century and their rather odd conception of international legal rights and obligations, it seems unlikely that any conceptual clarity has been gained concerning the concept jurisdiction when the Convention was being drafted. For an account on the peculiar conception of international law that dominated international law theory from the late 18th century to the second half of the 20th century. See generally PETER REMEC, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTTEL* (1960).

tional Law.⁴⁸ In support for its interpretation of Article 1, the Court refers to a section in this book which gives a very general account on the concept of “sovereignty.”⁴⁹ Yet, at the same time, the Court completely ignores Cassese’s analysis of the term “jurisdiction” in Article 1 of the Convention and in Article 2 of the International Covenant on Civil and Political Rights – which raises the very same issue dealt with in *Bankovic*. In concluding his analysis on this matter, this learned scholar observes:

It follows from the above that States are to respect human rights obligations not only on their own territory but also abroad, when they exercise there some kind of authority or power, whether the individuals subject to this authority or power have the State’s nationality or are foreigners. In addition, by exercise of authority one should mean not only the display of sovereign or other powers (law-making, law enforcement, administrative powers, etc.) but also any exercise of power, however limited in time (for instance, the use of belligerent force in an armed conflict).⁵⁰

This understanding of the term jurisdiction is, of course, completely at odds with the Court’s understanding. However, let us concede, *gratia argumentandi*, that Cassese’s understanding is not the “ordinary understanding” of the term jurisdiction in international law usage. Unhappily for the Court, however, there remains an insurmountable disjunction between what the Court’s sources suggest to be the ordinary meaning of the term jurisdiction and the Court’s own understanding of this term. The term jurisdiction in international law usage is most often understood in a *de jure* sense, denoting a right under international law to act.⁵¹ If the term has a common meaning it is this.

At the outset of its opinion, the Court uses this generally used definition, proclaiming confidently that:

As to the “ordinary meaning” of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial.⁵²

The Court continued:

⁴⁸ See ANTHONY CASSESE, *INTERNATIONAL LAW* (2001).

⁴⁹ *Bankovic v. Belgium*, ¶ 60.

⁵⁰ CASSESE, *supra* note 48, at 362-3.

⁵¹ See e.g., RUDOLF BERNHARDT, *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, Vol. I p. 55 (noting “the issue of jurisdiction concerns a state’s ‘lawful power to act and, hence, to its power to decide whether and, if so, how to act’”); see also, ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 146 (1994) (noting that “international principles on jurisdiction deal with states’ legal competence or right to act in a physical and legal sense”).

⁵² *Bankovic v. Belgium*, ¶ 59.

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 the particular circumstances of each case[.]”⁵³

Subsequently, the Court abandoned this understanding, implicitly recognizing that the term “jurisdiction” in Article 1 should not always be understood in a *de jure* sense,⁵⁴ and essentially adopted a *de facto* interpretation, although it was a *de facto* approach that differed from the applicants’ approach. In doing so, the Court clearly contradicted itself. What is particularly troubling about this is that its whole decision is premised on this very point.

Moreover, to concede, as the Court eventually does, that the term “jurisdiction” in Article 1 should not always be understood in a *de jure* sense is to concede that the text of Article 1 is highly ambiguous and vague. In that case, the term can be understood in the sense of *de facto* power or authority. But what does it mean to say that a person is within a state’s power, authority, or capacity? Or that a state has exercised power, control, or authority over a person?

Anyone who claims that the answers to these questions are self-evident makes unjustified and unproven assumptions. Indeed, a cursory look at the longstanding debates over these concepts reveals that the term jurisdiction in Article 1 (if understood in a *de facto* sense) is capable of numerous and incompatible meanings and, most important, that the Court’s interpretation is not any more compelling, from a conceptual standpoint, than the applicants’ interpretation.⁵⁵

This is not to say that it is impossible to ascertain the meaning of Article 1. Rather, this can only be accomplished by reading the terms in their context and in light of the object and purpose of the treaty. The lack of any serious attempt to do so by the Court, particularly in light of its heavy reliance on supplementary means of interpretation (i.e., drafting history, random examples of state practice, and textual comparisons with other treaties) is clearly at odds with Articles 31 and 32 of the Vienna Convention.

B. *The Convention’s Object and Purpose*

The Convention is a human rights instrument. That is to say, the rights enumerated in the Convention are the same rights (or attempts to represent the very same rights) as all other international human rights instruments. What unites all human rights instruments is the idea that all

⁵³ *Id.* ¶ 61.

⁵⁴ See *infra* Section II(D)(4) in particular section II (D)(4)(a).

⁵⁵ See STEVEN LUKES, *Introduction*, POWER (Steven Lukes ed., 1999); STANLEY I. BENN, *Authority*, THE ENCYCLOPEDIA OF PHILOSOPHY (Paul Edwards ed., 1967); LESLIE GREEN, *Power*, THE ENCYCLOPEDIA OF PHILOSOPHY (Edward Craig ed., 1998).

human beings have an “inherent dignity”⁵⁶ and therefore all human beings should be treated with a minimum level of dignity, respect, and concern. The implication of this, as Michael Perry puts it, is that “certain things ought not to be done to any human being and certain other things ought to be done for every human being.”⁵⁷

The idea of human rights is extremely abstract and leaves plenty of room for good faith disagreements about what might be considered to be a human right and what a specific human right means in certain contexts. But it is not devoid of meaning: there are limits as to what kind of practices and what kind of theories of justice (or morality generally) that with integrity can be reconciled with this idea.⁵⁸ In particular, the idea of human rights is incompatible with instrumental or self-regarding accounts of justice and morality – that is, theories that define justice and morality in terms of pursuit of enlightened self-interest and view the norms of justice and morality as the outcome of mutually advantageous agreement between different actors pursuing their own self-interest.⁵⁹ Whatever rights can be derived from such theories, they are not human rights.

To say this is not to make a normative judgment about the legitimacy of human rights. Nor is it to say that those who espouse self-regarding accounts of justice and morality are necessarily less committed to the practical implications of the idea of human rights. Rather, to say that human rights are by definition rights that inhere in human beings simply because they are human beings and, thus, not based on any form of contractual or communitarian relationships is to make a conceptual claim about the meaning of human rights. To deny the validity of this claim – to suggest that the concept of human rights has a different meaning – is, we submit, to engage in sophistry.

What then is the legal significance of all of this? The idea of human rights suggests that the impetus to the Convention was a genuine concern for the well being of human beings writ large, not the advancement of the

⁵⁶ See Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., Part I, at 71, U.N. Doc A/810 (1948) available at <http://www.un.org/Overview/rights.html> [hereinafter UDHR]. “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world[.]” UDHR Art. 1. “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” *Id.*

⁵⁷ See MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 13 (1998).

⁵⁸ *Id.* at 32-35; see also JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING HISTORY AND INTENT* 290-296 (1999).

⁵⁹ PERRY, *supra* note 57, at 32-35; see also MORSINK, *supra* note 58, at 290-96; Louis P. Pojman, *Are Human Rights Based on Equal Human Worth?*, 52 *PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH* 605 (1992).

Contracting States or their members' enlightened self-interest.⁶⁰ Thus, by adhering to the Convention the Contracting States committed themselves to the idea that there are certain things that "ought not to be done to any human being – and certain other things ought to be done for every human being," simply because they are human beings. This idea clearly cuts against an interpretation of Article 1 that would allow Contracting States to "do" certain things to human beings outside its territorial borders that which they are prohibited from doing to human beings inside of their territorial borders.

To put this point differently, the object and purpose of the Convention – like those of every other human rights treaty – are quite clear. The "object" is human rights, while the "purpose" of the Convention is the protection of those rights.⁶¹ The Convention did not create these rights; they were inherent in human beings *qua* human beings and not the result of acts by governments. The self-imposed task of the Convention, then, is to "take the first step for the collective enforcement"⁶² of human rights.

It is true that the Convention only protects "certain" of the inherent human rights stated in the Universal Declaration of Human Rights ("UDHR") (i.e., represents or purports to represent a particular conception of human rights not necessarily shared everywhere).⁶³ It is also true that the Convention only imposes legal obligations on "certain" states

⁶⁰ A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 25 (1993). The authors write:

The whole idea of human rights is that they pertain to everyone by virtue of their personality, that is to say by virtue of their nature as human beings. This being so, it follows that international measures to secure their protection cannot be limited in their effect to citizens of one country or a group of countries. Fundamental rights belong to everybody.

Id.

⁶¹ In addition to a desire to adopt a mechanism to enforce the recently articulated UDHR, the Convention also sought to provide for "the foundation of justice and peace in the world." See European Convention, *supra* note 6, Preamble. The connection between the respect for human rights and peace might be construed to reflect a purely instrumental moral and political philosophy. However, the philosophical outlook that underpins human rights does not view peace as a goal to which self-interested individuals should strive solely in view of their own self-preservation. Rather, it sees the opposite to peace – war – as necessarily involving violations of inherent human rights. Or as Morsink's has described this relationship:

Regardless of the consequences for world peace, these rights have an independent grounding in the members of the human family to whom they belong and who possess them as birthrights. If this were not so, a government could torture people (or violate any other right) as long as it was thought or shown to serve the cause of world peace. This is precisely how most governments rationalize and justify their human rights violations, but it flies in the face of the truth [. . .] about human rights[.]

MORSINK, *supra* note 58, at 320.

⁶² European Convention, *supra* note 6, Preamble.

⁶³ UDHR, *supra* note 56.

(i.e., it regulates the acts and inactions of states located in a particular region of the world). In this way, the Convention is regional. However, since the rights that the Convention does protect are universal in nature it must be presumed that these states' obligations to respect them do not arbitrarily end at their borders.

C. *An Alternative Interpretation*

If one starts from the premise that the Convention is a human rights treaty, it is natural to assume that the focus of Article 1 is not the identity of the beneficiaries of the Convention – which is given in the very notion of human rights – but the identity of the states whose acts and inactions the Convention regulates. Our thesis is this: Article 1 identifies the states whose conduct (actions and inactions) the Convention regulates. The language “persons within their jurisdiction” relates exclusively to Contracting State's positive obligations under the Convention – that is obligations that require them to do or provide things as opposed to their negative obligations, which is essentially not to infringe the human rights of individuals.

Each right set forth in the Convention is universal in the sense that it belongs to human beings qua human beings and each right generates both negative and positive obligations. For example, Article 2 entails a right to legal protection from deadly violence emanating both from state and non-state actors. This right corresponds to both positive and negative obligations; it prohibits Contracting States from using their police and security forces to intentionally and deliberately kill individuals without due process. It also enjoins them to take reasonable steps to prevent the taking of life by non-state actors or by agents of other states by, among other things, providing police and security forces.⁶⁴

The negative obligations under the Convention – or the obligations not to deprive people of what they have rights to – are owed to everyone everywhere. This is quite straightforward. A universal right could not be guaranteed unless the negative duties corresponding to it were universal.

⁶⁴ In *Osman v. the United Kingdom*, App. No. 23452/94, 1998 Eur. Ct. H.R. 101, the Court made the following observations on the nature of Contracting State's positive obligations under Article 2:

Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. [T]he State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. *Id.*, ¶ 115.

All states that have ratified a human rights treaty, including the Convention, thereby have agreed not to intentionally or recklessly infringe on an individual's human rights, no matter where this might take place.

Unlike negative obligations which are necessarily owed to everyone everywhere, states' positive obligations are limited in scope by the state system that prohibits one state from acting in another state's territory without that state's permission. In addition, positive obligations are also limited by considerations of fairness and efficiency. Thus, Shue's description of the limitations on positive obligations for individuals also applies to states:

Full coverage can be provided by a division of labor among duty-bearers. All the negative duties fall upon everyone, but the positive duties need to be divided up and assigned among bearers in some reasonable way. Further, a reasonable assignment of duties will have to take into account that the duties of any one individual must be limited, ultimately, because her total resources are limited, and, before that limit is reached, because she has her own rights, which involve the perfectly proper expenditure of some resources on herself rather than on fulfilling the duties toward others.⁶⁵

In other words, for human rights to be guaranteed it is not necessary for all states to protect the human rights of all human beings everywhere, nor would it be practically or legally feasible; it certainly would not be efficient. The only reasonable way to achieve universal coverage of human rights, then, is for each state to protect them within its recognized territories (or as we shall argue elsewhere on territories it effectively occupies) and for each state to respect them everywhere.⁶⁶

Admittedly, the distinction between positive and negative obligations is anything but clear-cut and it is more accurate to say that Contracting States' obligations range across a spectrum from the completely negative to the highly positive. But for the limited purpose of explaining the considerations that underpin the language of Article 1, this does not matter. Moreover, it should be noted that the *Bankovic* case clearly concerned

⁶⁵ See Henry Shue, *Mediating Ethics*, 98 *ETHICS* 687, 688 (1988).

⁶⁶ *C.f.*, LOUIS HENKIN, *THE AGE OF RIGHTS* 45 (1990).

A state's obligation to respect – to refrain from violating – the civil and political rights of individuals [. . .] applies in principle to all individuals wherever they are. Human rights law does not ordinarily address that obligation expressly, only because the character of the state system and general principles of international law ordinarily preclude such violations. Similarly, because a state may not ordinarily exercise authority in the territory of another state, there is no obligation upon it to act to ensure respect for human rights there, whether by the government of the state or by private persons. A state is not internationally responsible for another state's failure to respect or to ensure respect for rights.

Id.

the respondent states' negative obligations.⁶⁷ The applicant did not claim that these states had failed to protect their relatives from being killed. They claimed that the respondent states had knowingly caused this result.

So how does this model fit in with the text of Article 1? Above we noted that it is plausible, from a conceptual point of view, to understand the phrase "persons within [a Contracting State's] jurisdiction" as "persons within or subject to a Contracting State's power." To say that a state has exercised power (and jurisdiction understood as power) is to say that it has produced or prevented a certain outcome or state of affairs. Power can be exercised either by an act or omission. This would yield the following understanding of Article 1: a person is within a Contracting State's "jurisdiction" if that state has the power to (intentionally, knowingly, or negligently) affect one or several of his/her human rights.⁶⁸

Accordingly, if at time T1 a Contracting State A has the power to kill person P on State B's territory by commissioning some of its Special Forces to kill him, then P is within A's jurisdiction irrespective of the fact that P is outside of A's territory. The upshot of this is that State A has an

⁶⁷ The notion of Contracting States' positive obligations under the Convention is somewhat ambiguous. The notion is sometimes understood to include Contracting States' obligations to ensure that their organs and agents *in fact* will comply with the rights set fourth in the Convention; that the highest organs of Contracting states do not merely give their subordinates orders or directions on human rights, but that they take affirmative steps to ensure that those orders and direction are in fact complied with; in other words that they ensure that their subordinates will not act *ultra vires*. This approach is confusing. For the purpose of ascribing responsibility under a human rights treaty, it seems more accurate to view *ultra vires* acts as private acts. Accordingly, any responsibility that incurs in connection to such an act results from the failure of the State at issue to prevent the act from occurring and/or its subsequent failure to punish the actor in question.

However this particular issue is settled, it does not affect our analysis here. Thus we may say that Contracting States' positive obligations *exclusively* concerns their obligations to protect persons from certain type of harms (or threat of such harm) emanating from (i) the acts of *non-state actors* (ii) the acts of other States *and* depending on one's view on the issue just discussed) (iii) state actors acting *ultra vires*. Either way, it would be incorrect to say that the *Bankovic* case concerned the respondent states positive obligations under the Convention.

⁶⁸ It is generally agreed that power is an agency concept; that is, only rational actors (or entities presumed to be rational for some purposes such as states) are capable of having or exercising power. Correspondingly, power is distinct from causation. That is to say, not all outcomes that agents cause in the natural course of events are going to qualify as resulting from power. Rather, the outcomes of power must stand in a certain relationship with the desires and beliefs of those who hold it. Thus, to exercise power may be understood as to intentionally, knowingly and (in some contexts) negligently cause a particular outcome. Moreover, the outcomes of power must also stand in a certain relationship with the desires and beliefs of those who are subject to power; to exercise power is to affect some other actor's non-trivial interests. See LUKES *supra* note 55.

obligation to refrain from commissioning one of its Special Forces units to kill P. Of course, to say that State A has the power to do something at time T1 does not mean to say that it will or intends to do so. And even if State A chooses to commission one of its special forces to kill P, it is not certain that it will actually succeed.

Suppose, however, that A did commission its special forces to kill P and that, at time T2, it succeeded in this endeavor. At this later point it is evident that P was within A's power – it evidently had the power to kill P in the manner just described. In other words, it is evident that P was within state A's "jurisdiction" before he was killed, and thus, that State A had an obligation not to kill him and State A, in killing him, has violated its obligation (Article 2). This explains why the question of jurisdiction is not relevant for the purpose of ascribing responsibility under the Convention when the question is whether a Contracting State has violated its negative obligations (i.e., cases involving extraterritorial acts).

By the same token, State A may have the power at time T1 to kill person P in the manner just described (and thus the a duty not to do so) but be utterly powerless to prevent person P from being killed by some of State B's special forces, or it may not have the legal competence to prevent person P from being killed by State B's special forces. In this respect, P is not within State A's jurisdiction. Under the principle that "ought implies can," State A does not have the obligation to prevent State B's Special Forces from killing P. But this, of course, does not allow State A to commission its own military personnel to kill P. In short P was not within its jurisdiction.

To conclude, the term "within their jurisdiction" entails a limiting principle ("ought" implies "can"), but this principle applies exclusively to cases involving Contracting States' positive obligations; that is to say, to cases where the question is whether a state has failed to protect individuals from harm emanating from a non-state actor or another state.

D. *Territorial Limitations on Human Rights Protection*

1. The "Essentially Territorial Notion of Jurisdiction"

A major difficulty in analyzing the *Bankovic* decision is its ambiguousness. Whether deliberate or not, the Court often hides its arguments and conclusions from scrutiny by resorting to novel and highly confusing language. The starkest example of this is the curious proposition that the term "jurisdiction" in Article 1 should be understood in an "essentially territorial"⁶⁹ or "primarily territorial"⁷⁰ way. Before taking a closer look at what the Court might have meant by this and the evidence it advanced in support of this interpretation (i.e., apart from the Court's "ordinary

⁶⁹ *Bankovic v. Belgium*, ¶ 61, 63, 67.

⁷⁰ *Id.* ¶ 59.

meaning” analysis examined above), it is useful to reiterate two broader points on the Court’s understanding of Article 1.

First, under the Court’s view, a Contracting State need only respect the rights of those individuals who (by some unspecified criteria) can be determined to have a special relationship or, in the words of the Court, a “jurisdictional link” to it.⁷¹ In other words, the obligations assumed under the Convention are not obligations that, in the final analysis, are owed to all persons *qua* persons. Rather, the obligations assumed under the Convention (both positive and negative) are owed to some subset of persons. Their fundamental justification is not located in the intrinsic nature or inherent dignity of all human beings, but rather, in the *relationship* between the Contracting States and this subset of persons. Put differently, in the view of the Court, a Contracting State’s duties under the Convention are special duties: they are duties owed to persons because of an act, event, or relationship for which a causal or historical account can be given, as opposed to general or natural duties that are “owed on some ground independent of specific acts, events, and relationships, such as the mere fact that the parties involved are human beings.”⁷²

So the question arises: what kind of relationship must a person have with a Contracting State to be entitled to the protection of the Convention? Unfortunately, the Court does not give a clear answer to that question. But whatever the exact content of its understanding of Article 1, it clearly does not preclude responsibility for all extraterritorial acts. On the Court’s interpretation, a Contracting State’s obligations under the Convention extend to all persons within its recognized territory and to a limited class of person outside of this territory. Being within a certain Contracting State’s recognized territory is a *sufficient* but not a *necessary* condition for being within that state’s jurisdiction – i.e., for having rights under the Convention against that state.

If the standard purportedly enshrined in Article 1 does not in fact exclude responsibility for all extraterritorial acts – if Contracting States’ obligations do in fact extend to some persons outside of their territories – one has to wonder whether it is appropriately termed “territorial.” To depict the obligation as such hardly elucidates its nature or the potential normative considerations behind it. Rather, this characterization obscures such aspects. The proposition that the term jurisdiction “must be considered to reflect this ordinary and essentially territorial notion of jurisdiction”⁷³ tells us little about what significant properties persons who are within a Contracting State’s territory share with those who, while outside of this territory, nonetheless are within that state’s “jurisdiction” within the meaning of Article 1.

⁷¹ *Id.* ¶ 82.

⁷² Shue, *supra* note 65, at 688.

⁷³ *Bankovic v. Belgium*, ¶ 61.

2. Previous Case Law

One of *Bankovic*'s shortcomings is that the Court's analysis of its own case law is both selective and superficial. Contrary to what the Court claimed in *Bankovic*, its holding is not consistent with the previous jurisprudence of the Strasbourg organs. Prior to this decision, Article 1 had been interpreted in harmony with the object and purpose of the Convention and, while not explicitly, the Strasbourg organs had effectively followed the approach that we argue for here. To be sure, the Court's reasoning in previous cases on the extraterritorial scope of the Convention is at times murky and key points are not always sufficiently developed. In short, like any body of case law, these cases offer possibilities for manipulation. However, as we intend to show, it is not malleable enough to cabin the Court's decision in *Bankovic*. The Court not only misread its earlier jurisprudence; its analysis in this regard also exposed a flawed view of its relevance. Though the Court's judgment in previous cases may be used as a source of interpretation, its relevance is limited. As correctly observed by Orakhelashvili, Article 1 has an autonomous meaning independent of how and to what extent it has been dealt with in the previous jurisprudence of the Court.⁷⁴ Another problem with the Court's approach, also noted by Orakhelashvili, is that it treats previous case law "not as an expression of a specific incident of a general rule enshrined in Article 1 [. . .] but as an exclusive source of such specific incidents."⁷⁵

(a) *Cyprus v. Turkey* (1975)

The general understanding of Article 1 prior to *Bankovic* was first established by the European Commission of Human Rights in *Cyprus v. Turkey*.⁷⁶ In this case, the Turkish Government argued that a communication from Cyprus was inadmissible *ratio loci* because it related to alleged violations outside of the territory of Turkey. The Commission unanimously rejected this argument:

[T]aking into account the terms used and the purpose of the Convention as a whole, state responsibility might be incurred by acts of the state (including acts by diplomatic or consular agents and members of the armed forces) that produce effects outside the national territory. The reason for this is that such agents remain under the state's jurisdiction when abroad *and they bring persons and property within this particular "jurisdiction"* to the extent that they exercise authority

⁷⁴ See Orakhelashvili, *supra* note 40. Orakhelashvili writes: "Existing practice specifies that certain situations in a given case do or do not fall within the 'jurisdiction' of the state under Article 1. It does not, however, prejudice other situations not directly connected with a previous case." *Id.* at 546.

⁷⁵ *Id.* at 546.

⁷⁶ *Cyprus v. Turkey*, App. Nos. 6780/74, 6950/75, 2 Eur. Comm'n H.R. Dec. & Rep. 72 (1975) [hereinafter *Cyprus v. Turkey*, 1975].

over them. If a different meaning were attached to the term “jurisdiction,” states would be immune for *acts* committed by them on other states’ territories or, indeed, on the high seas.⁷⁷

The formulation of “bring[ing] persons and property within this particular ‘jurisdiction’ to the extent that they exercise authority over them” is somewhat tortuous and a potential source of confusion. Particularly, it might be taken to suggest that a person may not be within a Contracting State’s “jurisdiction” before a certain act takes place, but as a result of the act itself may somehow retroactively be brought within its dominion. That issue aside, what is undeniable is that in the view of the Commission, a Contracting State’s negative obligation to respect the rights set forth in the Convention (i.e., not intentionally or knowingly violating them) applies whenever and wherever a Contracting State asserts power or authority over a person or his/her property.

(b) *Drozd and Janousek v. France and Spain*

This view was reaffirmed in *Drozd and Janousek v. France and Spain*.⁷⁸ In this case, the applicants had been convicted of armed robbery by a Court in Andorra and sentenced to 14 years’ imprisonment. The applicants complained that they had not received a fair trial under Article 6 and that their detention was unlawful under Article 5. In accordance with an existing arrangement, the criminal courts in Andorra were composed of a French and a Spanish judge appointed by “Co-princes of Andorra,” the President of France, and the Bishop of Urgel. Further, both applicants served their sentences in France. In determining whether Spain and France had violated applicants’ rights, the Court first ruled that “the term ‘jurisdiction’ in Article 1 is not limited to the national territory of the High contracting parties; their responsibility can be involved because of acts of their authorities that occurred outside of their territories.”⁷⁹ In support of this position, the Court referred to the Commission’s decision on admissibility in, *inter alia*, *Cyprus v. Turkey*, *Hess v. United Kingdom*,⁸⁰ and *W. v. United Kingdom*.⁸¹ It then turned to the question whether the impugned conduct was attributable to the Con-

⁷⁷ *Id.* (emphasis added).

⁷⁸ *Drozd and Janousek v. France and Spain*, 240 Eur. Ct. H.R. (ser. A) (1992).

⁷⁹ *Id.* ¶ 91.

⁸⁰ *Hess v. United Kingdom*, App. No. 6231/73, 2 Eur. Comm’n H.R. Dec. & Rep. 72 (1975). In *Hess*, the wife of Rudolf Hess complained that the length and conditions of the detention of her husband amounted to inhuman and degrading treatment. The Commission ruled that there is in principle, from a legal point of view, no reason why the acts of the British authorities in Berlin should not entail the liability of the United Kingdom under the Convention. However, the responsibility for the continuing imprisonment of Hess was exercised by the four occupying powers jointly, and all decisions concerning his detention had to be unanimous. Because the U.K. did not have any real power to bring about Hess’s release, the Commission held that the

tracting States. The Court answered that question in the negative on the grounds that the two judges had acted autonomously and not in their capacity as agents of France and Spain respectively.⁸²

Two features of this case are worth underscoring for present purposes. First, the impugned conduct occurred within the territory of Andorra, which was not a party to the Convention. Second, one of the applicants was a national of a non-Contracting State (Czechoslovakia). Thus, the Court in *Drozd and Janousek* evidently thought that Contracting States' obligations under Article 6 (or some of them) extend to persons who face criminal trials in non-Contracting States – or, in the words of the *Bankovic* Court, outside of the “*espace juridique*” – and irrespective of their nationality.⁸³ Had the Court not held that view, it would have been utterly pointless for it to examine the question whether the conduct of the Spanish and French judge could be attributable to these states.

(c) *Loizidou v. Turkey (Preliminary Objections)*

In *Loizidou v. Turkey*, the applicant claimed that because of Turkey's invasion of Northern Cyprus in 1974 and the continued occupation and control of that territory by Turkish armed forces, she was unable to access her property in northern Cyprus.⁸⁴ This state of affairs, she claimed, constituted a continuing violation of her right to respect her home contrary to Article 8, and her right to peaceful enjoyment of her property contrary to Article 1 of Protocol No. 1 (P1-1).⁸⁵ The applicant also claimed that while attempting to access her property in 1989, she had been wrongfully arrested in violation of Article 5 and subjected to treatment contrary to Article 6. However, the Court did not examine these allegations.⁸⁶

situation complained of did not fall within the jurisdiction of the United Kingdom under Article 1 and held the application inadmissible.

⁸¹ In *W. v. the United Kingdom*, the applicant's husband had been shot dead at an auction in the Republic of Ireland. The Commission found that the United Kingdom had a positive obligation to protect life. Because the applicant's husband had been killed in the Republic of Ireland, where the U.K. had no real capacity to protect him, the Commission held that he had not been within the jurisdiction of the United Kingdom in the sense of Article 1. App. No. 9348/81, 32 Eur. Comm'n H.R. Dec. & Rep. 190 (1983).

⁸² *Drozd and Janousek v. France and Spain*, ¶ 96. The Court writes:

Whilst it is true that judges from France and Spain sit as members of Andorran courts, they do not do so in their capacity as French or Spanish judges. Those courts, in particular the Tribunal de Corts, exercise their functions in an autonomous manner; their judgments are not subject to *supervision* by the authorities of France or Spain (emphasis added).

⁸³ *C.f.*, *Bankovic v. Belgium*, ¶ 80.

⁸⁴ See *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser A.) (1995) (preliminary objections) [hereinafter *Loizidou v. Turkey, Preliminary Objections*].

⁸⁵ *Id.* ¶ 53.

⁸⁶ *Id.* ¶ 54.

Turkey objected to the admissibility of the applicant's claim on three grounds. First, it maintained that the matters complained of – *i.e.*, the applicant's inability to access her property – was clearly outside the realm of Turkey's "jurisdiction."⁸⁷ In its view, the applicant's grievance concerned acts and policies attributable to the Turkish Republic of Northern Cyprus ("TRNC").⁸⁸ According to Turkey, TRNC was a democratic and constitutional state, politically independent of all other sovereign states including Turkey.⁸⁹ Because TRNC acted on its own authority and independently of any other authority, its acts and policies could not be attributed to Turkey or any other state. The fact that Turkey was the only State that had recognized TRNC as an independent state was immaterial in this regard: it did not change the fact that Turkey did not control the acts and policies of TRNC.⁹⁰ In essence, then, Turkey's position was that it did not have (nor had it had) the power to guarantee applicant access to her property, and thus did not have (nor had it had) the obligation to do so.⁹¹

In support of its claim that it lacked jurisdiction over the matter complained of, Turkey (not unreasonably) drew attention to the fact that the question of Greek Cypriot properties in the north and Turkish Cypriot

⁸⁷ *Id.* ¶ 47.

⁸⁸ *Id.* ¶ 47. Note that TRNC was not an "organ of Turkey" according to Article 4 of the International Law Commission's Articles on State Responsibility. Article 4 states:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever positions it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the *internal* law of the State.

International Law Commission's Articles on State Responsibility, U.N. GAOR, Int'l Law Comm'n, 53d Sess., art. 4, U.N. Doc. A/CN.4/L.602/Rev.1 (2001) [hereinafter ILC Draft] (emphasis added); *see also infra* CRAWFORD, note 182. As to the legal authority that should be given to the ILC Draft *see* David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority* 96 A.J.I.L. 857 (October 2002). The author notes *inter alia* that "[s]everal, if not many, of the articles clearly involve the progressive development of the law [of state responsibility] rather than its codification. Yet they are still quite influential." *Id.* at 858. He notes also that the Draft "although written in the form of articles, is not a 'source' of law. The ILC articles and commentary instead are evidence of a source of law. In the wording of Article 38(1) of the Statute of the International Court of Justice, the articles are a 'subsidiary means for the determination of rules of law.' That is, the work of the ILC is similar in authority to the writings of highly qualified publicists." *Id.* at 867.

⁸⁹ *Loizidou v. Turkey*, Preliminary Objections, ¶ 47; *Loizidou v. Turkey*, 23 Eur. Ct. H.R. 513, ¶ 51 (1996) (judgment on the merits) [hereinafter *Loizidou v. Turkey*, Judgment on the Merits].

⁹⁰ *Loizidou v. Turkey*, Preliminary Objections, ¶ 56.

⁹¹ *Id.*

properties in the south was a matter discussed within the framework of the inter-communal talks between the Greek Cypriot and Turkish Cypriot communities and held under the auspice of the UN Secretary General.⁹²

Turkey conceded that it had a military presence in Northern Cyprus. However, it claimed that Turkish forces in northern Cyprus were there with the consent of the ruling authority of the TRNC, and that they acted exclusively in conjunction with and on behalf of the TRNC authorities.⁹³ The implicit argument was that actions taken by the Turkish military on Northern Cyprus were taken on behalf of the TRNC and thus should be attributed to the TRNC and not Turkey.⁹⁴

Turkey's second and third objection to the admissibility of applicant's claim concerned two limitation clauses in the declaration by which Turkey had accepted the Court's competence to examine individual complaints against it.⁹⁵ In the first place, Turkey's recognition of the Court's competence had been limited to "matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to the deposit of the [. . .] declaration."⁹⁶ According to Turkey, the applicant's complaint exclusively concerned facts that had taken place before the date the declaration had been deposited (January 22, 1990) and thus did not cover the applicant's claim.⁹⁷ The Court decided to join this question to the merits phase of the proceedings on the grounds that it raised difficult factual and legal questions which the court was unable to decide separately from the merits of applicant's claim.⁹⁸

Moreover, and more pertinent to the issue dealt with in this article, Turkey's recognition of the Court's and Commission's competence had been limited to complaints concerning matters "performed within the boundaries of the Republic of Turkey."⁹⁹ It followed, Turkey argued, that even if the impugned acts were imputed to Turkey, which it denied, the Court was not competent to examine applicant's claim as it concerned acts performed outside of that territory.¹⁰⁰

In its judgment on the preliminary objections, the Court first addressed Turkey's objection that the applicant's complaint concerned matters that

⁹² *Id.* ¶ 56.

⁹³ *Id.* ¶ 47.

⁹⁴ *C.f.*, ILC Draft, *supra* note 88, Article 6:

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

⁹⁵ *Loizidou v. Turkey*, Preliminary Objections, ¶ 47.

⁹⁶ *Id.* ¶ 36.

⁹⁷ *Id.* ¶¶ 36, 99-105.

⁹⁸ *Id.* ¶¶ 103, 104, 105.

⁹⁹ *Id.* ¶¶ 36-37.

¹⁰⁰ *Id.* ¶¶ 67-68.

could not fall within the “jurisdiction” of Turkey. It should be noted that the Court’s inquiry at this stage of the procedure was limited to the principal question whether the matters complained of were *capable* of falling within the jurisdiction of Turkey.¹⁰¹ The Court would not, it emphasized, determine whether the impugned conduct was actually imputable to Turkey and if so whether the conduct was in violation with its Convention obligations.¹⁰²

In answering the question thus defined, the Court reaffirmed its position that the term “jurisdiction” in Article 1 was not restricted to the territory of a High Contracting party and, thus, that “responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.”¹⁰³ Furthermore, the Court ruled that:

[B]earing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when 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 rights 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.¹⁰⁴

In this passage, the Court identified two possible ways that the impugned conduct could involve the responsibility of Turkey. First, Turkey’s responsibility could be involved if the applicant’s inability to access her property was a result of acts of Turkey’s official organs.¹⁰⁵ Second, Turkey’s responsibility could be involved if Turkey were found to be in effective control over Northern Cyprus (and implicitly the TRNC).¹⁰⁶ In such a case, Turkey would be held responsible not only for the acts of its own publicly recognized organs but also for the acts and policies of the TRNC.¹⁰⁷ According to the Court, there was sufficient evidence to suggest that one of these two possibilities existed, and thus, the Court ruled that Turkey’s objection (that the applicant’s complaint concerned matters that could not possibly fall within its “jurisdiction”) failed.¹⁰⁸

As to Turkey’s territorial restriction in its declarations, the Court held that the Convention should be viewed as a European constitutional

¹⁰¹ *Loizidou v. Turkey*, Preliminary Objections, ¶ 35.

¹⁰² *Id.* ¶ 35.

¹⁰³ *Id.* ¶ 36. In this connection, the Court referred to its holding in the above mention *Drozdz and Janousek v. France and Spain* and importantly its holding in *Soering v. the U.K.* examined below.

¹⁰⁴ *Id.* ¶ 62.

¹⁰⁵ *Id.* ¶¶ 63-64.

¹⁰⁶ *Id.*

¹⁰⁷ *Loizidou v. Turkey*, Preliminary Objections, 63-64.

¹⁰⁸ *Id.*

instrument aimed at achieving greater unity in the maintenance and further realization of human rights.¹⁰⁹ This, it asserted, required a uniform and effective enforcement mechanism.¹¹⁰ The consequences of accepting territorial limitations under Article 25 would have such far-reaching consequences for the achievement of this objective “that a power to this effect should have been expressly provided for” in the Convention.¹¹¹ The fact that no such provision existed strongly supported the view that such restrictions were not permitted.¹¹² This view, the Court maintained, was further supported by subsequent state practice.¹¹³ Accordingly, the Court concluded, Contracting States were prohibited from including territorial limitations in declarations under Articles 25 and 46, and thus, Turkey’s limitation was invalid. However, the invalidity of Turkey’s territorial restrictions under Articles 25 and 46 did not render the Turkish declarations to accept the Commission and Courts competence null and void as a whole. The reason for this, the Court explained, was that Turkey had knowingly risked having its limitations struck down by the Convention organs.¹¹⁴ In taking that risk, Turkey had willingly accepted that it might be bound by an unlimited declaration.¹¹⁵

(d) *Loizidou v. Turkey (Merits)*

In its judgment on the merits,¹¹⁶ the Court subsequently ruled that the presence of the large contingent of Turkish troops in Northern Cyprus clearly indicated that Turkey had effective control over the territory, and thus implicitly the TRNC was to be viewed as a subordinate authority to Turkey, even though the TRNC did not possess such status under Turkey’s domestic laws.¹¹⁷ Therefore, the Court did not require proof that the act complained of was actually committed by an authority of the defendant State or occurred under its direct control.

The Court went on to establish that the applicant’s inability to access her property was indeed imputable to Turkey, and held that this consti-

¹⁰⁹ *Id.* ¶¶ 72, 75, 77.

¹¹⁰ *Id.* ¶¶ 73-5, 93-94.

¹¹¹ *Id.* ¶ 75.

¹¹² *Id.* ¶ 78

¹¹³ *Loizidou v. Turkey*, Preliminary Objections, ¶ 89

¹¹⁴ *Id.* ¶ 95

¹¹⁵ *Id.* ¶ 95.

¹¹⁶ *Loizidou v. Turkey*, Judgment on the Merits.

¹¹⁷ *Loizidou v. Turkey*, Judgment on the Merits, ¶ 56. The Court wrote:

It is not necessary to determine whether Turkey actually exercises detailed control over the policies and actions of the authorities of the “TRNC”. It is obvious from the large number of troops engaged in active duties in northern Cyprus that her army exercises effective overall control over that part of the island. Such control entails her responsibility for the policies and actions of the “TRNC” Those affected by such policies or actions therefore come within the “jurisdiction” of Turkey for the purposes of Article 1 of the Convention.

tuted a continuing violation of her right to respect her home, contrary to Article 8 and Article 1 of Protocol No 1.¹¹⁸

To recapitulate, *Loizidou* stands for the proposition that when a Contracting State effectively occupies the territory of another state, it will be held accountable not only for acts of its official organs but also for the acts of the local public authorities operating on that territory, irrespective of the status the Contracting State ascribes to these authorities. Stated differently, a judgment that a Contracting State has effective control over a territory entails the judgment that it has effective control over the local authorities operating in that territory – that the local authorities are subordinate to the Contracting State. This, in turn, implies that the local authorities within that territory are considered to act on behalf of that Contracting State and that all acts emanating from the public authorities within such a territory is attributable to the Contracting State in question.

(e) *Cyprus v. Turkey (2001)*

In *Cyprus v. Turkey*, Cyprus claimed that Turkey, as a result of the situation that had existed in Northern Cyprus since the start of Turkey's military operations in northern Cyprus in July 1974, had violated the entire set of human rights guaranteed by the Convention (except for Article 12).¹¹⁹ Turkey maintained that “the Court in its *Loizidou* judgments (preliminary objections and merits) had erroneously concluded that the ‘TRNC’ was a subordinate local administration whose acts and omissions engaged the responsibility of Turkey.”¹²⁰

The Court rejected this argument reaffirming its position in *Loizidou* that “having effective overall control over northern Cyprus, [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 [TRNC] which survives by virtue of Turkish military and other support.”¹²¹ It also held 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 violations of those rights are imputable to Turkey.”¹²²

Surely this is too broad a statement. It is difficult to see why a state should be held responsible for everything that occurs on its territory or a territory that it occupies.¹²³ But the general point the Court makes is

¹¹⁸ *Loizidou v. Turkey*, Judgment on the Merits, ¶ 64.

¹¹⁹ *Cyprus v. Turkey*, App. No. 25781/94, 35 Eur. Ct. H.R. 967, ¶ 18 (2001) [hereinafter *Cyprus v. Turkey*, 2001].

¹²⁰ *Cyprus v. Turkey*, 2001, ¶ 69.

¹²¹ *Id.* ¶ 77.

¹²² *Id.* ¶ 77.

¹²³ It seems safe to assume that the Court did not mean to say that any violations of rights occurring on Northern Cyprus were automatically imputable to Turkey.

clear enough and may be stated as follows: Because Turkey had effective control over Northern Cyprus, its obligations vis-à-vis persons within this territory were not confined to its negative obligations under the Convention, but rather, were identical to those it had vis-à-vis persons within its recognized territory. This implies that, for example, Turkey's obligations under Article 2 in this territory included not only the obligation not to arbitrarily deprive persons of their life, or the obligation to exercise due diligence not to inadvertently deprive persons of their life, but also the positive obligation to make adequate provision in their law for the protection of life. It also follows from this that Turkey's obligations in Northern Cyprus included obligations that, strictly speaking, it did not have the legal competence to fulfill in this territory: Turkey had no recognized right under international law to enforce its laws in the territory of North Cyprus.¹²⁴

A dilemma presents itself here. By holding that Turkey's obligations vis-à-vis Northern Cyprus included obligations that required Turkey to take certain actions in that territory, such as the duty to enforce laws for the protection of life, it could appear that the Court implicitly recognized Turkey's right to govern the territory. The Court confronted this particular dilemma in relation to the requirement of exhaustion of local remedies under Article 35 of the Convention (former Article 26). Cyprus had long argued that aggrieved individuals could not be expected to have recourse to the courts of TRNC for the purpose of Article 35, as these courts could not be expected to "issue effective decisions against persons exercising authority with the backing of the [Turkish] army in order to remedy violations of human rights committed in furtherance of the general policies of the regime."¹²⁵ Turkey, however, claimed that "the 'TRNC' had a fully developed system of independent courts which were accessible to every individual"¹²⁶

In brief, the Court faced the following choice. By requiring applicants to exhaust the domestic remedies in place in Northern Cyprus, the Court could be seen to implicitly recognize the legitimacy of these courts and the legal validity of their decisions. On the other hand, by not requiring applicants to exhaust these remedies, the Court could be seen as having released Turkey from the obligation to provide effective remedies for persons who claimed that their rights have been violated by the TRNC (read "Turkey").

Surely, torture carried out by agents of another state without the knowledge or consent of Turkey would not be imputable to Turkey.

¹²⁴ See e.g., United Nations Security Council of Resolutions 541 (1983) and 550 (1984) (stating that the Republic of Cyprus is the sole legitimate government of Cyprus).

¹²⁵ Cyprus v. Turkey, 2001, ¶ 83.

¹²⁶ *Id.* ¶ 82.

The Court opted for the first solution which, in its view, was supported by the International Court of Justice's *Namibia* advisory opinion.¹²⁷ Thus, it maintained that "despite the reservations the Greek Cypriot community in northern Cyprus may harbour regarding the 'TRNC' courts, that the absence of such institutions would work to the detriment of the members of that community" and, subsequently, "It is in the very interest of the inhabitants of the 'TRNC', including Greek Cypriots, to be able to seek the protection of such organs; and if the 'TRNC' authorities had not established them, this could rightly be considered to run counter to the Convention."¹²⁸ Therefore, the Court concluded, in respect to the requirement of exhaustion of local remedies in Article 35, it would not simply disregard the judicial organs set up by the TRNC but rather examine their effectiveness on a case-by-case basis.¹²⁹ At the same time, the Court underscored that "recognizing the effectiveness of those bodies for the limited purpose of protecting the rights of the territory's inhabitants does not, in the Court's view, legitimize the 'TRNC' in any way."¹³⁰

A summary of the Court's holding in *Cyprus v. Turkey* and its underlying rationale is as follows: By effectively occupying another state's territory, a state places itself in a position where it not only has the opportunity to infringe on the inherent rights of persons within that territory, but is also the most efficient protector of such rights. By the same token, the legitimate government of that territory loses its power to effectively protect the rights of persons in the territory. Given the overarching goal of human rights treaties (universal coverage of human rights, both positive and negative) and given that the occupying state has voluntarily and in violation of international law taken upon itself to enter this position, it reasonably follows that the state can make no distinction between

¹²⁷ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, ¶ 125 (June 21) [hereinafter *Namibia* opinion]. In this case the International Court of Justice (ICJ) established the obligation of the member states of the UN not to explicitly or implicitly recognize South Africa's administration in Namibia. It qualified this obligation by holding that the non-reorganization of South Africa's administration in Namibia should not work to the detriment of the people of Namibia:

In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.

Id. ¶ 125.

¹²⁸ *Cyprus v. Turkey*, 2001, ¶ 98.

¹²⁹ *Id.* ¶ 98.

¹³⁰ *Id.* ¶ 92.

its obligations in this territory and its obligations in its recognized territory. By ratifying the Convention, a Contracting State has committed itself to the idea that all persons everywhere are entitled to protection of their inherent human rights (as specified in the Convention) from the state in which they happen to be. It would be entirely contradictory for that same state to maintain a distinction in this respect between persons within its recognized territory and persons within its occupied territory. Moreover, it makes no sense to exempt those obligations under the Convention that would require a Contracting State to take certain actions in an occupied territory on account that its agents have no right, under general international law, to take actions in that territory in the first place.

3. The Court's Dilemma

It is important to understand the *Bankovic* Court's dilemma. On one hand, previous case law forced the Court to acknowledge that the Convention applied extraterritorially. On the other hand, the Court apparently wanted to establish that the scope of the Convention was "territorial." The Court's solution to this dilemma proceeded in two steps. First, the Court sought to establish that previous case law supported its interpretation:

In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention.¹³¹

And:

[T]he case law demonstrates that the Court's "recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional."¹³²

These assertions make it seem as if, prior to *Bankovic*, the Court had received numerous claims involving extraterritorial acts, but because such conduct can give rise to Convention responsibility only in "exceptional circumstances" the Court had declared only a fraction of them admissible. This is directly misleading. In fact, one is hard-pressed to find any previous case involving extraterritorial acts that have been declared inadmissible.

In the second step, the Court proceeded to carve out from previous case law what it contended to be the type of "exceptional circumstances" that justified holding a Contracting State responsible for extraterritorial acts.¹³³ Unfortunately, whether intentional or not, the Court's discussion of these exceptions is neither straightforward nor clear-cut. We will refer

¹³¹ *Bankovic v. Belgium*, ¶ 67.

¹³² *Id.* ¶ 71.

¹³³ *Id.* ¶¶ 71-73.

to these “exceptional circumstances” as: 1) *de jure* jurisdiction, 2) military occupation (of another contracting state), and 3) special relationship jurisdiction.

4. “Exceptional Circumstances”

(a) *De Jure Jurisdiction*

It has been noted before that the Court initially maintained that the term jurisdiction should be understood in a *de jure* sense. Perhaps to bolster this understanding, the Court further maintained that, with the exception of *Loizidou v. Turkey*¹³⁴ and *Cyprus v. Turkey*,¹³⁵ it had only recognized instances of extraterritorial jurisdiction where the Contracting State had in fact acted within its legal competence, either “[t]hrough the consent, invitation or acquiescence of the territorial state”¹³⁶ or in situations where “customary international law and treaty provisions have recognized the extra-territorial exercise of jurisdiction by the relevant State.”¹³⁷

In making these observations, the Court seemed to say that responsibility for an extraterritorial act may be premised on whether or not the act was in compliance with international law. Stated differently, the Court appears to suggest that the fact that a particular Contracting State had no authority under general international law to take a particular action (i.e., the fact that the state failed to obey general principles of international law) may count *against* holding that state responsible for that action under the Convention.

It is not difficult to see why ascribing responsibility for omissions would be conditional on the presence of legal authority – a state should, as a rule, not be held responsible under the Convention for failing to take certain actions when it did not have the legal authority to do so. However, it is difficult, if not impossible, to see why responsibility for acts imputed to a Contracting State would ever be conditional on the presence of legal authority. Needless to say, in such situations a state cannot logically justify its actions by claiming that it was unable to comply with its Convention obligations in light of its general obligations under general international law.

One may then legitimately ask why a treaty that seeks (i) to protect the inalienable and universal rights of human beings and (ii) recognizes that the realization of this objective is both conducive and necessary to achieve peace and stability in the world would exempt acts that directly contravene both of these objectives. The fact that a Contracting State not only has violated a person’s human rights, but also, in the course of doing

¹³⁴ *Loizidou v. Turkey*, Judgment on the Merits.

¹³⁵ *Cyprus v. Turkey*, 2001, ¶ 71.

¹³⁶ *Bankovic v. Belgium*, ¶ 71.

¹³⁷ *Id.* ¶ 73

so, has violated the autonomy of another state, should plausibly be considered an aggravating factor. One might further ask why the applicability of a multinational human rights treaty would hinge on the legal relationship between the acting Contracting State(s) and the territorial state – which, notably, may or may not be party to the Convention.

Whatever the intrinsic merit of this approach (and we find none), it is difficult to square with the Court's holding in *Loizidou v. Turkey*¹³⁸ and *Cyprus v. Turkey*¹³⁹ where the Court underscored that the illegality of Turkey's exercise of power in Northern Cyprus in no way affected its obligations to secure the rights of the Convention on that territory.¹⁴⁰ The *Bankovic* Court affirmed this view.¹⁴¹

This approach is also difficult to square with the Court's holding in *Stocké v. Germany*, where the Commission established that the arrest of a person in another state's territory in violation of an extradition treaty or otherwise in violation of that state's territorial integrity is presumed to violate Article 5 of the Convention.¹⁴² In other words, the fact that the extraterritorial act is illegal (that is, illegal under general principles of international law delimiting states' autonomies *inter se*) not only does *not* preclude liability in such situations but, on the contrary, gives rise to a presumption of a material breach of the Convention. The Commission's holding was implicitly affirmed by the Court in its decision on the admissibility of the claim.¹⁴³

This contradicts the assertion made by the *Bankovic* Court that, apart from the case of Turkey's occupation of Northern Cyprus, prior case law had only recognized instances of the extraterritorial exercise of jurisdiction by a Contracting State in cases where the Contracting State had acted within its legal authority.¹⁴⁴ Even more interesting is the fact that the *Stocké* doctrine was categorically affirmed in *Öcalan v. Turkey*, which was decided after *Bankovic*.¹⁴⁵

In this case the Court maintained that to trigger a presumption of liability under Article 5 (1) in cases of unlawful extraterritorial arrest, the claimant had to establish: "to the Court 'beyond a reasonable doubt' that the authorities of the State to which the applicant has been transferred have acted extra-territorially in a manner that is inconsistent with the sov-

¹³⁸ *Loizidou v. Turkey*, Judgment on the Merits, ¶ 59.

¹³⁹ *Cyprus v. Turkey*, 2001, ¶ 71.

¹⁴⁰ *Loizidou v. Turkey*, Judgment on the Merits, ¶¶ 52, 62; *Cyprus v. Turkey*, 2001, ¶¶ 76-77.

¹⁴¹ *Bankovic v. Belgium*, ¶ 70.

¹⁴² *Stocké v. Germany*, App. No. 11755/85, Rep. of 12 October 1989, (ser. A) no. 199, p. 24, § 167 (Opinion of the Commission), referring to the case of *Bozano v. France*, 111 Eur. Ct. H.R. 54, at 23 (ser. A) (1986).

¹⁴³ *Stocké v. Germany*, 13 Eur. Ct. H.R. (ser. A) at 852 (1991) (Eur. Ct. H.R.).

¹⁴⁴ *Bankovic v. Belgium*, ¶ 37.

¹⁴⁵ See *Öcalan v. Turkey*, App. No. 46221/99, Eur. Ct. H.R. (2000) ¶ 88 (Dec. on admis.).

ereignty of the host State and therefore contrary to international law[.]”¹⁴⁶ After some analysis detailing the cooperation of Turkish and Kenyan authorities, the Court in *Öcalan* held that Kenya did not view the defendant’s arrest as a violation of its sovereignty and therefore Turkey was not in violation of international law. As a result, it concluded that Turkey’s arrest of Öcalan could not be considered in breach of Article 5 (1) on this basis alone.¹⁴⁷

What is important for present purposes is the implicit assumption that if the claimant had established “beyond a reasonable doubt” that Turkey had violated Kenya’s sovereignty, Turkey would have been presumed to be in breach of Article 5 (1).¹⁴⁸ This result is, to reiterate, completely inconsistent with the Court’s approach in *Bankovic*, where the Court seemed to suggest that the Convention would not apply extraterritorially unless a Contracting State was acting lawfully. This raises the question why the *Bankovic* Court would spend so much time on the legality of a Contracting State’s extraterritorial activities when, apparently, it does not seem to matter. More fundamentally, why is it that the Court has spent so much time defending its territorial reading of the Convention when territory has not proven dispositive either?

Unfortunately, the Court did not answer these questions in *Öcalan*, or more to the point, the Court did not advance our understanding of what criteria it uses in determining the applicability of the Convention. On the contrary, in what seems to be an emerging inclination, it only further muddied the waters. In response to Turkey’s claim that, in light of the *Bankovic* judgment, the impugned act (the extraterritorial arrest of Öcalan) could not be considered to fall within the scope of the Convention, the Court rejected this position and in doing so drew yet another vague distinction:

The Court considers the circumstances of the present case are distinguishable from those in the aforementioned *Bankovic* and *Others* case, notably in that the applicant was physically forced to return to Turkey by Turkish authorities and was subject to their authority and control following his arrest and return to Turkey.¹⁴⁹

How are we supposed to understand this? Are we supposed to view this as another free-standing exception – we might term this the “arrest exception” – to its rule of territoriality and supplementary rule of legality? Or is this a micro-version of the “effective control” exception that we will discuss in a moment? Again, we are given no theory, not even a superficial one, which explains what unites situations falling under the above description with other “exceptional situations” and, indeed, situa-

¹⁴⁶ *Id.* ¶ 92.

¹⁴⁷ *Id.* ¶¶ 96-97.

¹⁴⁸ *Id.* ¶ 92.

¹⁴⁹ *Id.* ¶ 93.

tions involving territorial acts (the paradigm case). Instead, the Court simply stipulates the relevance of some vaguely described features.

(b) *Effective Military Occupation*

The other exceptional circumstance where, according to the Court, an extraterritorial act could amount to an exercise of jurisdiction within the meaning of Article 1 was the situation where, as in *Loizidou v. Turkey* and *Cyprus v. Turkey*, a Contracting State “exercised effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation.”¹⁵⁰

To reach this result, the *Bankovic* Court conveniently sidestepped the salient facts of these cases. From the discussion above, it should be clear that *Loizidou v. Turkey* and *Cyprus v. Turkey* do not stand for the proposition that “effective control of a territory and its inhabitants” is a salient circumstance in cases involving extraterritorial acts. On the contrary, the Court’s point of departure in those cases was that extraterritorial acts – acts attributable to Contracting States own authorities – automatically fell under its purview. That premise was not in dispute in *Loizidou v. Turkey* or in *Cyprus v. Turkey*. Instead, what was disputed in these cases was whether Turkey could be held responsible under the Convention for the acts and policies of TRNC, an entity that according to Turkey should be viewed as an independent state. It was in response to Turkey’s objection in this respect that the Court noted that responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory.

Moreover, what exactly did the Court in *Bankovic* mean by the expression “effective control of the relevant territory *and* its inhabitants”? We suspect that the Court meant something along the following lines: the state in question has a particularly high degree of control or power over the human beings on this territory; its power over the human beings on this territory equals or approximates the degree of power that a state is normally thought to exercise over human beings within its own territory; and its control or power over the human beings on this territory is *exclusive* in the sense that no other state exercise power on that territory to that degree and extent. This means, then, that a state that has effective control over a foreign territory not only has control over the behavior of its own agents (which it is presumed to have regardless of where these agents act) but also has the power to affect the behavior and interests of all human beings on that territory to a certain degree and to a certain extent.

It is easy to see why the issue of effective control over a foreign territory understood in this sense is relevant in regard to responsibility for

¹⁵⁰ *Bankovic v. Belgium*, ¶ 71.

omissions – i.e., in cases where the alleged violation is said to have been caused by the Contracting State’s failure to prevent a non-state actor (or another state) from infringing on a person’s human rights. Because responsibility for an omission implies a failure to intervene or take certain actions, may be necessary to determine which state ought to have taken the appropriate measures. For obvious reasons, responsibility for a failure to take appropriate measures as a rule falls on the state that exercises effective control over the territory where such measure should have been taken. The logic is that the exercise of control over territory implies a capacity to take action – specifically, a capacity to protect persons from human-rights infringements of non-state actors – as well as a corresponding incapacity of other states. Whether the state has a legal title to the territory is not an essential element in this respect. The focus, instead, is on whether the state *de facto* exercised exclusive authority over the territory and thus had the capacity to take actions (whereas other states did not).

In contrast, the Court’s approach to its previous case law has a rather curious implication. It would seem to suggest that a Contracting State, in the course of unlawfully occupying a particular territory, will have no (or only a very minimal) obligation to respect the rights set forth in the Convention on that territory – until it has secured full and absolute control over it, when suddenly its obligations under the Convention (both positive and negative) will apply with full force.

(c) *Convention Regionalism*

Another incongruous aspect of the Court’s reading of the Cyprus cases was its attempt to limit this case law to situations where a Contracting State occupies a territory that was previously in the control of another Contracting State. In response to the applicants’ argument that a failure to accept their claim would defeat the public *ordre mission* of the Convention, the Court stated:

It is true that, in its above-cited *Cyprus v. Turkey* judgment the Court was conscious of the need to avoid “a regrettable vacuum in the system of human-rights protection” in northern Cyprus. However, that comment related to an entirely different situation to the present: the inhabitants of northern Cyprus would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed, by Turkey’s “effective control” of the territory and by the accompanying inability of the Cypriot Government, as a Contracting State, to fulfill the obligations it had undertaken under the Convention.¹⁵¹

Subsequently, the Court observed:

¹⁵¹ *Id.* ¶ 80.

The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.¹⁵²

These passages appear to imply that if a Contracting State effectively occupied the territory of a non-party or a non-European state it would have more limited (if any) obligations under the Convention than in situations involving the military occupation of another Contracting State. More generally, they imply that Contracting States' obligation to respect the human rights of persons who happen to be within a non-contracting state is less rigorous than their obligations to respect the human rights of persons who happen to be within a Contracting State. The Court offered no textual support for this distinction, and we contend that none exists. The only attempt for a justification was the contention that the Convention should be seen as a "constitutional instrument of European public order for the protection of individual human beings,"¹⁵³ which, it concluded, "underline[d] the essentially regional vocation of the Convention system."¹⁵⁴

This argument is unpersuasive for several reasons. In the first place, the fact that the Court in *Loizidou* chose to label the Convention as a "constitutional instrument of European public order for the protection of individual human beings" does not necessarily make it so and thus hardly constitutes a sufficient justification for a distinction of such a fundamental nature. Second, what the Court in this case meant by this assertion was that the Convention system aimed at achieving a uniform European policy (or a European public order) with regard to the protection of individual human beings.¹⁵⁵ Standing alone, this assertion says little about the intended content of this policy, and it says nothing about the issue at hand. In other words, the assertion that one of the objectives of the Convention was to achieve a uniform European policy in regard to the protection of individual human beings does not entail the proposition that individual human beings must be located in a particular territory/region to benefit from that policy. Thirdly and as a corollary to the second point, it is evident that the Court in *Louzidou* by the expression "Constitutional instrument of European public order for the protection of individual human beings" referred to the aim, as expressed in the Preamble

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See e.g., *Loizidou v. Turkey*, Preliminary Objections, ¶¶ 73-77, 86-89.

to the Convention, to “achieve greater unity in the maintenance and further realisation of human rights.”¹⁵⁶

It is difficult to understand, then, how the Court thought the characterization of the Convention “as a Constitutional instrument of European public order for the protection of individual human beings” supported a distinction between Contracting States’ obligations vis-à-vis persons who are within the territory of a Contracting State and persons who are within the territory of a non-contracting state. One possibility is that the Court ascribed a particular meaning to the term “Constitutional,” assuming perhaps that rights protected under national constitutions are restricted to certain territories or to certain persons, and from that assumption inferred a similar limitations in the Convention. If that was indeed its thinking, it is both circular and unfortunate. Many, if not most, Constitutional Bills of Rights have the same philosophical foundations as human rights and thus ought to be given a universal reading.

More fundamentally, there appear to be two alternative lines of thought capable of explaining the Court’s reasoning in this context and, indeed, the judgment as a whole. The first one is the notion that Contracting States’ human rights obligations are only owed to people who share particular religious, ethnic, and cultural ties (call this European Nationalism). The second line derives from a purely instrumental ethics, i.e., an ethics that construes morality and justice solely in terms of rational bargaining among self-interested individuals. On this view, the Convention could be construed as a cooperative scheme that citizens of the Contracting States have entered, through their representatives, solely for their mutual benefits. The problem is that both views are at odds with the purposes and the intent of the Convention.

(d) *The Colonial Clause (Article 56)*

Before leaving the question whether the Convention’s vocation is essentially regional, it is instructive to take a look at the so-called “colonial clause,” particularly in light of the Court’s statement that the Convention is a “multilateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States.”¹⁵⁷ This statement appears to imply a relationship between Article 1 and Article 56, although the Court never develops this line of thought. However, in a footnote to this statement, the Court clarified that “Article 56 § 1 enables a Contracting State to declare that the Convention shall extend to all or

¹⁵⁶ Louzidou v. Turkey, Preliminary Objections, ¶¶ 73 – 76, and 77; and the Commission’s decision in Chrysostomos v. Turkey, App. No. 15299/89, 68 Eur. Comm’n H.R. Dec & Rep. 216 at 242 (1991), where the Commission depicted the Convention as a “constitutional instrument of European public order in the field of human rights.”

¹⁵⁷ Bankovic v. Belgium, ¶ 80.

any of the territories for whose international relations that State is responsible.”

This language, in particular the term “enables,” makes it seem as if the principal objective of Article 56 (formerly article 63) was to provide Contracting States with a possibility to extend their obligations to “territories for whose international relations that State is responsible,”¹⁵⁸ but that this privilege was not to be extended to other territories, on the grounds that the Convention was not designed to be applied in all parts of the world. Certainly, one could argue that if Article 1 is understood to imply that Contracting States’ obligations extend to persons outside of their territories, including territories “for whose international relations that State is responsible,” then Article 56 would appear redundant. This, one may conclude, suggests that Article 1 should not be given such an interpretation. This contextual argument has some superficial plausibility. The trouble is that it ignores the actual rationale behind Article 56.

It is widely recognized that Article 56 was incorporated into the Convention to limit the obligations that would, by way of ratification, otherwise automatically be imposed upon colonial states.¹⁵⁹ But for this clause, through the process of ratification a colonial state would assume

¹⁵⁸ Article 56 was Article 63 in the original Convention. It became Article 56 through the adoption of protocol No. 11, which entered into force in November 1998. Article 56 reads:

Any State may at the time of its ratification or at any time thereafter declare by notification [. . .] that the present Convention shall [. . .] extend to all or any of the territories for whose international relations it is responsible.

¹⁵⁹ See e.g., Karel Vasak, *The European Convention of Human Rights Beyond the Frontiers of Europe*, 12 INT’L & COMP. L.Q. 1206, 1207 (1963) (“by empowering States to extend the application of the Convention to territories for whose international relations they were responsible, this clause waived its automatic application to non-metropolitan states”); FRANCIS G. JACOBS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 14 (1975). The author writes:

But for [Article 56], it would have been clear that the Convention extended, by the mere act of ratification, to all such territories. It has already been shown that the wording of Article 1 does not introduce any territorial limitation to the Convention. It is introduced, therefore, only by implication in Article [56], which runs counter to the whole scheme of the Convention, and which can be explained by historical circumstances of little relevance today.

Id.; see also ROBERTSON & MERRILLS, *supra* note 60, at 26 (noting that Article 56 qualified the principle of universality in Article 1). The authors also note that colonial states justified Article 56 by maintaining that:

[They] could not apply the Convention to their Colonial territories without first consulting the colonial legislature. If, therefore, extension to the colonies was automatic, it would not be possible for some governments to ratify the Convention before consulting other legislatures to obtain their approval. Consequently the practical result of the formula proposed would be to delay the ratification of the Convention by some of the principal signatories, perhaps for a considerable period.

Id.

full responsibility not only for the acts and omissions of its own agents but the acts and omissions of the local authorities in such territories as well. This result would have followed because of the universal nature of the rights that the Convention aimed at protecting, and also because the colonial state did in fact exercise control over local authorities and thus had both legal and *de facto* ability to control their actions.

Article 56 made the assumption of full responsibility under the Convention for all acts of public authorities in the colonies conditional on a special declaration. The article, which met stiff resistance from several drafting states, was justified by the colonial states in terms of respect for the autonomy exercised by local culture but also on the grounds of the cultural differences between home and colony. The apparent subtext was this: the colonies were in the process of becoming civilized – under the stern guidance of the colonial powers – but that they had not yet reached the same level of sophistication as the population of the mother states.

Today, few would argue that the rationale behind Article 56 was not hypocritical. The real interests that it served were of course not entirely consistent with the underlying idea of human rights. Although the article is of little practical significance today, its codification proves useful to the extent that it exposes the drafting parties' original understanding of the nature of human rights and corresponding state obligations. Any reliance on this clause to support a narrow understanding of the Convention's scope ignores its character as a limitation clause, and the duty to construe such provisions narrowly.

Thus, a Contracting State's ability to limit its obligations vis-à-vis "a territory for whose international relations that State is responsible" thereby implies an absence of authority to limit its obligations to "other" situations. If a Contracting State were to occupy a territory and set up local authorities to govern that territory, it would automatically assume full responsibility for the conduct of such authorities. Whether this territory rightfully belongs to another Contracting State or not is, for the reasons just stated, immaterial.

Further, the rationale of the colonial clause rested on a distinction between the agencies of local governments and the agencies of the metropolitan states. Nowhere was it suggested that the incorporation of Article 56 would make the responsibility of the colonial states' "own" officials acting under its direct authority conditional on a separate declaration.

This understanding of the colonial clause is supported by the Court's previous case law. In *Loizidou*, as we have seen, the question arose whether the Court was bound by a reservation issued by Turkey that would effectively restrict the right to petition under Articles 25 and 46 to events occurring within Turkey's recognized borders.¹⁶⁰ In this context, the Court examined the argument, which notably was not raised by the respondent state, "whether the application of Article 63 para. 4 (art. 63-

¹⁶⁰ *Loizidou v. Turkey*, Preliminary Objections, ¶ 86.

4), by analogy, provided support for the claim that a territorial restriction is permissible under Articles 25 and 46 (art. 25, art. 46).¹⁶¹ Specifically, it examined the questions whether (i) Article 25 would “not apply beyond national boundaries to territories, other than those envisaged by Article 63 (art. 63), unless the State specifically extended it to such territories and as a corollary, (ii) the State can limit acceptance of the right of individual petition to its national territory – as has been done in the instant case.”¹⁶²

The Court dismissed this line of reasoning by first reiterating that the concept of jurisdiction in Article 1 did not confine Contracting States’ obligations to their national boundaries.¹⁶³ Therefore, “there can be no requirement, as under Article 63 para. 4 (art. 63-4) in respect of the overseas territories referred to in that provision, that the Article 25 (art. 25) acceptance be expressly extended before responsibility can be incurred.”¹⁶⁴

As to the second question the Court correctly pointed out that the rationales behind Article 25 and Article 63 were different:

Article 63 (art. 63) concerns a decision by a Contracting Party to assume full responsibility under the Convention for all acts of public authorities in respect of a territory for whose international relations it is responsible. Article 25 (art. 25), on the other hand, concerns an acceptance by a Contracting Party of the competence of the Commission to examine complaints relating to the acts of its own officials acting under its direct authority. Given the fundamentally different nature of these provisions, the fact that a special declaration must be made under Article 63 para. 4 (art. 63-4) accepting the competence of the Commission to receive petitions in respect of such territories, can have no bearing, in the light of the arguments developed above, on the validity of restrictions *ratione loci* in Article 25 and 46 (art. 25, art. 46) declarations.¹⁶⁵

This passage affirms the view expressed above that the colonial clause did not affect Contracting States’ obligations for acts attributed to the agencies of the mother state.

As already discussed in its subsequent holding on the merits and in *Cyprus v Turkey*, the Court held Turkey responsible for all conduct attributed to the TRNC. In contrast to the colonial states’ responsibility for the conduct of local governments, Turkey’s responsibility for TRNC was not premised on a special declaration. This affirms our second point that Contracting States cannot rely on Article 56 to limit their Convention

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* ¶ 87.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* ¶ 88.

obligations in contemporary situations analogous to those regulated by this provision.

Unfortunately, the *Bankovic* Court sought to restrict the scope of this holding to situations involving military occupation of another Contracting States. As we have argued here, this position is not in line with the underlying rationale of Article 56. Indeed, it reveals a view of human rights that not even the colonial powers would openly subscribe to when the Convention was being drafted – that the universal human rights of non-Europeans are not necessarily the same as those of Europeans.

(e) *Special Relationship Jurisdiction*

We doubt that the “exceptions” carved out by the *Bankovic* Court from its previous case law fit together under one coherent standard, particularly in a way that corresponds to the object and purpose of the Convention. In any event, the Court did not present such a standard. We shall propose and examine two alternative interpretations of Article 1, which, although not expressly relied on by the Court, may have influenced its reasoning, and may arguably bring some coherence to its reasoning.

The first alternative interpretation understands the term “jurisdiction” in Article 1 in terms of prescriptions, directives, and commands. On this view, to exercise jurisdiction within the meaning of Article 1 is to prescribe, direct, and command and to enforce prescriptions, directives, or commands. Accordingly, a Contracting State’s Convention obligations would be limited to persons who are subject to its legal prescriptions, directives, and commands or to whom its prescriptions, directives, and commands apply: to persons whose behavior it attempts to influence. This class of persons would seem to include a) all persons within its territory – because all persons who are within a particular state’s territory are ipso facto also subject to its legal prescriptions, directives, and commands, and b) all persons outside of its territory who are subject to the Contracting State’s extraterritorial prescriptions, directives and commands. Conversely, a Contracting State’s Convention obligations would not be owed to persons outside of its territory who are not subject to its legal prescriptions, directives, and commands.¹⁶⁶

The second alternative interpretation is less plausible and less straightforward. This interpretation explains the term “jurisdiction” in Article 1 in terms of Contracting States’ overall power over persons. Like the interpretation that we have argued for, this interpretation understands the terms “persons within their jurisdiction” roughly as “persons within

¹⁶⁶ The respondent states appear to have interpreted Article 1 along these lines when it asserted that the term jurisdiction involves the “assertion or exercise of legal authority, actual or purported, over persons owing some form of allegiance to that State.” *Bankovic v. Belgium*, ¶ 36. See also, the analogous interpretation of the U.S. Constitution advocated by Justice Brennan in *United States v. Verdugo-Urquidez*. 494 U.S. 259, 271 (1990).

or subject to their power.” However, for a person to be within the jurisdiction of a Contracting State on this interpretation it is not sufficient that the Contracting State has the ability to (intentionally, recklessly, or negligently) affect that person’s human rights. Rather, the Contracting State must have the ability to affect a broader range of that person’s interests.¹⁶⁷ Following this line of reasoning, one could argue that a Contracting State’s obligations are owed to all persons within its territory (on the assumption that the state influence on the interest of all persons within its territory is sufficiently far-reaching) and to persons outside of its territories over whose interests the state has a comparable level of control. Suggestions of this interpretation can be found in the *Bankovic* Court’s analysis of the Cyprus cases – specifically, the effective control test that the Court erroneously deduced from these cases would appear to correspond to such an interpretation, and in the Court’s assertion in *Öcalan* that what distinguished *Öcalan* from *Bankovic* was that the applicant in the latter case was in the physical control of Turkish agents.

Both of these interpretations are textually plausible. However, neither of these interpretations is textually more compelling than the interpretation that we have argued for in this paper. Both of these interpretations raise difficult questions of application. For example, would a Contracting State’s Convention obligations under the first interpretation extend to persons who are subject to only one or a handful of its directives? If so, it would seem to follow that a Contracting State that asserts universal jurisdiction for certain crimes thereby triggers its Convention obligations vis-à-vis all human beings. In terms of the second interpretation, how much power must a state have over a person to trigger its Convention obligations – and over what interests?

More importantly, underlying both approaches lays a transactional explanation of the Convention’s rights and obligations, according to which a state grants persons rights in return for claiming obedience or for exercising power over them. Additionally, behind this explanation lurks a distinctly self-regarding conception of justice and morality.

Neither of these interpretations coheres with the Court’s case law before *Bankovic*. Consider the *Loizidou* case. The applicant in this case was, at the time the alleged violation occurred, neither within the territory of the respondent state nor in a territory effectively controlled by the respondent state. Rather, the basis of the applicant’s claim was that she was prevented from *entering* Northern Cyprus where she owned property. Nowhere in its decision did the Court examine whether she was subject to the laws and directives of Turkey or whether Turkey’s power over her was particularly broad-ranging. Instead, the focus of this case rested squarely on the question whether Turkey had the capacity to

¹⁶⁷ *C.f.*, LUKES, *supra* note 55, at 7-8 (distinguishing between power relative to an issue or an outcome –such as the issue of a person’s human rights – and power *simpliciter*: the overall power an entity has over a person or persons).

secure the claimant's right to property, or "whether the matters complained of by the applicant [i.e., her right peacefully enjoy her property] are capable of falling within the 'jurisdiction' of Turkey even though they occur outside her national territory."¹⁶⁸

Also consider the Court's holding in *Soering* (*infra*) and other removal cases, where Contracting States in effect were held responsible under the Convention for relinquishing power and authority over individuals to another state. This is hardly coherent with the transactional explanation of the Convention rights and obligations outlined above.

Finally, juxtapose the Court's decisions in *Loizidou* and *Soering* with the position advanced by the Court in *Öcalan* that the facts of that case were distinguishable from the facts in *Bankovic* "because the applicant in the latter case was physically forced to returned to Turkey by Turkish authorities and was subject to their authority and control following his arrest and return to Turkey."¹⁶⁹

5. The *Soering* case

The Court's most notable extraterritorial decision to date was delivered in *Soering*, where it held that the United Kingdom would be in violation of Article 3 if it were to extradite a criminal defendant to the United States, where there were substantial grounds for believing this person would face treatment that it described as the "death row phenomenon."¹⁷⁰ The *Bankovic* Court quoted the following language from *Soering* as a means of both summarizing and underscoring its territorial ruling:

Article 1 sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to "securing" ("reconnaitre" in the French text) the listed rights and freedoms to persons within its own "jurisdiction". Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States.¹⁷¹

At face value, this passage might be taken to support the *Bankovic* Court's interpretation of Article 1. However, matters look radically different if one looks beyond this isolated statement and considers the judgment in the *Soering* case as a whole. Unfortunately, the *Bankovic* Court never engaged in a closer analysis of *Soering*.¹⁷² Instead, apart from the

¹⁶⁸ *Loizidou v. Turkey*, Preliminary Objections, ¶ 61.

¹⁶⁹ *Öcalan v. Turkey*, ¶ 93.

¹⁷⁰ *Soering v. United Kingdom*, App. No. 1438/88, 161 Eur. Ct. H.R. (ser. A) at 25 (1989) [hereinafter *Soering v. United Kingdom* (Judgment, 1991)].

¹⁷¹ *Bankovic v. Belgium*, ¶ 66.

¹⁷² For a discussion of this issue see TERJE EINARSEN, RETTEN TIL VERN SOM FLYKTNING [THE RIGHT TO PROTECTION AS A REFUGEE] 393-463 (2000); see also

passage just cited, it held *Soering* and its progeny completely inapposite to the issue of responsibility for extraterritorial acts because, as it explained:

[L]iability in such cases is incurred by an action of the respondent State concerning a person while he or she is on its territory, clearly within its jurisdiction, and that such cases do not concern the actual exercise of a State's competence or jurisdiction abroad (see also, the above-cited Al-Adsani judgment, at § 39).¹⁷³

The first thing to observe is that a violation of Article 3 of the Convention in removal cases has occurred where: (i) there are substantial grounds for believing that a particular person faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in a certain state,¹⁷⁴ and (ii) a Contracting State nonetheless proceeds to remove that person to that state.¹⁷⁵

In *Vilvarajah*¹⁷⁶ the Court clarified that the Contracting States' responsibility under Article 3 in these types of cases will be determined in reference to what a Contracting State knew or should have known *at the time of return* and not in reference to what actually happens to a person after s/he has been removed to another state:

[S]ince the nature of the Contracting States' responsibility under Article 3 (art. 3) in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion.¹⁷⁷

Accordingly, it might be argued that a violation of Article 3 in these types of cases is *completed* "at the time of removal."¹⁷⁸ So, the question

Terje Einarsen, *The European Convention on Human Rights and the Notion of an Implied Right to de facto Asylum*, 2 INT'L J. REFUGEE L. 361, 370-72 (1990).

¹⁷³ Bankovic v. Belgium, ¶ 68.

¹⁷⁴ Soering v. United Kingdom, ¶ 91.

¹⁷⁵ Notice that the Court in *Soering* did not rule that the U.K. had violated its obligations under Article 3. Rather what the Court said in this judgment was that "the U.K.'s decision to extradite the applicant to the United States would, *if implemented*, give rise to a breach of Article 3." See *Soering v. United Kingdom*, ¶ 111 (emphasis added).

¹⁷⁶ *Vilvarajah v. United Kingdom*, App. No. 13163/87, 215 Eur. Ct. H.R. (ser. A) (1991).

¹⁷⁷ *Id.* at ¶ 107.

¹⁷⁸ That a state's liability under Article 3 is determined in reference to what a Contracting State knew or should have known "at the time of removal" – and not in reference to what actually unfolds after a persons have been removed (i.e., whether or not the person in fact is exposed to treatment contrary to article 3) – is sensible for several reasons. For one, it ensures that a Contracting State's liability is not conditioned on factors over which it has no, or typically minimal, legal and actual

arises, is a person on a Contracting State's territory and thus clearly "within its jurisdiction" at the time of removal? Surely, the answer to that question is debatable. After all, the type of act that grounds responsibility in these cases consists in the physical removal of a person from the Contracting State's territory to the receiving state's territory; stated differently, it consists in the relinquishing of power and control over that person to the receiving state. To say that this action is completed when the person is still within a Contracting State's territory seems odd.

But we may safely leave this issue aside because the question raised is entirely beside the point. Whether the *Bankovic* Court was correct in saying that "liability in such cases is incurred by an action of the respondent State concerning a person while he or she is on its territory"¹⁷⁹ or not, it does not support its proposition that *Soering* was inapposite to the issue of Convention responsibility for extraterritorial acts.

First, the Convention cannot prohibit conduct that creates a risk of a particular harm unless the Convention treats the harm itself as undesirable. The type of harm at issue here – the type of harm that according to the Court's judgment in *Soering* Article 3 seeks to prevent – is ultimately imposed by agents of another state (or non-state actors) in that other state's territory. Second, it cannot be worse for a state to expose a person to a risk of certain harm by agents of another state than for that state to knowingly or intentionally bring about that harm itself. In other words, it cannot seriously be argued that a Contracting State is prohibited from removing a person to a certain state's territory when there are substantial grounds for believing that the person faces a real risk of being subjected to treatment contrary to Article 3 by the agents of the receiving state and, at the same time, argue that a Contracting State's own agents are free to subject that person to treatment contrary to Article 3 in that other state's territory. To concede this is to concede that the *Soering* case was highly relevant to the issue before the Court in *Bankovic*.¹⁸⁰

ability to influence. Further, by not requiring harm as an element of liability, the standard ensures (in theory) that equally culpable states will be treated equally – i.e., their liability will not be determined by their "good fortune." However, it does not suggest that the Convention is unconcerned with what happens to persons as soon as they are outside of a contracting state's territories.

¹⁷⁹ *Bankovic v. Belgium*, ¶ 68.

¹⁸⁰ The relevance of *Soering* and subsequent removal cases, in regard to the issue of extraterritorial responsibility was explicitly affirmed by the Court in *Loizidou*. “

“[J]urisdiction” [under Article 1] is not restricted to the national territory of the High Contracting Parties. According to its established case law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention.

See *Soering v. the United Kingdom*, at 35-36, ¶ 91; *Cruz Varas and Others v. Sweden*, App. No. 15576/89, 201 Eur. Ct. H.R. (ser. A) p. 28, ¶¶ 69 and 70 (1991); *Vilvarajah*

The *Soering* case stands for the proposition that Contracting States have an obligation to ensure that their actions will not facilitate human rights violations (as defined by the Convention) by other states. Contracting States have an obligation to refrain from taking actions that increases the probability that a certain right (or rights) will be violated outside of their territories.

There are no good reasons why this obligation should be limited to treatment contrary to Article 3.¹⁸¹ Thus, if a Contracting State is prohibited from removing a person to a certain state where there are substantial grounds for believing that the person faces a real risk of being subjected to treatment contrary to Article 3, then a Contracting State should also be prohibited from removing a person to a certain state where there are substantial grounds for believing that the person faces a real risk of being subjected to treatment contrary to Article 2. Nor are there any good reasons why this obligation should be limited to certain types of risky conduct (i.e., that it would only apply to removal cases).

It is important to note in this context that the Convention does not prohibit actions that merely create a risk of harm; it prohibits blameworthy conduct or conduct that involves unreasonable risk-taking or risk-taking that reflects a culpable disregard for human rights. Whether a particular risk-taking is unreasonable depends on a number of variables. We shall not discuss these here. Suffice it to note that a Contracting State cannot accurately foresee all the unintended consequences of its actions and there is a limit as to how many resources a Contracting State can and ought to spend on making such assessments.

The *Soering* case not only affirmed the universal nature of human rights; it departed from a commonly held presumption in the law of state responsibility that a state will not be held responsible for events that primarily reflect the choices and actions of other states. In his comment on the *International Law Commission's Draft Articles on State Responsibility*, Crawford describes "exceptional circumstances" where the conduct of one state, not acting as an organ or agent of another state, would be

and *Others v. the United Kingdom*, p. 34, ¶ 103; and *Loizidou v. Turkey*, Preliminary Objections, at 23.

¹⁸¹ *C.f.*, GREGOR NOLL, NEGOTIATING ASYLUM: THE EU ACQUIS, EXTRATERRITORIAL PROTECTION AND THE COMMON MARKET OF DEFLECTION 458-467 (arguing that article 3 does not enjoy exclusive possession of extraterritorial range: "Neither the wording, nor the context, nor the *telos* of Article 3 ECHR accommodate an exclusive possession of non-refoulement capacities"); see also HARRIS, O'BOYLE & WARBRICK, *supra* note 28 (noting that a party of the Convention would appear to be responsible under Article 2 if it deports or extradites a person to another state when "substantial grounds" have been shown for believing that the person faces a "real risk" on his return of being killed in circumstances that amount to a breach of Article 2).

“implicated” in the wrongfulness of the conduct of the former.¹⁸² One example of such an exceptional circumstance is when one state provides aid and assistance to another state to facilitate the commission of a wrongful conduct, the assisting state may be in violation of its own obligations.¹⁸³ However, in the view of the International Law Commission, such responsibility generally requires both knowledge and intent.¹⁸⁴ Thus, according to this view, a state may incur responsibility if it provides material aid to a state that uses the aid to commit human rights violations – but only if the State intends the aid to be used for this specific purpose (and only if it was in fact so used). In contrast, the *Soering* court held that a Contracting State could be held responsible for *negligently* facilitating the human rights violation of another state.

The reason why the *Bankovic* Court so desperately tried to avoid the underlying rationale of the *Soering* case should be obvious by now: It is strikingly inconsistent with its own holding.

E. *Supplementary Means of Treaty Interpretation*

As we stated in the beginning of this article, the Court did not adhere to the principles of treaty interpretation enshrined in Article 31 and Article 32 of the Vienna Convention. It should be clear by now that the term “jurisdiction” in Article 1 is both ambiguous and vague and thus has to be interpreted in light of the object and purpose of the Convention. The Court did not do this. Instead, it simply stipulated that the meaning of the term jurisdiction in Article 1 was clear and then proceeded to confirm its understanding of this term by resorting to supplementary means of interpretation. The Court’s reliance on supplementary authority was not only

¹⁸² See JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 5 (2002).

¹⁸³ See ILC Draft, *supra* note 88, Article 16:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- a) that States does so with knowledge of the circumstances of the internationally wrongful act; and
- b) the act would be internationally wrongful if committed by that State.

¹⁸⁴ In its commentary to Article 16, the ILC further explains that for this type of responsibility to occur all of the following criteria must be present. First, the relevant state organ or agency providing aid and assistance must be aware of the circumstances making the conduct of the assisted state internationally wrongful conduct. Second, the aid and assistance must be given with a view to facilitating the commission of that act. Third, a state is not responsible unless the relevant state intended, by the aid and assistance given, to facilitate the occurrence of the wrongful conduct and the conduct is actually committed by the aided or assisted state. Fourth, the completed act must be such that it would have been wrongful had it been committed by the assisting state itself.

premature, but as we shall now illustrate, the Court's deduction from this evidence was erroneous.

1. The Convention's Drafting History

*[T]he travaux préparatoires demonstrate that the Expert Intergovernmental Committee replaced the words "all persons residing within their territories" with a reference to persons "within their jurisdiction" with a view to expanding the Convention's application to others who may not reside, in a legal sense, but who are, nevertheless, on the territory of the Contracting States[.]*¹⁸⁵

While the drafting history on Article 1 is sparse and uninformative, the Court nonetheless claimed to have found "clear confirmation"¹⁸⁶ for its interpretation that the term jurisdiction should be understood in its "essentially territorial"¹⁸⁷ or "primarily territorial"¹⁸⁸ sense. Specifically, the Court found it significant that Article 1 of the Committee on the Consultative Assembly's draft Convention had made reference to all persons "residing in their territories."¹⁸⁹ The Expert Intergovernmental Committee replaced this language with its present form with the following motivation:

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 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 in the legal sense of the word. The Committee therefore replaced the term "residing" by the words "within their jurisdiction" which are also contained in Article 2 of the Draft Convention of the United Nations Commission.¹⁹⁰

This passage, the Court claimed, *demonstrates* no change in the territorial basis for the Convention. And elsewhere, it notes that "the extracts from the *travaux préparatoires* detailed above constitute a clear indication of the intended meaning of Article 1 of the Convention, which cannot be ignored."¹⁹¹ To further the impression that it followed the principles enshrined in articles 31 and 32 of the Vienna Convention, the Court

¹⁸⁵ Bankovic v. Belgium, ¶ 19.

¹⁸⁶ *Id.* ¶ 63.

¹⁸⁷ *Id.* ¶¶ 61, 63, and 67.

¹⁸⁸ *Id.* ¶ 59.

¹⁸⁹ *Id.* ¶ 19.

¹⁹⁰ See COUNCIL OF EUROPE (DIRECTORATE OF HUMAN RIGHTS), COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 260 (Vol. III., 1975) (quoted in Bankovic v. Belgium, ¶ 19).

¹⁹¹ Bankovic v. Belgium, ¶ 65.

underscored that its reference to the Expert Committee's report was only to *confirm* the meaning resulting from its application of Article 31.¹⁹² We have already noted that the Court's analysis fell far short of the requirements in this article.¹⁹³ Indeed, the Court's analysis of the drafting history offers an excellent example of the dangers of resorting to such material before consideration of the object and purpose of the treaty.

The passage quoted by the Court arguably lends some support for a strictly territorial reading of Article 1: that the Expert Committee's report only mentioned "persons in the territories of the signatory States" as the intended beneficiaries of its amendment of the Consultative Assembly's draft Article 1 could be taken to suggest, by way of negative implication, that "persons outside of the signatory States" were not. This, however, is not the Court's argument. Recall, the *Bankovic* Court's interpretation of Article 1 – which it claimed reflected the original understanding of the drafting states – was not strictly territorial.¹⁹⁴ Thus, if one accepts the Court's own reasoning, one must conclude that the rationale for exchanging the terms "residing in" with the terms "within their jurisdiction" as stated by the Expert Committee's report ("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") did not fully express the actual rationale behind this change. In other words, one must conclude that the passage of the drafting history the Court relies on to confirm its interpretation is at best ambiguous on the interpretive question at issue.

Does the passage of the Expert Committee's report that the Court refers to add any weight to the Court's interpretation? The short answer is no. Certainly it could be argued that the Expert Committee's failure to mention that the Convention would also apply to persons outside of their recognized territories suggests that the members of this Committee assumed that signatory states' obligations would predominantly relate to persons within their recognized territories, or conversely, that signatory states' obligations would only relate to persons outside of their recognized territories in very exceptional circumstances. Let us accept this proposition. The key question becomes, why would they assume this?

¹⁹² *Id.* ¶ 65.

¹⁹³ See *infra* Section II, (A) and (B).

¹⁹⁴ Supporters of the Court's analysis might claim that the original intent was strictly territorial and that in previous cases where the Court recognized the extraterritorial scope of the Convention it went beyond both the text and the drafters' original intent. This argument ignores that the Court relied quite heavily on these cases to support its narrow textual interpretation. Moreover, had the Court argued differently it would have had to explain why it was not appropriate to go beyond the text in *Bankovic*. This, however, would have forced the Court to examine the object and purpose of Article 1 and the Convention as a whole – something the Court seemed extraordinarily hesitant to do.

One explanation is that the members of the Expert Committee understood the term “jurisdiction” in the same way the Court did. Another alternative explanation is that the members of the Expert Committee assumed that the Contracting States would rarely be in a position either to violate or to support the rights of persons in another state’s territories. In view of the relevant background principles of international law – within whose context the treaty must be interpreted – they might have thought that it went without saying that the treaty they were drafting would not allow Contracting States to violate what were proclaimed to be universal human rights. This is the explanation we find most compelling. The reason to prefer it to the Court’s is simple: it is consistent with the idea of human rights, while the Court’s interpretation is not.

Finally, consider other language in the *travaux préparatoires* (not quoted by the Court) that arguably casts some additional, albeit minimal, light on the Expert Committee’s rationale for exchanging the term “residing in” with the term “within their jurisdiction:”

Since the aim of this amendment is to widen *as far as possible* the categories of persons who are to benefit by the guarantee contained in the Convention, and since the words “living in” might give rise to a certain ambiguity, the Sub-Committee proposed that the Committee should adopt the text contained in the draft Covenant of the United Nations Commission: that is to replace the words “residing in” by “within its jurisdiction.”¹⁹⁵

Whereas this passage, like the passage quoted by the Court, does not speak to the question of extraterritorial human rights violations, it does suggest that the drafters understood that the benefits of the Conventions were to be extended to human beings *qua* human beings rather than on the basis of membership in or level of attachment to the Contracting States.

2. Policy Considerations: Cause and Effect Type of Responsibility

*Had the drafters wished for what is effectively a “cause-and-effect” type of responsibility, they could have adopted wording similar to that of Article 1 of the Geneva Conventions 1949[.] In any event, the applicants’ interpretation of jurisdiction would invert and divide the positive obligation on Contracting States to secure the substantive rights in a manner never contemplated by Article 1 of the Convention.*¹⁹⁶

Although it employed different terminology, the Court apparently agreed with the respondent states’ contention that the applicants’ interpretation of Article 1 entailed a “cause and effect theory of jurisdiction,”¹⁹⁷ a “cause and effect notion of jurisdiction,”¹⁹⁸ or finally, a “cause

¹⁹⁵ Source found in NOLL, *supra* note 181, at 407, n. 1186.

¹⁹⁶ Bankovic v. Belgium, ¶ 40.

¹⁹⁷ *Id.* ¶ 43.

and effect type of responsibility.”¹⁹⁹ Thus, in the words of the Court, accepting the applicants’ interpretation of Article 1 was:

[T]antamount 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.²⁰⁰

The Court went on to note:

Admittedly, the applicants accepted the idea that jurisdiction, and any consequent Convention responsibility, would be limited to the circumstances of the commission and consequences of that particular act. However, the wording of Article 1 does not provide any support for the applicants’ suggestion that the positive obligations 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.”²⁰¹

The Court’s position here is too vague to untangle completely. Nonetheless, a few points should be made. First, it is evident that the *Bankovic* Court was intent on showing that the applicants’ interpretation of the treaty would lead to an absurd and clearly undesirable result. Specifically, it sought to create the impression that accepting the applicants’ interpretation would place “excessive demands” on the Contracting States and, presumably, on the Court itself.

It bears repetition in this regard that the applicants were more than “adversely affected” by the actions of the Contracting States. Rather, they were advancing the claim that they were victims of specific human rights violations prohibited by the Convention, which is a completely different matter. It is also important to note that the Convention does not entail strict liability or liability without fault, as the term “cause and effect type of responsibility” might be taken to suggest. Contracting States are not held responsible under the Convention for outcomes they merely cause in the natural course of events, but rather, for outcomes that (in some degree) reflect their choices or purposes for acting. Finally, as to the potential overload problem, one would hope that there would not be many individuals in the world who would be able to make a colorable claim that they have suffered human rights violations at the hands of a Contracting State. Unfortunately, the Court never examined the result of the interpretation advanced by the applicants, which was anything but absurd and undesirable. Instead, after describing the applicants’ interpretation as “tantamount to arguing that anyone adversely affected by an act

¹⁹⁸ *Id.* ¶ 75.

¹⁹⁹ *Id.* ¶ 40.

²⁰⁰ *Id.* ¶ 75.

²⁰¹ *Id.* ¶ 75.

imputable to a Contracting State [. . .] is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention,” the Court returned to textualism and concluded, without actually examining the plausibility of the applicants’ interpretation, that the text of the treaty did not allow for this interpretation. In short, the Court’s argument is circular. The Court introduces neither new information nor insight to support its interpretation, nor any new information or insight concerning the applicants’ interpretation.²⁰²

3. The 1949 Geneva Conventions

*Had the drafters wished for what is effectively a “cause-and-effect” type of responsibility, they could have adopted wording similar to that of Article 1 of the Geneva Conventions 1949[.] In any event, the applicants’ interpretation of jurisdiction would invert and divide the positive obligation on Contracting States to secure the substantive rights in a manner never contemplated by Article 1 of the Convention.*²⁰³

In support of its contention that Article 1 did not entail responsibility as wide as advocated by the applicants, the Court argued that the drafters of the Convention could have adopted a text that was the same or similar to the contemporaneous Articles 1 of the Geneva Conventions of 1949. The text of these articles reads: “The High Contracting Parties undertake

²⁰² The Court also misrepresented applicants’ argument in this context by focusing exclusively on an alternative reading that applicants had put forth in response to the respondent states’ brief. In the Court’s view, “applicants suggest a specific application of the ‘effective control’ criteria developed in the northern Cyprus cases.” *Bankovic v. Belgium*, ¶ 7. However, what the Court fails to mention is that the applicants had specifically argued that the issue of effective control was inapplicable to the case at hand: “The issue of effective control [. . .] is relevant only in circumstances where the responsibility of the State for a violation of the Convention is *indirect*, rather than *direct*. In the present case no issue of effective control arises, because there is no question that the respondent States were directly responsible for the acts about which the Applicants complain.” *See Replies of the Applicants to the Observations of the United Kingdom Regarding the Admissibility of the Application, Bankovic v. Belgium*, ¶ 99 (emphasis in original). Subsequently, the applicants put forward an alternative reading of the Cyprus cases:

As submitted above, the Applicants believe that the concept of “effective control” as set forth in *Loizidou* is not strictly relevant to the present case. If, however, contrary to the approach adopted by the Court in two cases within the past year (*Isaa* and *Xhavara*), the Court now believes that the degree of control exercised by the respondent States over Yugoslavia at the time the RTS building was bombed *is* relevant, the Applicants submit that such control is amply demonstrated in the present case.

Replies of the Applicants to the Observations of the United Kingdom Regarding the Admissibility of the Application, *Bankovic v. Belgium*, ¶ 113 (emphasis in original).

²⁰³ *Bankovic v. Belgium*, ¶ 40.

to respect and to ensure respect for the present Convention in all circumstances.”²⁰⁴

To make inferences about the meaning of one provision in one treaty by comparing its language with the language of a similar provision in a similar treaty (i.e., a treaty governing the same or a similar subject matter) is, at best, a supplementary means of interpretation.²⁰⁵ To the extent that this means of treaty interpretation is valid and pertinent, its application must be guarded. Complex principles and ideas can be expressed in many different ways and there is little reason for presuming that the drafters of international treaties would routinely seek to integrate language used over time and between different treaties.

Yet the Court offers no evidence indicating that the drafters of the Convention actually paid any attention to, or were influenced by, the wording selected by the negotiators of the Geneva Conventions. The Court offers no analysis on whether the difference in formulation between Article 1 of the European Convention and Article 1 of the four Geneva Conventions could be attributable to differences in structure and content of these treaties, or the fact that these treaties were drafted by different people representing different states, or that the law of war and the law of human rights have different historical and philosophical pedigrees. It also did not examine the actual considerations that underlie the language of the Common Articles 1. In what way, then, according to the *Bankovic* Court’s view, did the scope of state obligations implied by the language in Common Articles 1 of the 1949 Conventions differ from the scope of state obligations implied in the language of Article 1 of the Convention?

According to the International Committee of the Red Cross (ICRC), the rationale behind the language of Common Articles 1 was to emphasize that the obligations assumed under these treaties were not based on the principle of reciprocity which previously had “served as a key rationale for the formation of [humanitarian] norms and as a major factor in securing respect for them and discouraging their violation.”²⁰⁶ As noted by the ICRC Commentary to the Fourth Convention:

²⁰⁴ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; Convention (IV) relative to the Protection of Civilian Persons in Time of War; adopted by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949 entry into force 21 October 1950.

²⁰⁵ That is when the parties to the treaties, as in the present case, are not identical. See Article 31 and 32 of the Vienna Convention.

²⁰⁶ Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 243 (2000).

By undertaking at the very outset to respect the clauses of the Convention, the Contracting Parties drew attention to the special character of that instrument. It is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations “vis-à-vis” itself and at the same time “vis-à-vis” the others. The motive of the Convention is such a lofty one, so universally recognized as an imperative call of civilization, that the need is felt for its assertion, as much out of respect for it on the part of the signatory State itself as in the expectation of such respect from an opponent, indeed perhaps even more for the former reason than for the latter.²⁰⁷

The Commentary further explains the (nonreciprocal) nature of the Contracting States’ obligations as follows: “A State does not proclaim the principle of the protection due to civilians in the hope of improving the lot of a certain number of its own nationals. It does so out of respect for the human person.”²⁰⁸

This general rationale also explains the rather redundant expression, “in all circumstances.” According to the ICRC Commentary to the Fourth Convention, the specific rationale of these terms was to underscore that when “the conditions of application for which Article 2 provides is present, no Contracting Party can offer any valid pretext, legal or otherwise, for not respecting the Convention in its entirety.”²⁰⁹ The commentary further clarifies that “the words ‘in all circumstances’ which appear in this Article 1, do not, of course, cover the case of civil war (1), as the rules to be followed in such conflicts are laid down by the Convention itself, in Article 3.”²¹⁰ In other words, the term “in all circumstances” expresses the rather tautological idea that the convention applies in the circumstances in which it applies.

In essence, then, what Common Articles 1 seek to express is that the signatory parties must in good faith implement their obligations under these conventions, keeping in mind their non-reciprocal nature.

Clearly, the Court did not suggest that this principle – that a state must implement its treaty obligations in good faith – did not apply to the Convention. Thus, the question arises: did the Court implicitly suggest that the obligations assumed under the Convention, in contrast to the obligations assumed under the 1949 Conventions, are based on the principle of reciprocity? To be sure, this proposition is coherent with the Court’s opinion as a whole. It is nonetheless entirely backwards.

²⁰⁷ ICRC Commentary to the Fourth Convention, Article 2.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

As documented by Meron, the paradigm shift that the language of Common Articles 1 seek to express was inspired by the international community's increasing attention to human rights, and in particular, the adoption of the Universal Declaration of Human Rights (UDHR), which, it should be reiterated, most certainly does not appeal to ideas of self-interest and reciprocity but rather to the inherent dignity of all human beings.²¹¹ Moreover, the principle of reciprocity played a more limited role in the 1949 Conventions compared to earlier humanitarian law, the drafters of these treaties did not abandon this principle. For example, Article 4 of the Fourth Geneva Convention restricts the class of protected persons to nationals of a state that pursuant Article 2 is bound by the Convention.²¹²

4. Other International Human Rights Treaties

*As to Article 2 § 1 the CCPR 1966 (§ 26 above), as early as 1950 the drafters had definitively and specifically confined its territorial scope and it is difficult to suggest that exceptional recognition by the Human Rights Committee of certain instances of extra-territorial jurisdiction (and the applicants give one example only) displaces in any way the territorial jurisdiction expressly conferred by that Article of the CCPR 1966 or explains the precise meaning of "jurisdiction" in Article 1 of its Optional Protocol 1966 (§ 27 above).*²¹³

The Court attempted to buttress its holding by making reference to the International Covenant on Civil and Political Rights (ICCPR) and its 1966 Optional Protocol.²¹⁴ Like the Convention itself (or at least its own

²¹¹ Meron, *supra* note 206, at 245.

²¹² Consider in this connection the Commission's decision in *Austria v. Italy* in which it held that Austria had a right to initiate proceedings against Italy for events that had occurred in Italy and, notably, prior to Austria's ratification of the Convention. The Commission justified this decision by referring to the object and purpose of the Convention:

The purpose of the high contracting parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realize the aims and ideals of the Council of Europe [. . .] the obligations undertaken by the High Contracting Parties in the European a Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties.

Austria v. Italy, App. No. 788/60, 1961-VI Y.B. Eur. Conv. on H.R. at 138.

²¹³ *Bankovic v. Belgium*, ¶ 78.

²¹⁴ As a side issue, it is important to note the relationship between the ICCPR and the European Convention. All of the Contracting States are parties to both. However, the prevailing view is that states will fulfill their obligations under both treaties by complying with the European Convention, and some have even incorporated the Convention into their national legislation. What this also means is

interpretation of it), the Court held that the language “within its territory and subject to its jurisdiction” of Article 2 (1) of the ICCPR and the language “subject to its jurisdiction” in Article 1 of the Protocol was essentially territorial.²¹⁵ Furthermore, the Court asserted that the extra-territorial jurisdiction recognized by the Human Rights Committee was of an “exceptional” nature, but that it could not displace the plain meaning of the Covenant’s textual limitation.²¹⁶

Our analysis begins with what we feel is the Court’s misreading of the drafting history of Article 2(1). Specifically, the Court makes reference to the fact that in 1952 and 1953 there were attempts to change the “within its territory and subject to its jurisdiction” language in Article 2(1).²¹⁷ The Court concludes from the statute itself as well as the failed effort to change its language that the ICCPR should be given a territorial reading.

What the Court does not say is that the reason why these terms were retained was the concern expressed by a few states, the United States in particular, that citizens might seek to hold their own government responsible for failing to take measures against another state that had violated their rights.²¹⁸ Since states lack “jurisdiction” in other states, it was argued, they could not be compelled to enforce human rights by means other than diplomacy. As evidenced by *Bankovic* itself, the formulation chosen to remedy this conceived obscurity was unfortunate and has given rise to much confusion. On the other hand (and as indicated elsewhere), because the underlying assumption is that a state is generally prohibited from taking actions on another state’s territory, it is understandable that the drafters overlooked the interpretative problem they created.

In sum, the drafting history of Article 2(1) does not affirm the Court’s position that the ICCPR was without extraterritorial effect. Nowhere is it

that the Court’s interpretation of the European Convention will have an enormous influence on the manner in which the ICCPR is itself implemented.

²¹⁵ Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302. Article I reads:

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

²¹⁶ *Bankovic v. Belgium*, ¶ 78.

²¹⁷ *Id.* ¶ 26.

²¹⁸ See MARC J. BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 53-4 (1987); see also Thomas Buergenthal, *State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 74-75 (Louis Henkin ed. 1981); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 41-42 (1993).

suggested or implied in the drafting records that states should not be held responsible for their own acts for the sole reason that they occurred outside of the Contracting State's territory. What the drafting history *does* show is that the drafters were anxious to underscore that a state should not be held responsible for a failure to ensure the rights of the Covenant where the state in question lacked the legal competence to do so.²¹⁹

More puzzling but also more disturbing is the manner in which the Court treats the Human Rights Committee's unanimous decision in *Lopez v. Uruguay*.²²⁰ It is noteworthy that the Court never refers to the case by name; what is even more important is the manner in which the Court summarily dismisses its holding on the rather incredible grounds that the "applicants give one example only."²²¹ One unambiguous case is more than sufficient to establish an authoritative interpretation of the ICCPR, especially when the Human Rights Committee, the U.N. body entrusted with interpreting the ICCPR, speaks in the unequivocal terms that it does.

In *Lopez*, the author of the communication claimed that her husband, a Uruguayan national, had been kidnapped in Argentina by members of the Uruguay security and intelligence forces and had been secretly detained there before being clandestinely transported back to Uruguay.²²² Uruguay denied these accusations and argued that the communication was inadmissible under the Optional Protocol because the ICCPR did not apply to actions committed outside of the territory of the state.²²³

The Human Rights Committee soundly rejected Uruguay's position.²²⁴ It held that the language "individuals subject to its jurisdiction" in Article

²¹⁹ BOSSUYT, *supra* note 218 at 53-54.

²²⁰ *Lopez Burgos v. Uruguay*, Communication No. R.12/52 (6 June 1979), U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981).

²²¹ *Bankovic v. Belgium*, ¶ 78.

²²² *See Lopez Burgos*, U.N. Doc Supp. No. 40 (A/36/40) at ¶¶ 2.1-2.4.

²²³ *See Lopez Burgos*, U.N. Doc Supp. No. 40 (A/36/40) at ¶¶ 12.1-12.3.

²²⁴ In an individual opinion, Christian Tomuschat criticized the Court for basing its decision on article 5(1) of the Covenant (the prohibition of abuse). To him the mere absurdity of Uruguay's contention was obvious:

To construe the words "within its territory" pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would [. . .] lead to utterly absurd results. The formula was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations. Thus, a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential. Instances of occupation of foreign territory offer another example of situations which the drafters of the Covenant had in mind when they confined the obligation of States parties to their own territory. All of these factual patterns have in common, however, that they

1 of the Optional Protocol does not make reference “to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.”²²⁵ The Committee added that Article 2(1) of the ICCPR, which refers both to “territory” and “jurisdiction,” simply imposes a mandate on Contracting States to uphold the Covenant within their national boundaries, but says nothing that would permit states to perpetrate Covenant violations in the territory of other states.²²⁶ Finally, to underscore its support of the extraterritorial application of the ICCPR, the Committee expressed the view that “it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”²²⁷

The Court could not have assumed that *Lopez* was inapposite on the basis that Uruguay took action against one of its own citizens while Respondent NATO members acted against citizens of a different state. Such a distinction would fail to recognize that the Covenant’s rights belong to all individuals because of their status as human beings.

The final point is that the Court’s treatment of the case in general suggests an inappropriate, if not intentional, disregard for sound and thoughtful legal analysis. Even assuming that the absence of a citation to *Lopez* was purely an oversight, the Court exhibited an almost flagrant disregard for judicial comity in so readily dismissing the precedent set by the body authorized to interpret the ICCPR.

In addition to the Human Rights Committee’s holding in *Lopez*, the Court was also faced with the extraterritorial reading of the American Declaration of the Rights and Duties of Man by the Inter-American Commission. In *Coard et al. v. the United States*, the Commission held:

While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be

provide plausible grounds for denying the protection of the Covenant. It may be concluded, therefore, that it was the intention of the drafters, whose sovereign decision cannot be challenged, to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles. Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out willful and deliberative attacks against the freedom and personal integrity against their citizens living abroad. Consequently, despite the wording of article 2 (1), the events which took place outside Uruguay come within the purview of the Covenant.

Id.

²²⁵ *Lopez Burgos*, U.N. Doc Supp. No. 40 (A/36/40) at ¶ 12.2.

²²⁶ *Id.*, ¶ 12.3.

²²⁷ *Id.*

consistent with, but required by, the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination – “without distinction as to race, nationality, creed, or sex.” Given that individual rights inhere simply by virtue of a person’s humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state’s territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter’s agents abroad. In principle, the inquiry turns not on the presumed victim’s nationality or presence with a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of person subject to its authority and control.²²⁸

The Court dismissed the relevance of the jurisprudence of the Inter-American Commission on the grounds that the 1948 American Declaration on the Rights and Duties of Man contains no explicit limitation of jurisdiction.²²⁹ It is true that the Declaration does not use the term “jurisdiction.” Still, the Convention and Declaration share the same foundation, and the Commission’s jurisprudence reflects a keen understanding of the subject matter of extraterritorial human rights violations and therefore should have been given much greater weight and respect.

5. State Practice

*The Court finds State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts similar to the present case. Although there have been a number of military missions involving Contracting States acting extra-territorially since their ratification of the Convention (inter alia, in the [Persian] Gulf, in Bosnia and Herzegovina and in the FRY), no State has indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within the meaning of Article 1 of the Convention by making a derogation pursuant to Article 15 of the Convention.*²³⁰

It is beyond dispute that the Convention applies in times of war. This follows plainly from the text of Article 15(1) of the Convention which reads:

In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating

²²⁸ *Coard et al. v. United States*, Case 10.951, Report No. 109/99, Sept. 29, 1999, Inter-Am. C.H.R., ¶ 37 (footnotes omitted), quoted in *Bankovic v. Belgium*, ¶ 23.

²²⁹ *Bankovic v. Belgium*, ¶ 78.

²³⁰ *Id.* ¶ 62.

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.²³¹

According to the applicants, Article 15 also provided additional support for their interpretation of Article 1. Specifically, they argued that the term “war” in Article 15 refers to international armed conflicts that are conducted both inside and outside of states’ territories. If the Court had no jurisdiction to determine whether a killing during an armed conflict outside a national territory violated Article 2, it would have been redundant to provide that states can derogate not only “in time of public emergency threatening the life of the nation,” but also “in time of war.”²³² There would also be no need for the provisions of Article 15(2). “It is precisely because the Court has jurisdiction over such questions that it was necessary to add to the exhaustive list of situations in which a state may resort to potentially lethal force under Article 2, deaths resulting from lawful acts of war.”²³³

The Court responded to this argument by holding that “Article 15(1) itself is to be read subject to the ‘jurisdiction’ limitation enumerated in Article 1 of the Convention.”²³⁴ But rather than merely dismissing the applicants’ claim, the Court suggested that a territorial interpretation of Article 1 was in fact supported by state practice under Article 15. The Court’s thinking here needs to be quoted *in extenso*:

The Court finds State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts similar to the present case. Although there have been a number of military missions involving Contracting States acting extra-territorially since their ratification of the Convention (*inter alia*, in the [Persian] Gulf, in Bosnia and Herzegovina and in the FRY), no State has indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within the meaning of Article 1 of the Convention by making a derogations pursuant to Article 15 of the Convention.²³⁵

²³¹ European Convention, *supra* note 6, Art. 15(1).

²³² Replies of the Applicants to the Observations of the United Kingdom Regarding the Admissibility of the Application, *Bankovic v. Belgium*, ¶ 65.

²³³ *Id.*

²³⁴ *Bankovic v. Belgium*, ¶ 62. The Court writes:

[T]he Court does not find any basis upon which to accept the applicants’ suggestion that Article 15 covers all “war” and “public emergency” situations generally, while obtaining inside and outside the territory of the Contracting State. Indeed, Article 15 itself is to be read subject to the “jurisdiction” limitation enumerated in Article 1 of the Convention.

²³⁵ *Id.* ¶ 62.

In order to test the validity of this argument, which notably rests on the speculative enterprise of negative inference, it would have been useful to know more about “the number of military missions” that the Court relied on. The comparison between the bombing of RTS and “military missions” conducted in the war in the Persian Gulf and Bosnia Herzegovina would seem to suggest that the Court was referring to “combat missions” or “armed attacks” carried out in international armed conflicts. If so, apart from “combat missions” carried out by France and the U.K. in Kuwait and Iraq and Bosnia-Herzegovina, and the U.K.’s combat missions in the Falkland wars, what similar context did the *Bankovic* Court have in mind?

Leaving that question aside, the fundamental problem with this argument is the underlying assumption that *these* states’ failure in making derogation pursuant to Article 15(1) in *these* similar contexts can only be explained by their sincere belief that the Convention did not apply to extraterritorial military missions. There are, of course, other plausible reasons that can explain why these states “failed” to make any derogation in these situations, including the fairly obvious point that these states did not have a *right* to make derogations in these situations. Consider the requirement “threatening the life of the nation.” Although the Court has taken a rather lax approach to this requirement, it is difficult to argue that the U.K.’s and France’s involvement in the first Gulf war placed them in such a dire strait.

However, even when a Contracting State faces a public emergency that does rise to that level of emergency, one cannot and ought not to presume that it will automatically seek to make derogations under Article 15. As one author has correctly noted: “Article 15 of the ECHR would not have language allowing Contracting Parties to derogate during war unless its drafters had envisioned that some Contracting Parties would *not* exercise their right of derogation during war.”²³⁶

Consider further that Article 15 only allows states to derogate from Article 2 in cases of *lawful* acts of war. An *unlawful* act of war, that is, the use of force that cannot be justified under Article 51 of the UN Charter or is not authorized by the Security Council under Chapter VII of the Charter, is not a legal basis for derogating from Article 2. Thus, it cannot be expected that states engaged in legally dubious military missions (such as NATO’s bombing of Yugoslavia) would make any derogations under Article 15, as this is likely to draw attention to the potential illegality of their actions. This is particularly true given that a derogation based on a purportedly lawful act of war can be challenged by other states or by individual claimants.²³⁷ The Court would then have to determine

²³⁶ Francisco Forrest Martin, *Colloquy on the Law of Armed Conflict: The Unified Use of Force and Exclusionary Rules*, 65 SASK. L. REV. 451, 453 (2002).

²³⁷ See ANNA-LENA SVENSSON-McCARTHY, *THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION: WITH SPECIAL REFERENCE TO THE*

whether the use of force was in fact lawful. It is safe to assume that Contracting States engaged in such an act would want to avoid such an outcome.

Is there then any basis for the Court's assumption that states involved in extraterritorial military missions would have made derogating measures pursuant to Article 15 had they understood that the Convention also applied to such situations? To evaluate this question we need to consider two alternative interpretations put forth by the applicants on the relationship between Article 15 and Article 2.

First, the applicants argued that because the causing of deaths through "lawful" acts of war does not fit easily with any of the exceptions mentioned in Article 2,²³⁸ any deaths resulting from such action would be in violation of this article unless the state makes a derogation pursuant to Article 15. Since the defendant states had not done this, the applicants concluded, the attack on RTS was in violation of Article 2.²³⁹

Certainly, if this were the accepted interpretation of Articles 2 and 15, it would be reasonable to expect that states would derogate from Article 2 when engaging in lawful acts of war. The trouble is that this interpretation of Articles 2 and 15 is not particularly compelling and leads to results that we suspect the *Bankovic* Court would not have wanted to affirm. According to this interpretation, any deaths resulting from a lawful act of war – whether it occurs within or outside of a Contracting State's territory – would be in violation with Article 2, unless that state had previously made a derogation pursuant to Article 15. Hence, if a state is attacked by another state, it must in effect first make a derogation under Article 15 in order to defend itself – it is, after all, nearly impossible to fight against an aggressive state without killing its soldiers and without subjecting the civil population to great risks. It would follow from this, for example, that the United Kingdom had violated Article 2 in the Falkland Island War because it did not make any derogation from Article 2 pursuant to Article 15.²⁴⁰

TRAVAUX PREPARATOIRES AND THE CASE-LAW OF THE INTERNATIONAL MONITORING ORGAN 515 (1998) (noting that the phrase "except in respect of deaths resulting from lawful acts of war" may be too delicate to interpret in specific cases, since it would necessarily imply a judgment on the lawfulness of the resort to force of the High Contracting Parties during armed conflicts).

²³⁸ Article 2(2) states:

Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: in defence [sic] of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; in action lawfully taken for the purpose of quelling a riot or insurrection.

²³⁹ *Bankovic v. Belgium*, ¶ 49.

²⁴⁰ *C.f.* Council of Europe's list on communications available at: <http://conventions.coe.int/treaty/Commun/ListeDeclarations.asp?NT=005&CL=ENG>

If the U.K. failed to derogate from Article 2 in the Falklands (which, according to the Court's interpretation, took place "within its jurisdiction"), it cannot be inferred from its failure to derogate from Article 2 in later wars (which, according to the Court's interpretation, took place outside of its "jurisdiction") that it believed its obligations to respect the rights in the Convention only extended to military missions within its territory. The fact that the U.K. subsequently did not make any derogation from Article 2 in the Gulf War and the war in Bosnia-Herzegovina indicates either that it did not understand Article 15 and Article 2 as the applicants did, or it had some other motives for not making a derogation.

As an alternative argument (and in our view a better one), applicants maintained that in situations of armed conflict, Article 2 had to be read in the light of international humanitarian law.²⁴¹ This view corresponds to the holding of the International Court of Justice (ICJ) in the *Nuclear Test* case in which the ICJ held that the evaluation of a potential violation of the right to life in Article 6 of the ICCPR must be conducted with reference to international humanitarian law.²⁴² In addition, the Inter-American Commission in the above mentioned *Coard* case has also held that human rights obligations in times of armed conflict should be determined with reference to humanitarian standards.²⁴³

On this understanding, deaths resulting from lawful acts of war are not necessarily in violation of Article 2 merely because the Contracting States have failed to make derogation. Rather, the Contracting States' compli-

²⁴¹ Replies of the Applicants to the Observations of the United Kingdom Regarding the Admissibility of the Application, *Bankovic v. Belgium*, ¶¶ 43-51; *Bankovic v. Belgium*, ¶ 48.

²⁴² Advisory Opinion of the International Court of Justice on Legality of the Threat or Use of Nuclear Weapons, ICJ Reps., 1996, p. 226, 110 ILR 163, ¶ 24-25. The opinion states:

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

Id.

²⁴³ In *Coard v. United States*, ¶ 42 (footnote omitted), the Inter-American Commission on Human Rights (citing the *Nuclear Weapons Case*) held that:

[I]n a situation of armed conflict, the test for assessing the observance of a particular right, such as the right to liberty, may, under given circumstances, be distinct from that applicable in a time of peace. For that reason, the standard to be applied must be deduced by reference to the applicable *lex specialis*.

ance with Article 2 – and other provisions protecting rights that are threatened in war – will be determined by the parallel standards of humanitarian law. Certainly, this understanding of the Convention gives Contracting States sufficient leverage to fight the type of lawful wars they have so far been engaged in without jeopardizing vital interests. Hence, in light of the condition of strict necessity and the condition of strict proportionality in Article 15, it is very difficult to see that any further derogation from the Convention’s principles would be justified.

Consider, then, France and the United Kingdom’s involvement in the Gulf War and the war in Bosnia-Herzegovina. It is possible that these states did not make any derogations in these wars because they believed that they had no duties to observe the Convention beyond their territories. On the other hand, it is equally possible that they did not do so because they thought that they had neither the right nor the need to make any derogation. That is, they construed their Convention obligations in armed conflict in the same way as the International Court of Justice construed the ICCPR.

In addition, there are political reasons for not making derogations pursuant to Article 15 of the Convention while engaging in extraterritorial military actions. For one, states engaged in the use of military force outside of their territories are rarely forthright with respect to their legal obligations, and instead tend to blur them. The fact that the governments of NATO states in the Kosovo war did not even admit that they were engaged in an interstate war speaks to this. One rationale for this tactic was undoubtedly to create the impression that these states did not need to observe all relevant treaty law applicable in international conflicts *de jure*, but would, as an act of grace, comply with them. The same political reasons that underlie this approach can explain why a state engaged in lawful acts of war would not want to make a derogation under Article 15. By making such a move, the state would unambiguously recognize its legal obligations in the conflict and also draw attention to them.

To conclude, the fact that the Contracting States have thus far not made any derogations pursuant to Article 15 of the Convention when involved in military missions outside of their jurisdiction does not constitute evidence of any relevant state practice for the purpose of interpreting Article 1.²⁴⁴ Indeed, in view of the Strasbourg organ’s previous

²⁴⁴ *C.f.*, Article 31 (3) (b) of The Vienna Convention, *supra* note 44 and accompanying text: “There shall be taken into account, together with the context [. . .] any subsequent practice in the application of the treaty, which establishes the agreement of the parties regarding its interpretation.” Notice that to fall within the meaning of Article 31 (3) (b), the subsequent practice must be coherent and shared by all parties to the treaty. The state practice relied upon by the Court clearly did not meet this condition. State practice not shared by all state parties to a particular treaty might constitute a supplementary means of interpretation within the meaning of Art. 32.

jurisprudence as well as the broad scholarly agreement as to its content, it is difficult to believe that Contracting States thought the Convention did not apply extraterritorially. The fact that Turkey in the case of *Issa v. Turkey*²⁴⁵ (concerning the killing of civilians by Turkish forces operating in Iraq) and in *Öcalan* (concerning the abduction of the PKK (Kurdistan Workers' Party) leader in Kenya)²⁴⁶ did not challenge the extraterritorial application of the Convention, although the scope of Article 1 was brought up by applicants, lends some support for this.²⁴⁷ The Court recognized that it had declared both of these cases admissible. However, these cases had no implications in *Bankovic* because "in neither of those cases was the issue of jurisdiction raised by the respondent Government or addressed in the admissibility decisions, and in any event, the merits of those cases remain to be decided."²⁴⁸ Apparently what it did not contemplate was the possibility that Turkey had understood previous case law to preclude transparent territorial objections.

F. Comparisons with U.S. Law (*United States v. Verdugo-Urquidez*)

One of our concerns is that, in time, the Court will come to adopt something resembling an American-style approach to these issues when it begins to deal (as it must) with issues involving the Contracting States acting outside of Europe, especially when its "territorial" standard leads to patently unfair results.

In *United States v. Verdugo-Urquidez*,²⁴⁹ the U.S. Supreme Court addressed the issue of the purview of the Fourth Amendment. *Verdugo-Urquidez* involved a search by U.S. Drug Enforcement Agents of a home in Mexico owned by a Mexican national who was being charged with violating U.S. criminal law. Rejecting a strictly territorial reading, the Court held that the phrase "the people" in the Fourth Amendment does not apply solely to U.S. citizens, but is also intended to protect foreign nationals who have "sufficient connection" with the United States. What remains unclear, however, is the exact nature of this relationship, and in particular what gives rise to it. In *Verdugo-Urquidez*, the criminal defendant had only been in the United States a few days (in a prison, no less) when the search of his house was carried out.²⁵⁰ The Court held that the circumstances did not meet the "sufficient connection" test and denied the respondent constitutional protection.²⁵¹

²⁴⁵ *Issa v. Turkey*, App. No. 31821/96, Eur. Ct. H.R. (2000) (Dec. on admis.).

²⁴⁶ See *Öcalan v. Turkey*, App. No. 46221/99, Eur. Ct. H.R. (2000) (Dec. on admis.).

²⁴⁷ Lawson also notes this, *supra* note 40, at 109-110.

²⁴⁸ *Bankovic v. Belgium*, ¶ 81.

²⁴⁹ 494 U.S. 259 (1990).

²⁵⁰ 494 U.S. at 262.

²⁵¹ 494 U.S. at 274-5.

Justice Brennan filed a vigorous dissenting opinion, arguing that by applying U.S. law against Verdugo-Urquidez, he had essentially become one of the “governed,” and thereby was deserving of constitutional protection.

What the majority ignores [. . .] is the most obvious connection between Verdugo-Urquidez and the United States: he was investigated and is being prosecuted for violations of United States law and may well spend the rest of his life in a United States prison. The “sufficient connection” is supplied not by Verdugo-Urquidez, but by the Government. Respondent is entitled to the protections of the Fourth Amendment because our Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for purposes of enforcing our laws. He has become, quite literally, one of the governed.²⁵²

Brennan’s approach is more inclusive. Unfortunately, he also takes the position that he would exempt scenarios involving the conduct of American foreign policy and limit the granting of constitutional protection to situations involving overseas criminal law enforcement.²⁵³ A more fundamental problem with Brennan’s approach is that he, like the majority, misconstrues the nature of the rights protected by the U.S. Constitution. On his view, a person is entitled to the protections of the Constitution when the U.S. Government has treated him as a member of the U.S. community; individuals obtain rights in return for being subjected to U.S. directives. The problem is that the framers of the Constitution did not share this theoretical explication of Constitutional Rights. As Jules Lobel observes:

To both the Framers and contemporary society, the social compact [the U.S. Constitution] is “not merely an arrangement for mutual protection; it is a compact to establish a “community of righteousness.” The view of the Framers that the “compact” required government to respect the rights of all human beings is reflected in their

²⁵² 494 U.S. at 283 (Justice Brennan dissenting).

²⁵³ One of the rationales relied upon by the majority is that it would be impossible to distinguish between international criminal law enforcement and the conduct of U.S. foreign policy. Toward the conclusion of his majority opinion Chief Justice Rehnquist writes:

Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country. Situations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.

Id. at 275.

notion that constitutional rights were derived from the natural rights of all people and not from any agreement. The state constitutions and declarations of rights explicitly recognized that all people have “certain inherent natural rights, of which they cannot, by any compact, deprive or divest their posterity.” Since the parties to the compact could not waive these rights for their posterity, the government they would establish had to respect the rights of all people, irrespective of whether they were in some metaphysical sense parties to the compact.²⁵⁴

This view notwithstanding, it seems likely that the U.S. Supreme Court – but the European Court of Human Rights as well – will apply a “substantial relationship” standard in a very ungenerous and arbitrary fashion: universally extending extraterritorial legal protection to citizens, granting protection to some small number of criminal defendants during the course of extraterritorial criminal law enforcement, but then denying the existence of any kind of “relationship” when it is politically expedient or when the executive branch claims that it is carrying out its foreign policy. Perhaps this is defensible in a constitutional scheme. It is not defensible under human rights.

G. *Recent Developments: Ilascu and Issa*

Since the *Bankovic* decision, the Court has affirmed its position on several occasions. We have already commented on *Öcalan*.²⁵⁵ Two additional cases that deserve special mention are *Ilascu v. Russia and Moldova*,²⁵⁶ and *Issa v. Turkey*.²⁵⁷ There are arguably some indications that in these cases the Court has retreated from some of *Bankovic*'s troubling positions. Ultimately, however, these cases are unsatisfactory and further underscore the problems created by *Bankovic* itself.

1. *Ilascu and Others v. Moldova and Russia*

In *Ilascu*, the applicants were arrested at their homes in Tiraspol by security personnel, some of whom were wearing uniforms bearing the insignia of the former USSR's Fourteenth Army. They were accused of anti-Soviet activities and illegally combating the government of the “Moldovian Republic of Transdnistria” (MRT). They were subsequently charged with a number of offenses including two murders. The first applicant, Ilie Ilascu, was sentenced to death in 1993 by a court in this self-proclaimed republic and an order was made for the confiscation

²⁵⁴ Jules Lobel, *The United States Constitution in Its Third Century: Foreign Affairs: Rights – Here and There: The Constitution Abroad* 83 A.J.I.L. 875-876 (1989).

²⁵⁵ See *supra* notes 145-149 and accompanying text.

²⁵⁶ *Ilascu v. Russia and Moldova*, App. No. 48787/99, Eur. Ct. H.R. July 8, 2004 (not yet reported).

²⁵⁷ *Issa v. Turkey*, App. No. 31821/96, Eur. Ct. H.R. (2000) (Dec. on admis.).

of his property. The other applicants were convicted by the same court and sentenced to terms of imprisonment ranging from 12 to 15 years, and their property was likewise ordered to be confiscated. The applicants complained of a violation of Article 6 of the Convention on the ground that they were not convicted by a competent court and also that the proceedings that led to their conviction were not fair. They also alleged that their detention was in breach of Article 5 of the Convention. The applicants further complained of their prison conditions, relying on Articles 2, 3, and 8 of the Convention. The applicants argued that the Russian Federation was legally responsible for the actions of the MRT, arguing that the State of Transdniestria, which has not been recognized by the international community, was effectively controlled by Russia. In addition, the applicants claimed that Moldova, which is considered the legitimate government of Transdniestria but which had lost control over the territory as a result of civil war, had failed to live up to its positive obligations by not making sufficiently strong efforts to secure their release.

The Court began its opinion by examining whether the applicants could be considered to be within the “jurisdiction” of either Russia or Moldova (or both). Following the holding in *Bankovic*, the Court first asserted that the exercise of jurisdiction was “a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.”²⁵⁸ Explaining what this necessary condition entailed, the Court (citing *Bankovic*) stated that “the established case-law in this area [i.e., *Bankovic*] indicates that the concept of ‘jurisdiction’ for the purposes of Article 1 of the Convention must be considered to reflect the term’s meaning in public international law[.]”²⁵⁹ Therefore, it concluded (again citing *Bankovic*), “the words ‘within their jurisdiction’ in Article 1 of the Convention must be understood to mean that a State’s jurisdictional competence is primarily territorial[.]”²⁶⁰

Responding (or so it appears) to Moldova’s argument that as a result of losing control of Transdniestria it was unable to secure the rights of the applicants, the Court proclaimed that “jurisdiction is presumed to be exercised normally throughout the State’s [recognized] territory.”²⁶¹ This presumption, the Court held, “may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory [for example] as a result of military occupation by the armed forces of another State.”²⁶² Whether such an exceptional situation exists must be examined in light of all the objective facts capable of limiting the effective exercise of a state’s authority over its territory,

²⁵⁸ *Ilascu and Others v. Moldova and Russia*, ¶ 311.

²⁵⁹ *Id.* ¶ 312.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

and on the other state's own conduct.²⁶³ However, interestingly, the Court maintained that a Contracting State's positive obligations vis-à-vis persons within its territory remained "even where the exercise of the State's authority is limited in part of [that] territory, so that it has a duty to take all the appropriate measures which it is still within its power to take."²⁶⁴

Having established this presumption, the Court again returned to *Bankovic*, observing that:

[A]lthough in the *Bankovic* case it emphasized the preponderance of the territorial principle in the application of the Convention, it also acknowledged that the concept of "jurisdiction" within the meaning of Article 1 of the Convention is not necessarily restricted to the national territory of the High Contracting Parties. The Court has accepted that in exceptional circumstances the acts of Contracting States performed outside their territory or which produce effects there may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention.²⁶⁵

One such exceptional circumstance, the Court noted, was the situation "where, as a consequence of military action – whether lawful or unlawful – [a Contracting State] in practice exercises effective control of an area situated outside its national territory."²⁶⁶

The Court then went on to hold both Russia and Moldova in violation of the Convention. The Court based its finding of Russian responsibility on the grounds that MRT "remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial, and political support given to it by the Russian Federation."²⁶⁷ This outcome does not warrant further examination here. Suffice it to say that while the "decisive influence" test is troubling enough, the outcome itself is correct.

What is of greater interest here is the Court's ruling against Moldova. Although the Court readily acknowledged that Moldova did not exercise any authority or power over this particular part of its territory, the applicants were nonetheless within its "jurisdiction." That is, Moldova still had a positive obligation under Article 1 of the Convention to take the measures that it were in its power to take and were in accordance with international law to secure to the applicants the rights guaranteed by the Convention. And, according to the Court, Moldova had failed to do so.²⁶⁸

²⁶³ *Ilascu and Others v. Moldova and Russia*, ¶ 313.

²⁶⁴ *Id.*

²⁶⁵ *Id.* ¶ 317 (citations omitted).

²⁶⁶ *Id.* ¶ 314.

²⁶⁷ *Id.* ¶ 392.

²⁶⁸ *Id.* ¶ 349-52.

At first glance this ruling might be viewed as a positive development, reflecting a rather expansive approach to Contracting State's positive obligations. Unfortunately, it is not. On the contrary, it reinforces the peculiar and erroneous territorial reading of Article 1 established by *Bankovic*. If there is anything positive with this ruling it is that it clearly illustrates just how incoherent the Court's present case law is. In the words of Judge Loucaides, in an insightful dissent:

I believe that the interpretation of a treaty should avoid a meaning which leads to a result which is manifestly absurd. In the *Bankovic* decision (with which I personally disagree) the Grand Chamber of the Court found that the bombing of buildings in Belgrade resulting in the killing of 16 civilians was an extraterritorial act outside the "jurisdiction" of the High Contracting Parties to the Convention responsible for such bombing and for that reason the relevant complaint of the relatives of the deceased was dismissed as inadmissible. It seems to me incomprehensible and certainly very odd for a High Contracting Party to escape responsibility under the Convention on the ground that the throwing of bombs from its aeroplanes over an inhabited area in any part of the world does not bring the victims of such bombing within its "jurisdiction" (i.e. authority) but a failure on the part of such Party "to take all the measures in [its] power whether political diplomatic, economic, judicial or other measures . . . to secure the rights guaranteed by the Convention to those formally [*de jure*] within its jurisdiction" but in actual fact outside its effective authority ascribes jurisdiction to that State and imposes on it positive duties towards them.²⁶⁹

We fully agree with Loucaides that the Court erred in finding Moldova in breach of its Convention obligations. When the government of Moldova lost control over the territory at issue it *ipso facto* lost the ability to effectively protect the rights of persons on that territory against infringements from agents of other states and non-state actors. True, Moldova retained the ability to use diplomatic, political and economic pressure on Russia to secure the rights of persons within that territory. But we doubt that Moldova had greater (legal or factual) ability to secure the rights of the applicants through such means than, say, the U.K., France, and Germany. One may legitimately ask, then, whether these states also had an obligation to use such means to secure the release of the applicants.

A likely response to this would be to say that the applicants had a "special relationship" to Moldova and that this special relationship explains why Moldova – and Moldova alone – had a positive obligation to secure their rights through diplomatic means. This, we submit, is the approach

²⁶⁹ *Ilaşcu and Others v. Moldova and Russia*, Dissenting Opinion of Judge Loucaides.

taken by the Court in *Ilascu*. Unfortunately, this approach conflates human rights obligations with an entirely different kind of obligation. Whatever obligations Moldova had towards the applicants in this case, they were not owed to them because they happened to be on a piece of land that legitimately “belonged” to Moldova, as suggested by the Court. Rather, they were owed to them because they were human beings. This is not to dispute that the applicants had a special relationship to Moldova. Nor is it to dispute that States have special obligations to their citizens and permanent residents that they do not have to non-citizens outside of their recognized territory. What we are saying is that such special obligations are not human rights obligations.

2. *Issa v. Turkey*

In the merits phase of *Issa v. Turkey*, the Court again faced the issue of Contracting States’ extraterritorial obligations, and notably, their obligations vis-à-vis persons outside of what the Court in *Bankovic* referred to as the Convention’s “legal space.” *Issa* was brought by a group of Iraqis claiming that Turkish officials, operating on Iraqi territory, had mutilated and killed relatives of theirs, and thus had violated various provisions of the Convention. Originally, the Turkish government had not contested the fact that the applicants had been within their “jurisdiction”; however, it did so following the Court’s decision in *Bankovic*.

In stating what it considered to be the applicable principles enshrined in Article 1, the Court adopted the same language as it did in *Ilascu*, again referring to *Bankovic*’s “primarily territorial” standard as “established case law in this area,”²⁷⁰ and once more asserting that only in “exceptional circumstances” had the Court accepted that “the acts of Contracting States performed outside their territory or which produce effects there may amount to exercise by them of their jurisdiction.”²⁷¹

Interestingly, however, the Court added that Contracting States “may also be held accountable for violations of the Convention rights and freedoms of persons in the territory of another state but who are found to be under the former State’s authority and control through its agents operating – whether lawfully or unlawfully – in the latter State.”²⁷² The Court went on: “accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.”²⁷³

On first impression, this passage may be taken to signal a retreat from *Bankovic*, particularly the assertion that “Article 1 does not allow a State party to perpetrate violations of the Convention on the territory of

²⁷⁰ *Issa v. Turkey*, ¶ 67.

²⁷¹ *Id.* ¶ 68.

²⁷² *Id.* ¶ 71.

²⁷³ *Id.*

another State, which it could not perpetrate on its own territory.” However, on closer examination, this matter looks quite different. The meaning of the Court’s assertion obviously depends on how one defines “violations of the Convention,” which in turn depends on how one understands the scope of Contracting States’ obligations. Viewed alone, this assertion is consistent both with the position that we have argued (i.e., that a Contracting State’s obligation to respect the rights set forth in the Convention is owed to all human beings *qua* human beings) and the position taken by the *Bankovic* Court (i.e., that a Contracting State’s obligation to respect the rights set forth in the Convention is owed to a limited to class of persons). The Court in *Issa* clearly affirmed the latter view. This is evident from the language taken from the *Ilascu* case. But it is also evident from the remainder of their opinion.

Thus, after having laid down the “applicable principles” enshrined in Article 1, the Court went on to examine whether the impugned acts constituted yet another exception to what it considered to be the primarily territorial meaning of the term “jurisdiction.” Apparently not content with the exceptions that it has already created, the Court seemed on the verge of creating an entirely new test under Article 1 – what might best be called the “temporary effective control” test – when it stated:

The Court does not exclude the possibility that, as a consequence of [Turkey’s military actions in Iraq], the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq.²⁷⁴

Yet, after throwing this idea out, the Court then beat a hasty retreat and held that the applicants had not offered sufficient proof that the deaths of their relatives had come at the hands of Turkish officials, noting that the applicants had not given any particulars as to the identity of the commander of the regiment involved or a detailed description of the soldiers’ uniforms, and no independent eyewitness account of the presence of Turkish soldiers in the area in question or of the detention of the shepherds.²⁷⁵ However, the Court did not reject applicants’ claim on the ground that they had failed to establish that Turkey was responsible for the killing and torturing of the applicants’ relatives. Instead, the Court rejected the claim on the ground that the applicants had failed to establish what it perceived as a more fundamental requirement: that the victims had been within the “jurisdiction” of Turkey. By failing to establish that Turkish troops had even been in the area where the killing and torturing of their relatives had taken place, the applicants had thereby failed to establish that Turkey had had “temporarily, effective overall control of the particular portion of the territory of northern Iraq” where the violations were said to have occurred. To see the absurdity of this reasoning,

²⁷⁴ *Id.* ¶ 74.

²⁷⁵ *Id.* ¶ 77.

recall that the applicants' claim was not that Turkey had failed to protect their relatives. Their claim, instead, was that Turkish troops had deliberately tortured, killed, and mutilated their relatives.

To be fair, there are some positive aspects of *Issa*. First, the opinion makes clear that the Convention applies beyond what the *Bankovic* Court referred to as the legal space (*espace juridique*). In addition, the Court provided a fuller accounting of prior case law in this area than it had in *Bankovic*, and it not only cited the Human Rights Committee's decision in *Lopez* by name, but approvingly as well.²⁷⁶

The problem, however, is that the Court remains wedded to an "effective control" standard that not only misreads prior case law before *Bankovic*, but also misreads the meaning of human rights. It is hard to conceive of a more heinous human rights violation than the deliberate torture, mutilation, and killing of innocent civilians – which is what the applicants claimed that agents of Turkey had done. Still, under the Court's interpretation of Article 1 it would not have been sufficient for the applicants to establish that Turkey had carried out these acts. Rather, the applicants would also have to establish that Turkey had exercised some degree of effective control – temporary or otherwise – over the particular piece of land where these violations were said to have occurred.

Consider an alternative scenario. Suppose that rather than entering Iraqi territory, Turkish officials had simply shot across the border, and in doing so killed a group of Iraqi citizens. Under the Court's *Bankovic/Issa* standard, Turkey would not have exercised "jurisdiction" over these now-dead civilians. The absurdity of this position is obvious.

The only important question raised in this case is whether a violation of *human rights* had taken place and whether that violation was imputable to Turkey. What did not matter – or, more accurately, what should not have mattered – was whether Turkish troops actually entered Iraqi territory, how long they remained on Iraqi soil, the activities they carried out while on Iraqi soil, and so on. All that should have mattered was that Turkey had an obligation not to deliberately kill, mutilate, and torture human beings, and whether it had violated this obligation.

The problem with *Bankovic* and its progeny is that the case stands for the proposition that human rights are not owed to human beings *qua* human beings and that the corresponding obligations are not ultimately owed to human beings *qua* human beings. The damage caused by this judgment cannot be undone by gradually expanding the class of persons deemed to have a "jurisdictional link" to the Contracting States. Instead, the damage can only be undone if the Court explicitly recognizes that it erred in *Bankovic*.

²⁷⁶ *Id.* ¶ 71.

III. THE BROADER IMPLICATIONS OF *BANKOVIC*

On the surface, the question raised by *Bankovic* – does European law apply outside of “Europe”? – would seem a relatively novel one. Yet the broader question of Europe’s relationship to the rest of the world is centuries old. More significantly, notwithstanding the creation of all kinds of “universal” human rights (and institutions such as the Court to enforce those rights), the answer is apparently the same that it has always been: Western states apply one set of legal standards for themselves and a completely different set of legal standards (arguably, no standards at all) in their dealings with those outside the West. As Antony Anghie has shown in his work, colonialism was premised on exactly this same separation between European law and non-European law.²⁷⁷ Thus, not only was every effort made to prevent “native” law from being applied against “civilized” peoples,²⁷⁸ but even more pertinent is the manner in which foreign populations were systematically excluded from invoking legal proceedings against the colonial power itself.²⁷⁹ To use what is, admittedly, one of the more extreme examples, the entire indigenous popula-

²⁷⁷ See generally Antony Anghie, “*The Heart of my Home*”: Colonialism, Environmental Damage, and the Nauru Case 34 HARV. INT’L L.J. 445 (1993); *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law* 40 HARV. INT’L L.J. 1 (1999); *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations* 34 N.Y.U. J. INT’L L. & POL. 513 (2002).

²⁷⁸ Anghie describes how this system of law was created:

For the European states, the local systems of justice were completely inadequate, and there was no question of submitting one of their citizens to these systems. Thus, non-European states were forced to sign treaties of capitulation that gave European powers extra-territorial jurisdiction over the activities of their own citizens in these non-European states. This derogation from the sovereignty of the non-European state was naturally regarded as a massive humiliation by that state, which sought to terminate all capitulations at the earliest opportunity.

Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law*, 40 HARV. INT’L L.J. 1, 52-3 (1999) (footnotes omitted).

²⁷⁹ It is noteworthy that even under the Mandates System, when the colonial powers were purportedly working towards the betterment of “native” populations, there was no mechanism by which subjects could question the actions of the European rulers. Anghie describes the operations of the Permanent Mandates Commission (PMC) in these terms:

[T]he PMC was unable to check abuses of the system by the mandatory powers themselves. Native cultures [. . .] possessed no inherent validity for the PMC, but the PMC did recognize the importance of at least getting some impression of native views and responses. The Mandate System, however, failed to provide any formal mechanism by which the native could communicate meaningfully with, and represent herself before, the PMC. [. . .] The PMC attempted to establish a system by which petitions from the natives themselves could be received. The subject of petitions was treated, however, as a delicate one, liable to generate great tensions. The compromise formula, arrived at in 1923, permitted PMC to receive petitions from inhabitants of the mandate territories, but only through

tion of Tasmania could be killed off without a single charge of murder ever being brought. Notwithstanding all of the strictures of British rule and British law, Tasmania was essentially “lawless” in that non-Europeans enjoyed few (if any) rights under this law, at the same time that the British seldom (if ever) held themselves legally accountable for their own actions there.²⁸⁰ This, of course, is not in any way to compare the atrocities of colonialism with NATO’s actions in Yugoslavia. What is important to realize is that throughout their history, European nations have maintained notions of universal rights – based on the idea of universal moral equality – but have consistently applied and interpreted these norms in an exclusionary fashion.

Some might find we have exaggerated the problem caused by *Bankovic*. After all, they might claim, the *Bankovic* case did involve a rather extraordinary situation, one not likely to occur again, and on the whole, Western European States have first-rate human rights records. There might be some truth in this. But, let us offer three brief points in response:

the mandatory [*sic*], which appended comments prior to sending the petitions on to the Commission.

Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*,” 34 N.Y.U. INT’L L. & POL. 513, 604-5 (2002) (footnotes omitted).

²⁸⁰ Describing the system of law “governing” British colonial policy in Tasmania, which resulted in the killing of every one of the original habitants of this island, Mark Cocker writes:

It is hardly surprising [. . .] that no one was ever committed for trial, let alone convicted, for murdering an Aborigine. Punishment, if administered at all, was normally restricted to the convicts and even these penalties need to be placed in context. For example, one man received a beating after showing off the little finger he had sliced from an Aborigine to use as a tobacco stopper. Another was flogged for the ears and other parts he had cut from the living body of a Tasmanian boy, while two men received twenty-five lashes each for their violence against native women. Although these last crimes were denounced as “indescribable brutalities” – the nature of which we can probably surmise – they were nevertheless deemed to be only half as serious as those of a convict cook, who was given fifty lashes for smiling at his mistress’ orders.

Cocker continues:

The truth was that while the colonial authorities had automatically made the indigenous Tasmanians answerable to British laws, they had never dreamed of bestowing on them the privileges of British citizens. And since they had ascribed to the Aborigines no prior right of occupancy, any attempt on their part to defend their land was automatically defined by the colonial government as a criminal offence. The settlers’ vision of the Tasmanian as an angry savage beyond the pale was, in fact, a self-fulfilling prophecy inbuilt into the nature of their judicial framework.

MARK COCKER, *RIVERS OF BLOOD, RIVERS OF GOLD: EUROPE’S CONQUEST OF INDIGENOUS PEOPLES* 137-8 (1998).

First, it is a mistake to believe that Western European states have once and for all eradicated the risk of serious human rights abuse. In the words of Philip Alston and J. H. H. Weiler:

The promotion and protection of human rights is not a one-time undertaking and neither governments nor bureaucracies can be counted upon to remain consistently, let alone insistently, vigilant. There will always be occasions and issues in relation to which it will seem preferable to sweep human rights under the carpet (“temporarily,” of course, and only in the interest of a more profound objective which is itself assumed to be human rights friendly).²⁸¹

Second, as a corollary to this, the essence of the Court’s ruling is that the Contracting States are not bound by the same standards in their dealings with “outsiders” as they are with “insiders.” Klaus Günther explains why this ought to be of grave concern:

The violation of human rights does not begin with their explicit negation or rejection, but with their implicit neutralization – at first with perceiving a human being as somebody who does not in all respects belong to the community of human beings, and secondly with the right to treat them as something which does not deserve the protection of human rights.²⁸²

Third, the most damning charge that has been made against “human rights” is that it serves Western interests.²⁸³ From a historical perspective, such skepticism about Western Europe’s commitment to human rights is certainly understandable. Unfortunately, *Bankovic* is a clear example of how Western interests are served – at the same time that the Court maintains a neutral façade of upholding the rule of law and universal values. Of course, to soften the blow and to make the decision more politically palatable, the Court holds out the olive branch that there might be some “exceptional circumstances” where the Convention would be applied extraterritorially.

Still, Western states will not be able to accomplish their self proclaimed agenda to spread the idea of human rights to all corners of the world unless their own democratic institutions understand the basic premise of this idea and comply with the standards derived from it.

This ambivalent approach to human rights is not confined to the European countries. Consider some of the recent criticism that has been directed against the United States. Within the territorial boundaries of the U.S., human rights are generally protected – at least with respect to

²⁸¹ Philip Alston and J.H.H Weiler, *An ‘Ever Closer Union’ in Need of a Human Rights Policy* in *THE EU AND HUMAN RIGHTS* 5 (Philip Alston ed., 1999).

²⁸² Klaus Günther, *The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture* in Alston, *supra* note 281, at 118.

²⁸³ For a forceful critic of the present day human rights regime see MAKAU MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE* (2002).

civil and political rights and notwithstanding some glaring exceptions such as capital punishment. However, it would be much more difficult to make this argument with respect to American actions in the world. The reason for these different standards is that the U.S. Supreme Court has refused to apply the Constitution extraterritorially – unless an American citizen is involved or unless a foreign national can show that she has a “substantial” connection to the United States.²⁸⁴

This approach has resulted in a divide between enforcement and protection. On one hand, there is an ever-growing U.S. involvement in the affairs of other countries, represented by security and law enforcement agents of all stripes (literally).²⁸⁵ On the other hand, there has been enormous resistance to extending any legal protections outside the territorial borders of the United States. Refugees can be turned around on the high seas and returned to their persecutors in Haiti without violating either domestic (U.S.) or international law (or at least the U.S. Supreme Court’s reading of this law).²⁸⁶ Likewise, the government’s premise for housing Al Qaeda suspects in Guantanamo Bay, Cuba was that the military base was outside the “jurisdiction” of the United States.²⁸⁷ To the welcome surprise of many (these authors included), the Supreme Court held that the Guantanamo Bay detainees are to be afforded certain due process rights.²⁸⁸ However, our concern is that the granting of such rights will begin – but also end – at Guantanamo Bay.

The larger point is that the Contracting States are engaging in the very same kind of practices for which they had condemned the United States. Many of these states have been quite critical of the American opposition to the International Criminal Court (although, inexplicably enough, they also have agreed to exempt the United States through a series of bilateral

²⁸⁴ Verdugo-Urquidez v. United States, 494 U.S. 259, 271 (1990).

²⁸⁵ Ethan Nadelmann has written:

As recently as the early 1980s most crimes committed overseas that did not directly affect United States security or territorial interests were not subject to United States jurisdiction. Today, a terrorist who harms an American citizen anywhere in the world has violated not just the law of the *situs* but United States law as well. Moreover, the longstanding reluctance of law enforcement officials to pursue their investigations overseas has faded considerably. Issues of extraterritoriality now dominate discussions of international law enforcement more than ever before.

Ethan Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT’L L.J. 37, 39 (1990).

²⁸⁶ Sale v. Haitians Center Council, 509 U.S. 155 (1993) (upholding Haitian interdiction policy on the grounds that *nonrefoulement* provisions under U.S. law do not protect individuals who were outside the territorial boundaries of the United States).

²⁸⁷ Rasul v. Bush, 124 S. Ct. 2686, 2693 (2004).

²⁸⁸ Rasul v. Bush, 124 S. Ct. 2686 (2004).

agreements).²⁸⁹ Yet, mirroring the example of the United States, the Contracting States have not shown the slightest willingness to be held accountable for any of the activities they have undertaken outside of their borders. *Bankovic* is a prime example.

Our criticism of the *Bankovic* decision should not be interpreted to mean that we do not recognize that the Court was in a difficult position. Indeed, the case posed very difficult questions concerning foreign policy, which by their very nature trigger balancing concerns. However, this does not justify the Court's decision. The Court could have deferred the difficult foreign policy questions raised by this case to national institutions under its margin of appreciation doctrine.²⁹⁰ If this approach had been utilized, the Court would have clarified that Contracting States remained legally obligated to balance conflicting interests – in this case NATO's duty to protect the human rights of Kosovar Albanians and the human rights of Yugoslavian residents – in good faith. Though unenforceable in a court of law, political pressures could also help to ensure that humanitarian efforts do not unnecessarily and disproportionately violate human rights obligations. Although we are not convinced that this approach would have been appropriate under the circumstances of this case, we also are of the view that it would have been preferable to the decision handed down in *Bankovic*. In a post-September 11 world, unwarranted deference to political branches of government creates a cloak of legitimacy that could readily permit Western nations to roam the world with impunity while undermining human rights objectives.²⁹¹

Beyond this, one of the recurrent themes justifying the holding in *Bankovic* is the specter of a finding that the Convention applied extraterritorially would thereby open up the Court (which already has an extensive caseload) to an entirely new and extraordinarily broad class of potential claimants. Prudential considerations aside, any concern that these types of cases would impose too heavy a burden on the Court cannot be used to construe a limitation in the Convention. Such a floodgate argument begs the question. Specifically, it reflects an *a priori* judgment about the relative lesser value of these types of cases – that cases of this kind are less worthy of the Court's attention than others. That, in turn,

²⁸⁹ See generally, Samantha Ettari, *A Foundation of Granite or Sand?: The International Criminal Court and the United States Bilateral Immunity Agreements*, 30 BROOK. J. INT'L. L. 205 (2004).

²⁹⁰ On the Margin of Appreciation see HARRIS, O'BOYLE & WARBRICK, *supra* note 28.

²⁹¹ *But see* Hamdi v. Rumsfeld, 124 S. Ct. 2633 (June 28, 2004) (holding that a U.S. citizen held as an "enemy combatant" in a military brig in South Carolina has a due process right to a hearing); *see* Rasul v. Bush, 124 S. Ct. 2686 (2004) (holding that a group of foreign nationals being held as "enemy combatants" at the U.S. military base at Guantanamo Bay, Cuba are entitled to a hearing under the Due Process clause); *see also supra* note 39 and accompanying text.

hinges on a judgment that the rights of people outside of Contracting States' territories are of lesser value.

Again, we recognize that the Court had some legitimate concerns based on the possibility of a rapid increase in the number of cases and, as indicated above, its role in cases involving Contracting State's foreign policy. Yet, instead of making the spurious argument it did, it could have dismissed the case by a more sophisticated competence argument, invoking the legitimacy of its involvement in any cases of this type.

The final issue that we wish to address relates to the kind of human rights institution the Court has evolved into. As acknowledged earlier, on one level the Court has enjoyed tremendous success – arguably too much “success,” given its staggering caseload. Yet, this avoids the question of whether the Court truly is a human rights institution – or whether it has become something entirely different. The Court has displayed a disconcerting pattern of simultaneously overreaching and under-reaching. In overreaching, it has exhibited an overzealous focus on petty and technical issues that have but a modest bearing on the protection of fundamental rights in Europe. It has come to be the depository for all sorts of claims, but such claims might be more appropriately settled by the democratic institutions in those states. At the same time, the Court has underreached by avoiding issues typically not fit for majority rule or where democratic accountability may not be sufficient. In addition, it has shown a decided lack of interest in issues involving conduct that can be empirically shown to pose real threats to human rights. In essence, what the Court repeatedly has failed to do is to remind Europeans what human rights are about. Because of this, the Court has neglected to play any kind of educational role concerning the nature of rights and to help answer the question why certain behavior warrants (or does not warrant) condemnation based on the values of the Convention.

In sum, *Bankovic* missed a number of golden opportunities. It missed an opportunity to reverse decades (if not centuries) of Western hypocrisy. It also missed a wonderful opportunity to explain the true nature of human rights and the role that the Court, the Contracting States, and the people of Europe could play in the advancement of those rights. And finally, rather than using the occasion to help take the “first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,”²⁹² the Court took some giant steps in the opposite direction.

²⁹² This language comes from the last paragraph to the Preamble of the Convention, *supra* note 6, and it bears repeating:

Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.