HANAN v. GERMANY

RIGHTS WATCH INTERVENTION

1. Rights Watch UK will be focusing in these oral submissions solely on the question of when an individual may come within a State's jurisdiction under Article 1 due to that State's exercise of physical power and control. I refer the Court to our Written Comments for two other matters on which Rights Watch has also intervened, that is – (i) the nature and scope of a State's duties to investigate violations of the right to life as a matter of international law, and (ii) the importance of the right to truth in considering the adequacy of remedies for human rights violations.

2. As to Article 1, this case brings into sharp focus the question of what the Court considers to be required where there is an exercise of physical power and control. To borrow the words of Mr Justice Leggatt at first instance in the *Al-Saadoon* case –

> "can a principled system of human rights law draw a distinction between killing an individual after arresting him and simply shooting him without arresting him first, such that in the first case there is an obligation to respect the person's right to life yet in the second there is not"? [95]

3. He stated in terms that no such distinction could be drawn. The English Court of Appeal thought it would be for this Court to say that there is no distinction, but it was clearly troubled by the persuasive force of the judge's reasoning, which it expressly acknowledged. [25, 72] Indeed, it might appear counter-productive to any system of human rights protection for rights to be engaged where there is detention, but not use of lethal force alone, such that accountability could have been avoided in a case like *Issa* if the victims had been shot by the soldiers right away as opposed to detaining them first.

4. This critical issue now comes before you in the form of an airstrike, as opposed to a bullet, and it is being strongly suggested to the Court that *Bankovic* provides the answer, and even [so far as concerns certain of the intervening States] that the important statements of principle on Article 1 in *Al Skeini* should be applied restrictively and by reference to *Bankovic*, almost as if they had never been made. That suggestion should be rejected:

a. The principles for identifying where a potential victim is within the jurisdiction of the contracting parties were formulated in *Al Skeini* with evident care, taking account of all the preceding jurisprudence of the Court, and that is no doubt why those principles have been reiterated in full in cases like *Jaloud* and *Hassan*, as well as repeated in multiple domestic cases. And, critically, the identification in *Al Skeini* [136] that, "in certain circumstances, the use of force by a state's agent operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction" reflects not only the Court's past jurisprudence, but also the ordinary meaning of the term "jurisdiction" within Article 1, as interpreted according to the usual rules.

b. And while the Court in *Bankovic* focused on the extent of a State's jurisdiction in international law, and unsurprisingly so, this was nonetheless a focus on where a State is generally permitted to exercise jurisdiction extraterritorially; so that could not provide, and presumably was not intended to provide, the Court with a definitive list of the instances where a State does in fact assert its jurisdiction over an individual outside its territory, such that the State can be expected – and intended through Article 1 – to protect the human rights of the individual in compliance with its ECHR obligations.

c. Of course, as the Court must have heard or read a thousand times, it was said in *Bankovic* that jurisdiction under Article 1 is essentially territorial nature and that extraterritorial jurisdiction is the exception; but that is an apt reflection of reality. The State does, on a day to day basis, and as a matter of fact exercise jurisdiction over those within its territory, and assertions of jurisdiction abroad are indeed the exception not the rule. But that does not somehow mean that an assertion of jurisdiction outside the State's territory is somehow conceptually different in nature to an assertion within the territory. According to the UK Supreme Court in the *Susan Smith* case [30], "The word "exceptional" is there not to set an especially high threshold for circumstances to cross before they can justify a finding that the state was exercising jurisdiction extraterritorially. It is there to make it clear that, for this purpose, the normal presumption that

applies throughout the state's territory does not apply." This appears correct and, as *Al Skeini* identifies [132], all depends on the particular facts.

5. Against that backdrop, I wish to make five brief points.

6. First, the Court is now concerned only with whether control and authority has been asserted so as to engage the right to life. That follows from the important statement in *Al Skeini* [137] that the State's only obligation under s. 1 of the Convention is to secure to the individual the rights that are relevant to his or her situation.

7. Second, *Al Skeini* and the Court's subsequent cases do suggest that it is not all cases involving physical power and control that are correctly regarded as falling within a state's jurisdiction. In *Jaloud* and *Pisari*, for example, the Court focused on the assertion of authority and control through the operation of a checkpoint, whilst *Hassan* was of course a detention case. Plainly the Court continues to reject a 'cause and effect' notion of jurisdiction [*Bankovic*, 75], and Rights Watch UK would respectfully suggest that it is correct to do so as otherwise the term 'jurisdiction' within Article 1 would be deprived of meaning.

8. Third, in identifying where, in the context of the right to life, an exercise of physical power and control may constitute an assertion of jurisdiction, the Human Rights Committee's General Comment 36 may provide a useful tool. In particular, this defines those subject to a State's jurisdiction with respect to the ICCPR right to life as

> *"… all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner". [63]*

9. As we identify in our Written Comments, the ICJ has accorded "great weight" to General Comments of the Human Rights Committee [Diallo], and here it is notable that, of the 173 State parties to the ICCPR, only 7 commented on this interpretation as to jurisdiction. Germany did comment, stating that the "mere fact that a military or other activity abroad has an impact on persons abroad" would not automatically suffice to

establish its jurisdiction over the person concerned. That must be correct, and is also consistent with this Court's jurisprudence, but that is not what GC 36 suggests.

10. This leads me to our fourth point, which is that the various statements on a functional approach to jurisdiction, including CG 36, contain important limitations that go to identify whether an individual is indeed within a State's jurisdiction. In GC 36, the impact to the right to life must be direct and reasonably foreseeable. In any given context, this will require a close inspection of the facts and any legal duties incumbent on the State that will give more specific content in terms of identifying what should be taken as reasonably foreseeable.

11. In the context of an armed conflict, the appropriate reference point is IHL and the protections that apply for civilians in the context of targeting a military object. Indeed, Article 1 must of course anyway be interpreted taking into account relevant rules of international law, which includes IHL [VCLT, art 31(3)(c)]:

    a. As to the relevant rules of IHL, as follows from Article 57 of Additional Protocol I to the 1949 Geneva Conventions, which reflects customary international law, and indeed as is reflected in this Court's own jurisprudence in *Isayeva* and other cases, those who plan or decide upon an attack must "take all feasible precautions in the choice of means and methods of attack with a view to avoiding and, in any event to minimising, incidental loss of civilian life"; and they must also "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life … which would be excessive in relation to the concrete and direct military advantage anticipated". The rule on proportionality in Article 51 of API, which is again reflective of customary international law, is cast in similar terms.

    b. Moreover, in ratifying Additional Protocol I, Germany declared its understanding that the word 'feasible' used in Article 57 means "that which is practicable or practically possible, taking into account all circumstances ruling at the time including humanitarian and military considerations".

12. As follows from these basic conduct of hostilities rules, and as is explained further by the ICRC legal advisers, Robinson and Nohle in their 2016 paper, an assessment of the

expected incidental damage arising from an attack is therefore required, including as to what is reasonably foreseeable, and Germany considers itself obliged to do all that is practicable or practically possible, taking into account all the circumstances, when it comes to taking feasible precautions, which of itself indicates that an assessment by the State of the risk of affecting the rights of civilians is, or should be, routine in this context. This also fits neatly with a functional approach to jurisdiction that focuses on the capacity of the State to protect,. That question of capacity can be seen as a limiting factor that establishes that a State cannot be seen as exercising jurisdiction where in practical terms it has no power.

13. Thus in this context, and consistent with this Court's past cases, it would be incorrect to focus on the airstrike alone, but it is necessary to look at all the circumstances to identify whether there was an exercise of State agent authority: that is, the German presence on the ground in Kunduz as part of the security function accepted by ISAF (so this is not a *Bankovic* case), the specific obligations of the German Commander with respect to civilians, his exercise of those obligations (defective or otherwise), the command given and, then, the actual airstrike. This is very different to a 'cause and effect' notion of jurisdiction, and fairly reflects the different stages at which not just physical power and control but also authority may be being exercised. Thus, in *Jaloud*, the checkpoint that formed part of the factual matrix was physical. In this case, the respondent State was also engaged in a form of filter process to ensure the protection and security of civilians, and that may correctly be seen as a form of asserting authority and control.

14. Related to this, our fifth and final point is that it appears of questionable assistance to say that, under IHL, the juridical relationship with an adversary during hostilities is one that simply cannot be assimilated to an exercise of jurisdiction or authority [UK, 32], as that is to fail to identify that, in this case, the relevant juridical relationship under IHL concerns how IHL protects civilians, not an adversary, and that focus is squarely relevant for the question of extra-territorial jurisdiction. It also appears to give insufficient weight to the jurisprudence of this Court in *Hassan* [77], which in turn referred to the well-known jurisprudence of the ICJ on the application of both IHL and human rights obligations in the context of armed conflict [cf. Germany, 46].