CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 52207/99
by Vlastimir and Borka BANKOVIĆ, Živana STOJANOVIĆ, Mirjana STOIMENOVSKI, Dragana JOKSIMOVIĆ and Dragan SUKOVIĆ
against
Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom

The European Court of Human Rights, sitting as a Grand Chamber composed of

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr C.L. ROZAKIS,
Mr G. RESS,
Mr J.-P. COSTA,
Mr GAUKUR JÖRUNDSSON,
Mr L. CAFLISCH,
Mr P. KŪRIS,
Mr I. CABRAL BARRETO,
Mr R. TÜRMEN,
Mrs V. STRÁŽNICKÁ,
Mr C. BÎRSAN,
Mr J. CASADEVALL,
Mr J. HEDIGAN,
Mrs W. THOMASSEN,
Mr A.B. BAKA,
Mr K. TRAJA, J*udges*,
and Mr P.J. MAHONEY, *Registrar*,

Having regard to the above application lodged on 20 October 1999 and registered on 28 October 1999,

Having regard to the decision of 14 November 2000 by which the Chamber of the First Section to which the case had originally been assigned relinquished its jurisdiction in favour of the Grand Chamber (Article 30 of the Convention),

Having regard to the observations submitted by the respondent Governments and the observations in reply submitted by the applicants,

Having regard to the parties' oral submissions on 24 October 2001 and their subsequent written comments in reply to Judges' questions,

Having deliberated on 24 October and 12 December 2001, decides, on the last-mentioned date, as follows:

THE FACTS

1. The applicants are all citizens of the Federal Republic of Yugoslavia ("FRY"). The first and second applicants, Vlastimir and Borka Banković, were born in 1942 and 1945, respectively and they apply to the Court on their own behalf and on behalf of their deceased daughter, Ksenija Banković. The third applicant, Živana Stojanović, was born in 1937 and she applies on her own behalf and on behalf of her deceased son, Nebojsa Stojanović. The fourth applicant, Mirjana Stoimenovski, applies on her own behalf and on behalf of her deceased son, Darko Stoimenovski. The fifth applicant, Dragana Joksimović, was born in 1956 and she applies on her own behalf and on behalf of her deceased husband, Milan Joksimović. The sixth applicant, Dragan Suković, applies in his own right.

2. The applicants are represented before the Court by Mr Anthony Fisher, a solicitor practising in Essex, by Mr Vojin Dimitrijević, Director of the Belgrade Centre for Human Rights, by Mr Hurst Hannum, Professor of International Law at Tufts University, Medford, MA, the United States and by Ms Françoise Hampson, barrister and Professor of International Law at the University of Essex. Those representatives attended the oral hearing before the Court together with their advisers, Mr Rick Lawson, Ms Tatjana Papić and Mr Vladan Joksimović. The third applicant, Ms Živana Stojanović, also attended the hearing.

3. The Governments are represented before the Court by their Agents. At the oral hearing the following Governments were represented as follows: the United Kingdom (whose submissions were made on behalf of all respondents) by Mr Christopher Greenwood Q.C. and Professor of International Law, by Mr James Eadie, Counsel, by Mr Martin Eaton, Agent, Foreign and Commonwealth Office and by Mr Martin Hemming, Adviser; Belgium by Mr Jan Lathouwers, Deputy Agent; France by

Mr Pierre Boussaroque, Counsel; Germany by Mr Christoph Blosen, Deputy to the German Permanent Representative to the Council of Europe; Greece by Mr Michael Apessos, Advisor; Hungary by Mr Lipót Höltzl and Ms Monika Weller, Agent and Co-Agent, respectively; Italy by Mr Francesco Crisafulli, Deputy Co-Agent; Luxembourg by Mr Nicolas Mackel, Agent; The Netherlands by Ms Jolien Schukking, Agent; Norway by Mr Frode Elgesem, Acting Agent; Poland by Mr Krysztof Drzewicki, Agent and Ms Renata Kowalska, Counsel; and Turkey by Ms Deniz Akçay, Co-Agent.

A. The circumstances of the case

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. The respondent Governments considered the application inadmissible without any need to address the facts of the case and submitted that any failure on their part to expressly dispute a fact should not be held against them. The Court has not, in summarising the circumstances of the case below, interpreted any failure expressly to contest a fact as any party's acceptance of it.

1. Background

6. The conflict in Kosovo between Serbian and Kosovar Albanian forces during 1998 and 1999 is well documented. Against the background of the escalating conflict, together with the growing concerns and unsuccessful diplomatic initiatives of the international community, the six-nation Contact Group (established in 1992 by the London Conference) met and agreed to convene negotiations between the parties to the conflict.

7. On 30 January 1999, and following a decision of its North Atlantic Council ("NAC"), the North Atlantic Treaty Organisation ("NATO") announced air strikes on the territory of the FRY in the case of non-compliance with the demands of the international community. Negotiations consequently took place between the parties to the conflict from 6 to 23 February 1999 in Rambouillet and from 15 to 18 March 1999 in Paris. The resulting proposed peace agreement was signed by the Kosovar Albanian delegation but not by the Serbian delegation.

8. Considering that all efforts to achieve a negotiated, political solution to the Kosovo crisis had failed, the NAC decided on, and on 23 March 1999 the Secretary General of NATO announced, the beginning of air strikes (Operation Allied Force) against the FRY. The air strikes lasted from 24 March to 8 June 1999.

2. The bombing of Radio Televizije Srbije ("RTS")

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

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

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

3. Relevant proceedings before other international tribunals

12. On 26 April 1999 the FRY deposited with the Secretary General of the United Nations ("UN") its declaration recognising the compulsory jurisdiction of the International Court of Justice ("ICJ"). On 29 April 1999 the FRY instituted proceedings against Belgium and nine other States concerning their participation in Operation Allied Force and submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court of the ICJ. By order dated 2 June 1999 the ICJ rejected that request. The remaining issues in the case are pending.

13. In June 2000 the Committee established to review Operation Allied Force reported to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). An investigation was not recommended. On 2 June 2000 the Prosecutor informed the UN Security Council of her decision not to open an investigation.

B. Relevant international legal materials

1. The Treaty of Washington 1949

14. The Treaty of Washington came into force on 24 August 1949 ("the 1949 Treaty") and created an alliance called the North Atlantic Treaty Organisation ("NATO") of ten European states (Belgium, France, Luxembourg, the Netherlands, the United Kingdom, Denmark, Iceland, Italy, Norway, Portugal) with Canada and the United States. In 1952 Greece

and Turkey acceded to the 1949 Treaty, the Federal Republic of Germany joined in 1955 and Spain also became a member in 1982. These countries were joined on 12 March 1999 by the Czech Republic, Hungary and Poland.

15. The essential purpose of NATO is to safeguard the freedom and security of all its members by political and military means in accordance with the principles of the UN Charter. Its fundamental operating principle is that of a common commitment to mutual co-operation among sovereign states based on the indivisibility of the security of its members.

2. The Vienna Convention on the Law of Treaties 1969 ("the Vienna Convention 1969")

16. Article 31 of the Vienna Convention 1969 is entitled "General rule of interpretation" and reads, in so far as relevant, as follows:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.
>
> ...
>
> 3. There shall be taken into account, together with the context:
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> ...
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> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
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> (c) any relevant rules of international law applicable in the relations between the parties."

17. Article 32 is entitled "Supplementary means of interpretation" and reads as follows:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure;
>
> (b) leads to a result which is manifestly absurd."

18. In its commentary on these Articles, the International Law Commission noted that Articles 31 and 32 should operate in conjunction, and would not have the effect of drawing a rigid line between the "general rule" and the "supplementary means" of interpretation. At the same time the distinction itself was justified since the elements of interpretation in Article

31 all relate to the agreement between the parties at the time when or after it received authentic expression in the text. Preparatory work did not have the same authentic character "however valuable it may sometimes be in throwing light on the expression of agreement in the text" (Yrbk. ILC (1966), ii. 219-220).

3. The drafting history of Article 1 of the Convention

19. The text prepared by the Committee of the Consultative Assembly of the Council of Europe on legal and administrative questions provided, in what became Article 1 of the Convention, that the "member States shall undertake to ensure to all persons residing within their territories the rights...". The Expert Intergovernmental Committee, which considered the Consultative Assembly's draft, decided to replace the reference to "all persons residing within their territories" with a reference to persons "within their jurisdiction". The reasons were noted in the following extract from the *Collected Edition of the* Travaux Préparatoires *of the European Convention on Human Rights* (Vol. III, p. 260):

> "The Assembly draft had extended the benefits of the Convention to 'all persons residing within the territories of the signatory States'. It seemed to the Committee that the term 'residing' might be considered too restrictive. It was felt that there were good grounds for extending the benefits of the Convention to all persons in the territories of the signatory States, even those who could not be considered as residing there in the legal sense of the word. The Committee therefore replaced the term 'residing' by the words 'within their jurisdiction' which are also contained in Article 2 of the Draft Covenant of the United Nations Commission."

20. The next relevant comment prior to the adoption of Article 1 of the Convention, made by the Belgian representative on 25 August 1950 during the plenary sitting of the Consultative Assembly, was to the effect that

> "henceforth the right of protection by our States, by virtue of a formal clause of the Convention, may be exercised with full force, and without any differentiation or distinction, in favour of individuals of whatever nationality, who on the territory of any one of our States, may have had reason to complain that [their] rights have been violated".

21. The *travaux préparatoires* go on to note that the wording of Article 1 including "within their jurisdiction", did not give rise to any further discussion and the text as it was (and is now) was adopted by the Consultative Assembly on 25 August 1950 without further amendment (the above-cited Collected Edition (Vol. VI, p. 132).

4. The American Declaration on the Rights and Duties of Man 1948

22. Article 2 of this declaration reads as follows:

> "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor."

23. In its report in the *Coard* case (Report No. 109/99, case No. 10.951, *Coard et al. v. the United States*, 29 September 1999, §§ 37, 39, 41 and 43), the Inter-American Commission of Human Rights examined complaints about the applicants' detention and treatment by United States' forces in the first days of the military operation in Grenada and commented:

> "While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extra-territorial locus will not only be consistent with, but required by, the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination – 'without distinction as to race, nationality, creed or sex'. ... Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control."

24. Article 1 of the American Convention on Human Rights 1978, on which the substantive jurisdiction of the Inter-American Court of Human Rights is based, reads, in so far as relevant, as follows:

> "The States Parties to this Convention undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination..."

5. The four Geneva Conventions on the Protection of War Victims 1949

25. Article 1 of each of these Conventions ("the Geneva Conventions 1949") requires the Contracting Parties to undertake "to respect and to ensure respect for the present Convention in all circumstances".

6. Covenant on Civil and Political Rights 1966 ("CCPR 1966") and its Optional Protocol 1966

26. Article 2 § 1 of CCPR 1966 reads, in so far as relevant, as follows:

> "Each State Party to the present Convention undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant ..."

The Commission on Human Rights approved during its sixth session in 1950 a motion to include the words "within its territory and subject to its" in Article 2 § 1 of the draft Covenant. Subsequent proposals to exclude those words were defeated in 1952 and 1963. Subsequently, the Human Rights Committee has sought to develop, in certain limited contexts, the Contracting States' responsibility for the acts of their agents abroad.

27. Article 1 of the Optional Protocol 1966 reads, in so far as relevant, as follows:

> "A State Party to the Covenant that becomes a Party to the present Protocol recognises the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. ..."

COMPLAINTS

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

THE LAW

29. The first to the fifth applicants rely on Articles 2, 10 and 13 on their own behalf and on behalf of their deceased close relatives. The sixth applicant, injured during the strike, relies on these Articles on his own behalf. With the consent of the Court, the parties' written and oral submissions were limited to the admissibility issues, the Governments' further accepting that they would not be arguing that the complaints were manifestly ill-founded.

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

31. The Governments dispute the admissibility of the case. They mainly contend that the application is incompatible *ratione personae* with the provisions of the Convention because the applicants did not fall within the jurisdiction of the respondent States within the meaning of Article 1 of the Convention. They also maintain that, in accordance with the *"Monetary Gold* principle" of the ICJ, this Court cannot decide the merits of the case as it would be determining the rights and obligations of the United States, of Canada and of NATO itself, none of whom are Contracting Parties to the Convention or, therefore, parties to the present application (*Monetary Gold Removed from Rome in 1943*, ICJ Reports 1954, p. 19 as applied in *East Timor*, ICJ Reports 1995, p. 90).

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

33. Finally, the Hungarian, Italian and Polish Governments submit that the applicants have failed to exhaust effective remedies available in those States as required by Article 35 § 1 of the Convention.

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

34. This is the principal basis upon which the Governments contest the admissibility of the application and the Court will consider first this question. Article 1 of the Convention reads as follows:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

1. The submissions of the respondent Governments

35. The Governments contend that the applicants and their deceased relatives were not, at the relevant time, within the "jurisdiction" of the respondent States and that the application is therefore incompatible *ratione personae* with the provisions of the Convention.

36. As to the precise meaning of "jurisdiction", they suggest that it should be interpreted in accordance with the ordinary and well-established meaning of that term in public international law. The exercise of "jurisdiction" therefore involves the assertion or exercise of legal authority, actual or purported, over persons owing some form of allegiance to that State or who have been brought within that State's control. They also suggest that the term "jurisdiction" generally entails some form of structured relationship normally existing over a period of time.

37. They maintain that they are supported in this respect by the jurisprudence of the Court which has applied this notion of jurisdiction to confirm that certain individuals affected by acts of a respondent State outside of its territory can be considered to fall within its jurisdiction because there was an exercise of some form of legal authority by the relevant State over them. The arrest and detention of the applicants outside of the territory of the respondent State in the *Issa* and *Öcalan* cases (*Issa and Others v. Turkey*, (dec.), no. 31821/96, 30 May 2000, unreported and *Öcalan v. Turkey*, (dec.), no. 46221/99, 14 December 2000, unreported) constituted, according to the Governments, a classic exercise of such legal authority or jurisdiction over those persons by military forces on foreign soil. Jurisdiction in the *Xhavara* case which concerned the alleged deliberate striking of an Albanian ship by an Italian naval vessel 35 nautical miles off the coast of Italy (*Xhavara and Others v. Italy and Albania*, (dec.), no. 39473/98, 11 January 2001, unreported) was shared by written agreement between the respondent States. The Governments consider that they are also supported in their interpretation of jurisdiction by the *travaux préparatoires* and by State practice in applying the Convention since its ratification by them. They refer, in this latter respect, to the lack of derogations under Article 15 of the Convention in respect of military operations in which the Contracting States participated outside of their territories.

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

39. Moreover, the Governments go on to take issue with the applicants' principal submissions as to the meaning of jurisdiction in Article 1 of the Convention namely, that the positive obligation to protect in Article 1 of the Convention applies proportionately to the control exercised.

40. In the first place, the Governments consider that the very text of Article 1 does not support this interpretation. Had the drafters wished for what is effectively a "cause-and-effect" type of responsibility, they could have adopted wording similar to that of Article 1 of the Geneva Conventions 1949 (cited above at § 25). In any event, the applicants' interpretation of jurisdiction would invert and divide the positive obligation on Contracting States to secure the substantive rights in a manner never contemplated by Article 1 of the Convention.

41. Secondly, they consider the applicants' reliance on Article 15 in support of their expansive interpretation of Article 1 to be mistaken and that Article 15, in fact, supports the Governments' own position. The Governments argue that there is nothing in the text or application of Article 15 of the Convention to imply, as the applicants wrongly assume, that Article 15 § 2 refers to "war" or "public emergency" situations outside as well as inside the territories of the Contracting States. Accordingly, Article 15 § 2 does not strengthen the applicants' broad interpretation of Article 1 of the Convention.

42. Thirdly, and as to the applicants' suggestion that the citizens of the FRY would be left without a Convention remedy, the Governments recall that a finding that Turkey was not responsible under the Convention in the northern Cyprus cases would have deprived the inhabitants of that territory of the benefit of the Convention rights they would otherwise have enjoyed (see, Loizidou v. Turkey judgment of 23 March 1995 (*preliminary objections*), Series A no. 310, Loizidou v. Turkey judgment of 18 December 1996 (*Merits*), *Reports of Judgments and Decisions* 1996-VI, no. 26 and *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001). In the present case, the Governments note that the FRY was not and is not a party to the Convention and its inhabitants had no existing rights under the Convention.

43. Fourthly, the Governments strongly dispute the applicants' assertions as to the risk involved in not rendering respondent States participating in such military missions accountable under the Convention. The Governments contend that it is rather the applicants' novel "cause-and-effect" theory of extra-territorial jurisdiction that would have serious international consequences. Such a theory would, when added to the applicants' assertion concerning the several liability of all respondent States as members of NATO, seriously distort the purpose and scheme of the Convention. In particular, it would have serious consequences for international military collective action as it would render the Court

competent to review the participation of Contracting States in military missions all over the world in circumstances when it would be impossible for those States to secure any of the Convention rights to the inhabitants of those territories and even in situations where a Contracting State had no active part in the relevant mission. The resulting Convention exposure would, according to the Governments, risk undermining significantly the States' participation in such missions and would, in any event, result in far more protective derogations under Article 15 of the Convention. In addition, they suggest that international humanitarian law, the ICTY and, most recently, the International Criminal Court ("ICC") exist to regulate such State conduct.

44. Finally, the Governments also contest the applicants' alternative theories of State responsibility under Article 1 of the Convention. As to their argument concerning the alleged control of the airspace over Belgrade by NATO forces, the Governments deny such control and, in any event, dispute that any such control could be equated with the territorial control of the nature and extent, identified in the above-cited judgments concerning northern Cyprus, which results in the exercise of effective control or of legal authority. The Governments further consider the applicants' comparison of the present case with the Soering case to be fundamentally flawed (Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161). At the time the impugned decision was to be taken in respect of Mr Soering's extradition, he was detained on the territory of the respondent State, a situation constituting a classic exercise of legal authority over an individual to whom the State could secure the full range of Convention rights.

45. In sum, the Governments submit that the applicants and their deceased relatives did not fall within the jurisdiction of the respondent States and that their application is, therefore, incompatible *ratione personae* with the provisions of the Convention.

2. The submissions of the applicants

46. The applicants consider the application to be compatible *ratione loci* with the provisions of the Convention because they were brought within the jurisdiction of the respondent States by the RTS strike. In particular, they suggest that the determination of "jurisdiction" can be done by adapting the "effective control" criteria developed in the above-cited Loizidou judgments

(*preliminary objections* and *merits*) so that the extent of the positive obligation under Article 1 of the Convention to secure Convention rights would be proportionate to the level of control in fact exercised. They consider that this approach to jurisdiction in Article 1 would provide manageable criteria by which the Court could deal with future complaints arising out of comparable circumstances.

47. Accordingly, when, as in the above-noted Loizidou judgments (*preliminary objections* and *merits*), the Turkish forces were found to have had effective control of northern Cyprus, it was appropriate to consider Turkey obliged to vindicate the full range of Convention rights in that area. However, when the respondent States strike a target outside their territory, they are not obliged to do the impossible (secure the full range of Convention rights) but rather are held accountable for those Convention rights within their control in the situation in question.

48. The applicants maintain that this approach is entirely consistent with the Convention jurisprudence to date, and they rely, in particular, on the admissibility decisions in the above-cited cases of *Issa*, *Xhavara* and *Öcalan* together with the admissibility decision in the *Ilascu* case (*Ilascu v. Moldova and the Russian Federation*, (dec.), no. 48787/99, 4 July 2001, unreported). They consider it also consistent with the interpretation of similar phrases by the Inter-American Commission of Human Rights (the Report in the *Coard* case, at § 23 above). Citing one case of the Human Rights Committee, they contend that that Committee has reached consistent conclusions as regards Article 2 § 1 of the CCPR 1966 and Article 1 of its Optional Protocol.

49. They further suggest that support for their approach to the concept of "jurisdiction" is to be found in the text and structure of the Convention and, in particular, in Article 15. They argue that Article 15 would be rendered meaningless if it did not also apply to extra-territorial war or emergencies. A State is therefore required to make a derogation under Article 15 because, without that derogation, the Convention applies even during such conflicts.

50. As to the Governments' reliance on the *travaux préparatoires*, they point out that this is not a source of primary or definitive evidence as to the meaning to be accorded to the use of jurisdiction in Article 1 of the Convention. Indeed, they note that the "legal authority" and "structured relationship" which the Governments submit are essential elements of jurisdiction are not mentioned in the *travaux préparatoires.*

51. They reject the Governments' suggestion that their interpretation of Article 1 would be a dangerous development. The present case is not about an accident or omission during a UN peace-keeping mission or about rogue soldiers. Rather it concerns a deliberate act approved by each of the respondent States and executed as planned. Indeed, the applicants suggest that it would be dangerous not to render States accountable for the violations of the Convention arising from this type of State action. In emphasising the pre-eminence of the right to life and the role of the Convention as an instrument for European public order, they stress that a failure to find the respondent States responsible would leave these applicants without a remedy and the respondent States' armies free to act with impunity. The ICJ is not open to an application from individuals, the ICTY adjudicates on the responsibility of individuals for serious war crimes and the ICC has not yet been established.

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

53. Alternatively, the applicants compare the circumstances of the present case to those of the above-cited Soering case, arguing that the impugned act was, in fact, the extra-territorial effect of prior decisions, to strike RTS and to launch the missile, which decisions had been taken on the territory of the respondent State or States. They suggest therefore that jurisdiction can be established for the same reasons it was in the Soering case.

3. The Court's assessment

54. The Court notes that the real connection between the applicants and the respondent States is the impugned act which, wherever decided, was performed, or had effects, outside of the territory of those States ("the extra-territorial act"). It considers that the essential question to be examined therefore is whether the applicants and their deceased relatives were, as a

result of that extra-territorial act, capable of falling within the jurisdiction of the respondent States (Drozd and Janousek v. France and Spain, judgment of 26 June 1992, Series A no. 240, § 91, the above-cited Loizidou judgments (*preliminary objections* and *merits*), at § 64 and § 56 respectively, and the *Cyprus v. Turkey* judgment, cited above, at § 80).

(a) The applicable rules of interpretation

55. The Court recalls that the Convention must be interpreted in the light of the rules set out in the Vienna Convention 1969 (Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, § 29).

56. It will, therefore, seek to ascertain the ordinary meaning to be given to the phrase "within their jurisdiction" in its context and in the light of the object and purpose of the Convention (Article 31 § 1 of the Vienna Convention 1969 and, amongst other authorities, Johnston and Others v. Ireland judgment of 18 December 1986, Series A no. 112, § 51). The Court will also consider "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (Article 31 § 3 (b) of the Vienna Convention 1969 and the above-cited Loizidou judgment (*preliminary objections*), at § 73).

57. Moreover, Article 31 § 3 (c) indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". More generally, the Court recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty (the above-cited Loizidou judgment (*merits*), at §§ 43 and 52). The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part (*Al-Adsani v. the United Kingdom*, [GC], no. 35763, § 60, to be reported in ECHR 2001).

58. It is further recalled that the *travaux préparatoires* can also be consulted with a view to confirming any meaning resulting from the application of Article 31 of the Vienna Convention 1969 or to determining the meaning when the interpretation under Article 31 of the Vienna Convention 1969 leaves the meaning "ambiguous or obscure" or leads to a result which is "manifestly absurd or unreasonable" (Article 32). The Court has also noted the ILC commentary on the relationship between the rules of interpretation codified in those Articles 31 and 32 (the text of those Articles and a summary of the ILC commentary is set out above at §§ 16-18 above).

(b) The meaning of the words "within their jurisdiction"

59. As to the "ordinary meaning" of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States (Mann, *"The Doctrine of Jurisdiction in International Law*", RdC, 1964, Vol. 1; Mann, "*The Doctrine of Jurisdiction in International Law, Twenty Years Later*", RdC, 1984, Vol. 1; Bernhardt, *Encyclopaedia of Public International Law*, Edition 1997, Vol. 3, pp. 55-59 "*Jurisdiction of States"* and Edition 1995, Vol. 2, pp. 337-343 "*Extra-territorial Effects of Administrative, Judicial and Legislative Acts*"; Oppenheim's *International Law*, 9th Edition 1992 (Jennings and Watts), Vol. 1, § 137; P.M. Dupuy, *Droit International Public*, 4th Edition 1998, p. 61; and Brownlie, *Principles of International Law*, 5th Edition 1998, pp. 287, 301 and 312-314).

60. Accordingly, for example, a State's competence to exercise jurisdiction over its own nationals abroad is subordinate to that State's and other States' territorial competence (Higgins, *Problems and Process* (1994), at p. 73; and Nguyen Quoc Dinh, *Droit International Public*, 6th Edition 1999 (Daillier and Pellet), p. 500). In addition, a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, unless the former is an occupying State in which case it can be found to exercise jurisdiction in that territory, at least in certain respects (Bernhardt, cited above, Vol. 3 at p. 59 and Vol. 2 at pp. 338-340; Oppenheim, cited above, at § 137; P.M. Dupuy, cited above, at pp. 64-65; Brownlie, cited above, at p. 313; Cassese, *International Law*, 2001, p. 89; and, most recently, the "*Report on the Preferential Treatment of National Minorities by their Kin-States*" adopted by the Venice Commission at its 48th Plenary Meeting, Venice, 19-20 October 2001).

61. The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case (see, *mutatis mutandis* and in general, Select Committee of Experts on Extraterritorial Criminal Jurisdiction, European Committee on Crime Problems, Council of Europe, "*Extraterritorial Criminal Jurisdiction*", Report published in 1990, at pp. 8-30).

62. The Court finds State practice in the application of the Convention since its ratification to be indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility in contexts similar to the present case. Although there have been a number of military missions involving Contracting States acting extra-territorially since their ratification of the Convention (*inter alia*, in the Gulf, in Bosnia and Herzegovina and in the FRY), no State has indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within the meaning of Article 1 of the Convention by making a derogation pursuant to Article 15 of the Convention. The existing derogations were lodged by Turkey and the United Kingdom[1] in respect of certain internal conflicts (in south-east Turkey and Northern Ireland, respectively) and the Court does not find any basis upon which to accept the applicants' suggestion that Article 15 covers all "war" and "public emergency" situations generally, whether obtaining inside or outside the territory of the Contracting State. Indeed, Article 15 itself is to be read subject to the "jurisdiction" limitation enumerated in Article 1 of the Convention.

63. Finally, the Court finds clear confirmation of this essentially territorial notion of jurisdiction in the *travaux préparatoires* which demonstrate that the Expert Intergovernmental Committee replaced the words "all persons residing within their territories" with a reference to persons "within their jurisdiction" with a view to expanding the Convention's application to others who may not reside, in a legal sense, but who are, nevertheless, on the territory of the Contracting States (§ 19 above).

64. It is true that the notion of the Convention being a living instrument to be interpreted in light of present-day conditions is firmly rooted in the Court's case-law. The Court has applied that approach not only to the Convention's substantive provisions (for example, the Soering judgment cited above, at § 102; the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45; the X, Y and Z v. the United Kingdom judgment of 22 April 1997, *Reports* 1997-II; *V. v. the United Kingdom* [GC], no. 24888/94, § 72, ECHR 1999-IX; and *Matthews v. the United Kingdom* [GC], no. 24833/94, § 39, ECHR 1999-I) but more relevantly to its interpretation of former Articles 25 and 46 concerning the recognition by a Contracting State of the competence of the Convention organs (the above-cited Loizidou judgment (*preliminary objections*), at § 71). The Court concluded in the latter judgment that former Articles 25 and 46 of the

[1] The United Kingdom has withdrawn its derogation as of 26 February 2001, except in relation to Crown Dependencies. Turkey reduced the scope of its derogation by communication to the Secretary General of the Council of Europe dated 5 May 1992.

Convention could not be interpreted solely in accordance with the intentions of their authors expressed more than forty years previously to the extent that, even if it had been established that the restrictions at issue were considered permissible under Articles 25 and 46 when the Convention was adopted by a minority of the then Contracting Parties, such evidence "could not be decisive".

65. However, the scope of Article 1, at issue in the present case, is determinative of the very scope of the Contracting Parties' positive obligations and, as such, of the scope and reach of the entire Convention system of human rights' protection as opposed to the question, under discussion in the Loizidou case (*preliminary objections*), of the competence of the Convention organs to examine a case. In any event, the extracts from the *travaux préparatoires* detailed above constitute a clear indication of the intended meaning of Article 1 of the Convention which cannot be ignored. The Court would emphasise that it is not interpreting Article 1 "solely" in accordance with the *travaux préparatoires* or finding those *travaux* "decisive"; rather this preparatory material constitutes clear confirmatory evidence of the ordinary meaning of Article 1 of the Convention as already identified by the Court (Article 32 of the Vienna Convention 1969).

66. Accordingly, and as the Court stated in the Soering case:

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

(c) Extra-territorial acts recognised as constituting an exercise of jurisdiction

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

68. Reference has been made in the Court's case-law, as an example of jurisdiction "not restricted to the national territory" of the respondent State (the Loizidou judgment (*preliminary objections*), at § 62), to situations where the extradition or expulsion of a person by a Contracting State may give rise to an issue under Articles 2 and/or 3 (or, exceptionally, under Articles 5 and or 6) and hence engage the responsibility of that State under the Convention (the above-cited Soering case, at § 91, Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, §§ 69 and

70, and the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, § 103).

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

69. In addition, a further example noted at paragraph 62 of the Loizidou judgment (*preliminary objections*) was the Drozd and Janousek case where, citing a number of admissibility decisions by the Commission, the Court accepted that the responsibility of Contracting Parties (France and Spain) could, in principle, be engaged because of acts of their authorities (judges) which produced effects or were performed outside their own territory (the above-cited Drozd and Janousek judgment, at § 91). In that case, the impugned acts could not, in the circumstances, be attributed to the respondent States because the judges in question were not acting in their capacity as French or Spanish judges and as the Andorran courts functioned independently of the respondent States.

70. Moreover, in that first Loizidou judgment (*preliminary objections*), the Court found that, bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party was capable of being engaged when as a consequence of military action (lawful or unlawful) it exercised effective control of an area outside its national territory. The obligation to secure, in such an area, the Convention rights and freedoms was found to derive from the fact of such control whether it was exercised directly, through the respondent State's armed forces, or through a subordinate local administration. The Court concluded that the acts of which the applicant complained were capable of falling within Turkish jurisdiction within the meaning of Article 1 of the Convention.

On the merits, the Court found that it was not necessary to determine whether Turkey actually exercised detailed control over the policies and actions of the authorities of the "Turkish Republic of Northern Cyprus" ("TRNC"). It was obvious from the large number of troops engaged in active duties in northern Cyprus that Turkey's army exercised "effective overall control over that part of the island". Such control, according to the relevant test and in the circumstances of the case, was found to entail the responsibility of Turkey for the policies and actions of the "TRNC". The Court concluded that those affected by such policies or actions therefore came within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention. Turkey's obligation to secure the rights and freedoms set out in the Convention was found therefore to extend to northern Cyprus.

In its subsequent *Cyprus v. Turkey* judgment (cited above), the Court added that since Turkey had such "effective control", its responsibility could not be confined to the acts of its own agents therein but was engaged by the acts of the local administration which survived by virtue of Turkish support. Turkey's "jurisdiction" under Article 1 was therefore considered to extend to securing the entire range of substantive Convention rights in northern Cyprus.

71. In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.

72. In line with this approach, the Court has recently found that the participation of a State in the defence of proceedings against it in another State does not, without more, amount to an exercise of extra-territorial jurisdiction (*McElhinney v. Ireland and the United Kingdom* (dec.), no. 31253/96, p. 7, 9 February 2000, unpublished). The Court said:

> "In so far as the applicant complains under Article 6 ... about the stance taken by the Government of the United Kingdom in the Irish proceedings, the Court does not consider it necessary to address in the abstract the question of whether the actions of a Government as a litigant before the courts of another Contracting State can engage their responsibility under Article 6 ... The Court considers that, in the particular circumstances of the case, the fact that the United Kingdom Government raised the defence of sovereign immunity before the Irish courts, where the applicant had decided to sue, does not suffice to bring him within the jurisdiction of the United Kingdom within the meaning of Article 1 of the Convention."

73. Additionally, the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.

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

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

75. In the first place, the applicants suggest a specific application of the "effective control" criteria developed in the northern Cyprus cases. They claim that the positive obligation under Article 1 extends to securing the Convention rights in a manner proportionate to the level of control exercised in any given extra-territorial situation. The Governments contend that this amounts to a "cause-and-effect" notion of jurisdiction not contemplated by or appropriate to Article 1 of the Convention. The Court considers that the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.

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

contemporaneous Articles 1 of the four Geneva Conventions of 1949 (see § 25 above).

Furthermore, the applicants' notion of jurisdiction equates the determination of whether an individual falls within the jurisdiction of a Contracting State with the question of whether that person can be considered to be a victim of a violation of rights guaranteed by the Convention. These are separate and distinct admissibility conditions, each of which has to be satisfied in the afore-mentioned order, before an individual can invoke the Convention provisions against a Contracting State.

76. Secondly, the applicants' alternative suggestion is that the limited scope of the airspace control only circumscribed the scope of the respondent States' positive obligation to protect the applicants and did not exclude it. The Court finds this to be essentially the same argument as their principal proposition and rejects it for the same reasons.

77. Thirdly, the applicants make a further alternative argument in favour of the respondent States' jurisdiction based on a comparison with the Soering case (cited above). The Court does not find this convincing given the fundamental differences between that case and the present as already noted at paragraph 68 above.

78. Fourthly, the Court does not find it necessary to pronounce on the specific meaning to be attributed in various contexts to the allegedly similar jurisdiction provisions in the international instruments to which the applicants refer because it is not convinced by the applicants' specific submissions in these respects (see § 48 above). It notes that Article 2 of the American Declaration on the Rights and Duties of Man 1948 referred to in the above-cited *Coard* Report of the Inter-American Commission of Human Rights (§ 23 above), contains no explicit limitation of jurisdiction. In addition, and as to Article 2 § 1 the CCPR 1966 (§ 26 above), as early as 1950 the drafters had definitively and specifically confined its territorial scope and it is difficult to suggest that exceptional recognition by the Human Rights Committee of certain instances of extra-territorial jurisdiction (and the applicants give one example only) displaces in any way the territorial jurisdiction expressly conferred by that Article of the CCPR 1966 or explains the precise meaning of "jurisdiction" in Article 1 of its Optional Protocol 1966 (§ 27 above). While the text of Article 1 of the American Convention on Human Rights 1978 (§ 24 above) contains a jurisdiction condition similar to Article 1 of the European Convention, no

relevant case-law on the former provision was cited before this Court by the applicants.

79. Fifthly and more generally, the applicants maintain that any failure to accept that they fell within the jurisdiction of the respondent States would defeat the *ordre public* mission of the Convention and leave a regrettable vacuum in the Convention system of human rights' protection.

80. The Court's obligation, in this respect, is to have regard to the special character of the Convention as a constitutional instrument of *European* public order for the protection of individual human beings and its role, as set out in Article 19 of the Convention, is to ensure the observance of *the engagements undertaken* by the Contracting Parties (the above-cited Loizidou judgment (*preliminary objections*), at § 93). It is therefore difficult to contend that a failure to accept the extra-territorial jurisdiction of the respondent States would fall foul of the Convention's *ordre public* objective, which itself underlines the essentially regional vocation of the Convention system, or of Article 19 of the Convention which does not shed any particular light on the territorial ambit of that system.

It is true that, in its above-cited *Cyprus v. Turkey* judgment (at § 78), the Court was conscious of the need to avoid "a regrettable vacuum in the system of human-rights protection" in northern Cyprus. However, and as noted by the Governments, that comment related to an entirely different situation to the present: the inhabitants of northern Cyprus would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed, by Turkey's "effective control" of the territory and by the accompanying inability of the Cypriot Government, as a Contracting State, to fulfil the obligations it had undertaken under the Convention.

In short, the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention[2], 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. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.

2. Article 56 § 1 enables a Contracting State to declare that the Convention shall extend to all or any of the territories for whose international relations that State is responsible.

81. Finally, the applicants relied, in particular, on the admissibility decisions of the Court in the above-cited *Issa* and *Öcalan* cases. It is true that the Court has declared both of these cases admissible and that they include certain complaints about alleged actions by Turkish agents outside Turkish territory. However, in neither of those cases was the issue of jurisdiction raised by the respondent Government or addressed in the admissibility decisions and in any event the merits of those cases remain to be decided. Similarly, no jurisdiction objection is recorded in the decision leading to the inadmissibility of the *Xhavara* case to which the applicants also referred (cited above); at any rate, the applicants do not dispute the Governments' evidence about the sharing by prior written agreement of jurisdiction between Albania and Italy. The *Ilascu* case, also referred to by the applicants and cited above, concerns allegations that Russian forces control part of the territory of Moldova, an issue to be decided definitively on the merits of that case. Accordingly, these cases do not provide any support for the applicants' interpretation of the jurisdiction of Contracting States within the meaning of Article 1 of the Convention.

4. The Court's conclusion

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

B. Remaining admissibility issues

83. In light of the above conclusion, the Court considers that it is not necessary to examine the remaining submissions of the parties on the admissibility of the application.

These questions included the alleged several liability of the respondent States for an act carried out by an international organisation of which they are members, whether the applicants had exhausted effective remedies available to them within the meaning of Article 35 § 1 of the Convention and whether the Court was competent to consider the case given the principles established by the above-cited *Monetary Gold* judgment of the ICJ.

C. Summary and conclusion

84. Accordingly, the Court concludes that the impugned action of the respondent States does not engage their Convention responsibility and that it is not therefore necessary to consider the other admissibility issues raised by the parties.

85. The application must therefore be declared incompatible with the provisions of the Convention and, as such, inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Paul MAHONEY
Registrar

Luzius WILDHABER
President