University of Nebraska - Lincoln
DigitalCommons@University of Nebraska - Lincoln

Publications of Affiliated Faculty: Nebraska Public Policy Center

Public Policy Center, University of Nebraska

1-1-2005

The Long Arm of the European Convention on Human Rights and the Recent Development of *Issa v. Turkey*

Tarik Abdel-Monem
University of Nebraska - Lincoln, tabdelmonem2@unl.edu

Follow this and additional works at: http://digitalcommons.unl.edu/publicpolicyfacpub

Part of the Human Rights Law Commons, International Law Commons, Military, War and Peace Commons, and the Peace and Conflict Studies Commons

Abdel-Monem, Tarik, "The Long Arm of the European Convention on Human Rights and the Recent Development of *Issa v. Turkey*" (2005). *Publications of Affiliated Faculty: Nebraska Public Policy Center.* Paper 27.
http://digitalcommons.unl.edu/publicpolicyfacpub/27

This Article is brought to you for free and open access by the Public Policy Center, University of Nebraska at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Publications of Affiliated Faculty: Nebraska Public Policy Center by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Abdel-Monem in Human Rights Brief (2005) 12(2). Copyright 2005, American University, Washington College of Law. Used by permission.

The Long Arm of the European Convention on Human Rights and the Recent Development of *Issa v. Turkey*

by Tarik Abdel-Monem

On November 16, 2004, the European Court of Human Rights (Court) issued its judgment in *Issa and Others v. Turkey*, a case involving the alleged extrajudicial killings of Iraqi Kurds by Turkish security forces in Iraq. *Issa* marked one of the few times the Court considered a case in which a State Party to the European Convention on Human Rights (Convention) was accused of committing human rights abuses not only outside its physical territory, but outside Europe itself. *Issa* and its predecessors provide direction on an important question before the Council of Europe: to what extent does the Convention impose responsibility on States Parties for human rights violations committed abroad?

The Court is well-placed to address this problem. The Convention is widely considered one of the strongest international human rights treaties in force. Because every member of the Council of Europe must ratify the Convention, its members have grown from eight at entry into force in 1953 to 46 at present, including Turkey and Russia. Several of the States Parties to the Convention, either acting alone or on behalf of multilateral efforts, have been involved in military interventions in foreign nations, including peacekeeping efforts in Africa, and, more recently, military intervention in the Middle East. The Convention's law on state responsibility abroad is still developing, however, and each case that comes before the Court adds another layer of interpretation to help parties understand their obligations. As the prospects of military or police intervention abroad have increased since September 11, we should expect to see the number of these cases also increase, for the commission of human rights violations by states acting in foreign nations is no longer a distant frontier of international human rights law.

Claire Trickler-McNulty

A mural at the border of Turkey and Cyprus depicts a map of Cyprus with the flags of Turkey (left) and the "Turkish Republic of Northern Cyprus" (right).

Background: The European Court of Human Rights' Major Cases on Extraterritorial Activities

The landmark European Court of Human Rights cases involving alleged human rights violations committed in foreign territories share a crucial issue: whether the alleged perpetrators exercised jurisdictional control over the plaintiffs at the time of the crime. This question turns on Article 1 of the Convention, which obligates States Parties to extend the Convention's fundamental human rights and freedoms "to everyone within their jurisdiction." In its most basic and general definition, a nation's jurisdiction is considered to be the extent of its capacity to make and enforce its laws. A nation's jurisdiction is traditionally limited to the physical space within its borders, as well as its embassies and ships abroad. Other theories of jurisdiction exist, most notably the somewhat controversial principle of universal jurisdiction, which allows all nations to prosecute perpetrators of particularly heinous crimes irrespective of where they took place or the nationality of the criminals or victims. Still, the most widely and customarily accepted standard of jurisdiction is based on a nation's physical territory, and the European Court has tended to rely on this customary definition. A recent line of cases, however, has recognized a *de facto* form of jurisdiction that can develop in the case of military or police intervention in a foreign nation, effectively broadening the responsibilities of State Parties to the Convention.

The case law in this area began with controversies involving the Turkish occupation of Cyprus, most notably in the 1996 *Loizidou v. Turkey* decision. In *Loizidou*, a Cypriot women's organization staged a march to protest the occupation of parts of Cyprus by thousands of Turkish troops sent to secure the breakaway "Turkish Republic of Northern Cyprus." The women crossed into Turkish-held territory and were detained for a short period. The Cypriot applicant, who was barred access to land she owned in the occupied territory, sued Turkey, claiming her detention had violated her right to liberty and the occupation deprived her of the right to enjoy her property. Turkey, a State Party to the European Convention, claimed that they had no Convention obligations to uphold in the occupied territory because the "Turkish Republic of Northern Cyprus" was an independent state and not itself a party to the Convention. Thus Turkey argued it had no jurisdiction over Cyprus.

The Court, however, ruled that by virtue of Turkey's military intervention it had "effective control" over the portions of Cyprus it was occupying. It noted that Turkey had over 30,000 troops stationed in Cyprus who continually patrolled the occupied territory, and its troops and all civilians in the area were subject to Turkish courts. Because of the scope and depth of its "effective control," the Court held that Turkey had jurisdiction over and was obligated to uphold the rights guaranteed by the Convention in this area. *Loizidou* sent a clear message that a nation bears responsibility for human rights violations in areas it has under military occupation.

The Court faced a different set of circumstances in the 2001 decision of *Banković and Others v. Belgium and 16 Other Contracting States*. During the Kosovo crisis of 1999, the North Atlantic Treaty Organization (NATO) commenced air strikes in Yugoslavia as part of Operation Allied Force. Several civilians were killed at a targeted television station. At the time of the bombing, Yugoslavia was not a State Party to the Convention. Family members of the deceased sued those nations that were members of both the Convention and NATO, alleging that the bombing amounted to a violation of the deceased's right to life guaranteed by Article 2 of the Convention.

Tarik Abdel-Monem, J.D./M.P.H., is a researcher with the University of Nebraska Public Policy Center.

The applicants acknowledged that NATO did not have the same level of broad control over Yugoslavia that Turkey had in occupied portions of Cyprus. Instead they argued that by virtue of its deliberate, precision air strike on the television station, NATO had an obligation to uphold the specific rights within its control in that particular situation, specifically the right to life. The Court, however, ruled that the air strike did not amount to the type of jurisdictional control that would trigger the Convention's protections. Because the Court held that the area affected by the bombing was not under the jurisdiction of NATO states, it found the case inadmissible. To do otherwise, the Court stated, would mean that any person anywhere in the world could have a claim against a State Party to the Convention for its harmful acts. The *Banković* decision was criticized by many commentators as having been influenced by a desire to protect NATO states rather than human rights. It was also perceived as sending a message that nations could bomb other nations with impunity.

With the *Banković* decision, the Court effectively created a grey zone in determining what circumstances triggered States Parties' obligations to uphold the Convention's human rights protections abroad. On one end of the scale, outright military occupation akin to that in Cyprus created an obligation to secure the Convention's rights abroad through the *Loizidou* holding. Yet, at the other end, *Banković* indicated that precision air strikes did not create such a responsibility.

Turkish Military Incursion in Iraq: *Issa and Others v. Turkey*

The Court's recent ruling in *Issa and Others v. Turkey* provides additional guidance on the Convention's applicability to military operations in foreign countries. The circumstances in *Issa* stemmed from Turkey's ongoing war against Kurdish separatists, although the facts were disputed. The plaintiffs were six Iraqi Kurds living close to the Turkish border within Iraq, which is not a European nation or party to the Convention. The applicants, acting on behalf of deceased family members, claimed to have seen Turkish soldiers and helicopters in the valley below their village on April 1, 1995. The next day they encountered a group of Turkish soldiers while tending their sheep. The soldiers allegedly beat the group with rifles, detained the men, and ordered the women to return home. On April 5th, the remaining shepherds and other villagers returned to look for the detained men and found them shot dead and mutilated, with their tongues and genitals removed. Other bodies were found in the same condition in subsequent days. Denying the alleged killings, the Turkish Government admitted that its forces had conducted an operation in Iraq between March 19th and April 16th, but claimed that the forces had been 10 kilometers north of where the alleged acts occurred.

The critical question before the Court again focused on jurisdiction. Following *Banković*, Turkey asserted that the Convention only applied to the physical "legal space" of nations that were States Parties to the Convention. Although its troops had engaged in a cross-border operation into Iraq, there were no official records of Turkish military activity in the specific area where the alleged acts had been committed. Turkey also asserted that because there was no independent proof beyond the applicants' claims that its soldiers had murdered the shepherds, it was possible that they had been killed by PKK fighters and not Turkish forces. The plaintiffs relied on the *Loizidou* decision to argue that Turkey had established effective control over the portions of Northern Iraq it had occupied during its operation, and hence had expanded its jurisdiction and Convention obligations over those areas. Additionally, the applicants argued that by physically arresting the group of shepherds at gunpoint, Turkey had asserted the type of complete control over them that was lacking in the *Banković* decision on the NATO air strikes.

"*Issa* and its predecessors provide direction on an important question before the Council of Europe: to what extent does the [European Convention on Human Rights] impose responsibility on States Parties for human rights violations committed abroad?"

Öcalan v. Turkey, decided in 2003, clarified the European Convention's extraterritorial human rights protections with regard to the arrest and detention of individuals. In *Öcalan*, Turkish agents physically abducted Abdullah Öcalan, the leader of the Workers' Party of Kurdistan (PKK), at Nairobi Airport in Kenya and quickly flew him to Turkey, bound and hooded. A Turkish court later found him guilty of murder as the leader of the PKK's insurgency and sentenced him to death. Öcalan sued Turkey, claiming that the abduction itself was illegal because it amounted to a deprivation of his liberty without due process of law, a protection enshrined in Article 5 of the Convention.

The critical jurisdiction question in this case was whether the abduction amounted to Turkey exercising its control over Öcalan upon his arrest at Nairobi Airport. Turkey claimed that Kenya made the arrest and simply handed him over to Turkish custody as a form of interstate police cooperation. The Court found, however, that Turkey made the arrest, and therefore had brought Öcalan within its jurisdiction at the moment it arrested him. In an interesting statement, the Court specifically noted that the control manifest in the traditional police-style arrest and detention of Öcalan was of the type necessary to trigger the Convention's obligations, as distinguished from the type of control asserted in *Banković*. The *Öcalan* case therefore indicated that a State Party to the Convention had obligations to protect individuals when making arrests abroad.

© European Court of Human Rights

European Court of Human Rights chamber.

Outlining its case law in the area, the Court noted that jurisdiction is traditionally confined to a nation's physical territories. In exceptional scenarios, however, such as in *Loizidou*, a nation could extend its jurisdiction outside its borders if it took effective control of an area abroad. In such circumstances, the obligation to uphold the Convention's human rights protections "derives from the fact of such control." Because Turkey had conducted extensive military operations in Iraq at the time of the alleged killings, the Court believed that Turkey could have established *Loizidou*-like effective control over that particular portion of Northern Iraq at that time, bringing both Turkey and the shepherds under the Convention. In addition to this general form of overall "effective control," the Court also noted that jurisdiction can exist when a State Party's agents exert their specific control or authority abroad.

The outcome of the case, however, turned on a two-part factual determination. First, to prove the necessary jurisdictional control, the shepherds must have demonstrated that they were in the specific area that Turkey had temporarily occupied. Second, they must have proven this beyond a reasonable doubt. Although the surviving shepherds all alleged that the arrest had been committed by Turkish forces, the Court noted that there were no independent witnesses who could confirm their claim, and the alleged act had occurred 10 kilometers south of where the operation had officially been conducted. Also, the applicants did not provide a detailed description of the soldiers or their commander. Because of these insufficiencies, the Court held that the applicants had not proven beyond a reasonable doubt that Turkish forces were in the same area where the killings occurred, and the acts therefore were not within Turkey's jurisdiction. The Court consequently found the case inadmissible because the shepherds were not under the Convention's jurisdiction.

Extraterritorial Cases: More to Come?

THE *ISSA* HOLDING PROVOKES MIXED REACTIONS. *Issa* confirms, along with *Öcalan*, that a State Party to the Convention can indeed extend its jurisdiction to non-European nations when it takes effective control of a foreign country, even temporarily. *Issa* also provides needed guidance on the Convention's extra-territorial application. This decision clarified the level of sufficient evidence that must be established to indicate that a state acting extraterritorially has established effective control over an occupied territory. This could be shown with detailed descriptions and independent witness testimony. Yet the Court's application of this principle to the facts in *Issa* raises other questions. It is striking that the surviving shepherds' accounts, combined with the acknowledged presence of Turkish forces a mere 10 kilometers away, were not considered sufficient to indicate that the men were taken into custody by Turkish forces. By seeming to require that other independent witnesses be present to confirm an arrest, the Court has set a high evidentiary threshold.

Issa will have significant implications for States Parties to the Convention conducting military, police, or peacekeeping operations abroad. Because States Parties must uphold the Convention's obligations wherever they assert a sufficient degree of control, the European Court of Human Rights now stands as the final arbiter of controversies involving alleged human rights violations committed abroad. This effect is already being demonstrated in the United Kingdom with regard to allegations of prisoner abuse in Iraq. The UK is both party to the Convention and has adopted a similar version of its rights and protections in its domestic law. The International Committee of the Red Cross has documented accounts of abuse in a report made public in 2004, which contained graphic descriptions of prisoner mistreatment by coalition forces. The report echoed accounts of abuse of prisoners by UK personnel made public earlier in the British press. According to the claims, British coalition forces in Basra took Iraqi prisoners to a holding facility and allegedly beat one man to death. English human rights attorneys have brought the deceased Iraqi prisoner's case before the High Court of England and Wales, although it has not yet been resolved. The critical question in this case is whether the European Convention on Human Rights applies to the United Kingdom's forces in Iraq. *Issa* seems to indicate that it may. The physical arrest and detention of the Iraqi man in a coalition prison clearly exhibits the type of control asserted in *Issa* and *Öcalan*. In such circumstances, it would be hard to argue that British personnel do not have effective control over the prisoners they hold in custody.

Numerous other allegations of prisoner mistreatment by coalition forces in Iraq could ultimately be reviewed under Convention law, provided that the perpetrators are members of the Council of Europe. This outcome is likely in the British court. The House of Lords' December 2004 ruling against the government's indefinite detention of suspected terrorists indicates that it will continue to adjudicate cases of alleged human rights violations based on the European Convention's principles.

Other States Parties to the Convention will also continue to act abroad in military, anti-terror, or espionage operations unrelated to Iraq. Russia, for example, recently internationalized its "war on terror," and its operations could make it a likely candidate to appear before the European Court of Human Rights for extraterritorial violations of the Convention. In September of 2004, following the Beslan tragedy during which terrorists seized an elementary school and killed hundreds of child hostages, Russia announced its intention to prosecute its anti-terror operations globally. Yet Russian agents were conducting anti-Chechen activities abroad even before the Beslan incident, as evidenced by its February 2004 assassination of a Chechen leader in Qatar. Russia also has recently asserted its interests in neighboring nations such as Georgia and the Ukraine. The Court already has found Russia in violation of Convention obligations stemming from its military operations in Moldova in the 2004 case of *Ilascu and Others v. Moldova and Russia*. It held that Russia had jurisdiction in a breakaway portion of Moldova due to the presence of significant numbers of Russian soldiers fighting for and providing weapons to separatist forces.

Conclusion

GIVEN THE LIKELIHOOD OF CONTINUED extraterritorial interventions in the foreseeable future, States Parties to the Convention should expect to be held accountable before the Court for their actions abroad. Based on the limited jurisprudence and mixed interpretations in these cases, however, it is unclear what form that accountability will take. *Issa* seems to extend the potential areas covered by the Convention in dramatic ways. One wonders if the Court will narrow its approach to extraterritorial jurisdiction in future cases. It may be argued that by setting a high evidentiary threshold in *Issa*, the Court has made it difficult to successfully establish when a nation exercises jurisdiction through its control while acting abroad, particularly in covert operations. Still, the Court has affirmed continuously the principle that States Parties to the Convention are responsible for human rights violations committed abroad, and jurisdiction flowing from effective control is both consistent in theory and makes common sense. What is clear is that the European Convention on Human Rights' long arm will likely remain active for the foreseeable future. *HRB*