

## HOW FAR DO THE LAWLESS AREAS OF EUROPE EXTEND? EXTRATERRITORIAL APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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In February of 2004, former Chechen President Zelimkhan Yandarbiyev was killed in Doha, Qatar, when his car was detonated by an explosive device.<sup>1</sup> Local authorities later arrested three alleged Russian intelligence agents for his death, one of them holding a diplomatic passport.<sup>2</sup> Two of the men admitted to being members of Russian intelligence services, and reported that the explosive used to kill Yandarbiyev was smuggled into Qatar through a diplomatic pouch.<sup>3</sup> A U.S. official later stated that the arrests of the Russian agents were made with assistance to Qatar by the United States.<sup>4</sup> After a diplomatic row between Russia and Qatar, the two suspects were tried and found guilty by a Qatari court, marking “the first time in recent history that a court has found that Russia, a key U.S. ally in the war on terrorism, itself employed terrorist tactics on foreign soil to eliminate one of its enemies.”<sup>5</sup>

Zelimkhan Yandarbiyev’s assassination should not be treated as an isolated event. In an era characterized by increased military intervention abroad, international courts should be prepared to

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1. Steven Lee Myers, *Russia Hits Qatar over Arrests of 2; Agents Held in Death of ex-Chechen Leader*, N.Y. TIMES, Feb. 27, 2004 (discussing the assassination of Yandarbiyev by a car bomb and arrest of suspects), available at LEXIS, European News Sources File.

2. Nick Paton Walsh, *Russian Fury as Agents Held in Doha*, THE GUARDIAN (London), Feb. 27, 2004 (describing Russia’s reaction to the arrests of three alleged agents responsible for the assassination), available at LEXIS, European News Sources File.

3. Michael Binyon & Jeremy Page, *Qatar Bombers “were Russian special forces.”* TIMES (London), Mar. 12, 2004 (reporting an alleged statement made during questioning of the Russian suspects, and noting that “Moscow would be hugely embarrassed by any trial if it revealed that its agents were instructed to assassinate Mr. Yandarbiyev, and even more so if it were shown that the bomb had been brought in through the diplomatic bag”), available at LEXIS, European News Sources File.

4. *US Helped Qatar Arrest Russian Agents: Top US Official*, AGENCFR.-PRESS, Mar. 22, 2004 (quoting a statement by U.S. Deputy Assistant Secretary for European and Eurasian Affairs Steven Pifer), available at LEXIS, European News Sources File.

5. Peter Baker, *Russians Convicted of Murder in Qatar; Court Says Intelligence Agents Killed Former Chechen President on Moscow’s Orders*, WASH. POST, June 30, 2004, available at LEXIS, European News Sources File.

address claims of human rights violations committed by state actors in foreign territories. The principle question in such inquiries, however, is to what extent human rights treaty obligations extend beyond the territorial jurisdiction of states acting on foreign soil. This article examines the role of the European Convention on Human Rights, arguably one of the most important international human rights agreements, in addressing claims of human rights violations by member-states to the Convention committed on the soil of nations not party to the Convention. The Convention's judiciary body — the European Court of Human Rights — has developed important precedents regarding alleged human rights violations committed in non-Convention nations and continues to grapple with the issue of the extraterritorial application of the Convention abroad. Most notably, the Court issued rulings in *Banković and Others v. Belgium and 16 Other Contracting States*, involving the NATO bombing of Yugoslavia, and *Öcalan v. Turkey*, concerning the Turkish abduction of a Kurdish leader in Kenya, which speak to the Convention's applicability to state actions in foreign nations.

This article proceeds as follows: Part I-A provides an overview of the European Convention on Human Rights — Europe's regional treaty protecting fundamental human rights and freedoms since its inception following the Second World War. Parts I-B and I-C, respectively, outline characteristics of the Convention's judicial body, the European Court of Human Rights, and its executive body, the Committee of Ministers, which is charged with enforcing rulings of the Court on member-states to the Convention. Part II provides a general outline of considerations of extraterritorial jurisdiction for state actors abroad.

Part III analyzes the European Court of Human Rights' ruling in *Banković*, in which citizens of Yugoslavia sued NATO for deaths caused by the bombing of a television station during Operation Allied Force. It provides, in Part III-A, a background to NATO intervention in Kosovo and, in Part III-B, a review of the plaintiff's argument that the European Convention applied to NATO actions in Yugoslavia — which at the time was not a member-state to the Convention. Those arguments relied on the Court's case law in: 1) *Loizidou v. Cyprus* and *Cyprus v. Turkey* — in which Turkey was found to have an obligation to uphold the Convention in areas of Cyprus under military occupation because of its exertion of effective control in those areas; 2) recent admissibility decisions in *Ilaşcu and Others v. Moldova and Russia*; and 3) *Issa and Others v. Turkey*, concerning military operations by member-states to the Convention in foreign nations. Parts III-C and III-D outline the respondent governments' arguments, and the Court's ruling in

*Banković*, respectively, in which it found that NATO countries did not have an obligation to adhere to the Convention. Part IV-A reviews the 2003 case of *Öcalan v. Turkey*—involving the abduction of Abdullah Öcalan by Turkish security forces at Nairobi International Airport, and Part IV-B reviews the Court's ruling—in contrast to *Banković*—that Turkey's actions in Kenya triggered the Convention's jurisdiction because of its effective control over Öcalan vis-à-vis his arrest and detention.

Parts V-X provide the bulk of this article's analyses, by indicating how European Court of Human Rights case law may apply to human rights violations committed abroad. Part V examines the state of the European Court of Human Rights' doctrine on extraterritorial application in the wake of *Banković*, *Öcalan*, and related cases. It argues that the Convention does apply to member-states acting abroad if its operations are characterized by effective control. Part VI reviews the recent adoption of the European Convention on Human Rights into the United Kingdom's jurisprudence through its passage of the Human Rights Act 1998. This development is significant, as suits have recently been filed against the United Kingdom for human rights violations committed by British military forces in Iraq alleging violations of the European Convention. Part VII specifically outlines the case of Baha Mousa, who was allegedly tortured with other Iraqis and killed by British military personnel while in their custody. Mousa's case, along with other complaints, has been filed before the High Court of England and Wales in the aforementioned suits against the United Kingdom.

Part VIII proceeds to examine the European Court's treatment of mistreatment and torture claims of persons in state custody in the cases of *Ireland v. The United Kingdom*, *Tomasi v. France*, *Ribitsch v. Austria*, and *Selmouni v. France*, in which the Court has found member-states to the Convention in violation of its prohibition against torture and inhuman treatment. Part IX begins with an analysis of *McCann and Others v. The United Kingdom*, in which the British government was found to have violated the Convention's protection of the fundamental right to life in the killings of Irish Republican Army suspects in Gibraltar. It also reviews the Court's case law on the "disappearance" cases of *Çakici v. Turkey* and *Timurta<sup>o</sup> v. Turkey*, in which the Court held that the unacknowledged detentions and deaths of Kurdish separatists by Turkish security forces also amounted to violations of the Convention's right to life, and *Velikova v. Bulgaria*, in which the Court found a violation of the right to life of an individual detained by Bulgarian police.

Part X concludes this Article with an argument that the United Kingdom should be liable for the death of Baha Mousa and other

alleged human rights violations committed in Iraq based on previous European Court of Human Rights case law. However, Mousa's case should not be considered the endpoint of an examination of the European Convention on Human Rights' extraterritorial application. The Court is now placed to review numerous claims of human rights violations originating from recent and ongoing conflicts, as it has and is continuing to do with cases regarding Turkey's 1990s operations against Kurdish separatists and Russia's continuing conflict in Chechnya.<sup>6</sup> In an era in which international military intervention may continue to occur for an unforeseeable amount of time, an examination of extraterritorial obligations to protect fundamental human rights in "lawless areas" of conflict is warranted.

#### I-A. THE COUNCIL OF EUROPE AND EUROPEAN CONVENTION ON HUMAN RIGHTS

The Council of Europe was created in May of 1949.<sup>7</sup> The principal motivation for developing the Council was to create a Pan-European association in the wake of the Second World War.<sup>8</sup> The Council's overriding mission was to protect democratic values and human rights.<sup>9</sup> At its inception, the Council restricted membership

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6. See STEFAN KIRCHNER, THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN TIMES OF CONFLICT, at [http://www.sarigiannidis.gr/articles/Kirchner\\_articleECtHR.PDF](http://www.sarigiannidis.gr/articles/Kirchner_articleECtHR.PDF) (last visited Feb. 25, 2005) ("[N]ow that the first cases relating to the conflicts in Kurdistan and Chechnya are being dealt with by the E.C.H.R., it has been estimated that up to 100,000 new cases could reach [the European Court of Human Rights] every year."). See also Press Release, Registrar of the European Court of Human Rights, Six Complaints Against Russia Concerning Events in Chechnya Declared Admissible (Jan. 16, 2003), at <http://www.echr.coe.int> (last visited Feb. 25, 2005) (announcing in 2003 the admissibility of the first six claims brought by Chechens for alleged human rights violations committed in Chechnya by the Russian military in 1999 and 2000).

7. COUNCIL OF EUROPE, MANUAL OF THE COUNCIL OF EUROPE: STRUCTURE, FUNCTIONS AND ACHIEVEMENTS 3 (1970) [hereinafter MANUAL] (discussing the creation of the Council of Europe by statute). See also PETER M. R. STIRK, A HISTORY OF EUROPEAN INTEGRATION SINCE 1914 103 (1996) [hereinafter HISTORY OF EUROPEAN INTEGRATION] (noting that the specific proposal behind the Council of Europe's formation came from French Foreign Minister Georges Bidault, who advocated for the creation of a European Assembly in 1948).

8. See A.H. ROBERTSON, EUROPEAN INSTITUTIONS: CO-OPERATION, INTEGRATION, UNIFICATION 4-5 (2d ed. 1966) (outlining the formative history of the Council of Europe and importance of a "need for European unity"). See also Statute of the Council of Europe, May 5, 1949, art. 1(a), Europ. T.S. No. 1 [hereinafter Statute] (stating that "[t]he aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress").

9. See Diana Pinto, *The Council of Europe: Its Missions and Its Structures*, in THE CHALLENGES OF A GREATER EUROPE: THE COUNCIL OF EUROPE AND DEMOCRATIC SECURITY 29, 29 (1996) (denoting the "basic functions" of the Council of Europe). See also Walter Schwimmer, *Statements Made at the Opening Session* (Nov. 3, 2000), in EUROPEAN MINISTERIAL CONFERENCE ON HUMAN RIGHTS AND COMMEMORATIVE CEREMONY OF THE 50TH

to ten West European nations: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.<sup>10</sup> In the Statute of the Council of Europe, it was these nations that deemed themselves devoted “to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy.”<sup>11</sup> Because of the fundamental requirement of democratic governance for membership, the Soviet Union and Soviet-bloc nations were not originally included in the Council.<sup>12</sup>

Shortly after the creation of the Council, it adopted the European Convention on Human Rights in 1950.<sup>13</sup> The Convention enshrines “fundamental freedoms which are the foundation of justice and peace.”<sup>14</sup> It was the first convention passed by the Council, and regarded by some as its most important.<sup>15</sup> Since it has been in force, all member-states of the Council of Europe must ratify the Convention to be a Council member.<sup>16</sup> Many of the rights and protections in the Convention are similar to those found in the Universal Declaration of Human Rights, passed two years prior to the Convention.<sup>17</sup> Major rights and protections in the European

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ANNIVERSARY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 13, 15 (2000) (“The Council of Europe has changed into a more political and operational organisation. One thing has not changed: the protection of human rights is and remains at the heart of its mission.”).

10. MANUAL, *supra* note 7, at 3 (listing the original ten members of the Council of Europe).

11. Statute, *supra* note 8, at pmb. See also MANUAL, *supra* note 7, at 8 (discussing the meaning of the “values” shared by the original member states and proposing that these values emanate from the “cumulative influence of Greek philosophy, Roman law, the Western Christian Church, [and] the humanism of the Renaissance and the French Revolution”).

12. See Pinto, *supra* note 9, at 29 (listing original members of the Council).

13. DONNA GOMIEN ET AL., LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 17-19 (1996) (outlining the general history and framework of the European Convention on Human Rights).

14. Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, pmb., Europ. T.S. No. 5 [hereinafter Convention for Human Rights], available at <http://www.echr.coe.int/Convention/webConvenENG.pdf> (last visited Feb. 28, 2005).

15. See Pinto, *supra* note 9, at 34 (asserting that the Council “derives its strength from the more than 155 conventions it has concluded over the years, the oldest and most important of which is the European Convention on Human Rights”).

16. See Convention for Human Rights, *supra* note 14, art. 1 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention.”). See also GOMIEN, *supra* note 13, at 18 (discussing the Convention and noting the “compulsory jurisdiction” of the Convention and Court of Human Rights); Heinrich Klebes, *Membership in International Organizations and National Constitutional Law: A Case Study of the Law and Practice of the Council of Europe*, ST. LOUIS-WARSAW TRANSATLANTIC L.J. 69, 76 (1999) (noting that a new Council of Europe member must sign the Convention at the same time they formally sign the treaty joining the Council).

17. Colloquium, *In our hands: The effectiveness of human rights protection 50 years after the Universal Declaration*, EUROPEAN REGIONAL COLLOQUY ORGANISED BY THE COUNCIL OF

Convention include the right to life,<sup>18</sup> right to liberty and security,<sup>19</sup> right to fair trial,<sup>20</sup> right to freedom of thought, conscience and religion,<sup>21</sup> right to freedom of expression,<sup>22</sup> prohibition of torture,<sup>23</sup> prohibition of slavery,<sup>24</sup> and prohibition of discrimination.<sup>25</sup> Since its inception, a number of changes and protocols have been made to the Convention, although its fundamental nature has remained unchanged.<sup>26</sup> The major operational organs of the Convention include the European Court of Human Rights and Committee of Ministers.

### I-B. THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights is the judicial body which interprets the European Convention on Human Rights for the Council of Europe.<sup>27</sup> The European Court of Human Rights was created in tandem with the Convention as its judicial decision-making body.<sup>28</sup> The potency of the Court is primarily due to two aspects. First, the Court retains compulsory jurisdiction over all Council of Europe members.<sup>29</sup> Secondly, the Court allows individuals, as well as states, to petition the Court directly for relief

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EUROPE 17 (1998) (statement of Daniel Tarschys, Secretary General of the Council of Europe) ("As you know, much of our European human rights protection system was inspired by and is deeply indebted to the Universal Declaration."). Many of the protections found in the Convention are also found in the Universal Declaration of Human Rights. See Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., art. 3, U.N. Doc. A/RES/810 (1948) (right to life, liberty and security); *id.* art. 4 (prohibition of slavery); *id.* art. 7 (prohibition of discrimination).

18. Convention for Human Rights, *supra* note 14, art. 2.

19. *Id.* art. 5.

20. *Id.* art. 6.

21. *Id.* art. 9.

22. *Id.* art. 10.

23. *Id.* art. 3.

24. *Id.* art. 4.

25. *Id.* art. 14.

26. See GOMIEN, *supra* note 13, at 18 (outlining several of the additional protocols that have been made to the Convention).

27. Convention for Human Rights, *supra* note 14, art. 19 ("To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as 'the Court.' It shall function on a permanent basis.").

28. *Id.*

29. *Id.* art. 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."); *id.* art. 32(1) ("The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto . . ."); *id.* art. 32(2) ("In the event of dispute as to whether the Court has jurisdiction, the Court shall decide."); *id.* art. 46(1) ("The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.").

from alleged violations.<sup>30</sup> These principles of the Convention were enshrined by Protocol Number 11 to the Convention, signed in 1994 and in force since 1998.<sup>31</sup> Together, these principles make the Convention, through the Court, an “essential Bill of Rights” for Europe.<sup>32</sup>

The number of judges in the Court is equal to the number of Council of Europe member-states, which, as of 2004, was forty-five.<sup>33</sup> Judges are elected into office for six-year terms by the Parliamentary Assembly of the Council of Europe.<sup>34</sup> Ordinarily, to decide a case, the Court meets in a Committee of three judges, a Chamber of seven judges, or in the case of an extraordinarily important issue, a Grand Chamber of seventeen judges.<sup>35</sup>

However, for a case to be admissible, it is first reviewed by a judge-rapporteur and committee of three judges.<sup>36</sup> If deemed inadmissible, the Court may dispose of the case at any time.<sup>37</sup> Criteria for admissibility include several major requirements. First, the Court may only review cases “after all domestic remedies have been exhausted.”<sup>38</sup> This requirement is based on the well-accepted principle of international law that states must first have an

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30. *Id.* art. 34 (“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties . . .”).

31. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, May 11, 1994, p.mbl., Europ. T.S. No. 155, available at <http://conventions.coe.int> (last visited Feb. 28, 2005).

32. EUROPAWORLD, HUMAN RIGHTS AND EUROPE’S WRONGS (Oct. 11, 2000), at <http://www.europaworld.org> (last visited Feb. 28, 2005).

33. THE COUNCIL OF EUROPE, THE COUNCIL OF EUROPE’S MEMBER STATES (2004), at <http://www.coe.int> (last visited Feb. 28, 2005). Current members include Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Spain, Sweden, Switzerland, “The former Yugoslav Republic of Macedonia,” Turkey, Ukraine, and the United Kingdom. *Id.* See also GOMIEN, *supra* note 13, at 33.

34. Convention for Human Rights, *supra* note 14, art. 23 (“The judges shall be elected for a period of nine years.”); GOMIEN, *supra* note 13, at 34 (noting that the first actual election occurred several years after the Court was created in 1959).

35. Convention for Human Rights, *supra* note 14, art. 27 (stating size of review bodies); *id.* art. 30 (stating that the Grand Chamber meets when there is a “serious question affecting the interpretation of the Convention”).

36. See *A New Court of Human Rights in Strasbourg*, in THE CHALLENGES OF A GREATER EUROPE: THE COUNCIL OF EUROPE AND DEMOCRATIC SECURITY 81, 81 (1996) (outlining procedures by which applications to the Court are first reviewed for admissibility).

37. See Convention for Human Rights, *supra* note 14, art. 35(4) (“The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.”).

38. *Id.* art. 35(1).

opportunity to provide relief to the claim domestically.<sup>39</sup> However, there are of course exceptions to this requirement, most notably involving situations in which pursuing a claim domestically would be difficult or impossible given wartime situations.<sup>40</sup> Second, an applicant must file a claim with the Court within six months of the date in which a domestic decision was finalized.<sup>41</sup> The six-month period begins not only when the decision is issued, but when the applicant becomes aware of that decision.<sup>42</sup>

A third requirement, particular to individual applicants, is that a case will be deemed inadmissible if found to be “incompatible with the provisions of the Convention or the protocols thereto, [or] manifestly ill-founded.”<sup>43</sup> The difference between the first and second item is slight. A case will be deemed incompatible with the Convention if the act or omission raised by the applicant does not speak to a protected right enumerated in it.<sup>44</sup> On the other hand, a case which does speak to a protected right under the Convention will be deemed ill-founded if not found to be a *prima facie*

39. GOMIEN, *supra* note 13, at 55 (noting that the requirement to exhaust domestic remedies is based on a “general principle of international law”); A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 265 (1993) [hereinafter ROBERTSON & MERRILLS, HUMAN RIGHTS IN EUROPE] (noting that the requirement to exhaust domestic remedies is based on “[a] well-established part of international law . . . [I]t would be unjust to engage the international responsibility of a State for an act or omission when a national means of redress is available but has not been used.”).

40. Jurisprudence has developed in this area in regards to Turkey’s war against Worker’s Party of Kurdistan (PKK) separatists. In *Akdivar v. Turkey*, applicants sued the government for destroying property in an anti-PKK operation. *Akdivar v. Turkey*, 1996-IV Eur. Ct. H.R. 1192, 1199. Although the government alleged that they had not yet exhausted domestic remedies, the Court noted that there were “special circumstances” that waived this requirement. *Id.* at 1211. In particular, the Court noted difficulty in gathering evidence and pursuing a claim because that region of Southeast Turkey was basically in a state of war. *Id.* at 1211-12. The Court also noted that facts of the case indicated a “clear reluctance” of the government to investigate acts of its own soldiers against the Kurdish population. *Id.* at 1209. In *Kiliç v. Turkey*, the applicant sued the government for the assassination of a Kurdish human rights worker. *Kiliç v. Turkey*, 2000-II Eur. Ct. H.R. 75, 83-84. The Court found that Turkey had not fulfilled its obligation to investigate the act and provide a remedy to the applicant because it had “permitted or fostered a lack of accountability of members of the security forces for their actions.” *Id.* at 99. The government’s inability to provide a domestic remedy, even in a wartime situation, was in itself found to be a violation of the Convention. *Id.* at 103.

41. Convention for Human Rights, *supra* note 14, art. 35 (1) (“The Court may only deal with the matter after all domestic remedies have been exhausted . . . and within a period of six months from the date on which the decision was taken.”).

42. GOMIEN, *supra* note 13, at 59 (discussing different circumstances in which the six-month period begins).

43. Convention for Human Rights, *supra* note 14, art. 35 (3).

44. ROBERTSON & MERRILLS, HUMAN RIGHTS IN EUROPE, *supra* note 39, at 272 (asserting that an application is “doomed to fail” if it alleges non-covered rights, such as a “right to asylum” or a “right not to be extradited”).



violation.<sup>45</sup> The “clearest situation [of an ill-founded application] is when the applicant fails to adduce any evidence in support of his claim.”<sup>46</sup> The final major requirement of admissibility is that an application has not “already been submitted to another procedure of international investigation or settlement and contains no relevant new information.”<sup>47</sup> This requirement has become more relevant given the development of other international mechanisms to address alleged human rights violations, such as the European Court of Justice<sup>48</sup> and the Human Rights Committee of the International Covenant on Civil and Political Rights.<sup>49</sup> “No relevant new information” is considered to be facts that were not known when the original application was submitted.<sup>50</sup>

Upon a finding that an application is admissible, review on the merits begins. The Court must first attempt to find a “friendly settlement” between parties.<sup>51</sup> If a settlement can be achieved, the

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45. See *id.* at 272-73 (quoting Felix Ermacora, *Rights of Minorities and Self-Determination in the Framework of the CSCE*, in *THE HUMAN DIMENSION OF THE HELSINKI PROCESS: THE VIENNA FOLLOW-UP MEETING AND ITS AFTERMATH* 197 (Arie Bloed and Pieter van Dijk eds., 1991)).

46. *Id.* at 273.

47. Convention for Human Rights, *supra* note 14, art. 35(2)(b).

48. See Elizabeth F. Defeis, *Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights*, 19 *DICK. J. INT'L L.* 301, 302-317 (2001) (discussing the gradual integration of human rights into community law of the European Union); *id.* at 329 (concluding that “[w]ithout question, the European Union will play an increasingly important role in the area of human rights, both in its external and internal policies”). See also SALVATORE ZAPPALA, *HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS* 10-14 (Ian Brownlie & Vaughan Lowe eds., 2003) (discussing systemic intricacies between the European Court of Human Rights, European Court of Justice, and International Criminal Tribunal for the former Yugoslavia); Jonathan Miller, *A European Bill of Rights?*, in *THE HARMONIZATION OF EUROPEAN PUBLIC POLICY: REGIONAL RESPONSES TO TRANSNATIONAL CHALLENGES* 219, 221-33 (Leon Hurwitz ed., 1983) (discussing the increasing willingness of the European Court of Justice to broaden its human rights framework in tandem with the European Court of Human Rights); Gerard Quinn, *The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?*, 46 *MCGILL L.J.* 849, 851-54 (2001) (outlining general issues pertinent to the European Union’s increasing human rights agenda).

49. See GOMIEN, *supra* note 13, at 61-62 (discussing implications of raising claims in either or both the European Court of Human Rights and the International Covenant on Civil and Political Rights); ROBERTSON & MERRILLS, *HUMAN RIGHTS IN EUROPE*, *supra* note 39, at 274 (discussing both forums, and noting the possibility of “appealing” a decision from the Court of Human Rights to the Covenant’s Human Rights Committee). For a general comparison of application procedures of the European Court of Human Rights and the Human Rights Committee, see Rein Müllerson, *The Efficiency of the Individual Complaint Procedures: The Experience of CCPR, CERD, CAT and ECHR*, in *MONITORING HUMAN RIGHTS IN EUROPE: COMPARING INTERNATIONAL PROCEDURES AND MECHANISMS* 25 (Arie Bloed et al. eds., 1993).

50. GOMIEN, *supra* note 13, at 61 (noting that “no new relevant information’ . . . encompasses only facts that were not known at the time of the previous application or have occurred since the [Court] disposed of the matter”).

51. Convention for Human Rights, *supra* note 14, art. 38(1)(b) (“If the Court declares the application admissible, it shall . . . place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human

case is then removed from the Court.<sup>52</sup> The finding of friendly settlements has become increasingly common, with one estimation being that one of seven cases are resolved through friendly settlement.<sup>53</sup> If such a settlement cannot be achieved, review continues, with proceedings scheduled by the Court.<sup>54</sup> Arguments and testimony are conducted in one of the Court's official languages: English or French.<sup>55</sup> Interpreters are provided for those not proficient in either language.<sup>56</sup> Hearings are generally public, with certain exceptions depending on circumstances.<sup>57</sup> After all arguments and evidence are offered, the judges deliberate in private.<sup>58</sup> A majority vote amongst the judges is required for final determination.<sup>59</sup> If a violation is found to have occurred, the Court may then "afford just satisfaction" to the plaintiff.<sup>60</sup> Just satisfaction is monetary and may include payment of legal and court fees, as well as "damages" that may either be compensatory in nature or "moral" — awarding a plaintiff for loss and punishing the actor in breach for violating the Convention.<sup>61</sup>

#### I-C. THE COMMITTEE OF MINISTERS

The Council of Europe's Committee of Ministers serves as the executive body for the Council.<sup>62</sup> It is composed of the Foreign Affairs Ministers of each Council member-state.<sup>63</sup> The Committee

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rights.”).

52. *Id.* art. 39 (“If a friendly settlement is effected, the Court shall strike the case out of its list.”).

53. ROBERTSON & MERRILLS, *HUMAN RIGHTS IN EUROPE*, *supra* note 39, at 282 (discussing the increasing incidence of friendly settlements and estimating that one in seven cases are resolved in this manner).

54. GOMIEN, *supra* note 13, at 70-71 (discussing the Court's procedures).

55. D.J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 658 (1995) (discussing procedures for review of cases).

56. EUR. CT. H.R., RULE 34(6), *available at* <http://www.echr.coe.int> (last visited Feb. 28, 2005).

57. *Id.* RULE 63(1-3) (outlining the “public character of hearings”).

58. *Id.* RULE 22(1) (“The Court shall deliberate in private. Its deliberations shall remain secret.”).

59. *Id.* RULE 23(1) (“The decisions of the Court shall be taken by a majority of the judges present. In the event of a tie, a fresh vote shall be taken and, if there is still a tie, the President shall have a casting vote.”).

60. Convention for Human Rights, *supra* note 14, art. 41.

61. HARRIS, *supra* note 55, at 686-87 (discussing pecuniary damages upon finding of a Convention violation).

62. Statute, *supra* note 8, art. 13 (“The Committee of Ministers is the organ which acts on behalf of the Council of Europe.”).

63. *Id.* art. 14 (“Representatives on the Committee shall be the Ministers for Foreign Affairs.”). In actuality, representatives of Foreign Affairs Ministers are the individuals who do much of the Committee's work. *See* ROBERTSON & MERRILLS, *HUMAN RIGHTS IN EUROPE*, *supra* note 39, at 324.

considers steps necessary to “further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters.”<sup>64</sup> Among other things, the Committee may make recommendations to member-states about policy issues,<sup>65</sup> invite states to become new members of the Council,<sup>66</sup> terminate states from Council membership,<sup>67</sup> and ratify the Council’s annual budget.<sup>68</sup>

In regards to the Convention on Human Rights, the Committee plays the crucial role of enforcing the decisions of the Court.<sup>69</sup> The Committee might oversee the payment of monetary damages to a plaintiff upon finding of a Convention violation.<sup>70</sup> It might also monitor a violating member-state’s compliance with the Convention by amending or reversing a law, administrative act, or judicial decision.<sup>71</sup> However, it should be noted that the Committee cannot compel a non-complying member to remedy a violation.<sup>72</sup> Perhaps the one power that the Committee does retain to address violations

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64. Statute, *supra* note 8, art. 15(a).

65. *Id.* art. 15(b) (“In appropriate cases, the conclusions of the Committee may take the form of recommendations to the governments of members.”).

66. *Id.* art. 4 (“Any European state which is deemed to be able and willing to fulfill the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers.”).

67. *Id.* art. 8 (“Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation [and] the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.”).

68. *Id.* art. 38(c) (“In accordance with the financial regulations, the budget of the Council shall be submitted annually by the Secretary General for adoption by the Committee.”).

69. Convention for Human Rights, *supra* note 14, art. 46(2) (“The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”).

70. *Id.* art. 41 (“If the Court finds that there has been a violation of the Convention or the protocols thereto . . . the Court shall, if necessary, afford just satisfaction to the injured party.”).

71. GOMIEN, *supra* note 13, at 90 (“This supervision may take the form of monitoring legislative or administrative reforms instituted by states in response to a finding of a violation, or, in the case of judgments for ‘just satisfaction’ under Article [41], ensuring that the state has made its payment to the individual.”).

72. *Id.*

It is important to remember that the Committee of Ministers has no power to intervene directly in the supervision and execution of judgments by the offending state in a given case . . . . Should a state choose to ignore, or not give full force to a judgment of the Court or a decision of the Committee of Ministers, there may often be little that either body can do to persuade the state to respect the holding of the Strasbourg body.

*Id.* See also ROBERTSON & MERRILLS, HUMAN RIGHTS IN EUROPE, *supra* note 39, at 338 (“The limitations of the Committee are all reflections of its political character and it was, of course, the desire of the Contracting States to have a political rather than a judicial organ as the ultimate decision-maker . . .”).

by a member-state is its most extreme — Article 8 of the Convention allows the Committee to remove a nation from the Council of Europe.<sup>73</sup> The Committee came close to considering this option following the 1967 military coup in Greece, but the Greek government subsequently chose to leave the Council on its own accord before the Committee could take such action.<sup>74</sup>

Still, enforcement of judgments against member-states has been extremely successful.<sup>75</sup> Failure to comply with judgments is virtually non-existent.<sup>76</sup> This includes the numerous times the

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73. Statute, *supra* note 8, art. 8 (“Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation [and] the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.”).

74. GOMIEN, *supra* note 13, at 89 (“In the Greek case the Committee of Ministers considered that a great many Articles of the Convention had been violated. However, before the Committee adopted its resolution in this case, Greece withdrew from the Council of Europe and denounced the Convention.”). See also ROBERTSON & MERRILLS, HUMAN RIGHTS IN EUROPE, *supra* note 39, at 337-38 (outlining the Greek case and discussing other instances in which the Committee addressed cases of member-states continually violating the Convention); Pinto, *supra* note 9, at 30 (outlining the Council’s strained relationships with Greece and Turkey following government overthrows, and the severance of ties with Yugoslavia).

Although Turkey was often cited for its relatively poor human rights record and strained relationship with the Council of Europe for its war against Kurdish separatists, the Council’s relationship with Russia has become increasingly difficult in regards to its war in Chechnya. See RUDOLF BINDIG, COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, Doc. 9732: *The Human Rights Situation in the Chechen Republic*, § II, ¶ 3 (Mar. 13, 2003) (suggesting that an international war crimes tribunal be created for human rights violations in Chechnya), available at <http://www.europarl.eu.int/meetdocs/delegations/russ/20030409-Tchechenie/05.pdf> (last visited Feb. 28, 2005); Press Release, Council of Europe, Assembly Gravely Concerned About Human Rights in Chechnya, Puts the Situation Under Its Constant Review (Jan. 25, 2001) (“[The Council of Europe’s Parliamentary Assembly] stressed once again that Russia did not act in line with the Council of Europe’s principles and values in the conduct of its military campaign and that many of the Assembly’s requirements in this regard are yet to be implemented.”), available at <http://press.coe.int> (last visited Feb. 28, 2005).

The European Court of Human Rights has declared admissible, for the first time, claims against Russia by Chechens allegedly committed during its 1999-2000 war in Chechnya in January of 2003. Press Release, European Court of Human Rights, Six Complaints Against Russia Concerning Events in Chechnya Declared Admissible (Jan. 16, 2003), available at <http://www.echr.coe.int> (last visited Feb. 28, 2005). Those claims are: *Khashiyev v. Russia*, App. No. 57942/00 at 12 (2002) (charging Russia with torture, disappearances, and extrajudicial killings in Grozny), at <http://www.echr.coe.int> (last visited Mar. 1, 2005); *Isayeva v. Russia*, App. No. 57947/00 at 10-11 (2002) (charging Russia with deaths of civilians following a bombardment of Grozny), at <http://www.echr.coe.int> (last visited Mar. 1, 2005); and *Isayeva v. Russia*, App. No. 57950/00 at 2, 8 (2003) (charging Russia with deaths of civilians following a bombardment of Katyr-Yurt), at <http://www.echr.coe.int> (last visited Mar. 1, 2005). See Press Release, *supra*.

75. HARRIS, *supra* note 55, at 702 (observing that the record of compliance with judgments by member-states “is generally recognised to be exemplary”).

76. Klebes, *supra* note 16, at 78 (noting that in the forty year history of the Convention, the Court has adjudicated approximately 800 judgments, and “[a]ll its decisions have been respected, though sometimes grudgingly, by the States concerned”).

Court has ordered member-states to pay monetary compensation to plaintiffs for Convention violations.<sup>77</sup> In 2001, the Court ordered Turkey to pay a record high of £2.5 million for a military operation against Kurds that killed fifteen civilians, a payment the Turkish government agreed to make.<sup>78</sup> In other instances, member-states have gone so far as to change constitutions to comply with Court rulings, as Germany has done.<sup>79</sup> This level of compliance with the Convention — through a body formed of the Foreign Ministers of all Council of Europe members — and its compulsory jurisdiction and ability for individuals to bring suits directly against member-states, make the Convention an extremely powerful mechanism for enforcement of human rights.<sup>80</sup>

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77. *Austria Violated Rights of Anti-Haider Paper: EU Rights Court*, AGENCE FR. PRESSE, Feb. 26, 2002 (noting a \$14,700 fine imposed on Austria for violating free speech rights), available at LEXIS, European News Sources File; *European Human Rights Court Condemns Turkey in Kurd's Death*, AGENCE FR. PRESSE, Feb. 14, 2002 (noting a \$63,100 fine imposed on Turkey after police tortured a Kurd to death), available at LEXIS, European News Sources File; *Council of Europe Says London Must Allow Elections in Gibraltar*, AGENCE FR. PRESSE, June 26, 2001 (noting a \$64,000 fine imposed on the United Kingdom for failing to secure voting rights for Gibraltar residents), available at LEXIS, European News Sources File; *France Fined by European Court Over Murder Trial of German*, AGENCE FR. PRESSE, Feb. 13, 2001 (noting a \$14,000 fine imposed on France for failing to secure trial rights to a German physician), available at LEXIS, European News Sources File; *Cyprus Says It Will Pay EU Human Rights Fine to Turkish Cypriot*, AGENCE FR. PRESSE, Dec. 22, 2000 (noting a \$15,370 fine imposed on Cyprus for maltreatment of a suspected criminal), available at LEXIS, European News Sources File.

78. Gareth Jenkins, *Cloudy Forecast for Turkey*, AL-AHRAM WEEKLY ON-LINE (Cairo), June 21–27, 2001 (noting strained relationships between Turkey and the European Union about its human rights record and an announcement by Turkey's interior minister that it would pay the £2.5 million sterling fine), available at <http://weekly.ahram.org.eg> (last visited Mar. 3, 2005).

79. Georg Ress, *The European Convention on Human Rights and States Parties: The Legal Effect of the Judgments of the European Court of Human Rights on the Internal Law and Before Domestic Courts of the Contracting States*, in PROTECTION OF HUMAN RIGHTS IN EUROPE: LIMITS AND EFFECTS 209, 256 (Irene Maier ed., 1982) (describing the Federal Republic of Germany's pre-emptive amendment to its Code of Criminal Procedure and Code of the Constitution of Courts to comply with the Court). See also HUMAN RIGHTS: A CONTINUING CHALLENGE FOR THE COUNCIL OF EUROPE 14 (1995) (noting alteration of laws or regulations in France, Ireland, Italy, Sweden, Switzerland, and the Netherlands to comply with the Convention); MANUAL, *supra* note 7, at 282 (describing instances when Norway changed its constitution, Belgium changed legislation, and Austria changed its Code of Criminal Procedure to comply with the Convention).

80. There is, of course, frequent criticism of the effectiveness of the Court and the Convention. For example, Doris Marie Provine argues that the Convention has not effectively addressed or conceptualized the problems encountered by half the population of Council of Europe member-states: women. Doris Marie Provine, *Women's Concerns in the European Commission and Court on Human Rights*, in LAW ABOVE NATIONS: SUPRANATIONAL COURTS AND THE LEGALIZATION OF POLITICS 76 (Mary L. Volcansek ed., 1997).

## II. JURISDICTION AND EXTRATERRITORIALITY

At a very general level, the framework in which extraterritorial actions committed by nation-states occur can be examined through well-accepted principles of jurisdiction.<sup>81</sup> Jurisdiction, it should be noted, differs from the concept of sovereignty.<sup>82</sup> On the international stage, a nation-state exercises jurisdiction over criminal acts based on principles of territoriality (the act was committed within the nation-state's territorial boundaries), nationality (the act occurred outside the nation-state's territory but was committed by a national), or passive nationality (the act occurred outside the nation-state's territory but the victim was a national).<sup>83</sup> The territorial principle is the most often cited grounds for the exercise of jurisdiction — and well-accepted in customary international law — whereas nationality, and passive nationality, respectively, are less relied on.<sup>84</sup>

In its model classification of international legal documents, the Council of Europe itself recognizes specific types of extraterritorial jurisdiction, such as traditionally accepted principles of jurisdiction over consulates, embassies, and military personnel stationed abroad.<sup>85</sup> It also recognizes “other” forms of extraterritorial intervention, such as “artificial islands, *terrae nullius*, etc.”<sup>86</sup> The

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81. For a general definition on jurisdiction, see WILLIAM R. SLOMANSON, *FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW* 214 (4th ed. 2003) (“The term jurisdiction has several meanings. It includes the legal capacity or power of a State to (a) establish, (b) enforce, and (c) adjudicate rules of law within its boundaries.”). See also Vaughan Lowe, *Jurisdiction*, in *INTERNATIONAL LAW* 329, 329 (Malcolm D. Evans ed., 1st ed. 2003) (“Jurisdiction’ is the term that describes the limits of the legal competence of a State or other regulatory authority (such as the European Community) to make, apply, and enforce rules of conduct upon persons.”).

82. SLOMANSON, *supra* note 81, at 214 (noting the conceptual differences between “jurisdiction” and “sovereignty” and defining sovereignty as “the exclusive right of a State to govern the affairs of its inhabitants”).

83. ANTONIO CASSESE, *INTERNATIONAL LAW* 260-62 (2001) (outlining general principles by which nation-states exert jurisdiction in criminal matters).

84. SLOMANSON, *supra* note 81, at 216-22 (discussing the degree of acceptance in customary international law of jurisdictional principles).

85. Lowe, *supra* note 81, at 331-33 (discussing a model plan formulated by the Council of Europe for the categorization of international law documents). The plan is entitled *Model Plan for the Classification of Documents Concerning State Practice in the Field of Public International Law*, Council of Europe Resolution (68) 17 (June 28, 1968). Its latest iteration is Council of Europe Recommendation No. R (97) 11 (June 12, 1997) [hereinafter Council of Europe Recommendation], available at <http://cm.coe.int/ta/rec/1997/97r11.html> (last visited Mar. 3, 2005).

86. Council of Europe Recommendation, *supra* note 85. *Terrae nullius* or “empty land” refers to a legal fiction devised during the British colonial era. It justified colonization of already inhabited areas on the basis that such land was either not inhabited or inhabited by barbarians. This fiction has since been formally terminated by an Australian decision in 1992. Shelby D. Green, *Specific Relief for Ancient Deprivations of Property*, 36 *AKRON L. REV.* 245, 253-65 (2003); Rick Sarre, *The Imprisonment of Indigenous Australians: Dilemmas and*

Council has also examined and recognized specific forms of extraterritorial jurisdiction for criminal acts.<sup>87</sup>

Practices based on the doctrine of universal jurisdiction have become increasingly more relevant. The exertion of universal jurisdiction is justified on the rationale that the act in question is of such a grave and far-sweeping nature that any state is morally bound to apprehend and/or stop the actor, regardless of nationality or location.<sup>88</sup> On the other hand, commentators have also pointed out that the customary application of universal jurisdiction over piracy — a crime not generally considered to be “heinous” relative to other crimes such as genocide — may have been rationalized on the premise that pirates on the high seas easily eluded capture.<sup>89</sup> A number of nations have enacted legislation that enables some form

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*Challenges for Policymakers*, 4 GEO. PUB. POL'Y REV. 165, 165-69 (1999).

87. COUNCIL OF EUROPE, EXTRATERRITORIAL CRIMINAL JURISDICTION 9-16 (1990).

88. SLOMANSON, *supra* note 81, at 222 (“Certain crimes spawn ‘universal interest’ because they are sufficiently heinous to be crimes against the entire community of nations.”); Lowe, *supra* note 81, at 343 (“Some crimes are regarded as so heinous that every State has a legitimate interest in their repression.”). See also M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 96-105 (2001) (providing an overview of the basis for universal jurisdiction); Jonathan H. Marks, *Mending the Web: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council*, 42 COLUM. J. TRANSNAT'L L. 445, 463-72 (2004). Marks further distinguishes the rationale for exercising universal jurisdiction into five sub-categories: 1) The “Manichean Rationale” — the act in question is of such a nature that its perpetrator is considered an enemy of all humanity; 2) the “Common Interest Rationale” — the act in question poses a threat to not only one state but all states, which thus have an interest in suppressing it; 3) the “Agency Rationale” — the act in question has violated common norms of *ius gentium* — the law of all nations — thus, a nation-state acts as an agent of all nations in repressing the act; 4) the “*Ius Cogens* Rationale” — the act in question violates a norm of international law so serious that it cannot be permitted and must be repressed; 5) the “Harm Rationale” — the act in question is so harmful and widespread (e.g. genocide) that it demands repression; and 6) the “Pragmatic Rationale” — in addition to any of the above reasons, the act in question must be repressed because if not, the perpetrator(s) might not be brought to justice unless a nation-state takes action. *Id.*

The concept of *Ius Gentium*, the law of all nations, or alternatively, the law of all peoples, is most famously spoken of in Justinian's Institutes. See J. INST. 1.1.3 (Peter Birks & Grant McLeod trans., Cornell University Press 1987). The *Ius Gentium* is “the law which natural reason makes for all mankind . . . . It is called ‘the law of all peoples’ because it is common to every nation.” *Id.* at 1.1.2. The law of all nations should not be confused with what is referred to as the modern “international law.” See WOLFGANG KUNKEL, AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY 73 (J.M. Kelly trans., Oxford University Press 1966). The law of all nations was law the Romans perceived to be shared by them with other peoples from surrounding nations. *Id.* They were shared social institutions, not laws. See HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 47 (10th ed. 1963) (defining the law of all nations as “the sum of the common ingredients in the customs of the old Italian tribes, for they were *all the nations* whom the Romans had the means of observing, and who sent successive swarms of immigrants to Roman soil”).

89. Lowe, *supra* note 81, at 343 (discussing traditional universal jurisdiction over high seas piracy, and noting how it generally cannot be considered as “heinous” as other acts such as genocide, war crimes, and even criminal acts against persons).

of prosecution based on universal jurisdiction.<sup>90</sup> Perhaps most well-known was the filing of complaints against various world leaders under a Belgian universality law — complaints later dismissed at the risk of straining diplomatic relations.<sup>91</sup>

Treaty jurisdiction offers a limited version of universal jurisdiction.<sup>92</sup> It essentially provides for jurisdiction over treaty-defined criminal acts or violations committed within member-states of that particular treaty.<sup>93</sup> The European Convention on Human Rights is a prototypical example of a treaty which provides for, in the absence of national redress, judicial jurisdiction and authority in the Court of Human Rights for violations of the Convention.<sup>94</sup> The principal problem at issue is the extension of the Convention's jurisdiction over acts committed by member-states in areas not covered by the Convention.

A major form of extraterritorial action that has received support by the Council of Europe, at least in principal, is humanitarian intervention.<sup>95</sup> Although armed intervention by one state in the affairs of another is generally unaccepted in contemporary international law and by the United Nations,<sup>96</sup> an exception exists

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90. CASSESE, *supra* note 83, at 261-62 (noting adoption in some form of the universal jurisdiction principle by Belgium, Germany, Italy, and Spain).

91. Raf Casert, *Belgium's Highest Court Dismisses War Crimes Cases Against Former President Bush and Others*, ASSOCIATED PRESS, Sept. 24, 2003 (reporting the dismissal of claims against George Bush, Dick Cheney, Colin Powell, and Ariel Sharon by a Belgian court), available at LEXIS, European News Sources File.

92. Lowe, *supra* note 81, at 344 (describing treaty based jurisdiction as basically a form of universal jurisdiction limited to the member-states of the treaty in question).

93. *Id.* at 343-45 (providing an overview of treaty-based jurisdiction and discussing examples).

94. Convention for Human Rights, *supra* note 14, art. 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"); *id.* art. 32 (1) ("The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto ....").

95. The United Nations at the turn of the New Century, Eur. Parl. Doc. (8822) § I ¶ 6 (2000), available at <http://assembly.coe.int> (last visited Mar. 3, 2005).

The Assembly fully supports the Secretary General of the United Nations in his efforts to reconsider how the United Nations should respond to crisis and which means should be employed in cases of massive and systematic violations of human rights with grave humanitarian consequences. The Assembly understands the difficult balance between legal, political and moral factors and the collision between national sovereignty and the rights of individuals. Humanitarian intervention should be based on legitimate and universal principles set by the United Nations.

*Id.*

96. U.N. CHARTER art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").



for particular circumstances.<sup>97</sup> Chapter Seven of the United Nations' Charter authorizes action in response to "threat[s] to the peace, breach of the peace, or act[s] of aggression."<sup>98</sup> Collective intervention, as recognized by the United Nations Charter,<sup>99</sup> is generally more acceptable than a unilateral approach.<sup>100</sup> Although traditionally a "threat to the peace" was deemed to be a threat to peace between nations, therefore requiring the existence of an actual armed conflict between nations,<sup>101</sup> the United Nations has more recently been inclined to justify intervention in internal civil wars on the basis that their humanitarian consequences threaten international peace and security.<sup>102</sup> These characterizations surrounded events authorizing military intervention in Haiti in 1993 and Rwanda in 1994.<sup>103</sup> The North Atlantic Treaty Organization's (NATO) 1999 aerial bombardments in the former Yugoslavia were a major case in point, elevating focus on the United Nations Chapter VII articles which NATO had relied

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97. See U.N. CHARTER art. 2, para. 7.

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

*Id.*

98. U.N. CHARTER art. 39. For an overview of principles and examples of U.N. interventions, see L. C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 318-26 (1993); David J. Scheffer, *U.N. Engagement in Ethnic Conflicts*, in *INTERNATIONAL LAW AND ETHNIC CONFLICT* 147 (David Wippman ed. 1998); Rüdiger Wolfrum, *The UN Experience in Modern Intervention*, in *INTERNATIONAL INTERVENTION: SOVEREIGNTY VERSUS RESPONSIBILITY* 95 (Michael Keren & Donald A. Sylvan eds., 2002).

99. The principal article in the United Nations' Charter authorizing use of force by the Security Council is Article 42:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

U.N. CHARTER art. 42.

100. SLOMANSON, *supra* note 81, at 492 (noting that "[collective intervention] is readily more justifiable than unilateral intervention").

101. BRIAN D. LEPARD, *RETHINKING HUMANITARIAN INTERVENTION* 151-52 (2002) (discussing definitions of the "threat to the peace" language in the United Nations Charter).

102. *Id.* at 153-59 (outlining examples in which United Nations Security Council resolutions have characterized internal matters as threatening international peace, security, and stability).

103. *Id.* at 154 (discussing the characterization of internal matters as having international effects, thus justifying intervention in Haiti and Rwanda).

upon.<sup>104</sup> NATO's involvement in that conflict served as the basis for the case of *Banković and Others v. Belgium and Others*.<sup>105</sup>

### III-A. BANKOVIĆ: THE BACKGROUND

The backdrop to the *Banković* decision originated from events directly related to the dissolution of Yugoslavia and ethnic tensions that had developed among rival communities. The communist government of Yugoslavia had divided the nation into six republics and two autonomous entities, one of which was Kosovo.<sup>106</sup> The government-imposed consensus and stability created out of Yugoslavia's multi-ethnic state set the stage for conflict upon Marshall Tito's death in 1980.<sup>107</sup> Within the next ten years, ethnic politics had escalated, and multiparty elections resulted in significant gains for a variety of ethnic nationalist parties in various republics.<sup>108</sup> From there, the conventional view is that Serb nationalists, led by Slobodan Milošević,<sup>109</sup> manipulated ethnic tensions and fear to spur the beginning of actual fighting.<sup>110</sup>

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104. Christine Gray, *The Use of Force and the International Legal Order*, in INTERNATIONAL LAW 589, 595-97 (Malcolm D. Evans ed., 1st ed. 2003) (discussing how NATO's actions resulted in "an extended debate on the issue as to whether [U.N. Charter] Article 2(4) allowed the use of force for humanitarian intervention").

105. *Banković and Others v. Belgium and Others*, 2001-XII Eur. Ct. H.R. 333, 333. The nations sued were NATO members also party to the Convention on Human Rights. *Id.* at 339.

106. MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 24 (1997) (noting Marshall Tito's creation of Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, Slovenia, and the autonomous areas of Kosovo and Vojvodina).

107. JOHN ALLCOCK ET AL., CONFLICT IN THE FORMER YUGOSLAVIA: AN ENCYCLOPEDIA 290-91 (1998) (discussing the impact of Tito's recreation of Yugoslavia and asserting that he be seen "in part, as the architect of Yugoslavia's problems in the 1990s"). See also SCHARF, *supra* note 106, at 24 (noting that Tito's creation of the individual republics of Yugoslavia was an attempt to dilute Serbian dominance); Radek Sikorski, *War In Europe Again*, NAT'L REV., Dec. 16, 1991, at 40, 42 (asserting another explanation for the subsequent break-up of Yugoslavia involving British support for the anti-Nazi communist partisans).

108. DIANA JOHNSTONE, FOOLS' CRUSADE: YUGOSLAVIA, NATO AND WESTERN DELUSIONS 18-19 (2002) (noting the development of nationalist parties in a number of elections in 1990). See also PETER RADAN, THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW 153-54 (2002) (discussing the period between Tito's death and the outbreak of military conflict and noting the development of nationalist parties).

109. SCHARF, *supra* note 106, at 25 (asserting that Milošević was the "chief engineer" arousing ethnic tensions that led to conflict in 1990 and 1991). See also *Focus on Kosovo: Wily Milošević makes the most of the worst*, CNN.COM (assessing blame for the break-up of Yugoslavia upon Milošević), at <http://www.cnn.com> (last visited Mar. 3, 2005). But see JOHNSTONE, *supra* note 108, at 16-19, 26-27 (arguing that some of the blame targeting Milošević as the principal culprit behind the ensuing war was undue and that Croatian President Franjo Tuđman was mainly responsible).

110. SCHARF, *supra* note 106, at 25. It should be noted that fears of ethnic cleansing were very real, as only decades earlier during World War II, Croatian fascists — ustaša — exterminated or expelled Serbs en masse. See Vincent M. Creta, *The Search for Justice in*

Some of the earliest unrest began in the Serbian Krajina area of Croatia in 1990.<sup>111</sup> As repeated attempts at negotiations failed, acquiescence on the international arena set the stage for major conflict.<sup>112</sup> On June 25, 1991, Croatia and Slovenia declared independence, prompting Milošević to send the Yugoslavian army, the majority of whom were Serbs, into those republics.<sup>113</sup> Massacres were committed by all sides.<sup>114</sup> In July of 1990, predominantly-Muslim Kosovo declared its separation from Serbia.<sup>115</sup> Bosnia-Herzegovina's declaration of independence on March 3 of 1992 sparked a subsequent declaration of a Serbian Republic within Bosnia, and fighting on a wider scale.<sup>116</sup>

Despite various attempts by the United Nations and the European Community to broker peace talks, fighting continued with no outside military intervention.<sup>117</sup> The infamous "siege of

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*the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, 20 HOUS. J. INT'L L. 381, 388-89 (1998). In response, Serbian militia — *četnici* — also killed Croats and Muslims. See Lisa L. Schmandt, *Peace with Justice: Is It Possible for the Former Yugoslavia?* 30 TEX. INT'L L.J. 335, 337-38 (1995). Croatian President Franjo Tudjman had resurrected the use of ustaša imagery, quite predictably causing fear among Serbian minorities in Croatia. JOHNSTONE, *supra* note 108, at 27; Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 95 AM. J. INT'L L. 7, 11 (2001). In the infamous Serbian "rape camps" of the 1990s, Serb forces also justified atrocities based upon ustaša imagery; one Croat woman reported that she was told she was ustaša and had to be impregnated to give birth to a Serb instead. Berta Esperanza Hernández-Truyol, *Women's Rights as Human Rights — Rules, Realities and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT'L L. 605, 636 n.124 (1995-1996).

111. ALLCOCK, *supra* note 107, at 148-49 (discussing developments in Krajina in 1990-91).

112. See RADAN, *supra* note 108, at 156, in reference to U.S. Secretary of State James Baker's visit to Yugoslavia on June 21, 1991.

Although Baker called for restraint on all sides and reiterated continued support for Yugoslavia's territorial integrity, it was also clear to all of Yugoslavia's republic leaders that the USA, and thus the rest of the international community, would not actively intervene in the crisis. This amounted to giving the green light for the use of force against secessionist republics. . . . Within days Slovenia and Croatia declared their independence.

*Id.*

113. SCHARF, *supra* note 106, at 26 (discussing the subsequent aftermath of Secretary of State James Baker's visit to Yugoslavia, and the beginning of all-out fighting).

114. JOHNSTONE, *supra* note 108, at 29-30 (discussing massacres committed by the "Croatian Knights" against Serbs in the Croatian town of Gospiæ); SCHARF, *supra* note 106, at 26 (discussing a massacre of hospital patients in the Croatian town of Vukovar by Serbs).

115. RADAN, *supra* note 108, at 198-99 (discussing developments leading to Kosovo's declaration of independence from Serbia). See also Miranda Vickers, *What Cost Kosovo?*, HIST. TODAY, Dec. 1991, at 6 (asserting that much of the ethnic strife surrounding Yugoslavia's break-up was due to the significance of Kosovo).

116. SCHARF, *supra* note 106, at 27 (discussing the spread of conflict into Bosnia-Herzegovina).

117. *Id.* at 30-36 (asserting that the UN "could have acted to stop the atrocities" that occurred in the early 1990s and noting failed diplomatic initiatives to either stop the conflict or intervene militarily).

Sarajevo” continued for several years, eventually prompting NATO<sup>118</sup> military action in August of 1995.<sup>119</sup> The destruction of substantial Serbian forces led to the conclusion of the U.S. sponsored Dayton Accords,<sup>120</sup> introduction of NATO peace-keeping forces into the former Yugoslavia, and creation of the Yugoslavia War Crimes Tribunal.<sup>121</sup>

However, tensions continued to build in Kosovo, a region politically affiliated with Serbia but populated by a majority of Muslim Albanians.<sup>122</sup> In the late 1990s, members of the Kosovo Liberation Army began targeting Serb government officials.<sup>123</sup> Serbian forces responded by committing a series of atrocities against civilians.<sup>124</sup> On March 24, 1999, NATO commenced Operation Allied Force to destroy Serbian military entities that

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118. The Yugoslavian crisis came at a time when many felt NATO had to revise its strategy following Soviet disintegration. S. NELSON DREW ET AL., *THE FUTURE OF NATO: FACING AN UNRELIABLE ENEMY IN AN UNCERTAIN ENVIRONMENT* 9-10 (1991) (discussing changing European realities and a need to revise NATO strategy); *NATO's New Strategy*, NAT'L REV., June 24, 1991, at 15 (noting revisions in NATO strategy).

119. Ian Traynor, *The Slow But Sure Sacking of Sarajevo*, THE GUARDIAN (London), May 11, 1992, at 22 (discussing shelling and sniper fire that paralyzed Sarajevo and its residents), available at LEXIS, European News Sources File; Ian Traynor, *Vulnerable Convoys of Refugees Flee "Dying" Sarajevo*, THE GUARDIAN (London), May 19, 1992, at 8 (discussing the refugee crisis in Sarajevo), available at LEXIS, European News Sources File; John Palmer et al., *U.S. Ready to Relieve Sarajevo*, THE GUARDIAN (London), June 26, 1992, at 1 (discussing President Bush's initiative to press for stronger actions against the Serbs with allies), available at LEXIS, European News Sources File; Ruth Marcus & Rick Atkinson, *NATO Envoys Agree to Back U.S. Air Strike Plan in Bosnia*, THE WASH. POST, Aug. 3, 1993 (discussing a U.S. air strike plan by NATO in conjunction with UN Security Council resolutions), available at LEXIS, European News Sources File; Dusan Stojanovic, *U.S. Fighters Down Four Serb Warplanes Over Bosnia*, THE ASSOC. PRESS, Feb. 28, 1994 (discussing the "first time NATO had struck militarily in its 44-year history" when U.S. planes shot down Serbian jets violating the no-fly zone), available at LEXIS, European News Sources File; Robert Burns, *Allies May Sustain Air Attacks for Several Days*, THE ASSOC. PRESS, Aug. 30, 1995 (discussing the beginning of major NATO attacks against Serbian positions), available at LEXIS, European News Sources File. For a description of post-siege Sarajevo from the perspective of a foreign journalist, see GREG CAMPBELL, *THE ROAD TO KOSOVO* 89-93 (1999).

120. ALLCOCK, *supra* note 107, at 70-71 (describing the Dayton Accords).

121. SCHARF, *supra* note 106, at 51-73 (describing the creation of the Yugoslavia War Crimes Tribunal).

122. ALLCOCK, *supra* note 107, at 145-47 (describing the history of Kosovo and ethnic tensions that led to conflict in 1998-99).

123. Laura Geissler, *The Law of Humanitarian Intervention and the Kosovo Crisis*, 23 HAMLINE L. REV. 323, 336 (2000) (discussing the background to NATO air strikes in Kosovo); Klinton W. Alexander, *NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of Security Council Approval*, 22 HOUS. J. INT'L L. 403, 431-34 (2000) (same).

124. BRUCE R. NARDULLI ET AL., *DISJOINTED WAR: MILITARY OPERATIONS IN KOSOVO, 1999* at 15 (2002) (noting the massacre of civilians in September of 1998 and continued tension in October); John J. Merriam, *Kosovo and The Law of Humanitarian Intervention*, 33 CASE W. RES. J. INT'L L. 111, 136-43 (2001) (describing accounts of human rights violations committed in Kosovo).

threatened Kosovo.<sup>125</sup> The first stage of the strikes involved the use of missiles against select military targets,<sup>126</sup> but progressed to heavy bombardments of non-military infrastructure.<sup>127</sup> At the conclusion of Operation Allied Force, an estimated 500-1,800 civilians were killed by NATO strikes.<sup>128</sup>

### III-B. *BANKOVIĆ*: THE PLAINTIFFS' ARGUMENT

In *Banković* the plaintiffs were relatives of individuals killed during Operation Allied Force<sup>129</sup> after a NATO missile hit a media station in Belgrade.<sup>130</sup> The plaintiffs asserted<sup>131</sup> that the NATO governments, who were all member-states to the European Convention on Human Rights, had violated Article 2 of the Convention — the right to life.<sup>132</sup> In determining whether or not the case was admissible to the Court of Human Rights, the principal issue was determining if Article 1 jurisdiction<sup>133</sup> was implicated by the air strikes, because at that time, Yugoslavia was not a contracting party to the Convention.

Noting that Article 1 of the Convention on Human Rights obligates member-states to “secure to everyone within their jurisdiction the rights and freedoms”<sup>134</sup> of the Convention, the key issue was determining what extraterritorial acts committed by member-states constituted an extension of jurisdiction. The plaintiffs asserted that the NATO air strikes brought them within the jurisdiction of those governments.<sup>135</sup> They relied on a series of

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125. BENJAMIN S. LAMBETH, NATO'S AIR WAR FOR KOSOVO: A STRATEGIC AND OPERATIONAL ASSESSMENT 19 (2001) (discussing the beginning of Operation Allied Force).

126. WESLEY K. CLARK, WAGING MODERN WAR: BOSNIA, KOSOVO, AND THE FUTURE OF COMBAT 193-94 (2001) (discussing the beginning of the military operation).

127. LAMBETH, *supra* note 125, at 39 (discussing the widening of NATO strikes to civilian targets such as media broadcast stations).

128. Marjorie Cohn, *The Myth of Humanitarian Intervention in Kosovo*, in LESSONS OF KOSOVO: THE DANGERS OF HUMANITARIAN INTERVENTION 121, 121 (Aleksandar Jokic ed., 2003) (discussing the civilian impact of the NATO campaign).

129. *Banković*, 2001-XII Eur. Ct. H.R. at 339 (noting relationships between the plaintiffs and deceased).

130. *Id.* at 340-41 (describing events on the morning of April 23, 1999).

131. *Id.* at 345 (noting the complaints filed against the NATO states).

132. Convention for Human Rights, *supra* note 14, art. 2. As noted by Lambeth, although the respondent governments were all European members of NATO, the United States also had a clear role in contributing forces to Operation Allied Force. See LAMBETH, *supra* note 125, at 20-21 (noting that the initial strikes involved a large contingent of U.S. aircraft and sea-launched missiles).

133. See Convention for Human Rights, *supra* note 14, art. 1 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in [the Convention].”).

134. *Id.*

135. *Banković*, 2001-XII Eur. Ct. H.R. at 345 (describing the plaintiff's main claim).

previous Court judgments and admissibility decisions to support their argument.

### 1. *The Cyprus Cases*

The principal case used by the plaintiffs was the Court's landmark 1995 decision in *Loizidou v. Turkey*.<sup>136</sup> Loizidou was a Cypriot who lived near the border of Turkish-occupied Cyprus, and owned land within that part of the island.<sup>137</sup> In March of 1989, Loizidou and other members of a Cypriot women's organization marched across the border to demonstrate against the occupation, and were subsequently stopped and detained by Turkish forces.<sup>138</sup> Although she was released shortly thereafter, she sued the Turkish government, alleging that her Article 3 Prohibition of Torture,<sup>139</sup> Article 5 Right to Liberty,<sup>140</sup> and Article 8 Right to Respect for Private and Family Life<sup>141</sup> protections had been violated.

At the time of the event, both Turkey and Cyprus had been member-states of the Council of Europe and parties to the Convention.<sup>142</sup> However, Turkey argued that the Court of Human Rights did not have jurisdiction over the issue because at that time the events did not occur within Turkey or Cyprus, but in the "Turkish Republic of Northern Cyprus,"<sup>143</sup> and that Turkey had not accepted the Court's jurisdiction outside of its territorial boundaries.<sup>144</sup>

In its analysis, the Court noted that the reference to jurisdiction in Article 1 of the Convention was not limited to territorial boundaries of member-states.<sup>145</sup> Actions such as personal extraditions and forced expulsions involving non-member-states did

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136. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995) (preliminary objections) [hereinafter *Loizidou I*].

137. *Id.* at 10 (describing the plaintiff and noting her claims to property in Turkish-occupied Cyprus).

138. *Id.* (describing the march by the "Women Walk Home" movement and subsequent events resulting in Loizidou's detention).

139. Convention for Human Rights, *supra* note 14, art. 3.

140. *Id.* art. 5.

141. *Id.* art. 8.

142. THE COUNCIL OF EUROPE, THE COUNCIL OF EUROPE'S MEMBER STATES (stating that Cyprus joined the Council in 1961 and Turkey joined in 1949), at <http://www.coe.int> (last visited Mar. 1, 2005).

143. YASEMIN ÇELİK, CONTEMPORARY TURKISH FOREIGN POLICY 62 (1999) (noting that Turkish Cypriots declared the existence of the Turkish Republic of Northern Cyprus in 1983). Only Turkey recognized the Turkish Republic of Northern Cyprus. F. STEPHEN LARRABEE & IAN O. LESSER, TURKISH FOREIGN POLICY IN AN AGE OF UNCERTAINTY 78 (2003).

144. *Loizidou I*, 310 Eur. Ct. H.R. (ser. A) at 17, 21 (describing the positions of Turkey).

145. *Id.* at 23 ("In this respect the Court recalls that, although Article 1 sets limits on the reach of the Convention, the concept of 'jurisdiction' under this provision is not restricted to the national territory of the High Contracting Parties.")

trigger Convention jurisdiction,<sup>146</sup> as did acts committed by member-states that “produce effects outside their own territory.”<sup>147</sup> In the instant case, the Court noted that military action or occupation — when a member-state “exercises effective control of an area outside its national territory”<sup>148</sup> — also produces an “obligation to secure, in such an area, the rights and freedoms set out in the Convention,”<sup>149</sup> and it was clear that Turkish occupation of northern Cyprus was related to Loizidou’s claims.<sup>150</sup> As the Court later stated in its judgment on the merits of the case:

[I]n conformity with the relevant principles of international law governing State responsibility, ... responsibility of a Contracting Party could 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 . . . .

. . . It is obvious from the large number of troops engaged in active duties in northern Cyprus . . . that [Turkey’s] army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility . . . . Those affected by such policies or actions therefore come within the “jurisdiction” of Turkey for the purposes of Article 1 of the Convention.<sup>151</sup>

The “effective control” Turkey had over northern Cyprus thus brought those within its occupation under its jurisdiction, extending the protections of the Convention to those within the scope of that control.

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146. *Id.* (noting case law in which “extradition or expulsion of a person by a Contracting State may give rise to an issue . . . and hence engage the responsibility of that State under the Convention”).

147. *Id.* at 24.

148. *Id.*

149. *Id.*

150. *Id.* (“[T]he respondent Government have [sic] acknowledged that the applicant’s loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops.”).

151. *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2216, 2234-35 [hereinafter *Loizidou II*].

The effective control test enshrined in the *Loizidou* holding was later reaffirmed in *Cyprus v. Turkey*.<sup>152</sup> In that case, Cyprus sued Turkey for a wide array of alleged violations stemming from Turkish occupation, including “disappearances” of Greek-Cypriots and violations of Articles 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 13, 14, 17, and 18.<sup>153</sup> Relying on *Loizidou*, the Court concluded that Turkish military occupation of northern Cyprus expanded all rights and protections of the Convention to those within that territory.<sup>154</sup> The Court also expanded on the effective control principle. Noting that Cyprus — as a Council of Europe member and signatory to the Convention — was denied the ability to secure the Convention rights in the occupied part of that country, the Court stated that such a situation amounted to a “vacuum in the system of human-rights protection.”<sup>155</sup> Because the Convention was an “instrument of European public order,”<sup>156</sup> it had to apply to the inhabitants of a nation party to the Convention, otherwise they would have no other recourse to secure their rights.<sup>157</sup>

## 2. Admissibility in *Ilaşcu v. Moldova and Russia*

In a case similar to *Loizidou* implicating jurisdictional issues, the *Banković* claimants cited the Court’s admissibility decision in *Ilaşcu and Others v. Moldova and the Russian Federation*.<sup>158</sup> Once a former republic of the Soviet Union, Moldova is ethnically divided between a majority of Moldovans and a minority of Slavic peoples.<sup>159</sup> After Moldova’s declaration of independence in 1991, a pro-Russian and separatist “Transnistrian Moldovan Republic” was declared on the east side of the Dniester River, sparking a minor civil war.<sup>160</sup> Russia’s Fourteenth Army remained in the

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152. *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1.

153. *Id.* at 11 (outlining complaints filed against Turkey by Cyprus).

154. *Id.* at 21 (“[I]n 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.”).

155. *Id.*

156. *Id.*

157. *Id.* at 25 (noting the consequences of a “vacuum” in human rights protections to the individuals living under occupation).

158. *Banković*, 2001-XII Eur. Ct. H.R. at 349 (decision as to admissibility) (citing *Ilaşcu and Others v. Moldova and Russia*, Eur. Ct. H.R. App. No. 48787/99 (2004)), at <http://www.echr.coe.int> (last visited Mar. 1, 2005).

159. William Crowther, *The Politics of Ethno-National Mobilization: Nationalism and Reform in Soviet Moldavia*, 50 THE RUSSIAN REV. 183, 184-86 (1991) (outlining demographic characteristics of Moldova). For an outline of historic ethnic/religious tensions in Moldova, see Nicholas Dima, *Politics and Religion in Moldova: A Case Study*, 34 THE MANKIND QUARTERLY 175, 175-94 (1994).

160. Charles King, *Eurasia Letter: Moldova With A Russian Face*, 97 FOREIGN POL’Y 106, 106-07 (1994) (outlining events subsequent to Moldova’s independence).



separatist portion and aided Slavic paramilitaries against Moldovans.<sup>161</sup>

In *Ilaşcu*, the plaintiffs were arrested in 1992 by Transnistrian security forces, tried and found guilty by a Transnistrian court for terrorism-related charges, and imprisoned.<sup>162</sup> While in prison, they were allegedly beaten, drugged, shot, and psychologically tortured by Transnistrian and Russian military forces.<sup>163</sup>

The Government of Moldova, which had ratified the Convention on Human Rights in 1997 — argued that it did not have *de facto* control of the east bank of the Dniester — the breakaway Transnistrian Republic — and hence did not have responsibility or jurisdiction for an area they did not control.<sup>164</sup> The Russian Federation also argued that it had no jurisdiction in Transnistria as well, and that its military forces stationed there were for “peacemaking duties.”<sup>165</sup> Citing *Loizidou*, the Court found the case admissible for further review on its merits, because Russian jurisdiction may have been implicated either through the actions of its own forces or a proxy entity.<sup>166</sup>

### 3. Admissibility in *Issa v. Turkey*

The *Banković* plaintiffs also relied on the Court’s admissibility decision in *Issa and Others v. Turkey*,<sup>167</sup> involving extraterritorial action taken by Turkey against Kurds in Iraq — obviously a non-Council of Europe nation. In *Issa*, the plaintiffs were Iraqi women living on the Iraqi side of the border with Turkey.<sup>168</sup> They alleged that an encounter had occurred between Turkish military forces deployed in Northern Iraq and the applicants in April of 1995 while they were sheep-herding.<sup>169</sup> In the encounter, the soldiers allegedly began beating and abusing the shepherds, and then ordered the women to return to their village while keeping the men in their

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161. *Id.* (discussing Russia’s involvement in Moldova).

162. *Ilaşcu*, Eur. Ct. H.R. App. No. 48787/99 at 5-7 (2004), (describing the plaintiffs’ arrests and trials) at <http://www.echr.coe.int> (last visited Mar. 1, 2005).

163. *Id.* at 8-10 (describing instances of alleged beatings, shootings, and mock executions suffered by the applicants).

164. *Id.* at 14-15 (describing the position of the Moldovan government).

165. *Id.* at 16.

166. *Id.* at 21 (referencing the *Loizidou* control test and finding the issue admissible for further determination on its merits).

167. *Banković*, 2001-XII Eur. Ct. H.R. at 349 (citing *Issa and Others v. Turkey*, Eur. Ct. H.R. App. No. 31821/96 (2000)) (decision as to admissibility), at <http://www.echr.coe.int> (last visited Mar. 1, 2005).

168. *Issa and Others v. Turkey*, Eur. Ct. H.R. App. No. 31821/96 2 (2000) (describing the applicants and their livelihoods and relationships to the deceased).

169. *Id.* (describing the applicant’s alleged encounter).

custody.<sup>170</sup> Within the next two-three days the detained shepherds were found shot dead and mutilated.<sup>171</sup> The Turkish government claimed that although a military incursion into Iraq had occurred at that time, there was no record of the alleged event.<sup>172</sup> Charging Turkey with multiple violations of the European Convention on Human Rights, the Court admitted the case for review on its merits.<sup>173</sup>

In sum, the *Banković* plaintiffs asserted that the *Ilaşcu* and *Issa* admissibility decisions and ruling in *Loizidou* and *Cyprus* together suggested that a signatory to the Convention on Human Rights could be sued in the Court for actions taken either in non-Council of Europe nations, or areas within the Council marked by ambiguous authority (i.e., the “Turkish Republic of Northern Cyprus” or “Transnistrian Republic”), if jurisdiction was established through effective control by a Council member-state. In the case of Yugoslavia — then a non-Council of Europe nation — the plaintiffs acknowledged that NATO may not have had complete control over that nation, as Turkey did in Northern Cyprus through its occupation.<sup>174</sup> However, by virtue of the deliberately planned and precision-guided military air strikes, they had enough control to be responsible for the consequences of the strikes, and should thus be held accountable for the resulting damage and deaths under the Convention that NATO knew would occur, amounting to an obligation to uphold not all Convention protections — but just those actions in which control was maintained.<sup>175</sup> Finally, the plaintiffs argued that if NATO did not fall under Convention jurisdiction for its actions in Yugoslavia, the governments would be “free to act with impunity”<sup>176</sup> abroad, and the basic mission of the Convention — to secure the fundamental human right to life in Europe — would be entirely circumvented.<sup>177</sup>

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170. *Id.* (“The [Turkish soldiers] started shouting abuse at the eleven shepherds, beating them with their rifle butts, kicking them and slapping them on the face. Then they separated the women from the men. They told the women to return to the village and took the men away.”).

171. *Id.* at 3 (“The bodies had been shot at several times and were badly mutilated — ears, tongues and genitals missing.”).

172. *Id.* at 4 (describing Turkey’s position in the complaint).

173. *Id.* at 8 (declaring the case admissible to the European Court of Human Rights).

174. *Banković*, 2001-XII Eur. Ct. H.R. at 348-49 (describing the plaintiffs’ arguments applying the effective control test of *Loizidou* to the instant case).

175. *Id.* at 349 (describing the plaintiffs’ stance that when a Convention member-state conducts air strikes, they should be “held accountable for those Convention rights within their control in the situation in question”).

176. *Id.* at 349-50.

177. *Id.* (describing the plaintiffs’ emphasis on the purpose of the Convention).

III-C. *BANKOVIĆ*: NATO'S ARGUMENT

The respondents' (governments of NATO nations) argument rested on a number of points. Its major contention was that the plaintiffs' type of claim was not originally intended to be scrutinized by the Convention.<sup>178</sup> If the Convention drafters intended to allow broad and loose "cause-and-effect" claims before the Court, in which the consequences of any member-states' extraterritorial actions would be reviewed, then the text of the Convention would be similar to that of the Geneva Conventions,<sup>179</sup> which state that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."<sup>180</sup> Instead, the European Convention does not cover acts occurring in *all circumstances*, but only those falling under the Article 1 obligation to "secure to everyone within their jurisdiction the rights and freedoms"<sup>181</sup> of the Convention. The exercise of jurisdiction, as defined by the respondent governments, only referred to traditionally-accepted notions of exercises cloaked with the emblem of legal authority, such as an arrest or detention.<sup>182</sup>

Similarly, the NATO governments argued that the military actions taken in Yugoslavia could not be equated with such traditional notions of legal authority purportedly covered by the Convention.<sup>183</sup> If such activities fell under the jurisdiction of the Convention, then all extraterritorial military missions would be reviewed by the European Court of Human Rights, an expansion of the Court to uncharted territory already covered by other international legal entities.<sup>184</sup> The NATO governments also argued that their alleged control over Yugoslavia's airspace did not equate with the control exercised by Turkey in Northern Cyprus in *Loizidou*,<sup>185</sup> and that while Cyprus and all its citizens had

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178. *Id.* at 347.

179. *Id.* at 347 (describing the respondents' defense regarding the textual differences between the Geneva Convention and the European Convention on Human Rights); *id.* at 344 (citing language from the Geneva Conventions).

180. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, art. 1.

181. Convention for Human Rights, *supra* note 14, art. 1.

182. *Banković*, 2001-XII Eur. Ct. H.R. at 346 (describing the respondent governments' assertion that "jurisdiction" only referred to the exercise of legal authority, such as the arrests and detentions of individuals).

183. *Id.* at 347 ("The Governments conclude that it is clear that the conduct of which the applicants complain could not be described as the exercise of such legal authority or competence.").

184. *Id.* at 347-48 (describing the respondents' arguments related to alleged "serious consequences for collective international military action").

185. *Id.* at 348 (describing the respondents' assertion distinguishing the *Loizidou* case with the instant one).

previously enjoyed the protections of the Convention prior to Turkish occupation, Yugoslavia and the Banković plaintiffs were not previously, nor at the time of the incident, covered under the Convention.<sup>186</sup>

### III-D. THE COURT'S DECISION IN *BANKOVIĆ*

The Court began its analysis by outlining the issue as a question of whether or not the Banković plaintiffs were covered under NATO's jurisdiction through its military actions.<sup>187</sup> Examining the meaning of "jurisdiction" by defining its ordinary meaning under applicable treaty laws,<sup>188</sup> the Court concluded that jurisdiction ordinarily referred to government exercise of authority within its territorial boundaries.<sup>189</sup> Instances of extraterritorial action were thus considered to be exceptional cases,<sup>190</sup> and the Court's *Loizidou* ruling was one such exception as it was based on effective control of Turkey in the disputed area.<sup>191</sup> The Court thus recognized the continued legitimacy of its previous rulings in *Loizidou* and *Cyprus*.<sup>192</sup>

The Court then reviewed the applicants' argument that, in the absence of overall effective control, a member-state should not be responsible for all Convention protections, but only those relative to the amount of control possessed. In examining the assertion that NATO's jurisdiction could derive from control vis-à-vis the air strikes, the Court stated that such logic was "tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention."<sup>193</sup> Agreeing with the respondent governments, the Court found no textual evidence in the Convention supporting such

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186. *Id.* at 347 (noting the respondents' assertion that Yugoslavia "was not and is not a party to the Convention and its inhabitants had no existing rights under the Convention.")

187. *Id.* at 350 ("[T]he essential question to be examined therefore is whether the applicants and their deceased relatives were . . . capable of falling within the jurisdiction of the respondent States.")

188. *Banković*, 2001-XII Eur. Ct. H.R. at 350-51 (noting the importance of interpreting the ordinary meaning of "within their jurisdiction" as required by the Vienna Convention on the Law of Treaties).

189. *Id.* at 351-52 (concluding that the ordinary meaning of jurisdiction was based on territorial control).

190. *Id.* at 354 (noting that jurisdiction is "essentially territorial" in nature and that actions conducted abroad are instances of exceptional expansion of jurisdiction).

191. *See id.* (outlining and re-affirming the *Loizidou* case).

192. *Banković*, 2001-XII Eur. Ct. H.R. at 355 (summarizing the Court's previous holdings in the *Loizidou* and *Cyprus* cases).

193. *Id.* at 356.

a view that the Convention's protections could be "divided and tailored" relative to the proportionate amount of control at hand.<sup>194</sup>

Finally, the Court agreed with the NATO governments that a significant fact in *Loizidou* was that the inhabitants of Cyprus had previously been covered by the Convention prior to the Turkish occupation, distinguishing that situation from the one in Yugoslavia.<sup>195</sup> The Court reiterated the regional nature of the Convention, asserting that it covered a "legal space" that did not include Yugoslavia at that time.<sup>196</sup> Therefore, the Court concluded that the plaintiffs did not fall under NATO's jurisdiction, nor the Court's jurisdiction, since "[t]he Convention was not designed to be applied throughout the world."<sup>197</sup> The Court thus unanimously declared the case inadmissible. By citing *Loizidou* for the principle that extraterritorial jurisdiction can exist when one nation has effective control of another, but also stating that the Convention was meant to apply only within the Council of Europe and not "throughout the world," the Court seemed to state that Council member-nations can only have extraterritorial jurisdiction in other member-nations.

#### IV-A. THE ÖCALAN CASE

Abdullah Öcalan was a Kurd of Turkish nationality and head of the Worker's Party of Kurdistan (PKK) — a separatist Kurdish organization.<sup>198</sup> The PKK had initiated a wide-scale insurgency characterized by guerrilla and terrorist-style tactics in the 1980s.<sup>199</sup> The ultimate aim of the uprising was the creation of an independent Kurdish state from Turkey — which had historically conducted repressive policies against its Kurdish population.<sup>200</sup>

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194. *Id.* at 357 (stating that "[h]ad the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text identical or similar to" language in the Geneva Conventions).

195. *Id.* at 358 (discussing and distinguishing *Loizidou* and *Cyprus v. Turkey* from the instant case).

196. *Id.* at 358-59 (stating that the Convention is a treaty "in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space").

197. *Id.* at 359.

198. *Öcalan v. Turkey*, 37 Eur. H.R. Rep. 238, 252 (2003) (judgment) (describing the applicant's background).

199. AMIKAM NACHMANI, *TURKEY: FACING A NEW MILLENNIUM: COPING WITH INTERTWINED CONFLICTS* 36-37 (2003) (outlining the aims of the PKK and noting that its 1984 rebellion was the seventeenth Kurdish uprising against Turkey). *See also* HENRI J. BARKEY & GRAHAM E. FULLER, *TURKEY'S KURDISH QUESTION* 23-29 (1998) (discussing the goals of the PKK and its ideological foundations).

200. MICHAEL M. GUNTER, *THE KURDS AND THE FUTURE OF TURKEY* 11-14 (1997) (outlining Turkish human rights violations in its conduct of operations against the Kurds); HELSINKI WATCH, *DESTROYING ETHNIC IDENTITY: THE KURDS OF TURKEY* 7-18 (1988) (outlining Turkish

In late 1998 and early 1999, Öcalan traveled through Greece, Russia, and Italy, seeking asylum after being forced to leave Syria.<sup>201</sup> As leader of the PKK, Turkey had issued a number of warrants for his arrest.<sup>202</sup> In February of 1999, Öcalan was allegedly taken to Kenya by Greek secret services after being denied asylum.<sup>203</sup> For several days he stayed at the Greek Ambassador's residence, but was later informed that he could leave Kenya and travel to the Netherlands.<sup>204</sup> On February 15, Öcalan left the Greek embassy in a car driven by a Kenyan official, was taken to an international area of Nairobi Airport, and was arrested by Turkish agents after boarding a plane.<sup>205</sup> The Government of Kenya stated that they played no knowing role in his arrest at the airport.<sup>206</sup>

Upon his arrest, Öcalan was alleged to have been photographed, videotaped, and periodically blindfolded or hooded during the flight to Turkey.<sup>207</sup> On February 16, he was incarcerated at the Ýmráli Prison Island in Turkey, which had immediately transferred prisoners to other locations and was declared a military zone, and interrogated for several days by Turkish agents.<sup>208</sup> Turkish officials prevented several of Öcalan's attorneys from visiting him in prison or entering the country to aid in his defense.<sup>209</sup> He was first allowed

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ethnic identity policies and conduct of torture by security forces); HUMAN RIGHTS WATCH, TURKEY: FORCED DISPLACEMENT OF ETHNIC KURDS FROM SOUTHEASTERN TURKEY Vol. 6 No. 12, 10-21 (1994) (outlining reports of forced displacement of Kurds by Turkish forces in its conduct of operations against the PKK); HUMAN RIGHTS WATCH, TURKEY: HUMAN RIGHTS AND THE EUROPEAN UNION ACCESSION PARTNERSHIP 4 (vol. 12, no. 10 (D), 2000) ("The persistence of torture in Turkey is an indisputable matter of record.")

201. *Öcalan*, 37 Eur. H.R. Rep. at 252 (describing his travels through various nations seeking asylum).

202. *Id.* at 253 (noting outstanding Turkish arrest warrants for Öcalan alleging "founding an armed gang in order to destroy the territorial integrity of the State and of instigating various terrorist acts that had resulted in loss of life").

203. *Id.* at 255 ("The applicant also told the prosecutor that after leaving Syria on October 9, 1998 he had gone first to Greece and then to Russia and Italy. When the latter two countries refused to grant him the status of political refugee, he had been taken to Kenya by the Greek secret services.")

204. *Id.* at 252-53 (describing events in Nairobi prior to the applicant's arrest).

205. *Öcalan*, 37 Eur. H.R. Rep. at 253 (describing the applicant's arrest by Turkish agents in an international zone of Nairobi Airport).

206. *Id.* at 253.

The Kenyan Minister of Foreign Affairs added that the Kenyan authorities had played no part in the applicant's arrest and had had no say in his final destination. The Minister had not been informed of any operations by Turkish security forces at the time of the applicant's departure and there had been no consultations between the Kenyan and Turkish Governments on the subject.

*Id.*

207. *Id.* at 253-54 (describing alleged conditions of Öcalan's flight to Turkey).

208. *Id.* at 254-55 (describing conditions of Öcalan's detention following his arrest).

209. *Id.* at 255 (noting that one of his lawyers was prevented from leaving his office by

to visit with attorneys on February 25 in the presence of a Turkish judge and masked security officials.<sup>210</sup> After a series of trials by a State Security Court, in June of 1999 Öcalan was found guilty of instructing crimes and attacks aimed towards the establishment of an independent Marxist Kurdish state and was sentenced to death.<sup>211</sup>

Before the European Court of Human Rights, Öcalan sued Turkey for a variety of Convention violations stemming from his arrest, treatment in custody, trial, and subsequent sentencing to death.<sup>212</sup> However, the major issue pertaining to extension of jurisdiction for extraterritorial actions revolved around Öcalan's Article 5 § 1 claim — which prohibits a person's deprivation of liberty in the absence of a "procedure prescribed by law."<sup>213</sup> The issue facing the Court was whether or not Turkey's act of detaining Öcalan at Nairobi Airport constituted an extension of its jurisdiction, bringing him under the protection of the Convention.<sup>214</sup>

Öcalan asserted that he did fall within Turkey's jurisdiction and that Turkey had violated the Convention's Article 5 § 1 protections because his arrest amounted to an abduction not prescribed by law, thus voiding his subsequent trial and sentence.<sup>215</sup> Based on statements from Kenyan officials about their lack of involvement in his arrest, he asserted that there was no official collaboration for extradition between the governments of Turkey and Kenya leading to his arrest.<sup>216</sup> Öcalan relied on *Cyprus v. Turkey* and other cases

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Turkish officials and other attorneys were stopped from entering the country at Istanbul Airport).

210. *Öcalan*, 37 Eur. H.R. Rep. at 255.

On February 25, 1999 the applicant was able to talk to two of the sixteen lawyers who had asked to see him, Mr. Z. Okçuoglu and Mr. H. Korkut. The first conversation took place in the presence of a judge and of members of the security forces wearing masks. The latter decided that it should not last longer than [twenty] minutes.

*Id.*

211. *Id.* at 257-59 (outlining events during Öcalan's trial leading to his indictment and sentencing).

212. *Id.* at 238-40 (outlining determinations by the Court on alleged violations of Convention Articles 2, 3, 5, 6, 7, 8, 9, 10, 13, 14, 18, 34, and 41).

213. Convention for Human Rights, *supra* note 14, art. 5 § 1 ("Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.").

214. *Öcalan*, 37 Eur. H.R. Rep. at 274.

215. *Id.* at 271 (outlining Öcalan's argument that his arrest "did not comply with Kenyan law or the rules established by international law, that his arrest amounted to an abduction and that his detention and trial, which were based on that unlawful arrest, had to be regarded as null and void").

216. *Id.* at 270 (outlining Öcalan's argument that "[m]ere collusion between Kenyan officials operating without authority and the Turkish Government could not constitute interstate co-operation . . . . The applicant further alleged that the Kenyan officials implicated in his arrest had been bribed.").

to assert that Turkey's Article 5 § 1 obligations were implicated by his abduction at Nairobi Airport.<sup>217</sup>

Relying on *Banković*, Turkey asserted, "without further explanation," that it was not responsible for Öcalan's arrest.<sup>218</sup> On the contrary, Turkey argued that Kenya had arrested Öcalan, that Kenya was a sovereign nation and Turkey had no means of exercising its jurisdiction there, and that Kenya simply released Öcalan into Turkey's custody as a matter of interstate cooperation.<sup>219</sup>

#### IV-B. THE ÖCALAN RULING

In a brief analysis of the Article 5 § 1 issue, the Court began by recognizing that Article 5 § 1's protection of a person's liberty reflected a purpose "to protect individuals from arbitrariness."<sup>220</sup> Interstate cooperation to extradite an individual could implicate Article 5 § 1 obligations if its protections were violated.<sup>221</sup> However, the Convention itself did not contain guidelines beyond the protections stated in Article 5 § 1 which spoke directly to how interstate extraditions should be effected.<sup>222</sup> Thus, the critical question at hand was whether "beyond all reasonable doubt" . . . the authorities of the State to which the applicant has been transferred have acted extra-territorially in a manner that is inconsistent with the sovereignty of the host State.<sup>223</sup> A finding that Turkey, in its pursuit of Öcalan, had violated its arrest procedures or violated Kenya's sovereignty, would have amounted to a violation of the Convention.

To determine if Turkish procedures complied with the Convention's Article 5 § 1 obligations, the Court first had to determine whether or not Öcalan was brought within Turkey's jurisdiction in Nairobi. The Court revisited *Banković* and noted that the exercise of extraterritorial jurisdiction by a member-state to the

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217. *Id.* at 270-71 (referring to *Cyprus v. Turkey* to argue that Turkey had violated Öcalan's Article 5 rights).

218. *Id.* at 271 (noting Turkey's argument that "their responsibility was not engaged by the applicant's arrest abroad").

219. *Id.* at 271-72 (outlining Turkey's arguments).

220. *Öcalan*, 37 Eur. H.R. Rep. at 272.

221. *Id.* at 273 (outlining precedent holding that Article 5 protections could be implicated in the case of cooperation between states for extradition of criminals).

222. *Id.* ("The Court further notes that the Convention contains no provisions concerning the circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted.")

223. *Id.* at 274.



Convention was only recognized in exceptional situations.<sup>224</sup> The Court then noted that:

In the instant case, the applicant was arrested by members of the Turkish security forces inside an aircraft in the international zone of Nairobi Airport. Directly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the “jurisdiction” of that State for the purposes of [Article] 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. The Court considers that the circumstances of the present case are distinguishable from those in the aforementioned *Banković* case, notably in that the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey.<sup>225</sup>

Having found that Turkey was bound by its Convention obligations, the Court subsequently found that it had neither violated its own arrest procedures,<sup>226</sup> nor Kenya’s sovereignty using a “beyond all reasonable doubt” threshold.<sup>227</sup> It therefore did not violate Article 5 § 1 of the Convention.<sup>228</sup>

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224. *Id.* (citing the Court’s statements in the *Banković* case acknowledging the exceptional nature of a finding that jurisdiction can be exercised beyond the territorial boundaries of a state).

225. *Öcalan*, 37 Eur. H.R. Rep. at 274-75.

226. *Id.* at 275 (“It follows that [Öcalan’s] arrest and detention complied with orders that had been issued by the Turkish courts.”).

227. *Id.* at 276 (“[T]he Court holds that it has not been established beyond all reasonable doubt that the operation carried out in the instant case partly by Turkish officials and partly by Kenyan officials amounted to a violation by Turkey of Kenyan sovereignty.”).

228. *Id.* (“It follows that the applicant’s arrest on February 15, 1999 and his detention must be regarded as having been in accordance with ‘a procedure prescribed by law’ for the purposes of [Article 5 § 1 (c)] of the Convention. Consequently, there has been no violation of [Article 5 § 1] of the Convention.”).

Öcalan did, however, win several of his other claims. The Court found Turkey had violated parts of Article 3, Article 5 § 3 and § 4, and Article 6 § 1, but had not violated Article 2, parts of Article 3, Article 5 § 1, and Article 14. *Id.* at 311-13. The Turkish government also changed its Constitution, rescinding Öcalan’s death sentence. *Id.* at 293. At the time of this writing, Öcalan remains in Turkish custody with a life sentence.

V. EXTRATERRITORIAL APPLICATION OF THE EUROPEAN  
CONVENTION IN THE WAKE OF *BANKOVIĆ*, *ÖCALAN*, AND OTHER  
CASES

The holdings in *Banković*, *Öcalan*, and other aforementioned cases have left several unanswered questions. *Loizidou*, and its affirmation in *Cyprus*, laid clear the doctrine that effective control engenders responsibility to uphold the Convention's protections:

[T]he 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 . . . .<sup>229</sup>

This obligation is imputed to a member-state either through its military or vis-à-vis “a subordinate local administration.”<sup>230</sup> Such a subordinate entity includes proxy governments supported by a member-state, such as the “Turkish Republic of Northern Cyprus” which was administering the occupied portions of Cyprus.<sup>231</sup> When the effective control amounts to “effective overall control[,] . . . [the member-state's] ‘jurisdiction’ must be considered to extend to securing the entire range of substantive rights set out in the Convention.”<sup>232</sup>

*Banković* clearly limited this assertion. The Court's reasoning in *Banković* seems inconsistent with other decisions by the Court. In response to the applicant's *Loizidou/Cyprus* effective control argument, the *Banković* Court asserted that the Convention's protections could not be divided and applied in a level commensurate to the action at issue, and to recognize jurisdiction in such cases would amount to allowing anyone in the world affected by a member-state's actions to be brought under the Convention's jurisdiction.<sup>233</sup> In one sense, *Banković* reaffirms the

229. *Loizidou I*, 310 Eur. Ct. H.R. (ser. A) at 24.

230. *Id.*

231. *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, 25 (recognizing Turkish jurisdiction over occupied Cyprus vis-à-vis the “local administration which survives by virtue of Turkish military and other support”).

232. *Id.*

233. *Banković*, 2001-XII Eur. Ct. H.R. at 356-57.

[The applicant's] claim that the positive obligation under Article 1 extends to securing the Convention rights in a manner proportionate to the level of control exercised in any given extra-territorial situation. The Governments contend that this amounts to a “cause-and-effect” notion of

effective control doctrine and makes the determination of whether effective control exists a question of fact. In *Loizidou and Cyprus*, Turkish military occupation of parts of Cyprus was enough for the Court to find that such effective overall control obligated Turkey to expand its Convention responsibilities to those areas.

NATO's air campaign in Yugoslavia, and its arguable control over its airspace, was certainly not analogous to the military occupation of Cyprus. However, by requiring such effective overall control vis-à-vis military occupation, the Court neglected the principle that under the Convention, extraterritorial jurisdiction should be broadened to "bring any other person 'within the jurisdiction' of that State to the extent that they exercise authority over such persons. Insofar as the State's acts or omissions affect such persons, the responsibility of that State is engaged."<sup>234</sup> As recognized by the Parliamentary Assembly of the Council of Europe on the topic of extraterritorial jurisdiction, the effective overall control of the type in Cyprus is not a requirement of jurisdiction:

Accordingly the State's "jurisdiction" is not limited to its territory; it extends to all persons "under its actual authority and responsibility". The main difference with the *northern Cyprus* cases is of course that there is no lasting and effective control over an area. The consequence is that the State concerned is not required to secure *the entire range* of substantive rights set out in the Convention, but rather to respect the individual's rights "to the extent that it exercises authority over such persons".<sup>235</sup>

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jurisdiction not contemplated by or appropriate to Article 1 of the Convention. The Court considers that the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.

. . . [T]he Court is of the view that the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure "the rights and freedoms defined in Section I of [the] Convention" can be divided and tailored in accordance with the particular circumstances of the extraterritorial act in question

. . . .

*Id.*

234. *Stocké v. Germany*, 199 Eur. Ct. H.R. (ser. A) 1, 24 (1991) (Commission report).

235. Report of the Committee on Legal Affairs and Human Rights, Areas where the European Convention on Human Rights cannot be implemented, EUR. PARL. DOC. 9730, § V, ¶ 41 (Mar. 11, 2003) [hereinafter Committee Report], available at <http://assembly.coe.int>.

*Banković* deviates from this principle by asserting that the Convention's protections cannot be applied in proportion to the act of the member-state in question.<sup>236</sup> Critics of *Banković* have appropriately pointed out that the effective control in the *Loizidou/Cyprus* cases should not be a prerequisite for a finding of extraterritorial jurisdiction, but only one example of such.<sup>237</sup> By asserting that Convention protections cannot be detached based upon circumstances, the Court created "a gap in the protection afforded by the Convention,"<sup>238</sup> in which jurisdiction exists in circumstances of effective overall control vis-à-vis military occupation, but obligations do not exist in instances where member-states take extraterritorial action short of military occupation.

Another unanswered question left in the wake of *Banković* and other decisions on extraterritoriality is the degree of importance to which the extraterritorial act in question occurred in a Council of Europe member-state or the territory of a non-member. In *Cyprus*, the Court noted the integral nature of the Convention in protecting human rights in Europe, and that by depriving those protections to an area that had formally enjoyed those protections, the purpose of the Convention would be subverted.<sup>239</sup> The *Banković* Court partially premised its decision on the distinction between Turkish-occupied Cyprus and Yugoslavia, the former having been a signatory to the

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236. *Banković*, 2001-XII Eur. Ct. H.R. at 356-57 (rejecting a "cause-and-effect" application of the Convention).

237. Rick Lawson, Life After *Banković*: On the Extra-Territorial Reach of the ECHR 10 (Apr. 2, 2003) (unpublished manuscript, on file with author) ("The northern Cyprus saga might create the impression that effective overall control is required for a State to be held responsible for its acts abroad . . . [b]ut this would be to ignore the existing case-law of the Commission."). Professor Lawson served as legal advisor to the applicants in the *Banković* case, and his article serves as an excellent overview of the current status of extraterritorial application of the European Convention.

238. Sarah Williams & Sangeeta Shah, Comment, *Banković* and Others v. Belgium and 16 Other Contracting States, 6 EUR. H.R. L. REV. 775, 781 (2002). One proffered explanation for the Court's decision is patently political in nature — that it did not want to extend jurisdiction, and hence liability, to NATO forces acting in a perceived "just" war. See Alexandra Ruth & Mirja Trilsch, *International Decisions*, 97 AM. J. INT'L L. 168, 172 (2003).

What might explain the defensive stance assumed by the Court is that the admissibility of the instant case was difficult and awkward not only with regard to the extraterritoriality of the impugned acts, but also with regard to the question of whether — and if so, which — contracting parties are responsible under the Convention for actions carried out within the framework of NATO. By adopting a restrictive approach in relation to the question concerning extraterritoriality, the Court avoided the need to address the one concerning NATO.

*Id.* Professor Lawson offers a detailed criticism of the Court's parsing of the issue of defining control in the Yugoslavian situation. See Lawson, *supra* note 237, at 17-21.

239. *Cyprus*, 2001-IV Eur. Ct. H.R. at 25 (discussing the importance of circumventing a "vacuum" in human rights protections).

Convention and the latter having not.<sup>240</sup> However, in *Öcalan*, the act in question — the arrest of Mr. Öcalan — occurred in an international area of Nairobi's airport.<sup>241</sup> Additionally, in *Issa*, which contrary to *Banković* was found admissible, the impugned acts in question occurred in Iraq, which is obviously not a Council of Europe member.<sup>242</sup> The importance of locale to the Court's case law on extraterritoriality remains a significant, albeit not fully examined, issue.

The *Öcalan* judgment, however, may offer some explanation to these unanswered questions. In regards to the significance of the location of the impugned act, it must again be noted that Turkey's arrest of Öcalan occurred in an international area of Nairobi's airport.<sup>243</sup> However, neglecting the fact that the arrest took place in an international area, the Court instead focused on the question of whether Turkey's actions had violated the sovereignty of Kenya, and found that it had not — making Öcalan's arrest permissible under the Convention.<sup>244</sup> Perhaps more importantly, the Court found that Turkey did maintain an obligation to the Convention because of its clear control over the circumstances.<sup>245</sup> The Court's analysis, thus, seems to place an emphasis on the factual question of degree of control, rather than on location. Turkish security forces clearly had control over Öcalan by virtue of his arrest and detention.<sup>246</sup> The Court therefore seems to recognize that Turkey's degree of control over Öcalan was greater than the control NATO exercised over Yugoslavia's airspace in *Banković*.<sup>247</sup>

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240. *Banković*, 2001-XII Eur. Ct. H.R. at 358-359 (distinguishing Yugoslavia from Cyprus based on its membership status in the Council of Europe).

241. *Öcalan*, 37 Eur. H.R. Rep. at 253 (outlining events prior to Öcalan's arrest).

242. *Issa*, Eur. Ct. H.R. App. No. 31821/96 at 2-3 (describing alleged events which occurred during a Turkish military incursion in Iraq).

243. *Öcalan*, 37 Eur. H.R. Rep. at 253 (recognizing that the arrest of Öcalan occurred on an airplane in Nairobi Airport).

244. *Id.* at 276 (finding that Kenyan authorities had de facto cooperated with Turkey in Öcalan's arrest, and that no violation of Kenyan sovereignty had occurred).

245. *Id.* at 274.

Directly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the "jurisdiction" of that State for the purposes of [Article] 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.

*Id.*

246. *Id.* at 274-75.

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

*Id.*

247. Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights*

In the wider sense, *Banković* and *Öcalan* contradict each other — both involving extraterritorial acts committed by Council of Europe member-states, but the former declared inadmissible for lack of jurisdiction, and the latter declared admissible and decided. The Parliamentary Assembly of the Council of Europe has recognized this conflict: “*Issa and Öcalan* suggest that a [High Contracting Party] must secure the Convention rights and freedoms to the extent that it can when performing an operation in a third country, but *Banković* expressly points in the opposite direction.”<sup>248</sup> In a narrower sense, *Öcalan* re-affirms one aspect of *Banković* by requiring that a certain degree of control must be found to exist in order for the Convention’s obligations to extend to extraterritorial acts of Council of Europe states.<sup>249</sup>

Despite the unanswered questions from *Banković*, *Öcalan*, and related cases about the degree of control required for Convention jurisdiction to exist, what is known is that member-states conducting actions outside of the Council of Europe will be obligated to adhere to the European Convention on Human Rights if such control is found to exist. *Loizidou* and *Cyprus* indicate that such control exists by virtue of a military occupation.<sup>250</sup> *Banković* indicates that use of precision-targeted air strikes does not amount to such control.<sup>251</sup> Finally, *Öcalan* indicates that the threshold of control is met if the security forces of a member-state conduct an arrest and detention of an individual.<sup>252</sup> The continuing development of this case law comes at an ample and pressing time, as the United Kingdom — a member-state to the Council of Europe and the Convention on Human Rights — has been conducting military operations in Iraq since March of 2003.<sup>253</sup> In a groundbreaking decision in May of 2004, the High Court of Justice of England and Wales ordered a hearing on England’s European

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*in the Occupied Territories*, 73 ISRAEL L. REV. (forthcoming Spring 2005), available at <http://www2.colman.ac.il/law/concord/publications/livingindenial.pdf> (last visited Mar. 3, 2005) (critiquing the *Banković* and *Öcalan* cases but asserting in relation to the Court’s reasoning in *Öcalan* that “[p]erhaps the Court attributed importance to the intensity of physical control exercised by Turkish officials over *Öcalan*, which clearly surpassed the level of physical control exercised by NATO forces flying over Belgrade”).

248. Committee Report, *supra* note 235, § VI ¶ 48.

249. See Ben-Naftali & Shany, *supra* note 247 (asserting that “[i]t should further be noted in this context that the restrictive approach embraced by the Court in *Banković* was somewhat revised in the *Öcalan* case”).

250. See *supra* Part III.B for a discussion of the northern Cyprus cases.

251. See *supra* Part III.D for a discussion of *Banković*.

252. See *supra* Part IV.B for a discussion of *Öcalan*.

253. See Lawson, *supra* note 237, at 19 (discussing the implications of *Loizidou* and *Banković* in regards to British military operations in Iraq).

Convention on Human Rights obligations in regards to the alleged deaths of Iraqi civilians at the hands of British military forces.<sup>254</sup>

#### VI. THE UNITED KINGDOM AND THE HUMAN RIGHTS ACT OF 1998

Not only is the United Kingdom bound by the European Convention of Human Rights as a convention party and member-state to the Council of Europe, it has also incorporated virtually all of the Convention rights and protections into statutory law vis-à-vis the Human Rights Act.<sup>255</sup> The Act will theoretically decrease the amount of cases involving the United Kingdom that will go before the European Court of Human Rights in Strasbourg. The United Kingdom is certainly no stranger to the Court as a party to previous cases. From 1959-1989, the United Kingdom was found to have violated the Convention twenty-three times.<sup>256</sup> In its own courts, judicial references to the European Convention have appeared over 150 times.<sup>257</sup> The Human Rights Act itself was finally passed after considerable debate about its implications for the UK.<sup>258</sup>

The Act includes the major Convention rights to life,<sup>259</sup> liberty and security;<sup>260</sup> fair trial;<sup>261</sup> and freedom of thought, conscience and religion.<sup>262</sup> The Act dictates that United Kingdom courts must take into account European Court rulings on human rights.<sup>263</sup> The two significant omissions from the Convention are the absence of articles 1 and 13 regarding obligations to uphold the Act's protections within the jurisdiction of the United Kingdom and to

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254. Richard Norton-Taylor, *Families Win Hearing on Deaths*, THE GUARDIAN (London), May 12, 2004 (discussing a High Court ruling to hear a case against Britain for deaths of Iraqis allegedly shot or beaten to death by British forces), available at LEXIS, European News Sources File.

255. Human Rights Act, 1998 (Eng.).

256. DONALD W. JACKSON, THE UNITED KINGDOM CONFRONTS THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1 (1997) (asserting that the United Kingdom violated the Convention twenty-three times in the stated period, and that "measured both by the number of complaints before the Court and by the violations found, it was the most frequent offender").

257. *Id.* at 126-27 (describing Professor Jackson's search results for ECHR references in English court decisions).

258. Lammy Betten, *Introduction*, in THE HUMAN RIGHTS ACT 1998: WHAT IT MEANS 1, 1-6, (Lammy Betten ed., 1999) (discussing debate and implications for the UK's adoption of the Human Rights Act); Clare Dyer, *Human Rights Law: Bringing Home the Basics*, THE GUARDIAN (London), Nov. 12, 1998 (outlining implications of the Human Rights Act for UK law), available at LEXIS, European News Sources File; Frances Gibb, *Rights Act will Allow Judges to Shape our Lives*, THE TIMES (London), Oct. 27, 1998 (discussing debate over the role and adequacy of English judges to interpret the Human Rights Act), available at LEXIS, European News Sources File.

259. Human Rights Act, 1998, sched. 1, art. 2 (Eng.).

260. *Id.* art. 5.

261. *Id.* art. 6.

262. *Id.* art. 9.

263. *Id.* § 2(1)(a) (Introduction).

provide an effective remedy for proven wrongs.<sup>264</sup> In parliamentary debate, it was recognized that these Convention articles could be removed due to redundancy, as they were “in effect giving our domestic courts the jurisdiction relating to the rights and freedoms guaranteed under the European Convention on Human Rights.”<sup>265</sup> In addition, clause 8 of the Act, which enables domestic courts to provide remedies to unlawful acts,<sup>266</sup> was thought to be sufficient enough to exclude the Convention’s wording.<sup>267</sup>

In another noteworthy departure from the European Convention, the United Kingdom has officially reserved a right to derogate from certain Convention obligations in the Human Rights Act, particularly in regards to alleged terrorist activities. Its principle derogation relates to the Convention’s Article 5 obligations in regards to securing individual liberty.<sup>268</sup> The United Kingdom had enacted police powers to arrest and detain individuals without charge for a period of time in its operations against Irish Republican Army (IRA) terrorist activity, and reserved a continuing right to do so in its derogation of Convention obligations in the Human Rights Act.<sup>269</sup> Despite the European Court of Human Rights

264. See Human Rights Act, 1998, sched. 2 (Eng.) (including Convention articles 2-12 and 14-18).

265. 585 PARL. DEB., H.L. (5th ser.) (1997-98) 419 available at <http://www.publications.parliament.uk> (last visited Mar. 2, 2005).

266. Human Rights Act, 1998, c. 8 (Eng.) (“In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.”), available at <http://www.hmsso.gov.uk/acts/acts1998/19980042.htm> (last visited Mar. 2, 2005).

267. See 584 PARL. DEB., H.L. (5th ser.) (1997-98) 1266-67.

My Lords, I have not the least idea what the remedies the courts might develop outside Clause 8 could be if Article 13 was included. The noble and learned Lord has really made my point for me. Clause 8(1) is of the widest amplitude. No one is contending that it will not do the job. When we have challenged the proponents of the amendment on a number of occasions in Committee to say how Clause 8 might not do the job, they have been unable to offer a single example. Therefore, the argument is all one way. What we have done is sufficient.

*Id.*

268. Convention for Human Rights, *supra* note 14, art. 5 (declaring that “[e]veryone has the right to liberty and security of person” unless lawful processes have been enacted to arrest and detain individuals).

269. Human Rights Act, 1998, sched. 3, § 1 (Eng.), available at <http://www.hmsso.gov.uk> (last visited Mar. 2, 2005).

The Government found it necessary in 1974 to introduce and since then, in cases concerning persons reasonably suspected of involvement in terrorism connected with the affairs of Northern Ireland, or of certain offences under the legislation, who have been detained for 48 hours, to exercise powers enabling further detention without charge, for periods of up to five days, on the authority of the Secretary of State.

*Id.*



1988 judgment in *Brogan and Others v. The United Kingdom*,<sup>270</sup> finding that the UK had violated Article 5 protections after detaining alleged terrorist suspects for several days without adhering to Convention obligations,<sup>271</sup> the UK has continued to reserve this power, and has moved to expand this derogation in regards to arresting foreign nationals in the wake of the 9/11 terrorist attacks.<sup>272</sup> It should be recognized, however, that even though derogations of Article 5 protections are permissible in certain circumstances, there are four Convention principles deemed so important that they cannot be derogated from in any circumstances.<sup>273</sup> These include the Convention Article 2 right to life “except in respect of deaths resulting from lawful acts of war,” Article 3 prohibition of torture, Article 4 prohibition of slavery, and Article 7 prohibition of criminal penalties for non-criminal acts.<sup>274</sup>

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270. *Brogan and Others v. The United Kingdom*, 11 Eur. H.R. Rep 117 (1988).

271. *Id.* 131-36.

272. Human Rights Act, 1998, amend. 2, order 2001 (Eng.), available at <http://www.hmso.gov.uk> (last visited Mar. 2, 2005).

As a result of the public emergency, provision is made in the Anti-terrorism, Crime and Security Act 2001, inter alia, for an extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful under existing domestic law powers. The extended power to arrest and detain will apply where the Secretary of State issues a certificate indicating his belief that the person's presence in the United Kingdom is a risk to national security and that he suspects the person of being an international terrorist.

*Id.*

273. Convention for Human Rights, *supra* note 14, art. 15.

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

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

*Id.*

274. *Id.*

## VII. THE DETENTION AND DEATH OF BAHA MOUSA

The cases before the High Court of England and Wales originated from alleged human rights violations committed by British military forces in Iraq. The alleged violations were reported in an International Red Cross report that was leaked to the *Wall Street Journal* and reported in early May of 2004.<sup>275</sup> The International Committee of the Red Cross (ICRC) asserted its displeasure with the public disclosure of the previously confidential report.<sup>276</sup> It also claimed that the report was communicated to the Coalition Provisional Authority (CPA) of Iraq in February of 2004, and was based on information gathered throughout 2003.<sup>277</sup> The 24-page report was based on interviews with Iraqi detainees and other witnesses, and concluded that CPA forces had allegedly engaged in widespread abuse of prisoners that violated international human rights law.<sup>278</sup> The ICRC reported that the most frequent forms of alleged abuses by CPA forces included prolonged hooding of detainees; beatings with guns and other objects; psychological abuse; sleep, food, and water deprivation; sexual humiliation; and other forms of maltreatment.<sup>279</sup>

British lawyers have now filed cases against the United Kingdom triggered by the ICRC report and other accounts.<sup>280</sup> These cases involve circumstances in which British soldiers allegedly shot and killed Iraqis while in their homes, cars, or other public

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275. David S. Cloud, et al., *Red Cross Found Widespread Abuse of Iraqi Prisoners; Confidential Report Says Agency Briefed U.S. Officials on Concerns Repeatedly*, WALL ST. J., May 7, 2004, at A1; David S. Cloud, *Red Cross Cited Detainee Abuse Over a Year Ago; Agency Filed Complaints About Abu Ghraib Prison Months Before U.S. Probe*, WALL ST. J., May 10, 2004, at A1.

276. Press Release, International Committee of the Red Cross, Iraq: ICRC explains position over detention report and treatment of prisoners (May 8, 2004) (asserting that ICRC "reports carry a specific mention that they are strictly confidential and intended only for the authorities to which they are presented. . . . As already indicated this report was, however, released without our consent"), available at <http://www.icrc.org> (last visited Mar. 2, 2005).

277. *Id.* ("[T]his report includes observations and recommendations from visits that took place between March and November 2003. The report itself was handed over to the Coalition Forces (CF) in February of 2004.")

278. INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION (Feb. 2004) [hereinafter ICRC REPORT].

279. *Id.* ¶ 25 (outlining "methods of ill-treatment most frequently alleged during interrogation"). Public disclosure of these allegations of prisoner abuse is most frequently credited to an article published by the *New Yorker* days before the ICRC report was leaked to the *Wall Street Journal*. See Seymour Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, available at <http://www.newyorker.com> (last visited Mar. 2, 2005).

280. Public Interest Lawyers, *Iraq Litigation*, available at <http://www.publicinterestlawyers.co.uk> (last visited Mar. 2, 2005) (describing cases brought by Iraqi families against the United Kingdom).

places.<sup>281</sup> One case involves the alleged beating to death of an Iraqi man while in detention. As noted in the ICRC report, the man, earlier identified as Baha Mousa, was detained by British soldiers along with others who had raided the Basra hotel he worked at.<sup>282</sup> According to the report:

[The detained men] were made to kneel, face and hands against the ground, as if in a prayer position. The soldiers stamped on the back of the neck of those raising their head. . . . The suspects were taken to Al-Hakiyima, a former office previously used by the [Iraqi Intelligence Service] in Basrah and then beaten severely by CF personnel. One of the arrestees died following the ill-treatment . . . . Prior to his death, his co-arrestees heard him screaming and asking for assistance.

The issued “International Death Certificate” mentioned “Cardio-respiratory arrest-asphyxia” as the condition directly leading to the death.<sup>283</sup>

According to witness accounts reported earlier, witnesses alleged that Mousa and others were arrested by British soldiers, bound with flexi-cuffs, hooded, and severely beaten.<sup>284</sup> The detained men were repeatedly kicked in their kidneys and forced to dance.<sup>285</sup> Various medical documents reported that Mousa and the other detained men were seriously beaten after arrest.<sup>286</sup> The family of Mousa accepted \$3,000.00 in compensation for his death.<sup>287</sup>

Mousa’s family and others then disputed a government “policy decision” to not conduct an independent inquiry into his death and deaths of others allegedly committed by British soldiers, and they

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281. *Id.* (describing the cases of Hazim Jum’aa Gatteh Al-Skeini — shot during a funeral; Hannan Mahaibas Saeed Shmailawi — shot while eating dinner in her home; Muhammad Abdul Ridha Salim — shot while at a family member’s home; Waleed Fayayi Muzban — shot from behind while driving).

282. ICRC REPORT, *supra* note 278, ¶ 16 (describing arrest of Baha Mousa and others on September 13, 2003).

283. *Id.*

284. Rory McCarthy, “They were kicking us, laughing. It was a great pleasure for them,” THE GUARDIAN (London), Feb. 21, 2004, (describing witness accounts of men arrested at a Basra hotel by PCA forces), available at LEXIS, European News Sources File.

285. *Id.* (describing witness accounts in which British soldiers repeatedly kicked detainees and forced them to dance “like Michael Jackson”).

286. *Id.* (describing medical reports alleging kidney failure and severe beatings).

287. *Id.* (“Since then [Mousa’s father] has accepted \$3,000 (about £1,600) as part of a compensation payment for his son’s death.”).

won the right to a full hearing over the matter before the High Court of England and Wales.<sup>288</sup> Lawyers for the families have acknowledged that jurisdiction vis-à-vis the Human Rights Act and European Convention is “[t]he crucial issue the High Court must decide.”<sup>289</sup> It should be noted again that by incorporating the European Convention’s principles via the Human Rights Act, the United Kingdom’s courts now “must take into account” European Court of Human Rights case law.<sup>290</sup> The remainder of this Article will provide an overview of European Court of Human Rights case law supporting the argument that the United Kingdom does maintain extraterritorial jurisdiction over its forces in Iraq, and more importantly, that the death of Mousa and torture of other Iraqis violates the European Convention’s Article 3 prohibition of torture and Article 2 right to life.

VIII. THE EUROPEAN COURT OF HUMAN RIGHTS AND ARTICLE 3:  
*IRELAND, TOMASI, RIBITSCH, AND SELMOUNI*

The landmark court case involving Convention violations of Article 3<sup>291</sup> was *Ireland v. The United Kingdom*, decided in 1978.<sup>292</sup> In response to terrorist activity by both the IRA and loyalist forces,<sup>293</sup> the government of Northern Ireland enacted special powers to arrest and detain individuals in order to prevent terrorism.<sup>294</sup> These powers enabled authorities to arrest individuals without warrant and traditional due process rights for detention and interrogation for varied periods of time, including indefinitely.<sup>295</sup> The United Kingdom notified the Council of Europe of their intention to derogate from the Convention in order to exercise these powers.<sup>296</sup>

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288. *Iraqi Families Win Right to Challenge Government*, THE GUARDIAN (London), May 11, 2004 (reporting a High Court decision to conduct a full hearing on the alleged killings), available at LEXIS, European News Sources File.

289. Karen McVeigh, *Relatives of Dead Iraqis Win High Court Challenge*, THE SCOTSMAN (Edinburgh), May 12, 2004, available at LEXIS, European News Sources File.

290. Human Rights Act, 1998, c. 2 (Eng.), available at <http://www.hms0.gov.uk> (last visited Mar. 2, 2005).

291. Convention for Human Rights, *supra* note 14, art. 3 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”).

292. *Ireland v. The United Kingdom*, 2 Eur. H.R. Rep. 25 (1978).

293. *Id.* at 35 (“The situation worsened in 1970. The number of explosions recorded by the police jumped dramatically from a total of eight in 1969 to 155 in 1970. Some explosions were caused by Loyalists . . . but there is no dispute that the majority were the work of the IRA.”).

294. *Id.* at 50.

295. *Id.* at 51-57 (describing special powers regulations enacted by the government of Northern Ireland).

296. *Id.* at 51 (noting the UK’s official notification of derogation to the European Convention six times in the 1970s).

In 1971, the United Kingdom's security forces initiated Operation Demetrius — a wide-scale operation in which hundreds of suspected IRA members were detained and interrogated by the Royal Ulster Constabulary.<sup>297</sup> Although the majority of detainees were released within several days, a number of detainees were held for “interrogation in depth.”<sup>298</sup> Five general categories of interrogation techniques were employed by government forces in interrogation: 1) “wall-standing” (keeping detainees in “stress positions” for prolonged periods of time); 2) hooding; 3) prolonged exposure to loud noise; 4) sleep deprivation; and 5) food and water deprivation.<sup>299</sup> In addition to these conditions, detained individuals alleged that a variety of acts of maltreatment were committed against them, including severe beatings.<sup>300</sup>

The Court noted that Article 3 maltreatment exists upon a finding that a level of severity has been reached as determined by the factual circumstances at hand.<sup>301</sup> It also reaffirmed the principle that Article 3 could not be derogated from in any form or in any circumstances.<sup>302</sup> The Court then recognized that the five interrogation techniques did comprise “inhuman treatment” outlawed by the Convention.<sup>303</sup> Reviewing allegations by detainees at several different holding locations, the Court found that this pattern of inhuman treatment of detainees was practiced in many, although not all, detention centers.<sup>304</sup> The Court thus held that the use of the five interrogation techniques did amount to a violation of Article 3 by the United Kingdom.<sup>305</sup>

Since *Ireland*, a number of cases have spoken specifically towards Article 3 violations committed by government forces against detainees. *Tomasi v. France*<sup>306</sup> concerned the detention of a Corsican separatist who had allegedly participated in an attack against a French military garrison.<sup>307</sup> Tomasi was arrested and kept in police custody for forty-eight hours, and alleged that he had been

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297. *Id.* at 38 (outlining the arrest of some 350 individuals in an operation “directed against the IRA organisation as a whole”).

298. *Ireland*, 2 Eur. H.R. Rep. at 59.

299. *Id.* (outlining interrogation techniques used by government forces of alleged IRA detainees).

300. *Id.* at 61-70 (describing allegations of mistreatment of detainees).

301. *Id.* at 79 (noting that “ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3”).

302. *Id.* (“The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim’s conduct.”).

303. *Id.* at 79-80.

304. *Id.* at 79-85.

305. *Id.* at 107.

306. *Tomasi v. France*, 241 Eur. Ct. H.R. (ser. A) (1993).

307. *Id.* at 9.

beaten and maltreated during his interrogation.<sup>308</sup> Doctors appointed by French judicial officials confirmed after medical examination that he had sustained various lesions that may be consistent with his allegations.<sup>309</sup> However, the French court removed the case on the grounds that it was impossible to prove with certainty that his alleged beating was conducted while he was in detention, as police had expressly denied any such actions.<sup>310</sup> Tomasi then applied to the European Court with Article 3 and other claims, which were admitted for review.<sup>311</sup>

The Court noted France's argument that although Tomasi did sustain apparent injuries, it was impossible to prove that a causal link existed implicating police for his injuries.<sup>312</sup> Notwithstanding the absence of proof indicating that Tomasi's injuries were sustained while in detention, the Court found it "sufficient to observe that the medical certificates and reports, drawn up in total independence by medical practitioners, attest to the large number of blows inflicted on Mr[.] Tomasi and their intensity," and subsequently held that his treatment was inhuman and degrading and therefore in violation of Article 3.<sup>313</sup> *Tomasi* indicated that even in the absence of evidence proving a direct link between maltreatment and the actions of government agents, a significant body of evidence showing that maltreatment may have occurred in detention is sufficient to find a violation of Article 3.

The case of *Ribitsch v. Austria* further developed how the Court would treat evidence of maltreatment in detention.<sup>314</sup> Ribitsch was an alleged drug dealer who had been apprehended by police in the investigation of heroin overdose-related deaths.<sup>315</sup> After his release from detention, a medical examination indicated that he had several bruises and "symptoms characteristic of a cervical syndrome, [and] that he was suffering from vomiting and a violent headache."<sup>316</sup> Ribitsch claimed that he was repeatedly beaten

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308. *Id.* at 19-20 (outlining Tomasi's interrogation and alleged maltreatment).

309. *Id.* at 20-22 (outlining results of medical examinations performed by doctors and finding that the lesions were "consistent with Mr. Tomasi's declarations but could equally have a different traumatic origin").

310. *Id.* at 30 (citing the Court of Cassation's conclusions that furthering Tomasi's case would be "pointless").

311. *Tomasi*, 241 Eur. Ct. H.R. (ser. A) at 32 (finding Tomasi's case admissible for review of Article 3, Article 5, and Article 6 claims).

312. *Id.* at 40 (noting the Government's position that "excluded any presumption of the existence of a causal connection" between Tomasi's injuries and his detention).

313. *Id.* at 42.

314. *Ribitsch v. Austria*, 336 Eur. Ct. H.R. (ser. A) (1995).

315. *Id.* at 8-9.

316. *Id.* at 9.

during his interrogation, but police claimed his injuries were caused after he slipped while getting out of a police car.<sup>317</sup>

As in *Tomasi*, medical examination showed that Ribitsch had sustained injuries, but because it was impossible to conclude that they were a result of an alleged beating in detention absent other evidence,<sup>318</sup> he lost his case before an Austrian court.<sup>319</sup> Before the European Court's review of Ribitsch's Article 3 claim, Austria argued that alleged beating and injuries by government agents must be proved beyond a reasonable doubt.<sup>320</sup> The Court, however, came to another conclusion. Noting that it was "not disputed that Mr[.] Ribitsch's injuries were sustained during his detention in police custody,"<sup>321</sup> the Court found that Austria was "accordingly under an obligation to provide a plausible explanation of how the applicant's injuries were caused."<sup>322</sup> The Court also noted the "particular vulnerability" of Ribitsch as an individual detained by government agents.<sup>323</sup> Because it did not find it plausible that his injuries were caused by slipping out of a police car door, and in the absence of another explanation, the Court found Austria had violated Ribitsch's Article 3 rights.<sup>324</sup> *Ribitsch* indicates that not only will an Article 3 violation be found in the absence of direct proof establishing a link between government conduct and injuries sustained in detention, but places a positive obligation on governments to provide a suitable explanation for injuries in the absence of such evidence.

The case of *Selmouni v. France*<sup>325</sup> is also a notable development of the European Convention's Article 3 case law. After being detained by French police for suspected drug-trafficking, Selmouni alleged that he was repeatedly punched, beaten with a bat, urinated on, sodomized with a baton, and threatened with blow torches and forced injection of a syringe by the police.<sup>326</sup> Medical examination conducted during his period of interrogation indicated that he had sustained lesions throughout his head and body that "corresponds to the period of [Selmouni's] police custody."<sup>327</sup> Unlike in *Tomasi* and *Ribitsch*, a French domestic court found four police officers

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317. *Id.* (describing differing accounts of Ribitsch's detention).

318. *Id.* at 18-19 (citing a medical examination by a forensic expert).

319. *Ribitsch*, 336 Eur. Ct. H.R. (ser. A) at 20-22.

320. *Id.* at 24.

321. *Id.* at 25-26.

322. *Id.*

323. *Id.* at 26.

324. *Ribitsch*, 336 Eur. Ct. H.R. (ser. A) at 25-26 (concluding that Austria was in violation of Article 3).

325. *Selmouni v. France*, 1999-V Eur. Ct. H.R. 149.

326. *Id.* at 160-63.

327. *Id.* at 159-60 (citing medical reports of Selmouni's condition during his detention).

guilty of assault.<sup>328</sup> Three of the police officers were sentenced to twelve- to fifteen-month suspended imprisonments, and the commanding officer to eighteen months of imprisonment, fifteen of which were suspended.<sup>329</sup>

In the European Court's consideration of the case, it noted that "[e]ven in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment."<sup>330</sup> Relying on the medical examinations conducted during Selmouni's detention, the Court found that he had suffered extreme physical injuries.<sup>331</sup> Unlike in *Ireland*, where the Court had found that the United Kingdom had violated Article 3 by causing inhuman treatment,<sup>332</sup> it examined whether the police conduct in the instant case amounted to the more egregious level of torture prohibited by the same article.<sup>333</sup> Citing the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted,"<sup>334</sup> the Court found that the police conduct did amount to torture.<sup>335</sup> France thus became the first Western European nation to be found in violation of the Convention's prohibition against torture.<sup>336</sup>

#### IX. THE EUROPEAN COURT OF HUMAN RIGHTS AND ARTICLE 2: *MCCANN, ÇAKICI, TIMURTAŞ, AND VELIKOVA*

Significant Article 2 case law of the Convention began in claims brought against the United Kingdom. *McCann and Others v. The United Kingdom*<sup>337</sup> was the first European Court case to focus on an intentional killing and alleged violation of Article 2, which

328. *Id.* at 170-72 (noting the decision of the Versailles Court of Appeals).

329. *Id.* (outlining the sentencing of the four police officers).

330. *Selmouni*, 1999-V Eur. Ct. H.R. at 181.

331. *Id.* at 183 (outlining Selmouni's physical abuse and exposure to "heinous and humiliating" acts).

332. *See supra* notes 292-305 and accompanying text for a discussion of *Ireland*.

333. Convention for Human Rights, *supra* note 14, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

334. *Selmouni*, 1999-V Eur. Ct. H.R. at 181 (quoting the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

335. *Id.* at 183-84 (finding a violation of Article 3's prohibition of torture).

336. The government of Turkey had previously been found in violation of Article 3's prohibition against torture. *See, e.g.*, *Aydin v. Turkey*, 25 Eur. Ct. H.R. 251, 295-97 (1998) (violation of Article 3's prohibition of torture for beating, sexual humiliation, rape, and use of a water hose on a Kurdish woman by Turkish security officials).

337. *McCann and Others v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) (1995).



enshrines the basic right to life.<sup>338</sup> In *McCann*, members of British military Special Air Services (SAS) were detached to Gibraltar in order to arrest three IRA members.<sup>339</sup> The SAS believed that the IRA members were planning to detonate a car bomb near a military ceremony.<sup>340</sup> The SAS and local police tracked the three suspects to an area within the proximity of the military ceremony and identified what they believed to be “a ‘suspect car bomb.’”<sup>341</sup>

The SAS agents followed the three suspects walking away from the car.<sup>342</sup> Believing that they were about to detonate the car bomb, the agents shot one suspect after he allegedly reached across his front side in a rapid manner for a presumed detonation device.<sup>343</sup> They then shot the other suspect after she allegedly reached for her handbag for a presumed weapon or detonation device.<sup>344</sup> The third suspect was also shot after he was seen reaching for a jacket pocket.<sup>345</sup> All three suspects were then searched and no weapons or detonation devices were found.<sup>346</sup> The vehicle identified as the suspect car bomb was also searched and no bomb was found.<sup>347</sup> However, an explosive device was later found in a car rented by one of the suspects.<sup>348</sup> Family members of the deceased IRA members later challenged the United Kingdom in both Gibraltar and

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338. Convention for Human Rights, *supra* note 14, art. 2.

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. 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:

- a. in defence of any person from unlawful violence;
- b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- c. in action lawfully taken for the purpose of quelling a riot or insurrection.

*Id.*

339. *McCann*, 324 Eur. Ct. H.R. (ser. A) at 11-12 (describing orders of SAS members to arrest an IRA active service unit in Gibraltar).

340. *Id.* at 14 (describing an intelligence briefing by SAS in regards to the possible actions of Daniel McCann, Sean Savage, and Mairead Farrell).

341. *Id.* at 21 (describing a brief examination of a car believed to be holding a bomb).

342. *Id.* at 22-23 (describing observations of the three IRA suspects by SAS agents).

343. *Id.* at 23 (describing the shooting of Daniel McCann).

344. *McCann*, 324 Eur. Ct. H.R. (ser. A) at 23-24 (describing the shooting of Mairead Farrell).

345. *Id.* at 27 (describing the shooting of Sean Savage).

346. *Id.* at 30 (“After the shooting, the bodies of the three suspects and Farrell’s handbag were searched. No weapons or detonating devices were discovered.”).

347. *Id.* (“The bomb-disposal team opened the suspect white Renault car but found no explosive device or bomb.”).

348. *Id.* at 31 (describing the discovery of explosives in a car rented by Mairead Farrell under the pseudonym of Katharine Smith).

Northern Ireland and lost their cases.<sup>349</sup> They then sued the UK, alleging a violation of Article 2, on the grounds that the use of lethal force and their subsequent deaths “were not absolutely necessary.”<sup>350</sup>

In determining whether or not the United Kingdom had violated Article 2, the Court first noted that the prohibition against the taking of life by government forces was not absolute, but could be permitted under very strict conditions.<sup>351</sup> A determination of whether or not a violation had occurred must take into account whether or not it was “absolutely necessary” to intentionally take life, given the factual circumstances of the situation.<sup>352</sup> An examination of such circumstances includes not only a review of the government force’s actions, but a wider scrutiny of “the planning and control of the actions under examination.”<sup>353</sup>

Focusing on the actions of the SAS agents, the Court found no evidence that the killings of the three IRA members were premeditated acts.<sup>354</sup> Furthermore, although it was later found that none of the suspects had weapons or explosive detonators on them, the Court recognized that SAS agents were acting under a reasonable belief that they did have such items with them and were imminently prepared to use them.<sup>355</sup> Given such considerations, the Court found that the shootings were justifiable since the agents were acting under the belief that they were about to prevent the taking of innocent lives, and that their actions themselves did not amount to a violation of Article 2.<sup>356</sup>

349. *McCann*, 324 Eur. Ct. H.R. (ser. A) at 31-38 (describing proceedings of the applicants failed challenges against the United Kingdom in both Gibraltar and Northern Ireland).

350. *Id.* at 45 (outlining the applicant’s Convention challenges alleging a violation of Article 2).

351. *Id.* at 45-46 (“It must also be borne in mind that, as a provision which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 ranks as one of the most fundamental provisions in the Convention.”).

352. *Id.* at 46 (“[T]he use of the term ‘absolutely necessary’ in Article 2 § 2 indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is ‘necessary in a democratic society.’”).

353. *Id.*

354. *McCann*, 324 Eur. Ct. H.R. (ser. A) at 51-52 (finding no evidence that the shootings were planned in advance as a form of intentional assassination).

355. *Id.* at 57-58 (reviewing the actions of the SAS soldiers prior to the shootings).

356. *Id.* at 58-59.

The Court accepts that the soldiers honestly believed, in the light of the information that they had been given, as set out above, that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life . . . . The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives.

It considers that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an

However, in regards to the Article 2 obligations in the planning and control of the SAS mission, the Court reached a different conclusion. It noted that the situation in which the shootings occurred could have been entirely preempted had the IRA members been arrested prior to that day, upon their arrival in Gibraltar, which was monitored by the government.<sup>357</sup> It also concluded that the security forces — with the knowledge that the SAS agents would in all likelihood kill the IRA members if they believed they were about to detonate a bomb — had an obligation to ensure that their intelligence information was either entirely correct or contained sufficient notice that there may not be enough of an absolute need to resort to lethal force.<sup>358</sup> Given these considerations, the Court was “not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence,”<sup>359</sup> and consequently found the United Kingdom in violation of Article 2.<sup>360</sup> The *McCann* holding thus indicated how closely the Court would scrutinize government use of lethal force, looking not only to the actions of the government agents themselves, but also to the planning and operationalization context to determine if lethal force was absolutely necessary or could have been preempted.

Since *McCann*, cases have developed combining Article 2 claims with the factual circumstances of arrest and detention which characterize the Article 3 cases discussed above.<sup>361</sup> Several illustrative cases originate from Turkish military operations against the PKK. In *Çakici v. Turkey*,<sup>362</sup> plaintiffs alleged that

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honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. . . .

It follows that, having regard to the dilemma confronting the authorities in the circumstances of the case, the actions of the soldiers do not, in themselves, give rise to a violation of this provision.

*Id.*

357. *Id.* at 59-60 (noting the failure to arrest the suspects prior to their shootings).

358. *Id.* at 61-62 (discussing considerations as to whether or not the use of lethal force was absolutely necessary).

359. *McCann*, 324 Eur. Ct. H.R. (ser. A) at 62.

360. *Id.* (“Accordingly, the court finds that there has been a breach of Article 2 of the Convention.”).

361. *See supra* Part VIII.

362. *Çakici v. Turkey*, 1999-IV Eur. Ct. H.R. 583; *see also* Gobind Singh Sethi, *The European Court of Human Rights’ Jurisprudence on Issues of Forced Disappearances*, 8 HUM. RTS. BRIEF 29 (2001); Irum Taqi, Note, *Adjudicating Disappearance Cases in Turkey: An Argument for Adopting the Inter-American Court of Human Rights’ Approach*, 24 FORDHAM INT’L L.J. 940 (2001) (providing analyses of European Court of Human Rights examination of “disappearance” cases involving Turkish operations against Kurdish separatist forces). Both Sethi and Taqi provide a thorough overview of *Çakici* and other European Court of Human Rights case law focusing on evidential issues related to alleged disappearances and deaths of Kurds in Turkish custody.

Çakici was taken into custody by Turkish forces from his village and detained for an unknown period of time at several holding facilities — where witnesses claimed to have seen him after he was tortured.<sup>363</sup> Turkey argued that they had never detained him and that he had eluded security forces as a wanted PKK member until he was allegedly found dead with dozens of other PKK fighters after a clash with government forces.<sup>364</sup>

The Council of Europe's then fact-finding entity — the Commission on Human Rights — concluded after an investigation, involving interviews with several witnesses, that Çakici had been detained by the security forces and was beaten on at least one occasion.<sup>365</sup> Noting Article 2 § 1's requirement "that the right to life be protected by law," and that there was "sufficient circumstantial evidence" showing that he had been detained by the government, the Court found that Turkey had a positive obligation to protect his life while in its custody.<sup>366</sup> The Court subsequently found that Turkey had violated Article 2's obligation to protect the right to life.<sup>367</sup> It also found Turkey in violation of Article 3's prohibition of torture as well, deducing from witness testimony that Çakici was tortured prior to his death.<sup>368</sup>

In *Timurtaş v. Turkey*,<sup>369</sup> Timurtaş was allegedly apprehended and detained by Turkish security forces from his village along with several other men.<sup>370</sup> Although the government denied that he had ever been detained,<sup>371</sup> evidence was provided that Timurtaş had been detained and interrogated by Turkish forces.<sup>372</sup> Citing to *Selmouni*, the Court recognized that "where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible

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363. *Çakici*, 1999-IV Eur. Ct. H.R. at 593 (describing the plaintiffs' allegations in regards to Çakici's disappearance).

364. *Id.* (describing the government's arguments in regards to Çakici's disappearance).

365. *Id.* at 599-601 (outlining the Commission's findings).

366. *Id.* at 610 (holding that Turkey had a positive obligation to protect Çakici's right to life after detaining him).

367. *Çakici*, 1999-IV Eur. Ct. H.R. at 610-11 ("As Ahmet Çakici must be presumed dead following an unacknowledged detention by the security forces, the Court finds that the responsibility of the respondent State for his death is engaged.").

368. *Id.* at 611-12 (finding witness testimony credible enough to indicate that Turkey had also violated Article 3 by torturing Çakici while he was detained).

369. *Timurtaş v. Turkey*, 2000-VI Eur. Ct. H.R. 303.

370. *Id.* at 311-12 (describing the plaintiffs' allegations in regards to Timurtaş' disappearance).

371. *Id.* at 313 (describing the government's arguments in regards to Timurtaş' disappearance).

372. *Id.* at 314 (describing a hearing of the Commission on Human Rights in which a military report indicated that Timurtaş had been arrested and detained by the security forces).

explanation of how those injuries were caused.”<sup>373</sup> Citing *Çakici*, it then noted that even if the detained individual’s body is not found, circumstantial evidence can lead to a presumption of death in custody.<sup>374</sup> Because Timurtaş<sup>o</sup> had been missing for over six years, the length of his disappearance itself was a significant factor indicating the likelihood that he had died in custody.<sup>375</sup> As in *Çakici*, the Court concluded that Timurtaş had died in “an unacknowledged detention,” and that Turkey had thus violated Article 2 for failing to protect his life while in custody.<sup>376</sup>

In a 2000 case involving an alleged Article 2 violation while in custody not involving a disappearance, the Court reviewed the death of a Gypsy while in police custody in *Velikova v. Bulgaria*.<sup>377</sup> In *Velikova*, Slavtcho Tsonchev was arrested by Bulgarian police for allegedly being involved in the theft of cattle.<sup>378</sup> At the time of his arrest, Tsonchev had been drinking substantial amounts of alcohol with friends.<sup>379</sup> According to police reports, he was too drunk to be questioned and was left in an arrest cell where he began vomiting and allegedly fell on the ground due to being intoxicated.<sup>380</sup> Later in the night, Tsonchev was found dead at the police station.<sup>381</sup> An autopsy conducted the next day found numerous bruises on his face, arms, and legs, and that “[t]he cause of Mr[.] Tsonchev’s death was the acute loss of blood resulting from the large and deep haematomas on the upper limbs and the left buttock . . . . The injuries are the result of a blunt trauma.”<sup>382</sup>

The Court, again citing to *Selmouni*, restated the Convention obligation to protect a detained individual’s health and safety while in government custody under Article 2.<sup>383</sup> It dismissed the government’s claim that Tsonchev died from injuries caused by falling while drunk, as the medical report indicated that his death

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373. *Id.* at 330.

374. *Timurtaş*, App. 2000-VI Eur. Ct. H.R. at 330 (holding that sufficient circumstantial evidence can allow a conclusion that an individual has died in custody).

375. *Id.* at 330-31 (discussing the length of Timurtaş’ disappearance and noting “that the more time goes by without any news of the detained person, the greater the likelihood that he or she has died”).

376. *Id.* at 331-32 (finding a violation of Article 2 because Timurtaş was presumed to have died during government custody).

377. *Velikova v. Bulgaria*, 2000-VI Eur. Ct. H.R. 1.

378. *Id.* at 9-10 (describing circumstances of Tsonchev’s arrest).

379. *Id.* at 10 (describing witness testimony that Tsonchev had been drunk at the time of his arrest, but did not seem to be experiencing any medical problems).

380. *Id.* at 10-12 (describing police accounts of Tsonchev’s detention).

381. *Id.* at 12 (noting police testimonies as to the discovery of Tsonchev’s dead body).

382. *Velikova*, 2000-VI Eur. Ct. H.R. at 13-14.

383. *Id.* at 23 (noting that “the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation” in regards to injuries or deaths that occur in government custody).

was due to blood loss caused by blunt trauma.<sup>384</sup> It thus concluded that Tsonchev died as a result of intentional injuries sustained while he was in police custody, amounting to a violation of Article 2.<sup>385</sup>

#### X. CONCLUSION: ANOTHER LOOK AT THE CASE OF BAHU MOUSA

Revisiting the case of Baha Mousa,<sup>386</sup> the European Court of Human Rights' Article 2 and Article 3 case law make it abundantly clear that his torture and death violated both articles. Mousa and others were arrested and taken into British custody.<sup>387</sup> In detention, the Iraqis were subjected to the identical treatment deemed illegal in *Ireland* — hooding, forced stress positions, and beatings<sup>388</sup> — as violations of Article 3's prohibition of inhuman treatment.<sup>389</sup> *Tomasi* and *Ribitsch* demonstrate the Court's willingness to find Article 3 violations even in the absence of a causal link between injuries and the state actors' alleged conduct.<sup>390</sup> *Ribitsch* also imposed an Article 3 obligation on the alleged state perpetrator to either safeguard an individual while in custody or provide a plausible explanation for injuries sustained in custody.<sup>391</sup> As Mousa allegedly died as a result of this treatment, it is arguable that the beatings he received rose to the degree of severity recognized in *Selmouni* as torture.<sup>392</sup> The conduct of British forces would therefore amount to at least a violation of Article 3's prohibition of inhuman treatment and likely a violation of its prohibition of torture.

The Turkish disappearance cases of *Çakici* and *Timurtaş* indicate that even in the absence of direct evidence or even a body, the Court will find an Article 2 violation of a state's obligation to protect life.<sup>393</sup> Such a violation can be concluded on the basis of a

384. *Id.* at 23-24 (reviewing evidence regarding Tsonchev's death).

385. *Id.* at 24 ("[T]here is sufficient evidence on which it may be concluded beyond reasonable doubt that Mr. Tsonchev died as a result of injuries inflicted while he was in the hands of the police. . . . The Court concludes, therefore, that there has been a violation of Article 2.").

386. *See supra* Part VII for a discussion of Baha Mousa's death.

387. ICRC REPORT, *supra* note 278, ¶ 16 (describing arrest of Baha Mousa and others on September 13, 2003).

388. *Id.* (describing conditions of detainment while in British custody); McCarthy, *supra* note 284 (describing witness accounts of men arrested at a Basra hotel by PCA forces).

389. *Ireland*, 2 Eur. H.R. Rep. at 79 (finding the interrogation techniques used by security forces against IRA suspects to be violations of Article 3).

390. *See supra* notes 306-24 and accompanying text for a discussion of *Tomasi* and *Ribitsch*.

391. *Ribitsch v. Austria*, 336 Eur. Ct. H.R. (ser. A) (1995) 25-26 (recognizing Austria's obligation to provide a plausible explanation for injuries sustained while in police custody).

392. *Selmouni v. France*, 1999-V Eur. Ct. H.R. 149, 183-84 (finding that the conduct of French police amounted to an Article 3 violation of the prohibition against torture).

393. *See supra* notes 362-76 and accompanying text for a discussion of *Çakici* and *Timurtaş*.

sufficient amount of circumstantial evidence alone.<sup>394</sup> In Mousa's case, it is not a situation in which circumstantial evidence alone exists — on the contrary, his dead body was produced after having been taken into custody.<sup>395</sup> His case would therefore be analogous to that in *Velikova*, where an Article 2 violation will be found upon the death of an individual in state custody.<sup>396</sup> Such a conclusion would follow from the Court's previously cited recognition "that where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused."<sup>397</sup> Undoubtedly, there is no "plausible explanation" that can be provided in regards to Mousa's death in custody other than that it was caused by the conduct of British military personnel detaining him. In reference to the Court's high degree of scrutiny employed in *McCann*, it should also be clear that his death by torture was by no means "absolutely necessary" to the furthering of any legally acceptable ends.<sup>398</sup> An Article 2 violation of the right to life should thus be found in regards to Mousa's death.

The critical question, of course, is whether the European Convention will apply extraterritorially to the United Kingdom in Iraq. The Court's rulings in *Loizidou* and *Cyprus* indicate that military occupation and effective control of another state imposes an obligation on the occupying state to extend the protections of the Convention on the occupied populace.<sup>399</sup> Such effective control was not found to exist in *Banković* vis-à-vis NATO air strikes.<sup>400</sup> Instead, the *Öcalan* judgment is factually analogous to Mousa's case, in which the Court found that Turkey had jurisdiction over Öcalan through his arrest conducted by Turkish forces at Nairobi Airport.<sup>401</sup> Mousa's arrest and detention should be recognized as a deprivation of his individual liberty and establishment of effective control over him by British military personnel. Therefore, the European Convention should apply to the United Kingdom in Iraq in Mousa's case.

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394. *Timurtaş v. Turkey*, 2000-VI Eur. Ct. H.R. 303, 330 (holding that sufficient circumstantial evidence can allow a conclusion that an individual has died in custody).

395. ICRC REPORT, *supra* note 278, ¶ 16 (describing witness accounts of Mousa's maltreatment and death).

396. *Velikova v. Bulgaria*, 2000-VI Eur. Ct. H.R. 1, 24 (finding Bulgaria in violation of Article 2 for the death of Tsonchev while in police custody).

397. *Timurtaş*, 2000-VI Eur. Ct. H.R. at 330.

398. See *supra* notes 337-61 and accompanying text for a discussion of *McCann*.

399. See *supra* notes 136-57 and accompanying text for a discussion of the *Cyprus* cases.

400. *Banković and Others v. Belgium and Others*, 2001-XII Eur. Ct. H.R. 333, 356-57 (ruling against the plaintiffs' argument that NATO exerted control over Yugoslavia).

401. *Öcalan v. Turkey*, 37 Eur. H.R. Rep. 238, 274-75 (holding that Turkey had jurisdiction over Öcalan through his arrest).

A Convention remedy should especially exist because, upon the occupation of Iraq, multinational military personnel of the Coalition Provisional Authority of Iraq were deemed “immune from Iraqi legal process.”<sup>402</sup> Instead, coalition forces are “subject to the exclusive jurisdiction of their Sending States.”<sup>403</sup> Having adopted the European Convention on Human Rights through the Human Rights Act 1998 — which requires domestic courts to consider European Court case law<sup>404</sup> — the U.K. judiciary should review the Mousa case, and related cases involving alleged human rights violations by British forces, in reference to the European Court’s case law. This article focuses on the Mousa case and the Convention’s Article 2 and Article 3 case law as effective control was established over Mousa through his arrest. However, it should be noted that other Convention case law exists concerning Article 2 claims that may be applicable to other civilian deaths that have occurred in military firefights.<sup>405</sup> In the event of an unsatisfactory judicial outcome in the United Kingdom, Mousa’s family and others should also have recourse to pursue claims against the United Kingdom before the European Court of Human Rights because it is a signatory to the European Convention.

As a policy matter, the extraterritorial application of the European Convention raises a fundamental question as to the continued viability of international human rights law: If a state can be liable for the commission of a human rights violation within its own territory, should it not also be responsible for the same act conducted abroad? It seems anathema to principles of universal human rights law that a state may be able to commit egregious acts with impunity abroad and not be required to answer to principles of international law. In this era of intervention, the European Convention on Human Rights should extend to those lawless areas of Europe to provide redress for such violations where obligations to protect human rights have been ignored, including such areas in Iraq.

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402. Status of the CPA, MNFI, Certain Missions and Personnel in Iraq, Coalition Provisional Authority, Order No. 17, § 2 ¶ 1, *available at* <http://www.iraqcoalition.org> (last visited Mar. 4, 2005).

403. *See id.* § 2 ¶ 3; *see also* PUBLIC INTEREST LAWYERS, IRAQ LITIGATION, *available at* <http://www.publicinterestlawyers.co.uk> (last visited Mar. 4, 2005) (“In the case of Iraq, the argument for domestic accountability is made even stronger in light of the immunity afforded to Coalition personnel (under Coalition Provisional Authority Order 17) from prosecution in Iraqi courts. Such personnel enjoy complete immunity from criminal and civil liability under Iraqi jurisdiction.”).

404. Human Rights Act, 1998, c. 2 (Eng.).

405. *See generally* Ergi v. Turkey, 1998-IV Eur. Ct. H.R. 1751 (finding an Article 2 violation because of insufficient precautions to protect civilian life during a military operation).



