The Convention abroad
Extra-territorial applicability of the European Convention on Human Rights

BY ROELAND BÖCKER[1]

A recent phenomenon

Extra-territorial operations by States – military or otherwise – are as old as statehood itself and have by no means ceased to occur since the creation of the European Convention on Human Rights ('the Convention'). The extra-territorial applicability of the Convention seems however largely a twenty-first century topic, whereas the Convention itself will soon celebrate its sixtieth birthday.

Focusing on the European Court of Human Rights, all relevant jurisprudential developments, with only a few exceptions, took place after the turn of the millennium. I raise this point mainly to substantiate my strong impression that this issue is still in its infancy and by no means fully crystalised.

The ends of the scale

In determining the extent to which the Convention may be applied to state conduct abroad, in particular to military operations, two extreme positions can be distinguished for argument's sake. One extreme would be the view that states should not be bothered or limited in their military activities abroad by the standards of a regional instrument that is clearly not tailored to the specific circumstances and requirements of warfare or peace-keeping. Even Article 15 of the Convention, which allows for derogation in times of emergency, would appear to be written exclusively for situations threatening the life of the nation, which is an extremely narrowly defined category. Protection in situations of war or peacekeeping should, according to this argument, not be found in human rights law, or *lex generalis*, but in international humanitarian law, or *lex specialis*, and other sources related to the specific situation, such as status of forces agreements. This traditionalist approach obviously does not reflect the official position of any of the states parties to the Convention, since it would not be in conformity with the case law of the European Court. The unrestricted detention of suspected terrorists on Cuban territory, introduced by the previous US administration, would, however, seem to be inspired by the idea that location is the unique decisive factor for the legal regime in force.

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The other extreme on the scale would be the view that the applicability of the Convention is triggered as soon as any Government official sticks his or her nose across the border, in an official capacity, or as soon as the Government takes a decision affecting the position of individuals abroad. This would include not only military activities in all their forms and manifestations, but also purely diplomatic or consular contacts between states or, for example, decisions to institute commercial or political sanctions against other states or decisions in the area of development cooperation. The sending state would – in such a scenario – be obliged to guarantee the full range of Convention rights to anyone affected by its activities or decisions and, consequently, fulfil all its negative and positive obligations under the Convention. It goes without saying that this holistic or perhaps idealistic approach would lead to totally unworkable situations in which traditional interstate relations would be seriously undermined by perceived Convention obligations of one kind or another.

Striking the balance

The extremes now having been determined and defined as either unlawful or unworkable, it is time to focus on the middle ground, where, as is so often the case, solutions may be found. The quest, in other words, is for a realistic approach which strikes the right balance between the extremes. This realism, this balance, is badly needed in an era when national, regional and universal interests and standards meet, and inevitably clash, more than ever before, leaving us with numerous dilemmas to be solved. This is beautifully exemplified by the cases of *Kadi* and *Al-Barakaat*[2] before the judicial organs of the European Union, concerning the fundamental rights of individuals listed by the UN Security Council as suspected terrorists, whose assets must be frozen by all UN member states, but whose procedural rights in that regard do not yet fully meet our European standards. The Court of First Instance, the advocate-general and the Court of Justice all had differing views on the interrelatedness of the various levels of law.

The European Court of Human Rights, for its part, has been all too aware of the context in which it operates. Time and again, it has expressed the opinion that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Convention forms part of international law and should therefore be interpreted as far as possible in harmony with other principles of international law. One such principle is the applicability of international humanitarian law to international and non-international armed conflict, which, as lex specialis, prevails over – but does not set aside! – general human rights law. Another crucial principle in this context, and most relevant to the present issue, is the essentially territorial character of the term 'jurisdiction' as it is used in international law, including in Article 1 of the Convention, which outlines the scope *ratione personæ* of the states parties' obligations. In keeping with this essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the states parties that were performed or produced effects outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention. Such exceptional cases included, notably:

[2] ECJ, 3 September 2008, joint cases C-402/05P and C-415/05P, LJN (index) BF7850, NJ 2009, 38.

- *Loizidou versus Turkey*[3], where Turkey was considered to exercise effective overall control, and therefore jurisdiction in northern Cyprus due to the presence of large numbers of Turkish troops there;
- *Ilascu and Others versus Moldova and the Russian Federation*[4], where the same conclusion was drawn with respect to the Russian military presence in the Moldovan region of Transdnjestria, although in this case jurisdiction was equally attributed to Moldova itself;
- *Isaak versus Turkey*[5], where the effective control by Turkey of northern Cyprus was – in the context of the case at hand – deemed to extend to the neutral UN buffer zone on Cyprus; the case concerned the Turkish involvement in the killing of a civilian demonstrator within that territory;
- *Georgia Andreou versus Turkey*[6], where the applicant – while attending a demonstration at the occasion of the funeral of Isaak, mentioned above – was shot by Turkish-Cypriot forces from Turkish-Cypriot territory; the fact that the applicant herself remained in Greek-Cypriot territory did not stand in the way of assuming Turkish jurisdiction for the acts complained of;
- *Öcalan versus Turkey*[7], where the abduction of the applicant in Kenya by Turkish security forces brought him within the jurisdiction of Turkey;
- *Issa and Others versus Turkey*[8], where the alleged arrest and killing of Iraqi shepherds by Turkish forces in northern Iraq brought the applicants under Turkish jurisdiction;
- *Xhavara and Others versus Italy and Albania*[9], where the attack on a ship transporting Albanian refugees by an Italian war vessel in international waters off the coast of Italy sufficed to bring the victims under the Italian jurisdiction, and most recently
- *Al Saadoon and Mufdhi versus the United Kingdom*[10], where the applicants, two detainees in a British detention facility in Iraq were under British jurisdiction before being transferred to the Iraqi authorities. The merits of this case remain to be examined by the Court. The complaint involves Articles 2 and 3 of the Convention, which do not allow for any margin of appreciation or other form of discretion by the state party. It will therefore be extremely interesting to learn the Court's assessment of the UK Government's argument that it was obliged under international law to surrender the applicants to the Iraqi authorities, on whose behalf – and on whose territory! – the applicants were detained in the first place.

What these cases have in common is the fact that the respondent state was actually exercising a certain level of *de facto* control over the applicants, if not *de jure* as well. This aspect of the Court's case law, at least, would appear to have been sufficiently developed by now. For example, in the case of *Medvedyev and Others versus France*[11], currently still pending before the Grand Chamber of the Court, France did not even raise the jurisdiction issue in a situation of

[3] ECHR judgment (preliminary objections), 23 March 1995, Appl. No. 15318/89.
[4] ECHR decision (admissibility), 4 July 2001, Appl. No. 48787/99.
[5] ECHR decision (admissibility), 28 September 2006, Appl. No. 44587/98.
[6] ECHR decision (admissibility), 3 June 2008, Appl. No. 45653/99.
[7] ECHR decision (admissibility), 14 December 2000, Appl. No. 46221/99.
[8] ECHR decision (admissibility), 30 May 2000, Appl. No. 31821/96.
[9] ECHR decision (admissibility), 11 January 2001, Appl. No. 39473/98.
[10] ECHR decision (admissibility), 30 June 2009, Appl. No. 61498/08.
[11] ECHR judgment (merits and just satisfaction), 10 July 2008, Appl. No. 3394/03.

interception by a French frigate of a merchant ship allegedly involved in drugs trafficking in the international waters.

The Dutch record

This does not mean that each and every activity by states outside their own borders implies the existence of *de facto* control and therefore of jurisdiction within the meaning of the Convention. This brings me to the Dutch record, which up until now has not seen any instances of extra-territorial jurisdiction in proceedings before the Court. In the famous – some would probably say infamous – case of *Bankovic and Others versus seventeen NATO member states* (including the Netherlands) [12], an air strike on the Serbian radio- and television station in Belgrade was *not* considered to imply effective control and thereby jurisdiction by the respondent states. This decision by the Grand Chamber has been severely criticised. Although the respondent governments were obviously satisfied with the Court's decision in this case, I do not consider it my task to defend the Court's judgments against criticism. The Court can speak for itself. Moreover, the decision in Bankovic is now almost eight years old. All I can say is that – whatever the other arguments entertained by the Court – it is understandable that the difference between the factual situation in Bankovic and the factual situation in the other cases I just mentioned led the Court to conclude that the *de facto* control over the applicants that was essential to the other cases was lacking in Bankovic.

The only other case concerning extra-territorial jurisdiction in which the Netherlands has been asked to respond, besides Bankovic, is the case of *Artemi & Gregory versus Cyprus and twenty-one other member states of the European Union* (including the Netherlands)[13], which is currently pending before the First Section of the Court. The applicants are Cypriot nationals living in the United Kingdom, who complain that their right to freedom of movement under Article 2 of Protocol No. 4 to the Convention is violated since they are not free to enter their village of origin in northern Cyprus. Turkey would, in keeping with the Court's *Loizidou* judgment[14], normally be considered responsible for this, but it is not a party to Protocol No. 4. Therefore, the applicants now turn to the EU member states claiming that the formal suspension of the EU *acquis* in northern Cyprus upon the accession of Cyprus to the EU is the true cause of their misery, since this suspension allegedly legitimized the partition of the island. The respondent states, represented by the EU Presidency, have argued that the applicants can in no way be considered to fall under their jurisdiction since there is no level of control whatsoever. Even the most generous interpretation of the Court's case law could not lead to a different conclusion. Slightly more ambiguous, perhaps, is the position of Cyprus, which has submitted separate observations, pointing at its inability to exercise any *de facto* control in the northern part of the island. The Court's decision on admissibility of the application is currently awaited.

[12] ECHR decision (admissibility), 12 December 2001, Appl. No. 52207/99.
[13] *Artemi & Gregory versus Cyprus, Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia and Sweden*, Appl. No. 35524/06.
[14] See footnote 3.

The UK experience; rights of members of the armed forces

I am well aware of the fact that an analysis of Strasbourg case law offers only limited guidance to Defence and Justice authorities confronted with incidents during military operations. It will not come as a surprise that it is particularly the United Kingdom national experience which may be of help here, since among all states parties to the Convention the UK has been most actively involved in international military operations in recent years. In the case of *Al Skeini and Others versus the Secretary of State for Defence*[15] five Iraqi victims who were killed by British troops during armed incidents in Iraq were not considered to be under British jurisdiction in the sense of Article 1 of the Convention. The sixth victim, however, who was first taken to a British military base and then died, allegedly as a result of torture, did come under British jurisdiction. In my view, a fairly clear and logical line would seem to have been drawn here.

The British experience moreover provides an interesting insight into the issue of the states parties' responsibilities under the Convention vis-à-vis the members of their own military whenever the latter become victims of an alleged violation of the Convention. This is in fact the reverse situation of what I have described so far. In the judgment in the case of *R (Smith) versus the Secretary of State for Defence*[16], it was found that members of the armed forces are at all times and in all places around the world within the UK jurisdiction for Convention purposes. This principle will obviously be relevant first and foremost in the light of the Government's positive obligations under Article 2 of the Convention, guaranteeing the right to life. It will inevitably have consequences for the level and quality of equipment the military are provided with whenever involved in operations. It will also, as expressly stated in the judgment, require an independent and effective investigation into the death of a member of the armed forces, whatever the circumstances and wherever in the world the death occurs. Since the facts of this particular case were rather straightforward – Private Smith in fact died of heatstroke at a UK military base in Iraq – these questions were dealt with only hypothetically in the judgment.

Be that as it may, I consider it no more than logical that members of the armed forces, who remain subject to their national state's military law and may be tried by their national military courts irrespective of the place where they operate, remain under the jurisdiction of their national state at all times. The law follows the flag. After all, the legality of the armed forces' presence abroad and of their actions depends on their being subject to the national state's jurisdiction and their compliance with national laws. This understanding also forms the basis of a draft recommendation on human rights of members of the armed forces, which is currently being prepared within the Council of Europe.[17]

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[15] House of Lords, 13 June 2007, [2007] UKHL26.
[16] Court of Appeal, 18 May 2009, [2009] EWCA Civ 441.
[17] Draft Recommendation of the Committee of Ministers to member states on human rights of members of the armed forces, CDDH (2009)019 Addendum III.