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EXTRATERRITORIALITY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: POSITIVE OBLIGATIONS AND JURISDICTION

Monograph

CHIȘINĂU 2014

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Recommended for publication by:

Senate of the Free International University of Moldova (minutes no. 10 dated 1 July 2014).

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ABBREVIATIONS

UNGA – United Nations General Assembly

PACE – Parliamentary Assembly of the Council of Europe

ACHR – American Convention on Human Rights

CIA – Central Intelligence Agency

ILC – International Law Commission

ECHR – European Convention on Human Rights

CJEU – Court of Justice of the European Union

IACHR – Inter-American Court of Human Rights

ICRC – International Committee of the Red Cross

ICJ – International Court of Justice

CoE – Council of Europe

ECmHR – European Commission of Human Rights

IACmHR – Inter-American Commission of Human Rights

PCIJ –Permanent Court of International Justice

UNSC – United Nations Security Council

CIS – Commonwealth of Independent States

IHRL – International Human Rights Law

PIL – Public International Law

IHL – International Humanitarian Law

UDHR – Universal Declaration of Human Rights

HCP – High Contracting Parties

KFOR – NATO Peacekeeping Force in Kosovo

NATO – North Atlantic Treaty Organization

UN – United Nations (Organization)

Para. – paragraph

ICCPR – International Covenant on Civil and Political Rights

GDR – German Democratic Republic

SFRY – Socialist Federal Republic of Yugoslavia

DPRK – Democratic People's Republic of Korea

TRNC – Turkish Republic of Northern Cyprus

EU – European Union

UNFICYP – United Nations Peacekeeping Force in Cyprus

UNMIK – United Nations Interim Administration Mission in Kosovo

USSR – Union of Soviet Socialist Republics

FOREWORD

In the light of the current realities of the international relations arena, the issue of human rights and fundamental freedoms acquires a new value. While the radical turn that marked a spectacular evolution of the international law of human rights dates back to the end of the Second World War, thus creating a new world under the system established by the UN Charter, globally, and the European Convention on Human Rights, regionally at European level, the current situation in this specific field proves that the issue of human rights embraces its original outlines, and conquers new spaces. From this perspective, the obligation to protect effectively human rights and freedoms, as recognized by certain international instruments, proves to be not only a noble task but also a difficult one for the contemporary world. The European Court of Human Rights, being the international jurisdiction vested with the task of supervising the application of the European Convention and verifying whether Member States, in specific cases, do in fact protect the rights and freedoms guaranteed thereby, has recently developed an absolutely unique and specific case-law on certain case issues, thus creating a new practice of extraterritorial application of the Convention. In this respect, the European Convention, initially conceived and regarded as an international instrument protecting a certain list of rights within the borders of the European continent and

within the boundaries of the High Contracting Parties, is seen today as guaranteeing rights and freedoms anywhere in the world provided that the respondent Member State, exercises an effective control therein.

The extraterritorial approach of the Convention is crucial for the States' liability in armed conflicts they participate at, in supporting separatist regimes, in conducting focused military interventions, and in annexation of territories. The Strasbourg Court had explicitly established in its judgments that where a State or its agents occupy a foreign territory, or support – directly or indirectly – certain secessionist regimes on third countries' lands, it will be found liable for the violations of human rights and freedoms committed on those respective (occupied or controlled) territories.

The extraterritoriality of the ECHR established Russia's responsibility for the situation of human rights in Transdniestria; Turkey was found liable for the violations of Greek Cypriots' rights, while the UK was held accountable for the detentions and ill-treatment of individuals during the Allied Forces' campaign in Iraq. Given the current crisis in Ukraine and its Government's lodging at least one inter-State application against Russia before the European Court, it is a plausible idea that the extraterritorial application of the Convention will continue to function, and repeated violations of rights and freedoms of individuals will be found in areas affected by armed conflicts.

The reasoning of the European Judges on extraterritorial application of the Convention has been criticized in the corridors of some establishments, as well as among career lawyers famous for their certain political beliefs. Most of the times they invoke the case of the Yugoslavian nationals complaining of violation of their rights due to the NATO forces' bombing of Belgrade, and the European Court ruled

that it had no jurisdiction in the case, thus declaring their application inadmissible. In spite of this criticism, the idea of extraterritoriality of the Convention is undoubtedly a progressive approach of its provisions, and certainly contributes to a global affirmation of the rights and freedoms enshrined in it.

In this respect, the elaboration and publishing of a legal monograph reflecting current issues on the extraterritoriality of the Convention and positive obligations of the High Contracting Parties offers the interested part of the society access to a complex, multilateral, professional, and sometimes even critical approach concerning relevant information, and it aims at elucidating the gaps, advantages and perspectives of the extraterritorial application of the Convention both within Europe and beyond.

Oleg BALAN,

Doctor habilitatus, university professor

Report

As is well known, the drafters of the European Convention on Human Rights had set themselves a limited goal: to guarantee, within a European context, some of the civil and political rights. Those civil and political rights, the so-called “classical” human rights, were generally seen as rights which implied for the States primarily obligations not to interfere in the free exercise of these rights by persons under their jurisdiction. These last words basically constitute the “apple of discord” among States on one hand, and between States and the Court on the other hand, when it comes to liability for the unlawful acts incriminated due to various extraterritorial

violations of human rights. It is the Court's task to clarify the disputes, and to judge at its best relying on today's realities.

There are thousands of articles and books on the ECHR law; yet not many of them focus on the fine issue of extraterritoriality of the Convention when it comes to States' responsibility for failure to comply with their obligation to protect the rights of the persons under their jurisdiction.

The present monograph was drafted as a result of a thorough research of the European Court's case-law, which is the main source of information and principles for protection of human rights at European level and beyond. By explaining the general principles of obligations under the Convention linked to the States' extraterritorial obligations, the authors – thanks to their vast experience in the human rights field – managed to facilitate the theoretical understanding of the problem, denoting a successful and appropriate research that has been carried out. Furthermore, the knowledge acquired as a former Judge of the European Court of Human Rights enabled Mihai Poalelungi to explain the complicate and sensitive issues, faced by the Court in its endeavours, from a critical point of (his) view. This has been achieved in the present paper by a very well-thought structure thereof and comprehensive approach.

Subsequently, the authors describe the core of the problem by highlighting the jurisdiction and elements of the extraterritorial responsibility of States, going into details, and thus helping the reader understand the essence of an extraterritorial act and its jurisdictional link with the State's ulterior responsibility. This specific section therefore rationalizes the problem, and remarkably explains why it should be treated as such. It defines the initial standpoint of the entire research

paper, which consequently leads to a comparative and more extensive analysis of the current thought on the problem – the responsibility of States in armed conflicts, both within the territory of the Council of Europe and beyond.

The background of the issue being described, the paper refers thereafter to the specific armed conflicts and the alleged violations of human rights in that respect on the territories of Cyprus, former Yugoslavia, and Iraq, as well as Transdniestria, Georgia and Ukraine. The research under this aspect is of a considerable contribution to the understanding of the Court's rationale in its judgments. The principal objective here is to point out that the Court would not hesitate to apply the Convention extraterritorially since it is an instrument of European public order, and the failure to apply its provisions creates a vacuum in the protection of human rights and fundamental freedoms.

The present monograph also offers the reader to learn some examples as to the limitations to, and special cases of, the extraterritorial application of the Convention, in terms of *inter alia* the concept of *espace juridique*, the derogation and colonial clause, as well as the jurisdictional immunity of States, which is not negligible at all, these situations determining the Court to adopt extremely complicated approaches. The analysis thereof is consistent with the original problem statement – positive obligations and jurisdiction.

Furthermore, the authors classified their findings in an extraordinary way and managed to explain the relationships between them. They outlined their disagreement with some of the Court's interpretations, and proposed their solutions to the problems relying on plausible principles of law. Some of the questions were

examined from a different point of view with improved methodology so as to offer more convincing arguments.

In my opinion, all the above should provoke the reader to an interesting perusal with further reflections. The present report would have two main objectives: to provide enough, but not too much, information to readers so that they are in a position to judge if the monograph is sufficiently relevant to their interest to be subsequently read in its entirety, and to enable the readers to obtain better understanding of the complex process that the European Court of Human Rights undergoes in establishing extraterritorial responsibility of Member States for the violations of human rights and fundamental freedoms of the persons under their jurisdiction.

Josep Casadevall, judge

Vice-President of the European Court of Human Rights

INTRODUCTION

The European Convention on Human Rights is an international treaty which not only sets out a list of rights and freedoms, but also establishes the means of obtaining just satisfaction in case of violations. This mechanism is primarily implemented by the European Court, the fundamental task of which is interpreting

and applying the rules of the Convention. In order for the applicant to benefit from the services of the Court, the latter must be competent to examine the specific case, i.e. to have personal and territorial jurisdiction to rule on an alleged violation. This involves imperatively the existence of the duty of protection attributed to the respondent State under Article 1 of the Convention.

The practical exercise of States' authority is not limited exclusively to the territories within their state boundaries over which they in fact exercise sovereign power. Therefore, it is necessary to protect human rights and fundamental freedoms wherever the violation committed or the harmful effects of the respondent State's interference produced. Thus, there is an organic interdependence between the concepts of States' and Court's jurisdiction. In this respect, a State's territory is physically limited by its borders. As a matter of fact, the State's authority cannot be limited because the state, like any other entity artificially created, exercises its jurisdiction merely through its agents, who in fact extrapolate State's jurisdiction outside its boundaries, extraterritorially. However, States' liability for breach of extraterritorial obligations does not incur without their exercise of extraterritorial jurisdiction over people, not just certain areas.

The European Convention on Human Rights has obviously transformed the domestic policy of European countries, becoming an effective influence over strategies and national security practices. However, the Contracting States face considerably more situations when the European Convention on Human Rights is applied outside their boundaries, thus becoming an instrument of coercion against them in terms of extraterritorial, in the same extent as domestic, activities.

Therefore, the Court's case-law contains several diffuse aspects, which will be analyzed in this monograph.

Firstly, importance shall be attributed to the autonomy of the concept of jurisdiction as provided by Article 1 of the European Convention on Human Rights. The drafters of the Convention originally intended to have the concept of jurisdiction reflect the usual term in the public international law, as well as to be interpreted in harmony with it. The Court's case-law on this issue was, in principle, consistent with that intention until adoption of the judgment in case of *Al-Skeini*. The internationalists applauded this decision because, once published, the States' responsibility for the violation of positive and negative obligations arising from the Convention came closer to a genuine universalism of human rights. Also, the Court filled the pre-existent vacuum in respect of the States' actions or omissions generated by their direct or indirect agents without having effective control over the territory of a third State.

Secondly, the failure to automatically apply the Convention outside the Council of Europe is still a concern. The Court convincingly refused to apply the Convention on the European continent in the case of *Banković*, where it argued that the ECHR was not designed to be applied throughout the world, but only on the territories being under the jurisdiction of the High Contracting Parties, since the extraterritorial jurisdiction of States was exceptional and required solid justification, which the Court had not received in the circumstances of an armed conflict in Europe. Thus, the Court created a double regime, and the exercise of extraterritorial jurisdiction is applicable with a presumption on European territory. However, that issue was rarely disputed by the parties in the proceedings before the Court. As a result, they have produced various standards of application of the Convention, and developed complex tests, which were subsequently found to be applied non-uniformly.

In preparing the present monograph, the motivation was the theoretical and practical complexity of the ECHR's extraterritoriality, the issues raised in specific cases regarding the extraterritorial exercise of the Convention, the relative and absolute limits of its application, and the absence of a fundamental work on the subject in question. The Court's case-law in this respect is far from being clear and consistent. While some of the Court's positions appear to support the territorial boundaries (of the Member States), other ones favoured the extra-territorial jurisdiction.

The issue of the extraterritorial application of the Convention, in the light of human rights, is not limited to mere extraterritorial acts; they are often the natural consequences of inter-State cooperation and defence of legitimate interests of States or other entities. The problem constitutes the abuse and negative consequences on the overall human rights situation in a certain region and/or on the subjects affected by extraterritorial acts.

Although the cases on extraterritorial application of the ECHR are not very frequent, in statistical terms they reflect some of the most obvious abuses of States against individuals under their jurisdiction.

Formally, the ECHR does not require extraterritorial application; however, it does not prohibit it either. The Convention merely limits it to the scope of extraterritorial obligations through the concept of "jurisdiction".

While discussing the genesis of the extraterritorial application of the Convention, even 30-40 years ago, the concept of extraterritoriality expressed less interest. Until recently, the probability of Saddam Hussein's lodging a complaint with the Court invoking violations committed by British agents in Iraq, or that of Alexandr Litvinenko's family's against the Russian Government invoking the latter's liability for

the death of their relative in the United Kingdom, seemed unlikely. Currently, however, the extraterritorial obligations are widely discussed among theorists, and they are often a controversial subject at the High Court.

The issue of the extraterritorial application of the Convention also refers to the application of the ECHR outside the legal framework of the Council of Europe. This is due primarily to the autonomous perception of the concept of jurisdiction in the European Court's case-law, which until now has no conclusive logical and legal structure. Secondly, the Court applies different standards, therefore *tests*, to determine the extraterritorial applicability of the Convention. It will sooner or later adopt a universal concept for extraterritorial application of the Convention, and therefore a clear *test*, which will enhance foreseeability, and will unify its case-law, to some extent.

The purpose of this monograph is to provide a complex research of the Member States' liability for their breach of the extraterritorial obligations under the European Convention on Human Rights, through the concepts of jurisdiction of States (as defined by the Court in its relevant case-law) and positive obligations, proportionate to the extent of exercise of jurisdiction. The conditions, limitations, and circumstances where the States can be held extraterritorially liable were identified. The concept of jurisdiction and the principles, according to which the States can be held accountable for the acts of their agents, were analyzed theoretically and in the light of the Court's case-law. In order for the mentioned goals to be achieved, there were established and reached the following objectives: justification of incurring extraterritorial liability of States in the light of the ECHR; identifying the circumstances where the relevant case-law of the European Court of Human Rights still encounters difficulties; analysis of the practice of some bodies

related to the Court on extraterritorial application of other IHRL instruments emphasizing the positive obligations of the High Contracting Parties in various circumstances with extraterritorial connotations; formulation of limitations removing the extraterritorial action of the ECHR; detailed analysis of the Court's relevant case-law; distinguishing of compulsory requirements, in the aggregation of which the States will incur extraterritorial liability; formulation of personal recommendations on the conditions of the extraterritorial application of the Convention in order for more effective and consistent application thereof to be implemented in future cases with extraterritorial implications.

The research of this scientific problem is based on studying relevant case-law, doctrine-theoretical and other Convention-related texts. In the absence of any scientific papers on the extraterritorial application of the Convention, the basic empirical source remains to be the case-law of the European Court of Human Rights interpreting the ECHR, as well as the case-law of related international courts, such as the Inter-American Court of Human Rights, as far as relevant for comparative analysis.

The monograph is the first paper in the Republic of Moldova, and one of the first in the Western doctrine dedicated exclusively to the extraterritorial application of the Convention, with implications beyond the ECHR law. In this regard, it is considered that the present monograph would serve as a basis for further analysis of the challenging particularities of the extraterritorial application of the ECHR, in order for appropriate solutions to be identified to new jurisprudential challenges.

I. ECHR MEMBER STATES' INHERENT GENERAL OBLIGATION TO PROTECT HUMAN RIGHTS

"Omne jus hominum causa constitutum est"[1]

1.1 Concept of the universalism of human rights

i. Universalism of human rights and the effectiveness of the IHRL treaties

The problematic of the States' extraterritorial obligations on human rights tends to take an increasing scale in the post-WWII period. It was during that period when, thanks to globalization, many states have taken actions that increasingly affected the rights and freedoms of people outside their territories, provided for primarily in the Human Rights Charter[2], in an ascending way and proportionally to the increase in the number of obligations assumed by them.

Therefore it would be wrong to consider that the extraterritorial obligations are a novation of the European Court; the term was initially introduced and analyzed by it because that particular jurisdiction can boast about a rich case-law, although sometimes controversial and unclear at first view, on the application of the ECHR outside the territorial boundaries of the High Contracting Parties, and even outside the space limit of the Convention, i.e. outside the legal framework of the Council of Europe. The European Court is undoubtedly a true model of supranational

[1] *Law is established for the benefit of man.* (Cicero, translation from Latin).
[2] Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights of 1966.

jurisdiction with human rights tending, but not without flaws as far as extraterritorial obligations are concerned.

The States' extraterritorial obligations are closely related to the universalism of human rights concept emerged with the adoption, in 1945, of the UN Charter and the Universal Declaration of Human Rights, denoting *lato senso* the States' obligation to respect and protect human rights through cooperation and independently, the territorial limits of states being irrelevant in this regard. The extraterritoriality of the human rights obligations is proving to be the main aspect of their universalism. However, as Professor S. Skogly[3] noted, the universalism of human rights, expressed in the right of every individual to the enjoy the human rights as laid down in some global or regional instrument without discrimination, actually tends to intersect in a very limited manner the States' obligations in the field of human rights, taking into account the often negligent attitude of the world community on the way state entities assume responsibility for the actions of their agents beyond their boundaries.

The universalism of human rights is an ideal any civilized nation should strive to. This ideal is inevitably "balanced" by objective factors which determine the purposes and effects of treaties on human rights for beneficiaries thereof, in relation to the obligations assumed by primary subjects. In our opinion, these factors are: the States' abstinence from adopting a firm position on the extraterritoriality treaties of the IHRL; the existence of the State's anachronistic self-perception just as a nation-state, in the absence of the necessity of such an assumption of additional obligations

[3] S. Skogly. Extraterritoriality – Universal Human Rights without Universal Obligations? Lancaster, 2010. [online]: http://eprints.lancs.ac.uk/26177/1/Microsoft_Word_-_Monash_-_Extraterritoriality_-_Final_draft.pdf (accessed on10.04.2014)

in respect of non-nationals, in a form of indifference. The *effectiveness* of a treaty can only be determinant upon the circumstances it is signed in, and the States' will.

For the purposes of extraterritorial obligations, the effectiveness of the treaty is that main parameter that determines the benefit that the instrument will bring to nationals of each state. Effectiveness is a concept denoting the pragmatic character of the treaty, so the extent to which the state will honour its obligations. For example, in the case of the UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment[4] the USA and other countries are attempting to limit the application of the Convention only within their territories, although it expressly states the extraterritorial application (in Article 5, for example). Turning back to the ECHR, at the recent public hearing in the case of *Hassan*[5], the representative of the British Government invoked the non-application of the ECHR in the circumstances of an armed conflict, insisting on the applicability of merely the rules of the international humanitarian law as *lex specialis*. This is an example reflecting the United Kingdom's reluctance in the "transportation" of the Convention standards at the same time with the start of military action.

The purpose of the term *efficacy of a treaty* lies in a realistic "forecast" of the extraterritorial application of its provisions, if such a perspective is provided; the state is the one that will balance its interests with subsequent extraterritorial obligations. In this regard, not all treaties are initially designed to be applied extraterritorially, the European Convention of Human Rights being an example in this respect: the drafters of the Convention initially ignored the extraterritoriality

[4] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UNGA on 10 December 1984. [online]: http://www.un.org/documents/ga/res/39/a39r046.htm (accessed on 22.06.2014)

[5] Record of the hearing in the case of *Hassan v. the United Kingdom* of 11.12.2013. [online]: http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2975009_11122013&language=lang (accessed on 22.06.2014)

perspective; a different approach appeared afterwards. Therefore, the prerogative to balance the efficacy of the ECHR with the universalism of human rights shall be exercised by the European Court, vested with powers to interpret the Convention, and to rule on the scope of the obligations of the High Contracting Parties. In this respect, an excessively "aggressive" approach of the extraterritorial obligations issue could also have negative effects on the extraterritorial protection of individuals.

ii. Genesis of the universalism of human rights

The notion of *universalism of human rights* would be devoid of any pragmatic value unless its reflection could be found in political and legal documents with international vocation. From political and legal points of view, a huge contribution to the emergence of the concept of extraterritorial obligations was made by the Universal Declaration of Human Rights which stipulates in Article 28 that "*Everyone is **entitled to a social and international order** in which the rights and freedoms forth in this Declaration can be **fully realized***"[6]. Therefore, the UN Member States have a moral duty to cooperate with each other to achieve and ensure such an order; this would not be possible without the existence of extraterritorial obligations. This task was also reconfirmed by other political and legal documents with universal vocation, such as:

- Millennium Declaration[7];
- Declaration on the Right to Development[8];
- Vienna Declaration and Programme of Action[9] etc.

[6] Universal Declaration of Human Rights, adopted by the UNGA Resolution No. 217A(III) on 10/12/1948, [online]:http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (accessed on 10.04.2014)
[7] United Nations Millennium Declaration, adopted by the UNGA Resolution No. 55/2 on 18/092000, [online]:http://www.un.org/millennium/declaration/ares552e.pdf (accessed on 10.04.2014)
[8] Declaration on the Right to Development, adopted by the UNGA Resolution No. 41/128 on 04/12/1986. [online]: http://humanrightsforyouth.org/wp-content/uploads/2011/03/Declaration-on-the-Right-to-Development.pdf (accessed on 10.04.2014)

The main legal foundation of the universality of human rights is contained in Article 1, para.3 of the UN Charter, which emphasizes the international cooperation, the promoting and encouraging the respect for human rights, namely: "One of the purposes of the UN is to achieve international co-operation […] in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" [10]. For the purposes of extraterritorial obligations, the notion of "cooperation" is primarily relevant since the states must contribute to the joint cooperation in international human rights law.

The rule contained in Article 1 of the UN Charter must be read in conjunction with Article 55 and 56 of the same Charter, the latter imposing a universal obligation "*to take joint and separate action […] for the achievement of the purposes set forth in Article 55*". Among the purposes mentioned in Article 55 there is "*universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion*". Article 56 refers to the basic (material) obligations, while Article 55 only refers to their goals. Articles 55 and 56 of the UN Charter, taken in conjunction, establish the States' obligation to take necessary *joint* and *separate* actions to promote human rights. As a matter of fact, the Preamble to the European Convention on Human Rights establishes, among the purposes of the Convention, that the High Contracting Parties "*to take the first steps for the **collective** enforcement of certain of the rights stated in the Universal Declaration of Human Rights*".

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[9] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25/06/1993. [online]: http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx (accessed on 10.04.2014)

[10] UN Charter of 26.06.1945. [online]: http://www.anr.gov.ro/docs/legislatie/internationala/Carta_Organizatiei_Natiunilor_Unite_ONU_.pdf (accessed on 10.04.2014)

In addition to the UN Charter, the International Covenant on Economic, Social and Cultural Rights[11], is of particular importance for the purposes of the subject in question. Article 2 enshrines the universality of human rights in a manner similar to the UN Charter ("*Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means […]*"), by omitting the reference to the limiting terms of "jurisdiction" or "territory". In fact, the absence of a legal "hint" on the extraterritoriality of the treaty and limiting its application only to the territory of a state does not preclude its extraterritorial application, which is, for example the case of the International Covenant on Civil and Political Rights[12].

The primary goal of the universality of human rights is the beneficiaries' protection *erga omnes* without providing the states the opportunity to manifest, outside their territorial boundaries, a certain behaviour which would be different from that in domestic law. However, their *erga omnes* protection is not possible without effective extraterritorial application of basic IHRL instruments.

1.2. Extent of the positive obligations of States

The Signatory States agreed that the aims of the Convention will be best achieved through a common understanding and observance of human rights, yet without providing that, relying on material rules of the ECHR, they would have

[11] International Covenant on Economic, Social and Cultural Rights of 16 December 1966. [online]:http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx (accessed on 10.04.2014)

[12] International Covenant on Civil and Political Rights of 16 December 1966. [Online]: http://lege5.ro/Gratuit/he2damju/pactul-international-cu-privire-la-drepturile-civile-si-politice-din-16121966- (accessed on 13/07/2014)

positive obligations that would extend to individuals outside their territorial jurisdiction. By means of its case-law, the Court establishes European standards corresponding to the common values of the Member States allowing both the maintenance and the promotion of unique criteria on uniform protection of the ECHR rights, regardless of the location of the person claiming violation of a right. The protection standard is not, however, equivalent to measures that can (or must) be taken by the state to ensure full and effective protection of individuals under its jurisdiction.

Under the existing circumstances in the late 1940s, the intention of those who drafted the Convention was to guarantee a certain freedom of individuals from the state. For this reason, most of the provisions were formulated in a negative way, prohibiting states' arbitrary and/or disproportionate interference in the free exercise of human rights and fundamental freedoms guaranteed by the ECHR. The positive obligations have been, and continue to be, a creative case-law; in the case of the *Belgian Linguistics* ("*Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*), the Court established in 1968, for the first time, that for an effective protection of the rights under the Convention, the High Contracting Parties may be required to take some positive actions[13]. Although the positive obligations find their origin in the Court's case-law, they are a result of the extensive interpretation of the Convention's provisions, rather than not the Court's *ex proprio motu* creation.

Despite the fact that from the adoption of the Convention in 1950 the concept of positive obligations had not been raised for nearly 20 years, the judgment in the case of the *Belgian Linguistics* marked one of the first turning points in the Strasbourg system. Even if not expressly, the Court noted that the ECHR needed to be

[13] Case of *Belgian linguistic v. Belgium*, judgment of 23/07/1968. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57525 (accessed on 25/07/2014)

interpreted in an evolutionary manner aiming at the effective protection of human rights and fundamental freedoms[14]. Moreover the protection standards had to increase along with the development of the society and its correlative requirements[15].

The boundaries between the State's positive and negative obligations are not subject to a precise identification, especially in private life. For example, the state should refrain from refusing a foreigner to reunite with his family as it can be interpreted as a violation by the fact that the state has not taken necessary actions to protect due respect for his family life.

However, even the origin of positive obligations is a subject of doctrinal dispute. Lina Urbaite[16] says that neither the Convention nor the Court's case-law defines a general concept of positive obligations. Moreover, the Court expressly refuses to develop a general theory on it. Accordingly, the positive obligations can be simply defined as requirements imposed on states to take actions in order to protect the enjoyment of the Convention rights. It is not clear whether the developing of a general concept of positive obligations is required to be regarded as a jurisprudential or doctrinal objective.

In the opinion of the Court's former President Jean-Paul Costa[17], the concept of positive or affirmative obligations of the High Contracting Parties definite (!) and implicitly present in the text of the Convention. Article 1, establishing the base for this concept, places the Member States under the general obligation "**to secure to everyone**" the rights and freedoms arising from the relevant provisions of the ECHR (Article 1 is expressed by "to secure" in the English version, and "*reconnaissent*" in

[14] Urbaite L. Judicial Activism in the Approach of the European Court of Human Rights to Positive Obligations of the State. In Baltic Yearbook of International Law, Volume 11. Boston: Martinus Nijhoff Publishers, 2011, p.218.
[15] Case of *Tyrer v. the United Kingdom*, judgment of 25/04/1978, para. 31. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57587 (accessed on 25/07/2014)
[16] Urbaite, *op. cit.*, p.214.
[17] Costa J-P. The European Court of Human Rights: Consistency of its case law and positive obligations. In: Netherlands Quarterly of Human Rights, Vol.26/2. Netherlands: 2008, p.452.

the French version, each of them having different connotations in terms of obligation types).

In our opinion, the positive obligations are mainly implicit because the general obligation of recognition (invoked by the former President) can be interpreted in declarative, negative and positive ways, as the Court did. Thus, the positive obligations inculcate certain characters, which should be found in the text of the Convention, and the main one should constitute the state's affirmative action, i.e. its obligation to take measures and ensure that individuals under its jurisdiction enjoy the respective right in the most efficient way. This condition may only be found after a broad interpretation of the Convention, which does not expressly provide for the High Contracting Parties' obligation to take certain measures; the substantive provisions have rather a negative connotation. There are less interpretation deficiencies in the case of some articles that require states in a "prompter" way to take certain positive actions, such as the obligation to ensure a fair trial under Article 6 (1), or to conduct free elections under Article 3 of Protocol No. 1.

The conventional origin of the positive obligations is found in Articles 1 and 13, which establish the general obligations and the development of the effectiveness principle.

Article 1 of the Convention establishes that the state should secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. The role of this article is not only to assign the Court's competence, but also highlight the mandatory nature of the Convention. It shall be noted that Article 1 also applies to the substantial rights enshrined in the additional protocols to the Convention. Even if the original intentional implications of Article 1 are not clear, it seems quite safe to assume that the group drafting the Convention did not foresee, in the absence of any express reference in that respect, the obligation not to intervene as a positive obligation for the Member States.

Nevertheless, the Court relied namely on Article 1 in developing its case-law on Article 2. In the case of *McCann*, it stated that Article 2 para. 1, taken in conjunction with Article 1, is to be interpreted in the spirit of establishing a procedural obligation in the situations where the person under the jurisdiction of a Contracting Party was killed, *inter alia*, by agents of the State[18].

In some cases, the Court has even caused a state of uncertainty for the States as to the scope and nature of their responsibilities arising from the Convention[19]. Thus, in case of the positive obligations under Articles 2 and 3, there is a reasonable amount of certainty about the correlative responsibilities of States. The State's procedural obligation to investigate the death of a person caused by its agent is a general rule to be carried out in accordance with a number of criteria (promptness, thoroughness, independence, involvement of relatives), in contrast to the Articles 8-11, for instance, where the existence and extent of a positive obligation in a given set of circumstances is to be determined by numerous factors.

Article 13, requiring the availability of effective remedies in cases of violation of the protected rights, embodies the subsidiary nature of the conventional mechanism, imposing a primary responsibility on States to provide effective remedies for the violated rights. Article 13 is subsidiary to other Convention articles, and its applicability requires a (n arguable) violation of any other provision, in substance. It is not imperative for this "appeal" to have a legal form since States are able to provide the most appropriate means to ensure that individuals within their jurisdiction enjoy a form of protection, which would restore their violated rights. Moreover, the negative obligations would lack substance if the individual had to lodge a complaint before the

[18] Case of *McCann and Others v. the United Kingdom,* judgment of 27/09/1995, para. 161. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57943 (accessed on 25/07/2014)
[19] Case of *Platform Ärzte für das Leben v. Austria,* judgment of 21/06/1988, para. 31. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57558 (accessed on 25/07/2014)

High Court for any violation of his rights. In such a case the European system of human rights protection would be ineffective.

The principle of effectiveness highlights the Convention system and had been the most influential in the development of the positive obligations, being the most often cited by the Court in "finding" positive obligations. The criterion of "efficiency" has no clear boundaries, being assessed depending on the circumstances of each case. The development of the concept of positive obligation by the Court is determined by the concern for the efficacy of each of the conventional safeguards, which, as often reiterated in its judicial acts, should be practical and effective, and not theoretical and illusory. This concern feeds the entire system of the Convention: there is no *a priori* limit of the contexts in which a positive obligation can be found, and the Court's case-law generously offers specific examples.

Referring to this problem, on the one hand, those positive obligations are not expressly set forth in the Convention, and therefore were not voluntarily and knowingly subscribed to by the Member States, when the Convention was ratified. On the other hand, the positive obligations can put a considerable financial and institutional burden on the State. Bearing that in mind, the Court could be understood and justified for the reason why it mitigated the concept of the (implicit) positive obligations with the discretion left to the Member States having a broad margin of appreciation in determining the type and measure of the positive action is necessary to make the right or freedom in question effective, without imposing an impossible or excessively heavy burden[20].

In determining whether there was or not a violation of a positive obligation, the Court takes into account the balance to be met between the general interest of the community and the individual's interests, based on the concept of the State's margin

[20] Case of *Osman v. the United Kingdom*, judgment of 28/10/1998, para. 116. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58257 (accessed on 25/07/2014)

of appreciation. The Court recognized that it was not its role to criticize or correct domestic legal systems. However, the State's discretion is subjected to a final supervision by the Court, which seeks to ensure that the solutions do not impose an excessive burden on a part of the society or its individuals, by establishing common minimum standards providing a broad European framework for the national protection of human rights.

The Court does not indicate to the State what measures must be taken to meet its obligations; it only verifies whether the relevant measures are appropriate and sufficient to ensure the effective exercise of the rights guaranteed by the Convention. Even in the case of the State's objective inability to act, the Court determines whether a minimal effort was still possible, especially in relation to the absolute rights, such as in the case of the Republic of Moldova's positive obligations to use all diplomatic and international legal agencies to improve the situation of detainees in the Transdniestrian region.[21]

The contents of the positive obligations vary widely: they may include actions of the legislative, executive, or national law enforcement agencies. When specifically referring to the substance of the requested actions, they concern either the contents or the procedural aspect (positive actions). The main feature is that the State must be active and take the necessary measures to protect the enshrined right, such as to investigate the circumstances of death; to criminalize certain acts in order to protect people; to provide an individual information about his/her origin/identity; to provide free legal assistance in criminal proceedings; to ensure sufficient procedural guarantees in civil proceeding; to provide necessary medical insurance; to take measures in order to prevent life-threatening situations etc.

[21] Case of *Ilaşcu and Others v. Moldova and Russia*, judgment of 08/07/2004, para. 333. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61886 (accessed on 25/07/2014)

In conclusion, the positive obligations can be defined as actions or measures that have to be taken by the State in order to efficiently guarantee the protection of the rights and freedoms enshrined in the Convention, including in the sphere of private relations, by taking legislative and executive measures to prevent and, if needed, to remedy any violations thereof at domestic level.

The object and purpose of the Convention, as an instrument for the protection of individuals, requires that its provisions be interpreted in a practical and effective way to guarantee the fundamental rights and freedoms it protects, and therefore it is incompatible with a negating approach to conventional obligations by the High Contracting Parties.

1.3. Obligation of the Member States to prevent human rights violations

The nature of the obligation to prevent human rights violations is addressed in doctrine and judicial practice with great caution because a wider understanding of this obligation would result in engaging the State's responsibility for the "risk" to violate the guaranteed right. In this context, it should be noted that one of the basic conditions of admissibility of an application before the European Court refers to the "victim" status in respect of the alleged violation, in the light of the respondent State's failure to fulfil its positive obligation in terms of protection. The State's obligation to prevent the infringement of a right, or freedom, recognized by the Convention practically externalizes by securing the compliance of the national legal framework's provisions with the ECHR and, therefore, by guaranteeing that all specialized State organs (judiciary, police, army, prosecution etc.) exhibit a behaviour

that provides effectiveness of the substantial provisions of the Convention and domestic laws.

Such a legal situation is characteristic for the UN, Inter-American, or African law. Thus, Article 1 of the African Charter on Human and Peoples' Rights[22] enshrines the requirement to the Member States "*to adopt legislative or other measures to give effect to them*". In its turn, the International Covenant on Civil and Political Rights establishes in Article 2 para. 2 that "*each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant*". Article 2 of the American Convention on Human Rights[23] provides that "*where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms*".

As to the European continent, the relevant regional instruments in terms of protection of human rights do not contain any express provision that would also establish a positive obligation of the States to adapt their national legal framework, and national officials' conduct, to European requirements and standards. In this context, it is shall be highlighted that the ECHR dates earlier than the international instruments cited above, the content of which is designed depending on the new

[22] African Charter on Human and Peoples' Rights of 27 June 1981. [Online]: http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf (accessed on 13/07/2014)

[23] American Convention on Human Rights of 18 July 1978. [Online]: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm (accessed on 13/07/2014)

realities in the field of human rights protection, perhaps little stated and researched in 1950.

The respective lacuna was filled by the Strasbourg judges, who gradually developed a case-law similar to standards embedded in the texts of other relevant international instruments. In the Court's judgments and decisions, the European judges have reiterated on numerous occasions that the ECHR Member States have positive obligations to take reasonable and appropriate steps to protect the human rights enshrined in the Convention, thus creating a genuine theory of positive obligations of States. In this respect, two issues seem to be important, and namely: whether the States' respective obligation lies in the provisions of Article 1 of the ECHR, and what exactly the reasonable and appropriate measures are.

Having focused on the first question, as mentioned previously, the theory of positive obligations was asserted due to a dynamic interpretation of the ECHR. From the outset, the European judges proved a confusing behaviour in the legal foundation of positive obligations. However, with the passage of time, the references to Article 1 of the Convention have become regular in this context, and in the recent years the Court proved – in its rulings – a genuine desire to unify the theory of positive obligations by requiring the States a general obligation of protection under Article 1 of the ECHR.[24] For example, in the case of *Siliadin v. France*[25], the Court stated unequivocally, in light of certain conventional provisions, that the mere fact that a Contracting Party refrains from violating the rights guaranteed is not sufficient to believe that it has complied with its positive obligations under Article 1 of the Convention. In the later case of *Sorensen and*

[24] Panoussis I. L'obligation générale de protection des droits de l'homme dans la jurisprudence des organes internationaux. In: Revue trimestrielle de droit de l'homme, 2007, p. 450.

[25] Case of *Siliadin v. France*, judgment of 26/07/2005, final on 26/10/2005, para. 77. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69891 (accessed on 13/07/2014)

Rasmussen v. Denmark[26], the Court noted that, under Article 1 of the ECHR, the States must ensure each individual within their jurisdiction the rights and freedoms guaranteed by the Convention, this general duty involving positive obligations inherent to ensuring the effective exercise of rights guaranteed by the Convention.

Thus, given that the reasons of the European Court on the positive obligations of States in terms of the ECHR demonstrates the same legal approach as in the other tools in the field of human rights protection, there only remains to estimate if the content of those obligations is a similar one as well. In this regard, several of the Court's judgments denote that the absence of adequate or imperative laws in the domestic legal framework of the ECHR Member States is regarded as a breach of the obligation to prevent human rights violations. In the Strasbourg judges' view, the implementation of mandatory laws is the main mechanism for fighting the potential risk of conventional violations, regardless of the substance of the right to be protected. This idea is reflected in the Court's reasoning in the pre-cited cases of *Siliadin v. France* in respect of the legislation on combating slavery (Article 4 "Prohibition of slavery and forced labour"), and *Sorensen and Rasmussen v. Denmark* regarding the negative trade union liberty (Article 11 "Freedom of assembly and association"). It could be also found in other cases with respect to protection of private property (Article 1 of Protocol No. 1 to the ECHR "Protection of property") as in *Broniowski v. Poland*[27], or in the context of protecting the physical and moral integrity of the person subjected to rape and sexual abuse (in terms of Article 8 "Right to respect for private and family life" and Article 3 "Prohibition of torture"), as

[26] Case of *Sorensen and Rasmussen v. Denmark*, judgment of 11/01/2006, para. 57. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72015 (accessed on 13/07/2014)

[27] Case of *Broniowski v. Poland*, judgment of 24/01/2004. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61828 (accessed on 13/07/2014)

for instance in the case of *M.C. v. Bulgaria*[28]. The above cases clearly demonstrate that the State's first obligation is to prevent any violation of the rights and freedoms protected by the Convention through adjustment of the domestic legal framework to the European standards and requirements. In the case of *Ilaşcu and Others v. Moldova and Russia*[29], the Court went further and established – in respect of the individuals under Moldovan jurisdiction, located within the Transdniestrian boundaries – that in the absence of an effective control over Transdniestrian territory, Moldova has a positive obligation set out in Article 1 of the Convention to take measures (either economic, diplomatic, legal or of any other nature) within its power and in accordance with the international law to secure respect of the applicants' rights under the Convention.

Thus, the European Court has established in its case-law the existence of a general positive obligation of States to create a national legal framework aiming at eradicating the risk of violation of rights and freedoms protected by the ECHR. Unless the national legislation and relevant national authorities' conduct meet the standards embedded in the Convention, the exercise of individual rights will not be properly secured, and the States will be condemned each time they fail to comply with their positive obligation to prevent any violations of protected rights and freedoms.[30] In this context, it shall be emphasized that the obligation to prevent violations is one of the particular aspects of positive obligations of the States in terms of Article 1 of the ECHR, followed by a positive obligation to suppress any

[28] Case of *M.C. v. Bulgaria*, judgment of 04/12/2003, final on 04/03/2005. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61521 (accessed on 13/07/2014)
[29] Case of *Ilaşcu and Others v. Moldova and Russia*, judgment of 08/07/2004. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61886 (accessed on 30/03/2014)
[30] Panoussis I., *op. cit*., p. 452.

conduct contrary to European standards, and to redress violations of fundamental rights and freedoms.

1.4. Obligation of the Member States to repress and redress human rights violations

The case-law of the Inter-American Court of Justice and the European Court of Human Rights enshrines the States' obligation to ensure the effective guarantee of human rights and fundamental freedoms from procedural point of view. The State's positive obligations go beyond the creation of a domestic legislative framework meant to meet the standards and requirements of the human rights international instruments; they also include the establishment of safe and effective procedural guarantees for any violation found. Pursuant to Article 1 of the ECHR, the State is bound to take all possible and necessary measures to punish those guilty of violating the rights protected by the Convention, and to repair the damage so caused. The respective obligation is valid at all stages of the proceedings; from the outset, the State must conduct an effective investigation on the alleged infringement, and later – if a violation of a protected right is found – it has the obligation to punish those responsible, and to repair the damage caused to the victim. Where any of these obligations is not fulfilled sufficiently or properly, the State will be condemned for violating – under procedural aspect – the right or freedom guaranteed.

From the case-law of the Inter-American Court of Justice, it shall be noted that this Court, on numerous occasions, has found that States had failed to comply with their positive obligations to provide minimum and necessary procedural safeguards for the victims of material rights violations. Thus, the Inter-American system of

human rights protection verifies whether States honour their commitments under Article 1 of the American Convention on Human Rights signed in San José. For example, in the case of *Panigua Morales and Others v. Guatemala*[31], the Inter-American Court found that the Respondent State had failed to comply with its positive obligations because of the impunity for the violation of the rights guaranteed by the Convention. The failure to comply with its positive obligations was due to the complete lack of investigation, punishment, arrest, trial, and conviction of the persons responsible for the violation (although according to its duties the State is bound to use all means and methods at its disposal to combat impunity). Thus, the State encouraged thereby both the chronic recidivism of violation of fundamental human rights, and the absolute absence of protection of victims, and their relatives, against arbitrariness.

Therefore, the above decision clearly demonstrates that the State has a positive obligation to suppress violations of the protected rights by organizing and conducting an effective investigation, and by punishing the offenders; otherwise the State will be condemned for a passive violation of the applicants' rights.

In terms of the right to physical and moral integrity, the Inter-American Court held on multiple occasions that the Respondent State's obligation to take active measures is based on two reasons. Firstly, the victims of the violation have the right to be compensated for the damages caused by that breach. The lack of an effective investigation conducted by the State minimizes the eventual success of the victim to obtain compensation before the national courts. The second reason is that this is the best way to avoid possible recidivism: both of guilty and potential offenders. Thus,

[31] Case of *Panigua Morales and Others v. Guatemala*, judgment on the merits of 08/03/1998, para. 173. in the database of the Inter-American Court of Human Rights. [online]: http://www.corteidh.or.cr/docs/casos/articulos/seriec_37_ing.pdf (accessed on 21/07/2014)

the Inter-American Convention establishes a genuine "prevention *a posteriori*", and the State has a fundamental role to deter further committing of reprehensible acts. Such a positive obligation was expressly established in the case of *Myrna Mack Chang v. Guatemala*[32], where the Court stressed that the States had a positive obligation to take all necessary and appropriate measures to protect and ensure the normal exercise of the right to life of individuals within their jurisdiction; that the protection of the right to life did not apply to merely the legislature by creating a sufficient legal framework, but also on all public institutions, including the agencies charged with ensuring order and security (police and army); that the States had to take all necessary measures for the prevention, prosecution and sentencing those guilty of illegal deprivation of life of victims. In case of illegal deprivation of life, the States are required to effectively investigate the circumstances of the case and punish the guilty, especially if State agents are involved; otherwise, they will help create conditions of impunity, and facilitate the commission of reprehensible acts in future, contrary to the positive obligation to respect and ensure the effective exercise of the right to life.

In the case of *Castillo Paez v. Peru*[33], the Inter-American Court ruled on the respondent State's attempts to evade responsibility by invoking domestic difficulties which had allegedly justified the passive conduct of public authorities. The Court pointed out promptly that, under the Convention, the Peruvian State was obliged to investigate the circumstances of violations of the applicant's right. Even admitting that some internal difficulties prevented the identification of the persons responsible for committing the alleged crimes, the victim's family still had the right to know what

[32] Case of *Myrna Mack Chang v. Guatemala*, judgment of 25/11/2003. In the database of the Inter-American Court of Human Rights. [online]: http://www.corteidh.or.cr/docs/casos/articulos/seriec_101_ing.pdf (accessed on 21/07/2014)
[33] Case of *Castillo Paez v. Peru*, judgment on the merits of 03/11/1997. In the database of the Inter-American Court of Human Rights. [online]: http://www.corteidh.or.cr/docs/casos/articulos/seriec_34_ing.pdf (accessed on 21/07/2014)

had happened to him and where his remains were. It is the duty of the State to use all the mechanisms that are available to meet the legitimate expectations of the victim's family. Additionally to the duty to investigate, the State has the obligation to prevent offences of enforced disappearances, and punish the guilty individuals. These duties were maintained in force for Peru, until their full enforcement.

The San José Court assigned a quasi-imperative nature to the respective obligations, similarly to the Strasbourg Court in the above cited case of *Ilaşcu and Others v. Moldova and Russia*; the domestic reasons allegedly justifying the State's failure to comply with the prescribed duties in ensuring the effective exercise of the rights guaranteed were simply inadmissible.

Given the situation that the State's positive obligations consist of initiating and conducting effective investigations into the violation of the protected material rights, of punishing the persons responsible for the violation, and of repairing the damage caused to the victim, it clearly follows that those obligations have a procedural character, especially applicable to violations of the right to life, and in case of torture, inhuman or degrading treatment or punishment.

In this context, it shall be noted that the Inter-American Court's case-law goes further in guaranteeing the right to life and its material and procedural aspects, and binds the Member States to protect the so-called "right to the truth", which is an autonomous concept under the San José Convention.[34] Thus, in the case of *Bamaca Velasquez v. Guatemala*[35], the Court noted that the "right to the truth" is the right of the victim or his/her next of kin to obtain clear information about the circumstances of the violation, and about the State agencies' corresponding obligations to

[34] Panoussis I., *op.cit*., p. 455.

[35] Case of *Bamaca Velasquez v. Guatemala*, judgment on the merits of 25/11/2000. In the database of the Inter-American Court of Human Rights. [online]: http://www.corteidh.or.cr/docs/casos/articulos/seriec_70_ing.pdf (accessed on 21/07/2014)

investigate and suppress those violations. Such a jurisprudential approach undoubtedly enriches the content of the State's positive obligations to suppress human rights violations, it having a particular importance for the victims of abuse and their relatives in cases of enforced disappearance of persons, or unlawful deprivation of life.

Turning back from the American continent to Europe, having analyzed the Strasbourg Court's case-law, it can be noted that the issue of the States' positive obligation to suppress human rights violations, and to repair the damage caused, has been considered in the Court's case-law since the 1990s. In its judgment in the case of *McCann and Others v. the United Kingdom*[36] (27 September 1995), the European Court ruled for the first time on the State's general obligation to protect the right to life under Article 2 of the ECHR, read in conjunction with the general obligation of protection under Article 1. That obligation imperatively requires the State to conduct an effective public investigation in cases of deprivation of life as a result of the use of force, including by State agents.

In this way, the European judges emphasized the Member States' obligation to conduct an effective and consequent investigation meant to elucidate all the circumstances of the cases relating to Article 2 (right to life) including those where the victim's death was caused by the application of force by State agents. The same logic can be observed in the cases of alleged violation of Article 3 of the ECHR (prohibition of torture), where the State is bound by the same positive obligations to carry out an effective investigation, and establish all the essential circumstances.

[36] Case of *McCann and Others v. the United Kingdom*, judgment of 27/09/1995. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57943 (accessed on 13/07/2014)

In the later case of *Bursuc v. Romania*[37], the Strasbourg Court emphasized that when a person credibly argues that he was subjected to a treatment contrary to Article 3 of the Convention, by police officers or other similar State agents, that provision, taken in conjunction with the general obligation of the State under Article 1 to secure "to everyone within their jurisdiction the rights and freedoms defined in the Convention", implicitly requires an effective official investigation. Such an investigation, as well as that required by Article 2, must lead to the identification and punishment of responsible persons. Otherwise, the general legal prohibition of inhuman or degrading treatment would be practically ineffective despite its fundamental importance, and it would create the possibility that in some cases State agents, enjoying quasi-impunity, might be tempted to violate the rights of persons under their supervision.

In the case of *Pereira Henriques v. Luxembourg*[38], the Court reiterated that the State's special obligation under Article 2 of the Convention, in conjunction with the general obligation under Article 1, imposes the initiation and conducting an effective investigation in order to clarify all important circumstances and to reveal the identity of the perpetrators, in case of violation of the right to life. The positive obligations entail the implementation by the Member States of appropriate mechanisms for the protection of fundamental rights and to prevent, suppress, and sanction violations, as well as to identify and punish the offenders.

Therefore, similarly to the Inter-American jurisdiction, the European Court expressly lays down the positive obligation of States to suppress violations of human rights and fundamental freedoms, and to offer reparation in that respect, by

[37] Case of *Bursuc v. Romania*, judgment of 12/10/2004, final on 12/01/2005. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67028 (accessed on 13/07/2014)

[38] Case of *Pereira Henriques v. Luxembourg*, judgment of 09/05/2006, final on 09/08/2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-75350 (accessed on 13/07/2014)

conducting a thorough investigation, punishing the perpetrators, and awarding the victims or their families just satisfaction for the damage caused.

This approach is found in the opinions of the UN Committee on Human Rights, which, referring to the general obligations imposed on States Parties to the International Covenant on Civil and Political Rights, declared that the State's conduct will amount to a violation of the Covenant in terms of obligations if it tolerates violations, or fails to take all necessary measures to prevent, suppress, and investigate such offences, or to repair any harm that may have been caused to individuals by such violations.[39]

Finally, the States' duty to comply with the positive obligations to take all necessary measures to suppress and redress the violations of rights and freedoms by organizing an effective investigation, by punishing the responsible persons, and by compensating for the damages incurred, is characteristic not only to regional mechanisms of human rights protection, such as the Inter-American, or European, Convention, but also to the mechanism of protection with a universal vocation established by the UN.

[39] Report No. 31 of the UN Human Rights Committee on the nature of the general legal obligation imposed on States in the light of the International Covenant on Civil and Political Rights, 29 March 2004. [online]: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/419/56/PDF/G0441956.pdf?OpenElement (accessed on 13/07/2014)

II. EXTRATERRITORIAL OBLIGATIONS OF STATES

2.1. Definition and characteristic of extraterritorial obligations in the light of the ECHR

i. Appearance of the extraterritorial obligation

As to international treaties, States assume obligations through free expression of consent to become a party to a respective treaty. The moment when such obligations arise is determined by the entry into force of the treaty, dictated by its specific circumstances. The situation is somewhat different for extraterritorial obligations. Due to their exceptional nature, the extraterritorial obligations can only arise under special circumstances, usually determined by a state's actions that are effective, or exercised, beyond its territorial boundaries.

As mentioned above, in most cases the extraterritorial obligations can be identified from the general amount of obligations through their spatial extension, i.e. the State will be required to have certain behaviour outside its boundaries. The consequent obligation will be often related to a person, or an extraterritorial space, outside the State's territorial limits; therefore, there is a connection point somewhat similar to the doctrine of the private international law. This analogy is only necessary to understand the particularities of extraterritorial obligations, not their legal nature, since they obviously go beyond the private sphere.

For that reason, depending on various circumstances, the extraterritorial obligations will have an effect on a certain area located outside the self-committed State's boundaries if the latter exclusively controls that territory, i.e. if that territory is under the exclusive jurisdiction of that State. This reasoning refers to both the

territory within its land boundaries and the territorial sea, but not to maritime space with mixed regime[40] or the maritime spaces outside the jurisdiction of states. In this respect there are two possible situations: the occupation of a territory by the armed forces of another State or a derivative entity (such as the European Union), or the economic, military, and financial support of a separatist regime, whose authority exercises exclusive control over the space of another State. It shall be noted that the State exercises its jurisdiction through an agent not on the space, but directly on the person.

In the first case, the appearance of extraterritorial obligation will coincide with the occupation by the State, or the non-state entity, which already has exclusive control over that territory. The space dimension will involve liability for any interference with human rights and freedoms committed on the territory occupied by, or under the exclusive control of, the respective State.

In the abovementioned cases, the extraterritorial obligation will appear prior to causing the interference. The situation would be different when the State acts through its agent on the territory of another State, or when a State allows a third country to commit various acts within its territory, which later will be causing interferences on the territory of that third country. In this situation, the appearance of an extraterritorial obligation coincides with the committing of the extraterritorial act, or with the admitting of a third country's action on its territory[41]. In terms of content, the extraterritorial obligations will be only limited to the respective action and the violated right.

[40] Se in this respect: Continental Shelf Delimitation Agreement between Turkey and the TRNC of 19 September 2011. [online]: http://www.mfa.gov.tr/qa_10_-30-april-2014_statement-of-the-spokesman-of-the-ministry-of-foreign-affairs-in-response-to-a-question-regarding-the-sta.en.mfa (accessed on 22.06.2014)

[41] For example – in case of the extradition of a person, whose rights were interfered with.

ii. Definition and structure of the extraterritorial obligation

The extraterritorial obligations prove to be a separate category in relations governed by the ECHR and in order to be properly applied, they have to be defined exhaustively, and their special features need to be delineated.

The extraterritorial obligations can broadly be defined as: "*obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally*"[42]. From our point of view, the definition of extraterritorial obligations is, in principle, exhaustive and embraces all its special elements, and namely:

- they are *global*, so there are no limitations of any kind. This means that the extraterritorial obligations in the light of the ECHR are practically not limited: neither under personal aspect (i.e. hypothetically, everyone, regardless of nationality or place of residence, can benefit from the protection offered by the Convention), nor under spatial aspect (i.e. the extraterritorial action of the State will impose its extraterritorial liability regardless of the *locus delicti*). However, there may be some special limitations of extraterritorial application of the Convention, which excludes its protection in certain circumstances (see Chapter V below);

- the *source* of the obligations, or the foundation thereof, is contained in the UN Charter and the International Bill of Human Rights. In terms of human rights protection under the ECHR, it is obvious that the main source is the Convention, the other instruments being merely interpretative;

- their *content* – to take action through cooperation and independently – involves both a negative obligation (i.e. not to interfere with the human rights and

[42] The Maastricht Principles on Extraterritorial Obligations of States. [online]: http://www.lse.ac.uk/humanRights/articlesAndTranscripts/2011/MaastrichtEcoSoc.pdf (accessed on 13.04.2014)

fundamental freedoms), and a positive one (i.e. to protect them against unlawful acts of the subjects of domestic and international law, as well as to undertake legislative and executive measures to achieve them). Whereas cooperation is an important aspect in terms of international genesis and policy forming international public order, the States' acts/omissions are more specific, in terms of their impact on each individual. An extraterritorial act of the State may give rise to obligations in regard to both international cooperation and individual acts affecting the rights or obligations of a specific person; alternatively it could cover both aspects simultaneously;

- the *purpose* requires universal consideration thereof. The respective measures have to be exercised both independently and in cooperation.

The extraterritorial obligations should not be understood as each State bearing responsibility in ensuring the human rights of all people in the world. The States' actions give rise to extraterritorial obligations in terms of human rights only in certain circumstances and conditions. A general prerequisite in that respect would be that the state had to exercise control or authority over some persons or places outside its territorial boundaries in a way that would have a negative impact on fundamental rights and freedoms of the persons concerned.

Thus, the extraterritorial obligations prove to be an *exception* to the application of the Convention since their appearance is only determined by the actions/omissions of States in relation to the individuals under its jurisdiction.

The extraterritorial obligations can be narrowly defined as follows: "*obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's ter-*

ritory"[43]. This definition falls into the situation of a State's extraterritorial act, susceptible to interfere with the rights and freedoms enshrined in the treaty, and reflects those characters, the aggregation of which is necessary for the State's extraterritorial liability to be incurred:

- the factual element – acts or omissions of the State (referring to the States' violation of their positive or negative obligations);
- the spatial element – the act/omission will usually take place outside the territory of the State; however, it is also possible that the act takes place on the territory of the State committing the interference, whereas the consequences thereof are taken beyond its territory; and
- interference – implies the existence of a causal link between the State's act/omission and the negative impact on human rights.

In order for a State to incur liability for breach of an extraterritorial obligation, it will have to meet a certain *test*, the "standardization" of which depends on each treaty separately. In the case of the European Convention on Human Rights this test is reflected by the concept of "jurisdiction" in Article 1 of the Convention. The International Covenant on Civil and Political Rights provides for the concept of "territory". The American Convention on Human Rights also provides for the concept of "jurisdiction". These three concepts, used in the respective instruments not just abstractly, are connected by the fact that their meaning is different from that in the public international law. The interpretation of these concepts is primarily the responsibility of the supervisory bodies established by those treaties, and of international jurisdictions of general competence, such as the ICJ. It is important to

[43] *Ibidem*

be noted that both concepts – territory and jurisdiction – are two aspects of the same phenomenon: the extraterritorial obligations.

Based on the existing situation during the world enactment of the second generation of rights, the concept of extraterritorial obligations was initially interpreted narrowly, whereas the Member States were only required to refrain from a conduct generating interferences (negative obligations). In the last two decades, however, in terms of composition the extraterritorial obligations prove to have no difference, at least formally, from their "ordinary" obligations. Depending on their classification, they are either positive or negative, meant to i) respect; ii) protect from interferences by third parties; and iii) fulfil[44]. Thus,

- the obligation to respect requires States to respect human rights in another State when it comes to mutual cooperation or military actions, for example;
- the obligation to protect requires States to prevent violations of human rights and fundamental freedoms by third parties' acts that may cause interference therewith, whereas the State should provide protection through legal means;
- the obligation to fulfil requires States to take appropriate and/or administrative measures, towards the full realization of such rights and freedoms.

The structure of extraterritorial obligations has proven to be a practical problem in the case-law of the European Court of Human Rights. For a long period of time the Court's position was that the rights provided for by the Convention could not be "*divided and tailored*" [45]. That means that whenever a State objectively was not able to guarantee protection of rights, both under negative and positive aspect, provided that it was not able to guarantee all the rights under the Convention, the

[44] Maastricht Guidelines, Guideline no. 6. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. [online]:http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html (accessed on 14/04/2014)
[45] Case of *Banković and Others v. Belgium and Others*, decision of 12/12/01. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22099 (accessed on 25/03/2014)

State was not liable for its extraterritorial acts. This principle drastically limited the extraterritorial application of the Convention, which was practically inapplicable to a State's acts committed by its agents in armed conflicts. Only in 2009, in the *Al-Skeini* judgment the Court stated that the rights and freedoms defined in the Convention could be "*divided and tailored*".[46]

The fact that the ECHR is a *regional* instrument does not diminish its fundamental character, especially to the extent that the obligations arising from the Convention coincide with the obligations *erga omnes* of the international human rights law.

The fundamental rights of individuals, groups of individuals and peoples are affected by, and depend on, the extraterritorial acts of States, taking into account the economic, social and military influence which comes into existence along with the phenomenon of globalization and the "new world order".

2.2. Extraterritorial obligations and international law principles

The extraterritorial obligations in the international human rights law are a point of convergence of several principles of the public international law.

Given the obligation of the UN Member States to cooperate in the sense of universal protection of human rights and fundamental freedoms, the extraterritorial obligations prove to be a logical continuation of the principle of international cooperation, and obviously of the principle of respect for human rights[47].

[46] Case of *Al-Skeini and Others v. the United Kingdom*, judgment of 7/07/2011. Para. 137. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606 (accessed on 25/03/2014)

[47] The principle of protection of human rights, the foundation of which is mentioned both in Article 56 of the UN Charter, and in the UDHR, the Helsinki Final Act of 1 August 1975 and others political legal documents.

The extraterritorial obligations often can be determined from spatial point of view, i.e. the State has a duty to perform a certain conduct outside its territorial boundaries, or at least be anticipated by such conduct. The respective actions will necessarily be a manifestation of State jurisdiction, and, therefore, of legislative, executive, and judicial authority. However, the obligation to exhibit a particular conduct cannot be seen *in abstractio* by the State actions preceding the appearance of the obligation to respect fundamental rights and freedoms. In fact, in most cases the extraterritorial obligation will be preceded by an extraterritorial act. There are two types of situations: when the State exercises its extraterritorial jurisdiction on the territory of a third State, and when the State exercises jurisdiction in areas which are not under any other jurisdiction.

As to the correlation between the fundamental principles and the extraterritorial obligations, the first case presents a greater interest, i.e. when the State exercises its jurisdiction legally or illegally in another State. The jurisdiction will be exercised legally when there is an agreement between the State exercising extraterritorial jurisdiction and the State where that jurisdiction is in fact exercised. The jurisdiction will be exercised illegally when there is no agreement as, for example, in case of military intervention.

Once a State introduced its military contingents onto the territory of another State in violation of the principle *jus contra bellum*[48]*,* it will be still required to comply with applicable norms of the international human rights law. Thus, the principle of respect for human rights cannot be neglected regardless of the violation of other fundamental principles, such as the principle of non-aggression, of

[48] *Jus contra bellum* – rules prohibiting the use of force for the settlement of disputes. For example, Article 2 para. 4 of the UN Charter states: "*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".*

territorial integrity, and of inviolability of state border. In this respect, the principle of human rights is somewhat independent of the other principles. However, a different situation can be observed when the State exercises its executive jurisdiction on the territory of a third State, such as in case of *extraordinary rendition*, i.e. without the consent of the State the extradition takes place. This fact could be regarded as mere interference in the internal affairs of that third State; however, in this case the principle of respect for human rights will be autonomous as well: the first state will still be required to comply with its obligations in international human rights law.

In the second case, when a State exercises jurisdiction in areas being not in any country's jurisdiction, such as the high seas, the question is no longer seen in "territorial" terms (such as in circumstances that give rise to relations between the "intervening" State and the "victim" of the latter's exercise of jurisdiction), but rather in "personal" terms, i.e. in what way the State's extraterritorial act affected the human rights and fundamental freedoms recognized as being within its jurisdiction in the high seas, the other principles having more limited implications.

2.3. Practice of extraterritorial application of international human rights law treaties

The separate interpretation of the presence and extent of extraterritorial obligations in respect of each IHRL treaty is within the competence of the international jurisdictions and the bodies created to monitor compliance of Contracting Parties with the obligations arising from the respective instrument. The criteria and circumstances relying on which a State has extraterritorial obligations

(finally determining the effectiveness of the treaty) depend on the reasoning, conditions, and provisions of the treaty, as well as other factors, whereas their extraterritorial application is not uniform.

As to the concurring opinion of the former Maltese judge of the High Court, Giovanni Bonello, in the *Al-Skeini* case, the case-law of the European Court of Human Rights on the extraterritorial application of the ECHR was a jurisprudential mixture in the best case.

Thus, a retrospect to the case-law of international bodies on the interpretation of the jurisdictional clause in parallel with the European Convention would be appropriate.

i. International Covenant on Civil and Political Rights (ICCPR)

Both the Human Rights Committee (hereinafter Committee), the body responsible for monitoring the States' conduct and the ICJ have developed a clear and consistent practical application of the ICCPR. The treaty uses differently two criteria: territory and jurisdiction; however, this does not have to lead to the wrong conclusion that the term jurisdiction should be only interpreted in light of other criterion.

In the case of *Lopez Burgos v. Uruguay*, the Committee established that the jurisdiction clause could not be interpreted to mean that the State, a person of a group of individuals were entitled to engage in any activity or to perform any act that would amount to the violation of a right or freedom recognized by the Covenant, or that the rights and freedoms set out in the Covenant should be limited extensively. Furthermore, the Committee even exposed the primary purpose of interpreting the Covenant in favour of extraterritoriality, arguing that it would be inconceivable to

interpret the liability under article 2 para. 1[49] of the Covenant in such a way as to enable a State Party to commit, on territory of another State, violations that would be inadmissible on its own territory[50]. This solution is not an innovation today for this case dates back to 1979. The Committee succeeded remarkably to assess all issues of extraterritorial application of the Covenant in two sentences, whereas the European Court has not been that successful for a long time.

Another case would be important from the perspective of the ECHR. The Committee addressed the issue of the consequences of the act committed on the territory of a State, which later occur in another State. In the case of *Mohammad Munaf v. Romania*[51], the applicant, a journalist with dual citizenship (of Iraq and the USA), invoked violation of the right to life and of prohibition of torture. He indicated that he had been captured in Iraq along with other three Romanian journalists, and held on the premises of the Romanian embassy in Baghdad. Later was handed over to American troops to be investigated in the context of criminal proceedings. He was later handed over to Iraqi authorities, being subsequently tortured and sentenced to death. The applicant alleged that the Romanian government had violated the ICCPR by handing him over to the respective authorities. The Committee stated that to hold Romania liable, i) the latter should have exposed a person to the real risk of his respective rights being violated extraterritorially, according to the information in the government agent's possession; ii) and there should have been a causal link between the State's act and the consequence occurring outside its jurisdiction. Thus, the

[49] Article 2 para. 1 stipulates: *"Each State Party to the present Covenant undertakes to respect and to ensure to* ***all individuals within its territory and subject to its jurisdiction*** *the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

[50] Case of *Burgos v. Uruguay*, Communication of the UN Human Rights Committee of 29/07/1981. [online]: http://www.unhchr.ch/tbs/doc.nsf/0/e3c603a54b129ca0c1256ab2004d70b2?Opendocument para. 12(3) (accessed on 22/04/2014)

[51] Case of *Mohammad Munaf v. Romania*, Communication of the UN Human Rights Committee of 21/09/2009. [online]: http://www.refworld.org/docid/4acf500d2.html (accessed on 22/04/2014)

Committee clearly emphasized the criterion when the State should found liable for its actions with extraterritorial effects.

As to the correlation of the extraterritorial application of Covenant with the international responsibility, the Committee commented that the Member States were obliged to secure the rights laid down in the Covenant to all persons *under their effective control, even if they are not located within the respective State*[52].

Thus, the Committee prefers an extensive interpretation of the principle of effective control, extending it to the actions of State agents, regardless of whether the interference occurred inside or outside the premises under the jurisdiction of the State.

Referring to the International Court of Justice on this matter, being addressed the question whether the Covenant was to be applied extraterritorially by the Israeli government on the territories, which were *de facto* within its jurisdiction, the ICJ answered in its advisory opinion that the editors of the Covenant had not intended to allow States to evade their obligations while exercising jurisdiction outside their national boundaries, but to prevent non-residents of that State to claim rights to it that do not fall under the jurisdiction of that State[53]. The ICJ concluded expressly that ICCPR is applicable to acts committed outside their territory.

ii. The Inter-American system of human rights protection

This is a system of bodies, created under the auspices of the Organization of the American States[54], designed to monitor the respect for human rights by Member States of the organization. It is basically an analogy of the protection system of the Council of Europe that existed prior to the reform of the European Court through

[52] General Comment No. 31 (80) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenants, 29/03/2004, Para. 10 [online]: http://www.refworld.org/docid/478b26ae2.html (accessed on 22/04/2014)
[53] Case on *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*…para. 109
[54] Official website of the al Organization of American States [online]: http://www.oas.org/en/default.asp (accessed on 23.04.2014)

Protocols 9 and 11. The Organization of the American States consists of two main bodies – the Inter-American Commission on Human Rights (hereinafter the Commission), and the Inter-American Court of Human Rights (hereinafter the Court). The main legal instruments of protection are the American Declaration of Human Rights, the American Convention on Human Rights (hereinafter the Convention), and the Charter of the Organization[55].

The extraterritorial application of legal instruments has not undergone major changes recently since the Court and the Commission already have a stable and consistent case-law in this respect. The highlights in their case-law concerning extraterritorial obligations are the principle of non-discrimination defined in Article 1 of the Convention[56] and the aggressive application of the criterion of *authority and control*. The last criterion is different from the criteria applied by the European Court through its flexibility. In principle, it covers any State's extraterritorial act committed by its agents whenever they are under the authority and control of the respondent State. The criterion of authority and control regards both the State agent and indirect relations.

In this case of *Armado Alejandra Jr. and Others v. Cuba*[57], the Commission addressed the extraterritorial application of the Convention in international airspace. The applicants complained that the military airship belonging to the Cuban Air Force destroyed two commercial aircrafts while they were in international airspace, which caused the death of people on the board of the shot down aircrafts. The Commission

[55] Charter of the Organization of American States of 30 April 1948. [online]: https://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.pdf (accessed on 24.04.2014)

[56] *" The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons* ***subject to their jurisdiction*** *the free and full exercise of those rights and freedoms, without any discrimination …".* The notion of "person" in the light of the ACHR shall be only interpreted in respect of private persons.

[57] Case of *Armado Alejandre Jr. and Others v. Cuba*, Report of the Inter-American Commission on Human Rights of 29/09/1999. [online]: http://www1.umn.edu/humanrts/cases/86-99.html (accessed on 24/04/2014)

held that in some circumstances the extraterritorial application of the Convention was not only permissible, but also necessary, in accordance with the principle of non-discrimination in the protection of human rights as provided for in Article 1 of the Convention. Referring to the *causal link* between the death of the victims due to the violations committed by the actions of the Cuban military airship, the Court concluded that it arose from the direct actions of the crew of the aircraft, which was at that time under the control and authority of the Cuban government. These findings satisfied the criteria for determining the Cuban State's responsibility for its internationally wrongful act, and namely:

a) violation of an international obligation;

b) imputability of the offence to the respondent State;

c) causal link between the wrongful act and the victim's suffering.

Similarly, in this case of *Coard and Others v. USA*[58] the Commission applied the Convention extraterritorially in the circumstances of the armed conflict in Grenada. The applicants invoked violation of the right to a fair trial, and to freedom, by the United States Government claiming that the latter had imprisoned them, thus failing to offer them any remedy to challenge the US agent's unilateral decision to keep them in custody of the US Armed Forces. The United States Government tried unsuccessfully to justify their actions by military necessity and non-applicability of IHRL during an armed conflict. As to the Commission, the right to a fair trial is absolute, and the protection of civilians during armed conflict is to be guaranteed along with the right to liberty (except for the provisions set out in the Geneva Conventions of 1949), stating *inter alia* that human rights are to be protected without discrimination, based on simple human nature of people, whereas States are

[58] Case of *Coard and Others v. USA*, Report of the Inter-American Commission on Human Rights of 29/09/1999. [online]: http://www1.umn.edu/humanrts/cases/us109-99.html (accessed on 24/04/2014)

obliged to protect these rights whenever they are subject to their authority and control[59].

Given the analyzed case-law, it should be noted that the organs of the American human rights protection system, in the cases involving extraterritorial application of relevant instruments, do not hesitate to refer to the *principle of authority and state control*, applied primarily, rather than the principle of territoriality. In the same context, the Commission does not hesitate to invoke the non-discrimination clause, which allows applying its instruments with less "legal hypocrisy".

iii. International Court of Justice

In the case of *Georgia v. the Russian Federation*, the ICJ considered the principle of effective control, invoked by the Georgian Government, in order to determine Russia's jurisdiction in terms of the extraterritorial applicability of the Convention on the Elimination of Racial Discrimination (hereinafter the Convention)[60]. The Convention contains no express extraterritorial clause. In the present case, Georgia invoked the violent and discriminatory acts exercised by Russian armed forces. Georgia argued its position noting that the Convention extends to Russia's obligations arising from the acts of the Russian army stationed in Abkhazia and South Ossetia[61]. In its turn, Russia argued that the obligations arising from Articles 2 and 5 of the Convention only applied within States Parties[62] since

[59] *Idem*, para 37. See also the Report of the Inter-American Commission on Human Rights in the case of *Rafael Ferrer-Mazorra and Others v. USA* of 04/04/2001. [online]: http://www.refworld.org/docid/502cbf872.html (accessed on 18/04/2014)

[60] International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965. [online]: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx (accessed on 15/04/2014)

[61] *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, Request for indication of provisional measures. ICJ Order of 15/10/2008 [online]: http://www.icj-cij.org/docket/files/140/14801.pdf (accessed on 23/04/2014)

[62] *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, Preliminary objections of the Russian Federation, of 01/12/2009. Volume 1. para. 153. http://www.icj-cij.org/docket/files/140/16099.pdf (accessed on 18/04/2014)

there was no extraterritorial clause; thus, in the absence thereof there could be no genuine exception of extraterritoriality under public international law, Russia citing the case on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The Court reversed the last argument, and held that the absence of jurisdictional barriers would lead to the absence of territorial limits for the obligations arising under the Convention.

Therefore, the Court did not specify what circumstances should have served as a basis for the extraterritorial application of the Convention, but implicitly came to the conclusion that in the absence of any territorial or jurisdictional clause, it would be applied outside the territorial boundaries of the Member States.

iv. Committee against Torture[63]

In accordance with Article 2 (1) of the Convention against Torture[64]: "*Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture* ***in any territory under its jurisdiction***". Similar clauses can be found in Articles 5 (para. 1), 11 and 16 of the Treaty. Despite the ambiguity of the bold phrase, the Committee interprets the Convention in favour of the extraterritorial application thereof within the limits of exercising an *effective control*. Thus, after receiving the report from the Macau Special Administrative Region (establishing that Macau was applying extraterritorially the acts punishable under the Convention only if the other country also incriminated similar acts, which is at least a strange interpretation with an obvious shortcoming of extraterritorial non-application of the Convention in the absence of dual incrimination, or in case of no State's jurisdiction),

[63] Body formed in accordance with Article 17 of the Convention against Torture, the Committee is empowered to examine the annual reports of the States, to take action on its own initiative, as well as to accept complaints from other States or individuals, if the respondent State submitted a statement to that effect in accordance with Articles 21 § 1 and 22 § 2 of the Convention.

[64] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984. [online]: http://www.un.org/documents/ga/res/39/a39r046.htm (accessed on 22.06.2014)

the Committee recommended the State to implement the "full jurisdiction in the extraterritorial application of the Convention.[65]

III. JURISDICTION AND ELEMENTS OF EXTRATERRITORIAL RESPONSIBILITY OF STATES

3.1. Preliminary remarks on the concept of "jurisdiction"

[65] Concluding Observations of the Committee against Torture in the Macao Special Administrative Region of 19/01/2009. [online]: http://www.refworld.org/country,,CAT,,MAC,,4986bc0c13,0.html (accessed on: 20/04/2014)

The adequate perception of the conditions of extraterritorial application of the ECHR, as well as of Article 1 of the Convention is inextricably linked to the existing meanings of the notions of jurisdiction in public international law. This concept does not have a unique sense since it is interpreted depending on circumstances, i.e. on the instrument, the subject of international law, and the referred object of interpretation.

Professor Lukashuk defines the jurisdiction of states as follows: "*Jurisdiction is the manifestation of state sovereignty, and it consists of state power, as well as the volume and action scope thereof*"[66]. This definition presents an *abstract* concept of jurisdiction, with territorial implications, however, not limited thereto. It is important to separate the concept of jurisdiction of that of territory due to the effects they have on the extent of extraterritorial obligations. The territory proves to be a more limitative notion in terms of States' obligations within international human rights law because in such a way the extent of the obligation is limited to the territory of the Contracting State. On the other hand, the authority of the State may be effectively reflected on the territory of third countries, whereas the concept of jurisdiction proves to be a broader concept allowing application of this Treaty wherever the state effectively exercises its authority.

From another perspective, in terms of international dispute settlement bodies, the concept of jurisdiction is used to define both the (physical, personal, spatial, temporal) competence of these organs, as well as to define the authorities for that matter. In this respect, the international jurisdiction is a "*body supposed to resolve*

[66] Лукашук И.В. Медународное право. Общая часть. Москва: Волтерс Клувер 2008, p. 330.

an international dispute through a binding decision taken in accordance with the international law [...] by identifying its activity iuris dictio"[67].

Therefore, the public international law distinguishes at least 3 meanings of the concept of jurisdiction. This should not create any confusion, because each treaty on international human rights law certainly mentions, explicitly or implicitly, the subject attributed with notion of jurisdiction.

Thus, referring to Article 1 of the ECHR, the concept of jurisdiction should be only seen in relation to the High Contracting Parties. Moreover, the notion of jurisdiction in the light of the Convention is to be perceived *independently* of the public international law, in accordance with the European Court's relevant case-law.

The jurisdiction of States is generally an aspect of sovereignty, referring to their judicial, legislative, and administrative competence[68] supposed to regulate the conduct of individuals and legal entities in the domestic law. The notion of jurisdiction emanates from the concept of sovereignty, which, by its nature, is closely related to the spatial element, i.e. to the territory of a sovereign State. This fact leads to the priority of interpretation of State jurisdiction through the *principle of territoriality*. A State's territory is composed of its land, waters (within 12 sea miles, excluding inland waters), and airspace[69]. A point of interest are also the territories lacking state jurisdiction, as for example the high seas, where the exercise of extraterritorial jurisdiction raises fewer difficulties.

The *principle of territoriality* formally reflects the Court's current sense of interpretation of Article 1, denoting the primacy of territorial definition of the concept of jurisdiction.

[67] Sârcu-Scobioală D. Actul jurisdicţional internaţional. Chişinău: 2013, p.28.
[68] Brownlie I. Principles of Public International Law. 7th edition. Oxford University Press, 2008, p. 299.
[69] Burian A. and Others. Drept Internaţional Public. Ediția a IV-a. Chișinău: Elena V.I., 2012, p. 158.

The principle has different effects, depending on the territorial area in question. Thus, with reference to the territory of a State it normally has jurisdiction over, a presumption of jurisdiction will generally prevail; that means that if a State does not control a part of their territory, it has to prove that fact[70]. On the other hand, whenever a State exercises its extraterritorial jurisdiction, it will be the applicant's duty to prove that assertion, whereas the State may object since there is always a presumption of non-exercise of extraterritorial jurisdiction[71]. Moreover, according to Article 1, the State will also exercise its jurisdiction over those parts of its territory, which *de facto* are not subject to control.

The notion of State jurisdiction in the public international law involves at least three dimensions thereof:

1. legislative powers, i.e. the authority of the State to regulate the conduct of individuals;
2. executive power, i.e. the authority to enforce the developed standards;
3. judicial power, denoting the authority of the State to administer justice.

Thus, when this concept is applied in respect of sovereignty of States, it has more than one definition. The distinction between jurisdictional competences of a State raises interested issues from both theoretical and practical points of view.

The extraterritorial obligations of States involve primarily the executive and legislative powers: executive because they "enable" their agents to commit interferences outside their boundaries. However, the regulatory jurisdiction will also have absolute implications in terms of the extraterritorial application of the Convention because, by acting extraterritorially, the States extrapolate their

[70] Case of *Catan and Others v. Moldova and Russia*, judgment of 19/10/2012. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114082 (accessed on 20/04/2014)

[71] Case of *Pad and Others v. Turkey*, decision of 28/06/2007. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81672 (accessed on 20/04/2014)

domestic legal order beyond their territories. Due to the direct impact of the ECHR on national law, the States ideally should not hesitate to "transport" the Convention standards in respect of, and impose them on, their agents acting extraterritorially. This argument should not be confused with the imposition of conventional obligations of third States, which are not parties to the ECHR.

On the other hand, the judicial competence has limited implications. For instance, this situation arises when it comes to legal proceedings against a foreign State or a diplomatic mission in the receiving State, pending before the latter's courts.

The generally accepted meaning of jurisdiction is that it has to be exercised within the territorial boundaries of the State concerned. This means that States cannot exercise jurisdiction beyond their borders, i.e. in other states *unless they consent thereto*. For example, in compliance with a respective agreement signed, two countries could exercise executive power by creating consular missions, or by delegating powers of control over customs and foreigners[72].

The lawful or unlawful military occupation would constitute an exception to the rule laid down, with a limited scope. In other circumstances, the exercise of extraterritorial jurisdiction will be considered illegal, as it happened, for example, with Mossad (Israel's National Intelligence Agency) agents capturing Adolf Eichmann in Argentina, without even notifying the Argentinian authorities. In general, the illegal exercise of extraterritorial State jurisdiction leads to violations of international mandatory rules.

In any case, unless it amounts to obvious violations of mandatory rules, the exercise of extraterritorial jurisdiction is not prohibited by public international law,

[72] Treaty regarding the inclusion of the Principality of Liechtenstein in the Swiss customs-area of 29 March 1923. [online]: http://www.worldlii.org/int/other/LNTSer/1924/1.pdf (accessed on 18/04/2014)

since the clause of *reasonable purpose* is always admissible when applying the extraterritoriality of a legal instrument. Thus, in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ stated that "*while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory*"[73]. The mentioned reasonable purpose means nothing else but the discretion of States to determine where and when to exercise their extraterritorial jurisdiction, which can lead to multiple abuses from them, such as the controversial detention of persons by the United States at the Guantánamo Bay military base in Cuba. The States' discretion in this regard, *de jure*, is limited by other States' sovereignty; however, in fact it is unlimited. Therefore, the main purpose of the concept of jurisdiction in public international law is limiting the jurisdiction of States, needed for a harmonious exercise of their rights by sovereign States.

From the perspective of international human rights law, it is irrelevant whether the State exercises its jurisdiction legally or illegally. Apart from the limitations *ratione loci* and *ratione personae* of various international instruments in terms of human rights protection, the State would normally exercise its extraterritorial jurisdiction at any time. That State would not be able to invalidate the application of international instruments it is party to. However, when the State exercises its regulatory and executive jurisdiction outside its territorial boundaries, it should not have discretion to apply its domestic law selectively: for example, to use punitive mechanisms without harmonizing them with mechanisms of human rights protection it is a party to.

[73] Case of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion of 9 July 2004. [online]: http://www.icj-cij.org/docket/files/131/1671.pdf p.179, para. 109 (accessed on 18/04/2014)

In fact, such States not only create a vacuum in the protection of human rights, but also neglect their own commitments to other States. However, the ethical dimensions of the issue concerning the exercise of extraterritorial jurisdiction should not be ignored either: the sovereign States' position in respect of the human rights beneficiaries cannot be compared from legal or moral points of view.

It is certain that the jurisdiction, in terms of States' extraterritorial obligations arising from international human rights law treaties, refers to the ability of States to exercise authority beyond their territorial limits, thus the scope of conventional obligations being clearly determined. In the light of the treaties on international human rights law, this means nothing else but a test, i.e. a mandatory criterion to initiate the extraterritorial action of the treaty.

3.2. Jurisdiction concept of *ratione personae*

In the abovementioned case of *Al-Skeini and Others v. the United Kingdom*, which will serve as a reference several times in this monograph, the European Court managed to adopt an alternative concept of personal jurisdiction, on basis of the exclusive link between the respondent State and persons under its jurisdiction. Similarly, referring to territories and areas under the effective control of a State, the Court upheld that the use of force by State agents operating outside its boundaries may fall within the definition of jurisdiction under Article 1, whereas the applicants were under the respective State's control.

In this context, the approach of the personal criterion of jurisdiction is noteworthy, and namely the possibility of applying the ECHR to persons outside the legal framework of the Council of Europe, through the agents of a State Party to the

Convention. The idea of the jurisdiction exercised by agents of a State on persons outside the borders thereof is not new in the case-law of the Strasbourg Court. The concept of "personal" jurisdictions was used by the ECmHR in the 1970s with clear reasoning to hold a State responsibility for the extraterritorial activities of its agents. In such cases, the Commission admitted that States were required to secure the rights and freedoms enshrined in the ECHR of all persons under their authority, i.e. not just of those within their sovereign territories, but also of those abroad.[74] Thus, the ECmHR was interested neither in imposing States' responsibility on territories where the disputed acts were issued, nor in answering the question about the existence of any legal basis under the public international law for issuing the agents' impugned acts. Essentially, the Commission primarily referred to facts, and determined whether State authorities exercised effective control over the alleged victims at the moment of the impugned conduct.[75] Nevertheless, neither the Commission nor the European Court had ruled on the admissibility of the Convention's application outside the Council of Europe prior to the case of *Al-Skeini.* It was in the case of *Banković* that the Court expressly established the limitation of the extraterritoriality of the ECHR through the criterion of legal space.

The *Al-Skeini* case was neither the first nor the only one where the Strasbourg supervising bodies have ruled on the personal competence of the ECHR application outside the respondent State's territory; however, in that specific case the European Court formulated the concept of *ratione personae* of the jurisdiction in terms of effective control by State agents on persons. It emphasized that physical exercise of a State's authority plays a decisive role, thus getting rid of the concept of *espace*

[74] Case of *Hess v. the United Kingdom*, decision of 28/05/1975. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70003 (accessed on 22/04/2014)
[75] Velu J., Ergec R. La convention européene des droits de l'homme. Bruxelles: Bruylant, 1990, p. 68.

juridique as previously established in the *Banković* case, according to which the jurisdiction of a State is to be determined by the territory of the Member States of the Council of Europe.

Such an approach toward the *ratione personae* criterion marks a new period in affirming the European Court's case-law because it involves abandoning the theory of legal space, and conditions the acknowledgment of extraterritoriality in terms of universality. It is noteworthy that in the field of applicability of the International Covenant on Civil and Political Rights, in its advisory opinion on the aforementioned Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, and in its judgment in the case of *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo v. Uganda)[76], the International Court of Justice arrived at a similar conclusion, noting that the Covenant applies to a State's actions committed in the framework of the exercise of its sovereignty outside its territories.

Paradoxically, although in its case-law the Strasbourg Court refers on multiple occasions to the absence of need to comply *ad literam* with the rules of general international law, the legal concepts embedded in the ECHR having an autonomous character, it just rules its final judgments respecting the exact approaches of the public international law.

Such cases are not unique in the case-law of the Strasbourg Court. As to the jurisdiction *ratione loci*, it also aligns its reasoning with the jurisprudential approaches of other international bodies in the field of human rights protection,

[76] Case *Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo *v.* Uganda), judgment of 19 December 2005. [online]: http://www.icj-cij.org/docket/files/116/10455.pdf (accessed on 24/06/2014)

whereas, in evaluating alleged violations, it relies on the relationship between the State and the individual, rather than on the *locus delicti*.[77]

In the context of the analysis of the personal dimension, it is important to assess the activities of State agents in order to determine the procedural distinction between the concepts of jurisdiction and imputability. In principle, due to its preliminary nature, the appreciation of the respondent State's jurisdiction is distinct from identifying the assigned actions. Such opposition between the jurisdiction (the estimation of which is made during the preliminary analysis of the case) and imputability (referring to the merits of the alleged infringement) can be found in the Court's case-law. As to the reprehensible acts committed outside the respondent State' territory (yet under its control, for example), European judges habitually concluded that the condition on the jurisdiction was satisfied. Thus, the test of jurisdiction, conducted by the Court at the preliminary examination of the case, clearly differs from the imputability issue. The Court highlighted the estimate of the issue whether the impugned acts had been committed by a body of the respondent State and could be attributed to the latter in assessing the merits.

The application of the concept of personal jurisdiction should not differentiate these successive stages of the proceedings – preliminary and on the merits – for establishing the jurisdiction under Article 1, whereas the Court has the option to use the assessment of the effective control criterion, as well as the criterion of authority between the agent and the State, as described below.

[77] Laval P.-F. A propos de la juridiction extraterritoriale de l'état. Observation sur l'arrêt Al-Skeini de la Cour Européenne des droits de l'homme d 7 juillet 2011. In: Revue générale de droit international public, Vol. CXVI, 2012, p. 79.

3.3. Analysis of the jurisdictional clause as a special admissibility criterion

i. States' jurisdiction

As established above, the jurisdiction of states lies in their ability to manifest legislative, executive, and judicial powers both within their territories and abroad. The key word here is "capacity" because, whenever the State exercises its powers extraterritorially, the Court – for the purposes of determining jurisdiction – will not be bound to consider merely the territory over which the respondent State is entitled to exercise it. Thus, whenever the High Court has to examine an application with extraterritorial implications, it will examine the factual situation depending on the violation alleged.

Therefore, the purpose of each treaty on human rights determines the extent of its beneficiaries' rights; it also sets certain limits to the correlative obligations of States. These limits are established by a clause expressed by the phrase "jurisdiction of States", as in the case of the ECHR; "territory and competences of States", as in the case of the International Covenant on Civil and Political Rights; or just "territory" as stipulated in the Convention on the Abolition of Slavery[78]. Each of these phrases differently regulates the spatial and personal goals of the respective treaties by creating different "limits" in the exercise of the rights and freedoms set out therein.

As generally known, the so-called "jurisdictional clauses" do not have a rich history. In the pre-UN period there was a different type of limitations: for example, the obligation to protect the rights of residents and citizens, as foreseen in the *Peace*

[78] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 30 April 1956. [online]: http://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx (accessed on 19/04/2014)

Treaty of Saint-Germain in 1919[79]. Thus, there was a strict personal criterion involving just the citizens of the Signing State and the residents recognized by national law. Therefore, there could no question about the extraterritorial application of the act. During the inter-war period it is apparently known one single attempt to implement a jurisdictional clause. The USA proposed to include such a clause in Article 6 of the Covenant of the League of Nations, which declared the principle of non-discrimination of the minorities of the States wishing to become members of the organization, Article 23 providing for "fair protection of all residents on the territory of Member States".[80]

In such circumstances, the European Convention on Human Rights can be considered a pioneer in introducing limitations of obligations as a jurisdictional clause.

The jurisdictional clauses can be of two types: explicit and implicit. The express jurisdiction clause can be found in Article 1 of the ECHR, Article 1 of the American Convention on Human Rights, Article 2 (para. 1) of the International Covenant on Civil and Political Rights, Article 1 of the CIS Convention on Human Rights and Fundamental Freedoms[81], Article 3 (para. 1) of the Arab Charter on Human Rights[82] (similar with Article 1 of the ICCPR). The phrase "... all persons under its/their jurisdiction ...", or the equivalent thereof, is used in all of the above. Their interpretation is made under the public international law and the specifics of each treated separately.

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[79] Treaty of Peace between the Allied and Associated Powers and Austria; Protocol, Declaration and Special Declaration, Saint-Germain-en-Laye of 10 September 1919. [online]: http://www.austlii.edu.au/au/other/dfat/treaties/1920/3.html (accessed on 19/04/2014)

[80] Covenant of the League of Nations of 28 April 1919. [online]: www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3dd8b9854 (accessed on 19.04.2014)

[81] CIS Convention on Human Rights and Fundamental Freedoms of 11 August 1998. [online]: http://www.terralegis.org/terra/act/c26.html (accessed on 19.04.2014)

[82] Arab Charter on Human Rights, 23 May 2004. [online]: http://www.acihl.org/res/Arab_Charter_on_Human_Rights_2004.pdf (accessed on 19/04/2014)

The situation of international implicit clauses is more interesting. That means that the general clause on the obligation of States to protect the rights set out in international instruments refers to the general measures to be taken by the State to protect human rights. These measures involve some of the competences that are part of the jurisdiction of the States. For example, Article 1 of the African Charter on Human and Peoples' Rights stipulates that "*the Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and* ***shall undertake to adopt legislative or other measures*** *to give effect to them*". A similar provision is contained in the International Convention on the Elimination of All Forms of Racial Discrimination[83].

In its turn, Article 1 of the ECHR provides that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention". Is it somewhat fascinating that these, at first sight, simple terms cause such blurring in applying the Convention. In any event, the clear comment of the purpose of the Convention is of paramount importance for its effective implementation.

Initially, Article 1 as proposed by the Committee of the Consultative Assembly of the Council of Europe contained the phrase "Each State Party to this Convention undertakes to protect the following rights of everyone residing in its territory […]"[84]. Subsequently an alternative phrase was chosen: "*under their jurisdiction*", the term "residence" being considered too restrictive. The extension of the Convention's scope to all persons within the territory of a State Party, rather than only to residents in its legal sense, was beneficial. By combining the concepts of residence

[83] International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965. [online]: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx (accessed on 20/04/2014)
[84] Preparatory Work on Article 1of the ECHR. [online]: http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART1-COUR(77)9-EN1290551.PDF (accessed on 20/04/2014)

and territory, the circle of beneficiaries of the Convention would have been severely reduced, because on the one hand the ECHR would have been only applicable on the territory of the Contracting Party, and on the other hand it would have been limited to residents of that state only. That means that not all persons being *de facto* on the territory of a State Party could have enjoyed the fundamental rights and freedoms under the Convention.

It is important to be noted that the Committee did not lose sight of the principle of territoriality; it merely decided to use the spatial criterion instead of the personal one, which means that the concept of jurisdiction laid down in Article 1 originally had to reflect the territorial aspect of jurisdiction, i.e. the "classic" element of the public international law. For example, in the *Banković* case, the Court stated 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""[85]. That principle is reiterated in each case with extraterritorial implications. Therefore, both from the *Travaux préparatoires* of the Convention and the Court's case-law it follows that from the very beginning the extraterritorial application of the Convention was not among its legal purposes.

However, one cannot ignore the fact that in most cases the violations of the applicants' rights, complained of before the Court, were caused on the territory of a Contracting Party; therefore, it is clear why the States insist on limiting to the greatest extent the application of the Convention outside their territories, which is not always justified and legitimate.

[85] Case of *Banković and Others v. Belgium and Others*, decision of 12/12/01, para. 61. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22099 (accessed on 25/03/2014)

In the post-war period, the public international law was seeking to strengthen the legal protection of independent states, they having full sovereignty over their territory, whereas the jurisdiction, i.e. the ability to exercise authority over the territory, derived from the concept of sovereignty[86]. This retrospect illustrates that the extraterritoriality, in essence, was perceived as an attempt of the jurisdiction of a State over another State's jurisdiction, which would be unacceptable in terms of the creation of the "new world order" under the system established by the UN Charter. However, the importance of the *Travaux préparatoires* to interpret the Convention is limited, and has a subsidiary role. This is the idea expressed primarily by Article 32 of the Vienna Convention on the Law of Treaties[87] and the Preamble of the Convention by the phrase "further realisation of human rights and fundamental freedoms". Also, the Court's case-law often makes reference to the rule that "the Convention is a living instrument which must be interpreted in light of present-day conditions"[88]. Therefore, the purely territorial connotation initially referred to by the drafters of the Convention has, and must have, today a more limited role.

Earlier it was mentioned that the concept of jurisdiction of Article 1 has an autonomous meaning common for the international law, and that it should not be interpreted solely in accordance with it. It should be remembered that the ECHR is an instrument subject to a progressive interpretation, depending on the issues raised for interpretation before the Court. Perhaps, the British and Turkish Governments

[86] Frederick A. Mann. The Doctrine of Jurisdiction in International Law. Hague: Recueil Des Cours, Hague Academy of International Law, 1964, p. 111

[87] Vienna Convention on the law of treaties of 23 May 1969. [online]: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf (accessed on 23/06/2014)

[88] Case of *Tyrer v. the United Kingdom*, judgment of 25/04/1978, para.31. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57587 (accessed on 24/06/2014)

have to be "thanked" for their unlawful acts committed extraterritorially because namely they raised the issue of the extraterritorial application of the Convention.

The autonomy of the concept of jurisdiction lies primarily in the fact that it does not reflect its general perception in the public international law, despite the Court's contrary purely declarative argument[89]. The primary purpose of the "jurisdiction" in Article 1 of the Convention, in our opinion, is to define the extent of the obligations of the Contracting States, whereas the jurisdiction in the general international law aims to limit the States' jurisdiction, following from the sovereignty possessed. The extent of the extraterritorial jurisdiction, and respectively of the extraterritorial obligations of the States, is to be determined by the *tests* applied by the European Court, relying on the circumstances of each case: *the effective control over a territory, and the "State agent authority".*

It is remarkable that the High Court virtually has no difficulties in the extraterritorial application of the Convention within the legal boundaries of the Council of Europe. A totally opposite situation can be observed in the case of the ECHR application beyond the CoE. Such a situation leads to the fragmentation of the tests and standards of the extraterritorial application of the Convention, depending on the location of the person whose rights were allegedly unlawfully infringed.

The concept has gained its autonomy also due to those limitations the Court is using in its case-law on extraterritoriality: the application of the Convention limited to only the Council of Europe's legal space (*espace juridique*); limitation of the extraterritorial application when the State's contribution to the extraterritorial act within a military campaign (the principle of monetary gold) cannot be determined; Article 15 of the ECHR which can serve as a general limitation on the extraterritorial

[89] Case of *Issa v. Turkey*, judgment of 16/11/2004, para. 67. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67460 (Accessed on 24/06/2014)

application of some rights; Article 56 of the Convention can also serve as a limitation in certain circumstances (the colonial clause) etc. It is important to be mentioned that in addition to the aspect of jurisdictional exercise outside beyond boundaries, there is an opposite effect thereof. Assuming that the State has no effective control over its territory, the ECHR will not hesitate to perceive that fact as an exception to the territoriality of State jurisdiction. Moldova's and Cyprus's inability to formally control some of the territories under their sovereignty could serve as examples. Thus, Moldova has not been held responsible for some violations in Transdniestria due to the lack of effective control (in the case of *Ivanţoc v. Moldova and the Russian Federation* or *Catan and Others v. Moldova and the Russian Federation*), whereas Cyprus and its nationals acted on their own before the Court, claiming responsibility for the actions of the self-proclaimed Turkish Republic of Northern Cyprus.

Therefore, from the point of view of the European Court, the notion of jurisdiction in cases involving extraterritoriality is also an eligibility criterion. However, it is different from the classical eligibility criteria, such as the respect of the period of six months, the non-anonymous nature of the application, or the exhaustion of domestic remedies. The jurisdiction is a special character criterion, based on which the European Court decides on two issues: whether the respondent State had an obligation the violation of which is invoked; and whether the victim had a right correlative to the respective obligation. Relying on jurisdiction, the Court arrives at the conclusion if the plaintiff can continue claim a violation of rights. In terms of procedure, the question of jurisdiction of the respondent State can be solved at the stage of examining both the admissibility and the merits, depending on the complexity of the circumstances, and challenges the Court might face.

In order to avoid confusion, it needs to be specified that the "criterion" of jurisdiction does not automatically involve the responsibility of States for their extraterritorial acts. The fact that the Strasbourg Court finds extraterritorial jurisdiction of a Contracting Party in a case has to be understood that it only finds the extraterritorial obligations of the State, i.e. primary positive/negative obligations thereof. The State's responsibility, and its obligations in that respect, for the breach of the primary obligation is subsidiary thereto, if the Court establishes that there was an interference with the applicant's fundamental rights and freedoms. The obligations arising from the State's extraterritorial responsibility and the extraterritorial obligation itself are two separate concepts; finding the respondent State's jurisdiction shall not be equated with establishing its liability.

ii. Jurisdiction of the European Union

The state is not the only subject of legal relations in terms of international liability. The international organizations' responsibility remains a disputed issue [90].

Therefore, the international organizations possess legal capacity for the purposes of public international law. For that reason, *a priori* they assume responsibility for their actions. It cannot be otherwise because it would create a legal vacuum in respect of the consequences of unlawful acts committed by them. Article 3 of the Draft articles on the responsibility of international organizations (hereinafter the Draft) states the "*every internationally wrongful act of an international organization entails the international responsibility of that organization".*

Taking into account the entry into force of Protocol No. 14 to the ECHR[91] and the current Article 59 (para. 2) of the ECHR[92], it would be appropriate to analyze the

[90] The UN Commission started work on the codification of rules on responsibility of international organizations in 2002; on 9 November 2011 it adopted the draft articles on responsibility of international organizations. [online]: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf (accessed on 24/04/2014)

effects thereof on the responsibility of the European Union for the violation of extraterritorial obligations, even if at the moment the EU has not yet acceded to the European Convention[93].

Although all EU Member States are parties to the ECHR, the EU itself is not formally responsible for the acts of their organs before the High Court.[94] Thus, there is a legal vacuum in the protection of fundamental rights and freedoms of persons "within the jurisdiction" of the European Union. Firstly, reference will be made to the most problematic aspect of the EU jurisdiction: military actions conducted by it, and then to the interpretation of the concept of EU jurisdiction in general.

The Treaty of Lisbon reaffirmed the EU's intention to extrapolate its legal order outside the Union, including through its responsibilities related to military missions of the *Common Foreign and Security Policy* (hereinafter CFSP)[95]. It is important that the Union has not been assigned exclusive responsibility for conducting military operations outside the EU. Thus, assigning international responsibility for its wrongful acts raises various legal difficulties.

First, the States maintain the disciplinary, criminal, and partially administrative control on their cotangents, whereas the EU only has strategic and political control over them. The soldiers remain members of the national armed forces, whereas strategic control belongs to the Political and Security Committee of the EU, according

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[91] Protocol No. 14 to the ECHR, 13 May 2004 [online]: http://www.conventions.coe.int/Treaty/FR/Treaties/Html/194.htm (accessed on 20.04.2014)

[92] Article 59(2) of the ECHR: "*The European Union may accede to this Convention*"

[93] Official current data on the Member States to the ECHR, [online]: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG (accessed on 17/04/2014)

[94] Between 2003 and 2011, the European Commission was actively involved in the development of the Project, the EU specifics being considered in its current version. Therefore, in the international responsibility law there is no *lex specialis* for attributing international responsibility to the EU.

[95] Frederik Naert. International Law Aspects of the EU's Security and Defence Policy. Antwerp: Intersentia, 2010, p. 15–191.

to Article 14 of the Maastricht Treaty[96]. At the same time, the EU practically does not have sufficient military capability to conduct military actions on its own; it, therefore, has three main options[97].

The first option would be exclusive operation with a contingent of up to 2000 people, this being rarely chosen due to reduced efficiency. A second option would be choosing one of those five national operational headquarters; in essence, there would be created contingent combined of the national armed forces of the EU Member States. The third option is the cooperation between the EU and NATO under the Berlin Plus agreement[98]. Thus, it is obvious that in most situations the EU does not maintain overall effective control on its military missions.

The project provides for different standards for assigning actions of military units fully deployed for the benefit of the EU, and of those partially deployed, i.e. to a certain extent under the authority of a State. In the first case the action will be automatically imputable to the organization[99], and the second case it will be only imputable to satisfy the test of *effective control*[100]. That difference, at least in respect of the European Union, seems somewhat artificial, considering that States will always keep (even if limited) control on its military contingents.

In this respect, it is important to note the opportunity of solidary responsibility of the EU Member States for the extraterritorial acts of the European Union, the

[96] Maastricht Treaty of 7 February 1992. [online]: http://www.eurotreaties.com/maastrichtec.pdf (accessed on 10/04/2014)

[97] Grevi G. and Others, European security and defence policy. The first 10 years (1999-2009). Paris: The EU institute for security studies, 2009, 448 p. [online]: http://www.iss.europa.eu/uploads/media/ESDP_10-web.pdf (accessed on 10/04/2014)

[98] Berlin Plus agreement between the EU and NATO. [online]: http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/berlinplus_/berlinplus_en.pdf (accessed on 10/04/2014)

[99] Article 6 of the Draft on Responsibility of States for Internationally Wrongful Acts. [online]: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (accessed on 23.03.2014)

[100] Article 7 of the Draft on Responsibility of States for Internationally Wrongful Acts. [online]: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (accessed on 23.03.2014)

implementation of which is left to the States. This issue is not premature because there are already attempts to have the EU assume responsibility. Thus, the Commission declared its incompatibility *ratione personae* whenever applicants submitted applications against the European Community or the EU[101]. In the case *Matthews v. the United Kingdom*, the Grand Chamber recognized the Court's compatibility *ratione personae* in the application against the EU Member States, which imposed impediments to citizens in the implementation of EU policies[102].

In respect of joint responsibility of the European Union and its Member States there are exhaustive regulations in the Draft Agreement on the Accession of the EU to the ECHR[103] (hereinafter Draft on Accession). Article 3 (para. 3) establishes the amendment of Article 36 of the Convention by adding to the future paragraph 4 the possibility to lodge an application against the European Union and the EU Member State, as a co-respondent. If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be **jointly responsible** for that violation, as is provided for in Article 3 (para. 7) the Draft on Accession. Therefore, in case of possible joint military actions it will be possible hold responsible the European Union and its Member States jointly, unless possible to find the effective control of EU over military troops separately.

[101] Case of *Confédération Française Démocratique du Travail v. European Communities*, decision of the ECmHR of 10/07/1978, para. 4. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-74373 (accessed on 06/04/2014)

[102] Case of *Mathews v. the United Kingdom*, judgment of 18/02/1999. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58910 (accessed on 07/04/2014)

[103] Revised Draft Agreement on EU Accession to the Convention for the Protection of Human Rights and Fundamental Freedoms. In: The Report of the Negotiations on EU Accession to the ECHR. [online]: http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1(2013)008rev2_EN.pdf (accessed on 10/04/2014)

The applicant will have the possibility to file a complaint either against a State Party to the Convention, with the subsequent involvement of the EU into the trial, or vice versa.

In order to get the EU involved into the trial it will suffice that the rules of the EU law or its actions arising from the agreement of association be contrary to the ECHR.

Nevertheless, the extraterritorial application of the Convention in relation to the European Union will not only be limited to its military actions.

Thus, the EU jurisdiction should be interpreted in the light of Article 1 of the Convention with regard to *acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf*[104].

Therefore, merely the acts and measures arising from EU's competencies will be imputable to it. At the same time, acts or omissions arising from the *implementation* by States of EU policies will be imputable only to States, whereas and the EU will be held accountable only for its acts/omissions in the process of adopting these "policies".

Article 1 (para 6) of the Draft on Accession interprets jurisdiction in the light of the relevant Court's case-law, giving priority to the principle of territoriality. However, the extraterritorial application is provided with the following condition: *if the EU's acts were, in similar circumstances, attributable to a State*. This means that the same tests and the same rules on the extraterritorial application of the Convention for the acts or omissions of the Member States extraterritorial are applicable to the European Union. It is plausible that the agreement expressly

[104] *Idem*, Article 1(3).

provides the responsibility of the EU for the acts of its agents, i.e. of those acting on behalf of the European Union, considering the controversy around the subject.

In our opinion, the application of the ECHR on the EU's acts/omissions will provoke fewer difficulties in its jurisdiction, or at least its nature will be different from those existing in respect of the States. Hypothetically, the spatial dimension of the EU jurisdiction reflects on the entire space of its Member States. Therefore, if an act of the EU has effects outside the territories of all its Member States, then the extraterritoriality of the ECHR would come into question. In other situations the Court will face the "ordinary" territorial application of the Convention.

3.4. Extraterritorial responsibility of States

Under social aspect, the international responsibility of States is determined by their simple belonging to the international community. As a member of the international community, generally the State cannot be exempted of responsibility for its acts[105], this being expressed by the dictum *sic uti suo non laedat alienum* ("use your belongings without causing damage to another"). An important question is, therefore, the relationship between the laws on international responsibility and the extraterritorial application of the ECHR.

The responsibility for the breach of the obligations arising from the ECHR is based on the binding force of the Convention, the principle *pacta sunt servanda bonae fide*, thus, the Convention "*linking the Parties, which have to respect it in good faith*"[106]; That responsibility is also exercised depending on the obligation of

[105] Лукашук И. В. Право Международной Ответственности. Москва: Wolters Kluwer Russia, 2004, p. 17.
[106] Article 27 of the Vienna Convention on the Law of Treaties of 23 May 1969. [online]: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf (accessed on 23.06.2014)

Contracting States to protect the rights and freedoms under the Convention, as required by Article 1 thereof. At the same time, by means of Article 19 and 32 of the ECHR, the European Court of Human Rights is empowered to ensure the Contracting Parties' compliance with their obligations under the Convention, it being vested implicitly with the power to establish the presence of extraterritorial responsibility of the Parties for violation of Article 1.

Liability law does not transform the State into a "guarantor" of fundamental rights and freedoms. The Member States are only responsible for their unlawful acts in terms of international legal order. In another hypothesis, the international human rights law extends the quality of this generic responsibility to another level. Thanks to the extraterritorial obligations arising from certain instruments, through which the universalism of human rights is achieved, the States are nevertheless required to participate in international relations as guarantors of human rights. The *ratione personae* purpose of the European Convention of human rights hypothetically extends to all existing people worldwide, regardless of the formality of the Convention's original purpose to be only applied within the European legal space. This gives any person from anywhere in the world the procedural opportunity to lodge an application, which will be examined, and eventual just satisfaction might be awarded if a State violated its extraterritorial obligation. In this regard, the Convention *nolens volens* is an instrument of world order (albeit to a limited extent) because it imposes the States the obligation to participate in its relations, including extraterritorially, as guarantors of a legal system in the spirit of the universality of human rights.

The principle of the responsibility of the States for their international unlawful acts, also applicable to extraterritorial organizations, covers all international human

rights treaties, except for the *lex specialis*, as provided in the respective treaties[107]. This principle is reiterated in many cases of the European Court. Thus, in the case of *A. v. the United Kingdom*[108], the Court found that the respondent State did not regulate any effective mechanism to prevent the stepfather of a nine-year-old child from causing the latter severe bruising. Therefore, the respondent State was held responsible for its omission to regulate an effective mechanism that would have prevented such violence against children. Similarly, in the case of *Vetter v. France*[109], the respondent State was condemned for vagueness of its domestic law in respect of the police's discretion to collect information though surveillance devices. Hence in some cases, the States cannot avail themselves of their domestic law. Moreover, the Court may draw the attention of the High Contracting Parties to certain regulations contradicting their obligations under the ECHR.

The ILC's Draft of articles on the Responsibility of States provides: "*Every internationally wrongful act of a State entails the international responsibility of that State*"[110]. Thus, whenever a State fails to respect the fundamental rights and freedoms set out in the ECHR, its international responsibility is automatically[111] entailed, under the Convention's *special* rules concerning responsibility of States. As to the unlawful act under public international law, the articles provide for the following two elements of responsibility of States: "*An act or omission of a State is considered internationally wrongful if it i) can be attributed to the State under public*

[107] As provided for by Article 55 of the International Law Commission Draft on Responsibility of States for Internationally Wrongful Acts. [online]: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (accessed on 23/03/2014)

[108] Case of *A. v. the United Kingdom*, judgment of 23/09/1998. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58232 (accessed on 25/03/2014)

[109] Case of *Vetter v. France*, judgment of 31/05/2005. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69188 (accessed on 25/03/2014)

[110] Article 1 of the International Law Commission Draft on Responsibility of States for Internationally Wrongful Acts. [online]: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (accessed on 23.03.2014)

[111] Case of *Phosphates in Morocco*, Preliminary objections, PCIJ judgment of 14/06/1938 [online]: http://www.icjcij.org/pcij/serie_AB/AB_74/01_Phosphates_du_Maroc_Arret.pdf (accessed on 15/04/2014)

international law (the subjective element); and ii) constitutes a breach of an international obligation (the objective element)." If the Strasbourg High Court's case-law is interpreted by analogy, the applicant, in principle, has the burden of proving that the respondent State conducted a improper interference with the fundamental rights and freedoms defined in the Convention, and that the violation (and, thus, unlawful act) is imputable to the respondent State.

As stated above, the State, as any other legal person, is an abstract entity that can act on its behalf directly. Therefore, the acts or omissions "of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State […]" (Article 4 of the Draft). Thus, the actions and intentions of officials/State organs are regarded as the intention of the State, represented by its agent outside its territorial boundaries. In light of the European Convention, this rule should be seen broadly, i.e. when for instance an agent of the State, outside his official quality, violated the right to life of a person, and another agent failed to investigate that fact, the State will be held responsible for the acts of the second agent, as well as for the actions of first agent who acted beyond his competences.

According to the law of international responsibility, the State is also responsible for the actions and omissions of persons or entities empowered to exercise certain **elements of governmental authority**, even if they are not State organs. Their acts will be considered actions/omissions of that State, provided that the violation by the agent of the obligation occurs during the exercise of powers. In

this respect, in the case of *Velásquez Rodríguez v. Honduras*[112] the Inter-American Court of Human Rights ruled as follows: "*Under international law, a State is responsible for its agents' acts and omissions during their official duties, even when those agents act beyond their authority, or violate domestic law*".

The respective rule is particularly appropriate in case of occupation or where governments increasingly delegate significant powers to private entities. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the case of *Tadic* also mentioned that "*the requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals*"[113]. A similar situation can be observed in the case of recognition by the State of any individual's actions, which, although not attributable to the State, are however recognized by it as its own acts[114].

The actions of private persons are attributable to States in terms of general public international law to a limited extent, unlike the ECHR law where the States' responsibility is engaged, for the acts of private persons causing damage, with the obligation *to protect*, such as the rights enshrined in Article 2 (Right to life) and Article 3 (Prohibition of torture). The State is punished *de jure* for breach of the positive obligation to investigate violations, or when it repeatedly tolerates the unlawful conduct of its nationals without getting involved[115]. Therefore, there is a sort of fiction when *de jure* the primary act is not punished under the ECHR, and in

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[112] Case of *Velásquez Rodríguez v. Honduras*, judgment of 21/07/1989. IACJ Reports 1999. [online]: http://www.corteidh.or.cr/docs/casos/articulos/seriec_07_ing.pdf (accessed on 16/04/2014)

[113] Case of *Prosecutor v. Duško Tadic*, Appeals Chamber of the International Tribunal for Former Yugoslavia, judgment of 15/07/1999. para.117[online]: http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf (accessed on 16/04/2014)

[114] Thus, in the case of *Diplomatic and Consular Staff*, the ICJ held that the subsequent adoption by Iranian State of a decree on the actions of the militants, who seized the US embassy in Tehran and its staff, was considered as an unlawful act of Iran. *Case of Consular and Diplomatic Staff*...para.74

[115] Case of *Remetin v. Croatia (2)*, judgment of 24/07/2014. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145741 (accessed on 26/07/2014)

the absence thereof the State's responsibility for breach of the derivative (secondary) obligation by its agent would not exist.

The concept of **elements of governmental authority** is thus interpreted extensively. For example, in the cases against Turkey, the European Court of Human Rights has established the link between the governing bodies of the Turkish Republic of Northern Cyprus and the Turkish government in respect of the violations of the victims' rights caused by both the separatist governing organs and by private persons, who were "allowed" to interfere[116].

The wrongful act of the State could analogously be caused by the breach of either a positive obligation (omission) and/or negative obligation (action).

The European Court's case-law makes reference to the fact that namely the imputability of an illegal act is often a disputed and difficult problem which renders the respondent States successful even in the event of apparently obvious interference.

The subjective element is manifested by the term "jurisdiction" of States in Article 1 of the ECHR. Therefore, the state will be responsible for the respective action whenever the unlawful act, constituting the cause for the breach of its extraterritorial obligation to protect the right or freedom violated, was committed on the territory of the respondent State by the agent thereof or of a third country, whereas the consequences occur outside the territorial boundaries. The respondent State will also be responsible for act committed by one of its agents outside its territorial boundaries, where that State has effective control over that area, in case of a military occupation, or when exercising its authority on some persons. This aspect most often involves the extraterritorial obligations of States, raising difficulties for the Court in

[116] Case of *Isaak v. Turkey*, judgment of 24/06/2008. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87146 (accessed on 15/04/2014)

several landmark cases such as *Loizidou v. Turkey*[117]*; Ilich Ramirez Sanchez v. France*[118]*; Öcalan v. Turkey*[119]*; Issa v. Turkey*[120] etc.

In the European Court's case-law there have been cases in which both the first and second element separately caused for an application to be rejected, or a case to be struck out. The most famous case of extraterritorial non-application of the Convention due to the lack of jurisdiction stated by the High Court is *Banković and Others v. Belgium and Others*, where it was established that respondent States could not be held responsible in connection with the collective military operations exercised by an international organization, committed outside the legal space of the Convention and without the possibility to differentiate each participating State's contribution to the interference. Therefore, the Court had no opportunity to refer to the alleged breach of the obligation for the reasons stated above although an interference with the fundamental rights and freedoms had been evident. Thus, the subjective element was taken as a criterion for non-engagement of the international responsibility. However, there are cases of extraterritorial application of the Convention when the alleged violation was covered by the subjective element, and the act was imputable to the State, whereas the objective element, i.e. no violation of the positive/negative obligation was found, and hence it was not possible to engage international responsibility of the respondent State, as in the notorious cases *M v. Denmark*, *Pad and Others v. Turkey and Others* etc.

In order to perceive clearly the difficulties encountered by the High Court in examining cases with extraterritorial implications, firstly it is necessary to deduce

[117] Case of *Loizidou v. Turkey*, judgment of 18/12/1996. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58007 (accessed on 26/03/2014)
[118] Case of *Ramirez Sanchez v. France*, judgment of 04/07/2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58007 (accessed on 26/03/2014)
[119] Case of *Öcalan v. Turkey*, judgment of 12/05/2005. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69022 (accessed on 27/03/2014)
[120] Case of *Issa and Others v. Turkey*, judgment of 16/11/2004. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67460 (accessed on 27/03/2014)

from its case-law those conditions which, found in the circumstances of a particular case, might entail the extraterritorial application of the Convention. The respective task does not have a theoretical purpose, but rather a practical one, and has the following objectives:

- foreseeability, denoting detailed and clear understanding when and under what circumstances it is possible to apply the ECHR extraterritorially;
- flexibility, denoting the clear perception of obligations and the extent thereof, and, given the circumstances of a particular case, their adaptability;
- efficiency, meaning that the extraterritorial application of the Convention has to bring maximum benefit to persons whose right was violated by an extraterritorial act, i.e. to be a truly effective remedy in case with extraterritoriality implications.

Having analyzed the Court's case-law, the following absolutely necessary elements for the extraterritorial application of the Convention may be identified: *the extraterritorial act, the State jurisdiction, and the jurisdictional link between the extraterritorial act and the interference*. The Court takes them all into account, even if not always each of these elements is disputed by the parties. The presence of all the elements is necessary for the engagement of the extraterritorial responsibility of States. The most difficult element, out of those three mentioned, is – in terms of legal analysis – the element of jurisdiction, referred to throughout the monograph.

Thus, for the extraterritorial application of the Convention and the protection of persons outside the borders of the respondent State, there has to be an extraterritorially caused interference that would attract international responsibility of the State under the Convention. The interference committed extraterritorially will have the prerequisite of an extraterritorial act, which will consist of an act/omission

of the State with specific characteristics to that category of facts. In order for an extraterritorial act to be imputed to the State, its extraterritorial obligations should also extend over the person alleging infliction of an unlawful interference, i.e. the extraterritorial jurisdiction of the respondent State on the victim of the interference has to be established. The extraterritorial jurisdiction over a person is not always exercised exclusively; therefore, for the purposes of Article 1 of the ECHR it is possible that two States exercise concurrent jurisdiction over the same persons, each with a specific set of obligations proportionate to the degree of the jurisdiction exercised. Thus, it is not enough that the State be just a carrier of extraterritorial obligations; the Court also has to establish the link between the extraterritorial act and the interference with the rights of the person under State jurisdiction. This is the only way that the extraterritorial responsibility of the State can be engaged.

The extraterritoriality of the ECHR is a rather vast and complex legal category, and it would be wrong to perceive equally the general circumstances of all cases with extraterritorial implications since the "non-discriminating treatment" thereof would be an incorrect solution if all "unknowns" are considered. Therefore, based on empirical research of the High Court's relevant case-law, there could be identified three categories of cases with extraterritorial implications:

a. The extraterritorial activities of States. This category includes the circumstances in which States commit an act through its agents outside its territorial boundaries. The term "agents" includes both individuals in official legal relationships with the respondent State (such as security officers, or members of military divisions) and State agencies supporting the State in its unlawful activities (such as paramilitary groups, or separatist regimes). The agent has to commit the respective act causing interference outside the State that s/he maintains *lato sensu*

subordination relations. This category is not only the largest, but also the most problematic in terms of determining the presence of State jurisdiction. Only this category should comprise all the three conditions listed above.

b. The State's action/omission on its own territory, the interference occurring *de facto* outside its territory through agents of a third party entity. It is the case of extradition from the territory of the respondent State (at the risk of the person's fundamental rights or freedoms to be violated), or the expulsion of aliens/refugees etc. The extraterritoriality of this category of cases is manifested by the fact that the State's act/omission (mostly) leads to violations of fundamental rights and freedoms, however, on the territory of a third State. The violation is usually manifested through the risk generated by the respondent State's actions or inactions in respect of the alleged victim. The act jeopardizing the individual occurs within the respondent State's boundaries, so the latter's jurisdiction is to be assumed, and the applicant should not have to prove the element of jurisdiction. In this regard, the applicant would only have to prove the way and extent he was jeopardized by the State's unlawful interference.

c. A special category of cases with extraterritorial implications refers to the adjudication of compensation in the benefit of an individual or legal entity, on the territory, and under national law, of a Contracting Party from a third country, whereas the latter's act/omission was performed/admitted by its diplomatic/consular representation on the territory of the initial Contracting Party. The extraterritoriality of the Convention is manifested in an indirect way, under Article 6, usually by ascertaining that the respondent State invokes unjustifiably the principle of jurisdictional immunity of States as a result of instituting legal proceedings against that State, its high ranking officials, or diplomatic missions. For

these reasons, the Court disagrees with the concept of absolute immunity of States within national proceedings, the Convention serving as the guarantor of the possibility of the alleged victims to initiate a civil case against the third State through a national court of law. In this category of cases there is no need to prove the element of jurisdiction because the legal proceedings (as a principal circumstance) are instituted on the territory of a Contracting Party before a court under its jurisdiction. Therefore, jurisdiction is presumed, and the extraterritorial act in such a case is also manifested by extrapolating conventional standards in relation to third countries, which are not parties to the ECHR, at least concerning the State's *acta jure gestionis* (privately related actions), unlike *acta jure imperii* (sovereign acts of the State).

3.5. Extraterritorial act

It shall be reiterated that state jurisdiction is not limited solely to its sovereign territory since the exercise thereof is only restricted by its capacities and intentions. For this reason, whenever a State performs an act outside the territory under its jurisdiction, there is an extraterritorial act. The extraterritorial act is a factual element having the potential of being the catalyst for acts inflicting interference with the rights and freedoms guaranteed by the Convention. Thus, from its beneficiaries' point of view, the extraterritorial act can have an effect on affect any individual (and less likely, on legal entities), regardless of his/her location in the world.

The extraterritorial act can occur as a result of both action and omission, i.e. it can violate both a positive and negative obligation. The imputable action will occur, for example, in case of torturing a person on the territory of another State. On the

other hand, an imputable omission will occur in the absence of an effective investigation when there are reasonable grounds to believe that a person under the jurisdiction of the State was killed by its agents in another State, i.e. in breach of the procedural obligation under Article 2 of the ECHR.

The concept of extraterritorial act is defined in the Court in the following phrase: "*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*"[121]. The emphasis on factual character of the extraterritorial act can be well noticed. Once performed, the act creates a *de facto* connection between the state and the individual, whereas jurisdiction only creates a legal bond between them. The extraterritorial act is a mandatory prerequisite for the extraterritorial application of the Convention to all three categories of circumstances of extraterritorial application, as mentioned above.

However, the State does not have to exercise its jurisdiction in the accepted meaning of Article 1 of the ECHR when it acts extraterritorially[122], However, the State does not have to exercise its jurisdiction in the accepted meaning of Article 1 of the ECHR when it acts extraterritorially; thus being possible that the State will commit an extraterritorial act, but due to lack of its extraterritorial obligation, the person might not be eligible to benefit from the protection offered by the ECHR.

The extraterritorial act can be performed by State agents, such as security services or members of military contingents. If the State offers military, technical, financial, and other kinds of support to a separatist regime, or it occupies a territory

[121] Case of *Banković and Others v. Belgium and Others*, decision of 12/12/01, para. 54. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22099 (accessed on 25/03/2014)
[122] Case of *Issa and Others v. Turkey*, judgment of 16.11.2004. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67460 (accessed on 23/04/2014)

under the *de jure* jurisdiction of another State, the acts of the separatist entity will be imputable to the supporting State.

In light of the above, we propose the following definition: *the extraterritorial act is the action/omission of State performed outside of its territory through its agents, and likely to inflict an interference with the fundamental rights and freedoms provided for by the Convention; or committed within the territorial boundaries of the State, whereas the consequences of the act have repercussions on the territory of a third State*.

From the proposed definition, there follow two dimensions of the extraterritorial act: acts performed on the territory of a State with consequences occurring outside, and acts performed outside of the sovereign territory of the State.

As to the acts performed within the territorial boundaries of the State, attention shall be drawn to the case of extradition when there is a clear risk that – in the State requesting the extradition – the individual will be subjected to torture, inhuman or degrading punishment or treatment, or to capital punishment, as, for example, in the case of *Soering*[123]. In such a case there will be no need to establish the element of jurisdiction because the act causing the violation will always occur within the State, whereas the negative consequence will occur beyond. The respective type of acts is also relevant for the protection of foreigners, when extradition acts can pose risks to life and/or their physical and mental integrity.

The second dimension generating more difficulties for the extraterritorial application of the Convention is the situation in which both the extraterritorial act and the interference occur outside of the territory of a Contracting Party. There are several cases serving as examples: *Issa and Others v. Turkey, Banković and Others v.*

[123] Case of *Soering v. the United Kingdom*, judgment of 07/07/1989. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57619 (accessed on 03/05/2014)

Belgium and Others, Loizidou v. Turkey; Ilașcu and Others v. Moldova and the Russian Federation, etc. The extraterritorial acts from this category will always be performed outside of the State, this meaning that States' *ex lege* or private agents will be involved. However, depending on the criterion applied to determine jurisdiction, the State can also be found responsible for acts of private persons, against whom the State failed to take measures, especially when it exercises effective/general control over the territory of another State. Accordingly, in order to impute this type of acts, the Court must state the existence of jurisdiction under Article 1. Due to the above mentioned goal of primary implementation of the Convention in its legal space, the jurisdictional acts can be classified into those performed within the legal space of the ECHR (such as in the case of *Ilașcu and Others v. Moldova and the Russian Federation*), and those performed outside of the legal space of the ECHR (for example, in the case of *Al-Skeini and Others v. the United Kingdom*). This classification is important (not only) from a theoretical perspective, the Court having applied stricter standards in the second case.

Finally, as stated above, for the extraterritorial application of the Convention it is not enough that the State perform an extraterritorial act; it is also necessary to establish that the respondent State effectively exercised jurisdiction over the victim of the interference, and, respectively, had a negative/positive obligation in respect of the alleged violation.

3.6. Jurisdiction – fundamental element of extraterritorial responsibility

Due to the abstract nature of the States, their action/omission causing interference is only manifested physically through their agents. In order to

determine the relationship between the State and the agent when the last acts extraterritorially on behalf of the State, it will be necessary to prove the element of extraterritorial jurisdiction, representing *the ability of States to exercise their authority outside of their territorial boundaries*. Based on the connection between the State and the agent, it will be required to subsequently establish the link between the agent and the victim of interference, manifested diversely: through the authority exercised directly on the person by the agent; by being on the territory controlled by the respondent State; or by being in the premises under its control.

The extraterritorial jurisdiction can be only exercised with the consent of the State on the territory of which it has to be performed, however, with the following exceptions: military occupation (regardless whether lawful or not), and legal areas not applicable to the jurisdiction of the States (the high seas, for example). In this sense, the term of "agreement" must be viewed broadly as the State's responsibility may be engaged even when it expressed its consent tacitly, through its omission or the assistance offered to another State for inflicting interference, as in the cases of extraordinary rendition to US agents from the territories of the Contracting States[124].

Unlike the territorial exercise of jurisdiction, the extraterritorial jurisdiction has an *exceptional* character being exercised for special (especially, military, and state security) purposes. *Per a contrario*, the territorial jurisdiction and the obligations arising from the exercise thereof always precede action/inaction inflicting interference with human rights and fundamental freedoms.

The jurisdiction under Article 1 of the Convention is an autonomous concept, having a special role for extraterritorial obligations. It shall be reiterated that it denotes primarily the extraterritorial scope of the obligation of the State. This is the

[124] Case of *Husayn (Abu Zubaydah) v. Poland*, judgment of 24/07/2014. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146047 (accessed on 25/07/2014)

ultimate role of the concept of jurisdiction because, whenever the State shall exercise its extraterritorial jurisdiction for the purposes of Article 1, it will also undertake extraterritorial obligations proportionate to the degree of exercise. The secondary purpose of the jurisdictional element is to determine the relationship between the State and its agent directly or indirectly, whereas the latter can be viewed either as a bearer of sovereignty or as an executor of the directives thereof. Given the subsidiarity of the element of jurisdiction, there could be identified two functions thereof:

- determining the relationship between the State agent, as bearer of sovereignty, and the alleged victim of a violation. Since the extraterritorial jurisdiction has to be analyzed not only in spatial terms, the State might often exercise its jurisdiction not on a space, but also on the people through its agents. There could be noticed a complex legal relationship determining the jurisdictional link between the State and an individual, through its agents or local authorities;
- determining the extent of extraterritorial exercise of jurisdiction. In case of the extraterritorial application of the Convention, at the moment of execution of the act causing the interference the person will be under the jurisdiction of at least two States: the State acting extraterritorially and that other one the subject is located in. It must be defined how and to what extent each of them exercises jurisdiction over that person, given the circumstances of each case. This rationale is particularly relevant when the States, having simultaneously exercised their jurisdiction on the same person, are co-respondent before the Court.

If the extraterritorial act is more factual, then that jurisdictional act has a formal-legal connotation.

Thus, jurisdiction is only an element of *imputability*, and it does not engage extraterritorial responsibility. In other words, the fact that the State exercises its jurisdiction extraterritorially does not mean that it is responsible for the interference inflicted on a person. This only means that the State might incur international responsibility, to the extent of the exercise of its jurisdiction. The exercise of jurisdiction under Article 1 in no case equals to responsibility for the acts alleged. In that respect, the Court will be required to establish the third element, i.e. the jurisdictional link between the extraterritorial act and the interference.

In order to determine the connection between the State agent and the respondent State, and, therefore, the element of jurisdiction under Article 1, the Court applies alternatively several criteria, depending on the circumstances invoked. The applied criterion has to determine the extent of the States' obligations under the Convention, the burden of proof, and the circle of persons subject to extraterritorial protection. If, having applied the criterion, it is still impossible to identify the relationship between the State and its agents acting extraterritorially, given the alleged extraterritorial act, the applicant will not benefit from protection under the Convention.

Therefore, in cases with extraterritorial implications when a State performs extraterritorial acts, the Court will apply the following criteria in order to identify the jurisdiction:

1. The criterion of *effective control over an area* – one of the general criteria applied by the Court. The *effective control*, which is a *spatial* criterion, consists of the control exercised by a State over a part of the territory of a third State, i.e. outside of the boundaries of the respondent State. It is a criterion with limited application because it does not allow the application of the Convention in cases where agents act

outside the control territory, or when the state generally has no effective control over the territory, but commits violations beyond its boundaries. In principle, it is only applicable to situations when:

a. the State is the aggressor for the purposes of Article 42 of the Hague Regulations[125], i.e. when the *hostile army* actually exercised authority over the respective territory. As to the modern armed conflicts, the situation described is invoked extremely rarely since the authority exercised by the High Contracting Parties over the occupied territory of the third State shall be exclusive;

b. authority is exercised on the territory under the effective control of an entity, which legally and factually is separated from the respective State's government, but also granted military, political and economic support by the third State, whose jurisdiction, and respectively responsibility, is invoked in respect of that entity's actions. It is mostly the case of separatist regimes which exercise authority over a territory in an exclusive way, and they are viable only thanks to the economic and military support granted by a third State, whereas the effective control is often accompanied by the presence of military forces of the State, which is invoked to be responsible for the violations committed on the respective territory.

In any case, the *control* should always be *de facto*[126] exclusive, thus excluding the factual exercise of the authority of the State with legal jurisdiction over that area.

Given the fact that the criterion of effective control is spatial, the Court must establish with certainty that the State exercising effective control has the objective possibility to protect the human rights and fundamental freedoms guaranteed by the ECHR in their entirety, this being impossible, however, in the absence of a really exclusively exercised control. This does not mean that the second State will be

[125] The Hague Convention Respecting the Laws and Customs of War on Land of 26 January 1910, Regulation concerning the Laws and Customs of War on Land. [online]: http://avalon.law.yale.edu/20th_century/hague04.asp (accessed on 04/04/2014)

[126] Давид Э. Принципы права вооружённых конфликтов: Курс лекций, прочитанных на юридическом факультете Открытого Брюссельского университета. Москва: Международный Комитет Красного Креста, 2011, с. 563.

exonerated from its obligations arising from the Convention in respect of the territory beyond its control; however, they will be applied to a limited extent.

Finding jurisdiction under the criterion of effective control will amount to extending the extraterritorial obligations of the respondent State to all persons within the territory controlled (or the ones enjoying the rights guaranteed by the Convention over objects on the controlled territory) in respect of all rights and obligations provided for, and to establishing the link between the State and each member of the group constituting a *de facto* agent of the respondent State. The State will be basically responsible for the violation of human rights and fundamental freedoms of persons within the territory under its effective control, just as in case of the other individuals generally being under its jurisdiction (mostly on its territory). Therefore, it will be responsible not only for the actions/omissions of its *de facto* agents, but sometimes also for the actions of any other individuals on that territory.

Depending on the subject directly exercising effective control, the respective criterion has two distinct elements: the *effective* and, on the other side, *overall* control over the area.

The *effective control over an area* will be applied in the cases where the State acts directly through its agents *ex lege*, for example through its armed forces. In this case it will not be necessary to prove the legal relationship between them; it will merely suffice to prove the spatial relationship between the State and the occupied territory, i.e. the fact that the State really exercises exclusive control over that area, so that it has jurisdiction over individuals on that territory. However, this criterion of effective control is less relevant due to the nature of modern armed conflict.

On the other hand, the *overall control over an area* will be applicable to circumstances in which the respondent State is to determine the viability of a nongovernmental entity which will control exclusively, and usually illegally, part of the territory of a third State. The mentioned entity most often takes the form of a

separatist authority, i.e. of an unrecognized State. For example, in case of economic, military and political support of an armed group, as in the cases of the armed conflicts in Transdniestria and Northern Cyprus, the Court established the indirect responsibility of the States which had provided support to the respective entities in violating the Convention on the territories controlled by Transdniestrian or TRNC authorities. As to the interferences caused by those authorities it is not necessary to prove the existence of a direct order from the respondent State. The latter incurs extraterritorial responsibility merely due to the essential support provided to the entity directly inflicting the interference.

In general terms, the Court's concept of *overall control* is of extensive nature, it having established in the *Loizidou* case that "*from the large number of troops engaged in activities in Northern Cyprus it is evident that the Turkish army exercised overall control over that part of the island*". Therefore, in order to engage Turkey's responsibility it sufficed to rely on the financial, military and other kinds of support offered to the TRNC. In the law of international responsibility[127], as well as in the international criminal law[128] the standard in this respect seems to be higher: in addition to financial, military, and economic support, it is also necessary to prove the respondent State's role in planning, organizing, and coordinating the activities of the nongovernmental entity. As to Professor Cassesse, under international criminal law the *effective control* presupposes the existence of a directive and constraint from the State on the agent[129], whereas *overall control* only presumes proving the existence of

[127] Case of *Nicaragua v. USA*, ICJ judgment din 27 June 1986, para. 242, 277. [online]: http://www.icj-cij.org/docket/files/70/6503.pdf (accessed on 16/04/2014)
[128] Case of *Prosecutor v. Duško Tadic*, Appeals Chamber of the International Tribunal for Former Yugoslavia, judgment of 15/07/1999, para. 137 [online]: http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf (accessed on 16/04/2014)
[129] Cassesse A. The Nicaragua and Tadic Test Revisited in Light of the ICJ Judgement on Genocide in Bosnia. In European Journal of International Law. Vol 18. No.4. 2007. [online]: http://www.ejil.org/pdfs/18/4/233.pdf p. 653 (accessed on 18/04/2014)

the support through supplying weapons, equipment, training of military, providing political and economic support etc.

In both cases, the aspects of the effective control criterion will have territorial connotations. That imposes an autonomous character in respect of the same criteria as in the international criminal law, or in the law of international responsibility, for their application since several implications of the territoriality principle are present in this context. In the other two branches, the criterion of effective/overall control only serves to extrapolate the State's/accused's responsibility and in respect of the acts of the nongovernmental entity, this rendering the purpose of the criterion more narrow.

It is remarkable that in the cases of armed conflicts both within the Council of Europe area and beyond, the criterion of overall control has been only applied so far; thus, it has only referred to supporting separatist regimes, whereas the issue on the violation of human rights by means of own armed forces has been ignored. It was only in the *Banković* case that the Court tried invoking the interferences inflicted by the respondent States through the actions of their armed forces, i.e. the application of the effective control criterion; however, the Court was reluctant as to the engagement of their extraterritorial responsibility. The effective control is more limited test than the other one, it being only applicable in circumstances of military occupation or exclusive exercise of jurisdiction through a direct agent. Its application creates shortcomings, which will be further pointed out in the detailed analysis of the Court's case-law.

The Court developed the principle of effective control in the cases concerning the occupation of the Northern Cyprus by Turkey: *Loizidou*; *Cyprus*[130]*; Banković and Others v. Belgium and Others* etc. In the above cases, as well as in the cases of *Ilaşcu v. Moldova and the Russian Federation* and *Ivanţoc v. Moldova and the Russian*

[130] Case of *Cyprus v. Turkey*, judgment of 10/05/2001. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58007 (accessed on 30/03/2014)

Federation[131], the Court extended its application to the economic, political, military and other support. We believe that in the pending inter-State cases – *Ukraine v. Russia*[132] and *Georgia v. Russia*[133] – the Court will also apply the overall control criterion given the similarities of the circumstances of facts in the mentioned cases with the armed conflicts in the Northern Cyprus and the east of Moldova. The Court's solution on the violations committed by Russian agents (military) in Crimea during and after its annexation will be interesting because there is genuine spatial overall control, unlike the Donetsk and Luhansk regions crisis and the activity of the separatist regimes in these areas, involving effective control. However, we are still far away from the point the Strasbourg Court formulates its final judgments of the on the merits of the alleged violations.

From the abovementioned rationale, we can conclude that the ECHR is applicable in circumstances that could involve the applicability of the criterion of effective control (unless there is derogation under Article 15 or an exception under Article 56). Also the criterion in question is primarily intended to protect individuals, whenever the State acts extraterritorially directly (through its military contingents) or indirectly (through a separatist movement or a paramilitary organization).

The Strasbourg Court is the single institution that added the spatial criterion element to effective control, thus there being certain reasonableness in the question whether the exercise of effective control, as to the Court's interpretation, is equivalent to occupation. The answer has to be partly affirmative because effective/overall

[131] Case of *Ivanţoc and Others v. Moldova and Russia*, judgment of 15/11/2011. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107480 (accessed on 02/04/2014)

[132] Press release of the Court's Registry on granting the provisionary measures in the case of *Ukraine v. Russia*, published on 13/03/2014. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-4699472-5703982 (accessed on 02/04/2014)

[133] Case of *Georgia v. Russia*, decision as to the admissibility of the application of 13/12/2011. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108097 (accessed on 02/04/2014)

control is a simple manifestation of military occupation[134], certainly involving it. The State can merely invade without having effective control over an area, as it was in the case of the occupation of parts of Iraq by British armed forces: on the occupied territory they exercised a certain powers characteristic a viable government, but the control exercised was insufficient, and far from being exclusive. It can be concluded that whenever the respondent State will be the invader through its hostile army for the purposes of Article 42 of the Hague Regulations, the identification of the jurisdiction of the High Contracting Parties will not be possible as long as the State does not exercise effective control over the area. In such circumstances, in light of the evident shortcoming of the respective criterion, the Court applies the second criterion – the "State agent authority".

2. The criterion State-Agent authority is the second test used by the Court to identify the extraterritorial jurisdiction of the respondent State and the alleged victim of the violation. Unlike the previous criterion, in this case the State's responsibility is engaged in relation to the offence committed by each of its agents separately, in respect of one or more individuals. The notion of *agent* has to be seen in its strict sense since there is a pre-established relationship between the State and the agent at national level. The agent may be a member of the national armed forces, an employee of the respondent State's national security services, a diplomatic or consular agent, an individual with the status of a judge exercising his/her judicial functions outside the respondent State etc.

The "State agent authority" is a personal criterion because the jurisdictional element is not proved by the area under the respondent State's effective control, but through an agent of the State, i.e. by State authority exercised by the State

[134] Occupation and other forms of administration of foreign territory. Report. International Committee of the Red Cross, 2012. [online]: http://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf (accessed on 15/04/2014)

through its agent. Therefore, the notion of jurisdiction in Article 1 obtains a very broad interpretation, the person being "under the jurisdiction" of the State whenever under the authority of that State agent. The extent of authority can vary: from the person being under the exclusive control of the respondent State within its premises, and up to murdering that person on the street.

The respective criterion is somewhat dispensed with the principle of territoriality since the area of exercising jurisdiction is irrelevant thereto. Thus, being an exception to the principle of territoriality, the criterion establishes the exclusive jurisdictional link between the State and the victim of interference.

In the case of this criterion the applicant will have to prove the agent's specific action, the interference and the legal connection of the agent while violating the victim's fundamental rights and freedoms, because the standard of proof prevails over any of the actions the applicant relies on. In the case of *effective control*, the element of jurisdiction and the element of the extraterritorial act causing the interference will have to be proved separately, whereas in the case of the *"State agent authority"* the connection between these 2 elements is closer.

Depending on the nature of the legal relationship between the State and the agent, the "*State agent authority*" criterion could be seen in broad and narrow terms.

In a narrow sense, this criterion reflects the situation where the violation of human rights and fundamental freedoms take place within the *premises* under the exclusive jurisdiction of the respondent State, such as diplomatic or consular mission headquarters of the respondent State: *X v. the Federal Republic of Germany*[135]; *X v.*

[135] Case of *X. v. Germany*, decision of 02/01/1970. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-3085 (accessed on 02/04/2014)

the United Kingdom[136]; a ship or aircraft: *Medvedyev and Others v. France*[137]; or a military unit, *Baha Mousa* in the case of *Al-Skeini and Others v. the United Kingdom*.

Although in this the meaning the respective criterion has a spatial character, it still differs from that of effective control. In this regard there can be identified at least two differences: in case effective control the protection of the Convention extends over the whole territory under the respondent State's control, whereas in case of "State agent authority" it will only protect the person within the premises under the exclusive control of the respondent State and only in respect of the act/omission of the State agent, the premises having a pre-established purpose (military, transportation of goods etc). In case effective control, the circle of subjects that might cause interference is wider, the State being also responsible for the damage caused by the actions of private persons, whereas in case of "State agent authority" the interference could be only inflicted by a State agent.

Loosely speaking, the *"State agent authority"* criterion is to be considered when that State performs an extraterritorial act through its agent, the territory or the premises being irrelevant. Thus, regardless of the locations the State agent interferes with an individual's rights, it will engage the extraterritorial responsibility of the State, as in the cases of *Al-Skeini and Others v. the United Kingdom, Drozd, Janousek v. France and Spain*[138].

Having analyzed the effective control criterion, it was established that its applicability is mainly limited to the circumstances of military occupation, which is not enough in respect of the extraterritoriality of the ECHR. It shall be noted that

[136] Case of *X. v. the United Kingdom*, decision of 15/12/1977. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-74380 (accessed on 04/04/2014)
[137] Case of *Medvedyev and Others v. France*, judgment of 29/03/2010. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97979 (accessed on 28/04/2014)
[138] Case of *Drozd and Janousek v. France and Spain*, decision of the ECmHR of 12/12/1989. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-24752 (accessed on 04/04/2014)

whenever the applicant proves the jurisdictional element of the offence committed by an agent acting extraterritorially, the extraterritorial responsibility of that State will engage inevitably, regardless of the fact whether the agent acted as police officer, security officer, or judge. However, in case of military actions, when they actually do not involve the occupation of a territory, the Court has hesitated for a long period of time to apply the criterion of "State agent authority". Only in 2011, by its judgment in the *Al-Skeini* case, the Court approved its application in the circumstances of an armed conflict, in respect of the agents' actions on the streets and private houses of nationals of that State, or within the premises under exclusive control of the respondent State.

Therefore, the *"State agent authority"* criterion, also called the personal criterion, is applied more frequently than the previous one. That fact enables the Court to apply the Convention whenever the agent acting on behalf of the State commits an improper interference with the rights or freedoms guaranteed by the Convention. The respective criterion was applied to determine the legal relationship between the State and an agent in the majority of classical cases on extraterritoriality, i.e. in the cases of violations committed at the headquarters of diplomatic and consular missions, or on the boards of ships and aircrafts; in case of "extraordinary renditions" carried out by a Member State outside of its boundaries etc. In principle, it involves any act committed in the absence of effective control. After the *Al-Skeini* judgment this criterion is also applied to the military actions.

At the same time, due to its personal character, the respective criterion axiomatically requires a higher standard of proof for each specific action of the State agent who committed a violation of human rights and fundamental freedoms beyond reasonable doubt, which is missing in the precedent test. This means that in

case of collective military actions, the applicant will be required to prove the State's specific contribution in committing the violation.

Unlike the effective control, the fundamental rights and freedoms will be protected proportionally to the facts alleged, and the Convention will be thus applied fragmentarily. Due to the spatial character of the previous criterion, the application of the ECHR was possible in its entirety. In case of the "State agent authority", however, the extent of extraterritorial obligations is proportional to the effect of the extraterritorial act performed by the respondent State.

3.7. Jurisdictional link

The last element needed to engage the extraterritorial responsibility of States in the light of the ECHR is the jurisdictional link between the extraterritorial act and the violation committed. That criterion is not expressly used in the Court's case-law, but it must be concluded, at least theoretically.

As stated above, it is not sufficient to establish merely jurisdiction, but also the actual breach of the obligation, the extent of which was proportional to the exercised jurisdiction. In other words, it is imperative that between the extraterritorial act and the interference caused be a certain degree of causality. Causality is usually not examined by the Strasbourg Court distinctly from the jurisdictional element. However, we considered it appropriate to conduct a separate doctrinal research.

The causality in the cases with extraterritorial implications occurs in a specific way. Due to the non-exclusive and inconsistent exercise of jurisdiction, it is important to determine the action/omission of which State entailed the violation of

the rights and freedoms of the alleged victim. This aspect is especially important in cases with extraterritorial implications, when the extraterritorial jurisdiction of the respondent Contracting Party is exercised concurrently with the jurisdiction of the "host" State. Another aspect would constitute the collective military actions when several countries commit actions, which might potentially cause interference. In such cases, as to the Court's jurisprudential standards, it is necessary to determine the causality of the extraterritorial act according to the degree of the exercised jurisdiction.

For example, in the case of *Ilaşcu and Others v. Moldova and the Russian Federation*, the applicants alleged breach of the conventional obligations of the respondent States due to several violations of the rights and freedoms guaranteed by the Convention. One of the difficulties faced by the High Court consists in determining responsibility for the respondent States' actions/omissions because each of them had exercised a certain degree of jurisdiction over the area. The Court established the overall effective control of the Russian Federation over the territory under the administration of the separatist Transdniestrian authorities, whereas Moldova had a *de jure* jurisdiction over the applicants, who were in the custody of the separatists. Therefore, both States exercised jurisdiction, and thus the obligations under the ECHR were imputable to both of them. However, the question was: To what extent could the respondent States' actions/omissions engage their responsibility? In its ruling, the Court relied on the extent of jurisdiction exercised proportionally by each respondent State. Therefore, the Russian Federation was responsible for the substantial violations of the Convention by both its agents (members of the armed forces) and the representatives of the Transdniestrian authorities. It was also established that the concept of jurisdiction in the light of

Article 1 had a low implication for Moldova, the latter being held responsible only for failing to fulfil its positive obligations to take legal and diplomatic measures, in respect of its nationals on the territory effectively uncontrolled by it, along with other States and international organizations in order to protect the fundamental rights and freedoms guaranteed by the Convention. Accordingly, the responsibility of the respondent States engaged due to their actions/omissions, in correlation with the previously established jurisdictional boundaries.

The State might have a jurisdiction in respect of extraterritorial acts of its agent (judge), but since at the time of performing the extraterritorial act he was not officially a State agent, there was no causal link for that purpose, as in the case of *Drozd and Janousek v. France and Spain*[139].

On the other hand, in case of collective military actions the applicant has to prove how the respondent State's action/omission having caused the interference, as in the bombing of Belgrade by NATO military forces, in the planning, control and execution of which there participated several countries, including non-members of the Council of Europe. Although, given the circumstances of the case, the extraterritorial act was obvious, the applicants failed to prove the legal relationship of the State with each of the alleged victims of the extraterritorial act, and respectively that causality was not considered by the High Court.

As a conclusion in respect of the above, we consider that the respondent State's responsibility will only engage once the Court establishes jurisdiction, and there is causality between the State's extraterritorial act inflicted on a person and the alleged violation. The State has to be found responsible for the breach of an extraterritorial obligation only to the extent of the jurisdiction exercised, i.e. within

[139] Case of *Drozd and Janousek v. France and* Spain, judgment of 26.06.1992, para. 84-97. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57774 (accessed on 01/07/2014)

the limits of the corresponding extraterritorial obligation, and only proportional thereto.

IV. EXTRATERRITORIAL APPLICATION OF THE ECHR IN ARMED CONFLICTS

The need to rigorously apply the Convention in the circumstances of an armed conflict lies primarily in the fact that any armed conflict has an advanced potential of unjustified restrictions in exercising the core rights of the Convention, such as the right to life, prohibition of torture etc., the latter being more likely to be cause not only by States, but also by armed groups (non-state entities). The reasons for the advanced degree of damage to fundamental rights and freedoms are different, but the result is the same – the doubtful proportionality of the interference, at best.

Although the jurisdiction of the States was interpreted by the Court primarily in its territorial sense, the case-law on the extraterritorial application of the Convention is richest in cases of armed conflicts, despite major geopolitical implications and the complexity of the cases from factual point of view.

The Court applies the Convention in circumstances of armed conflicts whenever States apply armed forces to settle a dispute between them, or there is long-lasting armed hostility between governmental authorities and organized armed groups, or between such groups within a State[140]. Although the latter type of conflict is less relevant in terms of the Convention, it applies to both international (the bombing of Belgrade by NATO forces) and non-international armed conflicts (armed conflict in northeast Cyprus). Paradoxically, the Court encountered greater difficulties when applying the ECHR extraterritorially in case of international

[140] Case of *Prosecutor v. Duško Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 02.10.1995. Para. 70. [online]: http://www.icty.org/x/cases/tadic/acdec/en/51002.htm (accessed on 25/06/2014)

conflicts. In the cases of non-international armed conflicts, there will always be the condition of control over the territory of a State by an armed group. Therefore, it will be necessary to first establish the connection of the respondent State with the respective armed group through the previously discussed criterion of *effective control over an area*. The relatively low standard for engaging the extraterritorial responsibility in such circumstances serves to a less problematic application of the Convention. The ECHR does not apply to extraterritorial internal conflicts *per se*, but only to those internationalized.

The core issues that have appeared before the Court concerning the application of the ECHR in circumstances of armed conflict consist, on the one hand, in standardizing and rationalizing the conditions on the extraterritorial application of the Convention, and, on the other hand, in the dualism between the international human rights law and the international humanitarian law.

Although the application of a unique wide-range criterion would benefit the flexible interpretation of the concept of jurisdiction of States in situations where they are acting beyond their boundaries, in case of armed conflicts the Court applies both criteria aimed at determining the jurisdictional element: the *effective control* and the *"State agent authority".*

The respondent Governments often try to oppose to the applicability of the ECHR in circumstances of armed conflicts, arguing that the international human rights law is not applicable to armed conflicts because the latter is a *lex generalis*, whereas the international humanitarian law as a *lex specialis* applicable exclusively to the circumstances of the case[141]. We cannot agree with this approach because the

[141] This argument was "aggressively" invoked by the representative of the United Kingdom during the hearing in the case of *Hassan v. the United Kingdom*. Record of the hearing of 11/12/2013. [online]:

instruments of the international human rights law are applicable at any time[142]. Moreover, the Convention expressly provides for the Contracting State's possibility to derogate, during an armed conflict, from the material provisions of the Convention except for its core articles. Furthermore, Protocol No. 6[143] refers to the express provision in Article 2 concerning the possibility of derogation, in time of war, from the prohibition of capital punishment. *Per a contrario*, in the absence of derogation or of any possibility of derogation (as in the core articles), the High Contracting Parties shall observe the positive and negative obligations arising from the Convention including in circumstances of armed conflict, in their entirety.

In spite of the States' argument stated above, the Court did not hesitate to apply the Convention extraterritorially, reiterating that the ECHR is an instrument of European public order, and the failure to apply it creates a vacuum in the protection of human rights and fundamental freedoms[144], whereas the notion of jurisdiction is not limited to the European space literally[145].

Therefore, the military acts of the States Parties to the ECHR, as well as the control over a foreign area, even if it is outside of the European space, are exceptions to the principle of territoriality of States' jurisdiction.

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http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2975009_11122013&language=lang&c=&py=2013 (accessed on 15/04/2014)

[142] Report of the International Committee of the Red Cross: International Humanitarian Law and the challenges of contemporary armed conflicts. Geneva, 2011, p.13-15. [online]: http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf (accessed on 29/06/2014)

[143] Protocol No. 6 to the Convention for the Protection of the Human Rights and Fundamental Freedoms, of 28/04/1983. [online]: http://conventions.coe.int/Treaty/en/Treaties/Html/114.htm (accessed on 29/06/2014)

[144] Case of *Cyprus v. Turkey* …para. 78; Case of *Loizidou*…para. 93; Case of *Banković* …para. 80.

[145] Case of *Al-Skeini*… para. 142.

4.1. Cyprus – engagement of responsibility of States for supporting separatist regimes

As a result of the Turkish armed forces' partial invasion of the northern part of the Cypriot island in 1974, the local separatists being supported militarily and economically by Turkey, the authorities of the respective region declared the independence of the Turkish Republic of Northern Cyprus (hereinafter TRNC). Subsequently, the legitimate government of Cyprus has lost control of the areas in the north-eastern part of the island, and was *de facto* unable to exercise jurisdiction over them. The self-proclaimed republic only remained recognized by Turkey, but, since both Turkey and Cyprus were parties to the ECHR and Cypriot authorities did not control the territory in the north of the island, that would have created a legal vacuum on that space, which was inadmissible within the European area.

In one of the first cases where the extraterritorial responsibility of Turkey on the territory of Cyprus was established (*Loizidou v. Turkey*), the applicant invoked the responsibility of the Ankara Government for the acts of the TRNC authorities. In 1974, Mrs. Loizidou began construction on a plot of land under the authority of the TRNC. She alleged that the TRNC authorities had prevented her to enjoy possession over the respective good. In 1989, the applicant participated at a protest, the aim of which was to require the TRNC authorities the possibility of repatriation of Greek Cypriots fled from that territory. Later she was apprehended and deprived of liberty for a period of 8 hours at the Cypriot-Turkish premises. The Constitution of the TRNC provides for the expropriation of property abandoned by refugees, and since the refugees were prohibited from repossessing their immovable property, the TRNC proceed to a *de facto* looting of their property.

In such circumstances, the question was whether the TRNC actions/omissions were imputable to Turkey. This means that the High Court had to rule on two types of legal relations. The first one resulted from the fact that the respondent State did not have a *de jure* jurisdiction (under public international law) on Cyprus; therefore, an extensive interpretation of the concept of jurisdiction under Article 1 the ECHR was needed. The second type of relations referred to the imputability of the TRNC authorities' actions/omissions to Turkish, i.e. it was necessary to determine the State agent relationship between Turkey and the TRNC, which is somewhat different from the institution of jurisdiction, but with the same goal – to determine whether the applicant was under Turkey's effective control at the moment of causing the alleged interference.

Regarding the first issue, the Court held that the concept of jurisdiction was not limited to national territories of the Contracting States, and they can bear responsibility for the actions of their authorities, regardless of whether they were performed, or the negative effect was produced, beyond their boundaries[146]. Consequently, the application of Article 1 of the Convention depended solely on the imputability of the TRNC authorities' actions to the respondent State.

At the same time, on the territory of the controlled by TRNC there were overall 30000 soldiers, being members of the Turkish military contingents. Given the military occupation of the territory under the authority of the TRNC, the Court found a legal connection between the TRNC and Turkish authorities, relying on the criterion of *overall control over the occupied territory*. This control implies Turkey's responsibility for all acts performed by the TRNC and individuals, whose offences have not yet been investigated. In other words, Turkey was held responsible for the

[146] Case of *Loizidou v. Turkey*, judgment on the preliminary objections of 23/03/1995. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57920 (accessed on 10/04/2014)

actions/omissions of the TRNC because of its military aid provided to the breakaway republic, thus being bound to protect the human rights and fundamental freedoms defined in the Convention, as reflected in Article 1 thereof.

We do not agree with lawyers criticizing that reasoning of the Court by mentioning that "*the real authority exercised by private officials has little to do with distinct violations of certain rights*"[147]. In the absence of such a link between the agents, i.e. the TRNC officials, and the respondent State (Turkey), the ECHR would have a far more limited and illusory purpose: States could finance separatist regimes by offering them military support, and by exercising a certain degree of control over them, whereas they will not be responsible for their actions. From formal point of view, the overall control is a condition that allows the identification of State responsibility for the acts of its agents; thus, responsibility cannot exist without interference, i.e. without the existence of an obligation under Article 1. In order to engage its agents' responsibility, the State does not have to exercise detailed control; it is rather sufficient to exercise an overall control over the actions and policies of separatist regimes. However, the dimension of the concept of jurisdiction in Article 1, being defined as the extent of the obligations of States, is only correlated to, and not identical with, the responsibility of States. Therefore, the "donor" State will be responsible for all violations committed by "private officials" of a non-state entity because the latter are only active due to the exclusive support provided by the respective State.

The general control test consists in the imputability, to a particular State, for all acts performed by an unrecognized entity on the territory of another state, which is a plenipotentiary subject of public international law. In this regard, the Court held

[147] Coomans F., Kamminga M.T. Extraterritorial Application of Human Rights Treaties. Antwerp: Intersentia, 2004, p.95.

that, given the purpose of the Convention, in the event of any military intervention, regardless of its lawfulness, the State would exercise effective/overall control over a territory. If the State exercises its control, it is automatically bound to protect the rights and freedoms of people in that area. This obligation will be binding both in case of direct exercise of jurisdiction, i.e. through own armed forces, and by means of subordinate local governments. Therefore, there is a complex legal relationship, where the State has a direct connection with its military contingents (i.e. its agents), and the military, by supporting the TRNC authorities, creates that State agent link between Turkey and the Northern Cyprus government. This relationship determines the jurisdiction of the Ankara government over the individuals on that territory.

In its judgment in the *Loizidou* case, the Court makes no distinction between the concepts of effective control and overall control. The Court uses both of these concepts along the *dicta*, which creates difficulties in interpretation. As Professor Cassesse remarked[148], the Court nevertheless wished to establish the State agent relationship, based on the criterion of overall control, however, with a territorial connotation, in order to extend the jurisdiction over the entire territory under the authority of the TRNC. From formal point of view, such an approach to the imputability for the actions of the Turkish State is sufficient to engage its extraterritorial responsibility.

In order to cover the entire occupied territory by the concept of jurisdiction, the Court ruled as follows: "It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops engaged in active duties in

[148] Cassese A., *op. cit.*, p. 658.

northern Cyprus that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the "TRNC". Those affected by such policies or actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention. Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus"[149].

The cited paragraph should not lead us to the conclusion that the Court applied the effective control criterion; however, the spatial connotation of the overall control criterion can be clearly observed. It is different, for example, from the notion of overall control applied in the *Tadic* case when it was merely necessary to establish the relationship between the armed forces of the Republika Srpska and the Yugoslav State. The effective control *per se*, in the sense of the above case, is basically inapplicable in the *Loizidou* case because it would be necessary to prove the Turkish responsibility for each violation committed by the TRNC authorities.

Accordingly, the Court found a violation of Article 1 of Protocol No. 1 to the ECHR (Protection of property) in respect of Turkey for the impediments imposed by the TRNC authorities regarding the applicant's access to her immovable property. Thus, Turkey violated the negative obligation to respect the applicant's right to property.

In another case, namely the inter-State case of *Cyprus v. Turkey*[150], remarkable both in terms of quality of the parties to the proceedings and its complexity, the Applicant State invoked Turkey's responsibility for actions/omissions of the TRNC

[149] Case of *Loizidou*…para. 56.

[150] Case of *Cyprus v. Turkey*, judgment on the merits of 10/05/2001. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59454 (accessed on 12/04/2014)

government, regardless of the proclamation of its independence in 1983. Cyprus argued that the TRNC was an illegal entity being *de facto* subordinated to Turkey, and the latter continued exercising its control over the occupied territory in northern Cyprus. The Ankara Government traditionally argued that the TRNC was a democratic and independent State, and, therefore, the obligations under the ECHR were not imputable to Turkey. Cyprus claimed violation of the obligations provided for by Articles 1 to 11, 13, 14, 17, and 18 of the ECHR, and Articles 1 to 3 of Protocol No. 1 to the Convention in respect of the individuals on the occupied territory.

Relying on the *ratio decidendi* in the *Loizidou* case, the Court raised the responsibility of Turkey for the violations committed by the TRNC officials to rank of principles, establishing, *inter alia*: "Having effective overall control over northern Cyprus, its responsibility cannot be limited to acts of their soldiers or officials in northern Cyprus, but must also be engaged in respect of the acts performed by the local administration which survives due to the Turkish military and other types of support". Compared to the previous case, from the pre-cited sentence it can clearly be observed that the Court reiterated the presence of jurisdiction under Article 1 of the ECHR, and the possibility of engaging potential responsibility under the test of overall control for any act performed by the TRNC authorities. The Court again highlighted the territorial character of the test, the Turkish jurisdiction extending, thus, over the entire territory of the TRNC.

The importance of the territorial aspect of the *overall control* lies in the impossibility of securing the random protection of the fundamental rights and freedoms. In other words, the Turkish jurisdiction extends over the entire range of rights and freedoms set out in the ECHR. It is a natural consequence of applying the general control criterion, the meeting of which would be impossible unless Turkey is

objectively able, given the circumstances of the case, to protect the fundamental rights and freedoms in their entirety.

In the *Banković* case, one of the factors that guided the Court to concluding the absence of jurisdiction of the respondent States during the bombing of Belgrade was their alleged impossibility to secure the protection of the rights under the Convention in their totality. This principle is reflected in the inability to "divide and adapt" the rights and freedoms enshrined in the Convention[151].

Moreover, the Court also extended the notion of jurisdiction to the interferences inflicted by the acts of private individuals on the territory controlled by the TRNC[152], thus enabling the extensive interpretation of the concept of extraterritorial jurisdiction for the purposes of the ECHR. In this case, the Court concluded that there had been a continuous violation of the positive obligation in the light of Articles 2, 3, and 5 para. 1, thus condemning the respondent Government for their omission to investigate cases of Greek Cypriots disappeared in dangerous circumstances and/or subsequently detained in Turkish custody. However, the Court did not find any violation of Article 2 concerning the protection of the right to life of the same persons. At the same time, the Court qualified the TRNC authorities' actions of enclaving the Karpas peninsula population as degrading treatment since the people could not get out of it and had not been able to develop their community. The Court stated that there had been a global violation of the rights arising from Article 8 because the Greek Cypriots from that region has been refused access to their homes, whereas security services had been monitoring their interpersonal relationships, and there had been frequent cases of permanent presence of officials in the homes of individuals. It was found the continuous

[151] Case of *Banković… p*ara. 75.
[152] Case of *Cyprus v. Turkey…*para. 81.

violation of Article 1 of Protocol No. 1 due to the TRNC authorities' failure to protect the right to property of the Greek population in the respective region. Therefore, property could not be *de facto* transferred by contract or will. On the other hand, the Court held that the native Greeks had been limited in controlling and fully enjoying their right to (immovable) property. Also, the Court found the violation of Article 9 of the ECHR due to limiting the access of Greek Cypriots to places of worship and their participation in religious activities, as well as violation of Article 10 due to the censorship imposed by the TRNC authorities concerning certain restrictions on the import of school textbooks and media sources printed in Greek.

In the present case, the Court gave a very broad interpretation of the concept of jurisdiction, whereas the effective control criterion covered virtually all the rights and freedoms defined in the Convention. The distinction of the present case from other cases on the extraterritorial application of the ECHR in circumstances of military actions lies in the fact that the Convention was applied in its entirety, and the Court found violations of both positive and negative obligations.

The Grand Chamber has recently delivered a judgment on just satisfaction in the case of *Cyprus v. Turkey*[153], awarding for the first time compensation for pecuniary damage in an inter-State case. The judgment on just satisfaction was issued 13 years after the adoption of the judgment on the merits, which is an exceptional period of time in the Court's case-law[154]. As a group of judges noted in their separate opinion: "The present judgment heralds a new era in the enforcement of human rights upheld by the Court and marks an important step in ensuring respect for the rule of law in Europe". The Court made it clear that participation at

[153] Case of *Cyprus v. Turkey*, judgment as to the just satisfaction of 12/05/2014. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144151 (accessed on 30/06/2014)
[154] Sârcu-Scobioală D., *op. cit.*, pp.78-80.

armed conflict on European land cannot be tolerated, and any violation of the Convention committed even by a non-State entity will be punished. The people, who have suffered from aggression of a State, have to be compensated, and they can be also represented before the High Court by their State.

After the cases of *Loizidou* and *Cyprus* there followed a series of judgments against Turkey, where the Court found the violation of the applicants' right to property because they had been refused the access to their homes and other immovable properties, either by Turkish armed forces or by the TRNC authorities, under circumstances similar to those in the previous cases. Thus, the Court found the violation of Article 1 of Protocol No. 1 to the Convention and of Articles 3 and 8 (as appropriate) of the ECHR in the cases of *Andriou Papi*[155]*; Olymbiou*[156]*; Strati*[157]*; Saveriades*[158]*; Gavriel*[159]*; Solomonides*[160]*; Kyriakou*[161]*; Alexandrou*[162] and others.

All of the listed cases have one fact in common: the High Court has applied the overall control criterion to establish the jurisdictional link between the actions of Turkish and the TRNC military. Under substantive aspect, especially in respect of Article 1 of Protocol No. 1 to the Convention, the Court found the violation of the negative obligation, i.e. not to interfere with the right to property.

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[155] Case of *Andreou Papi v. Turkey*, judgment of 10/05/2001. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94204 (accessed on 13/04/2014)

[156] Case of *Olymbiou v. Turkey*, judgment of 27/10/2009. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95300 (accessed on 13/04/2014)

[157] Case of *Strati v. Turkey*, judgment of 22/09/2009. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94200 (accessed on 13/04/2014)

[158] Case of *Saveriades v. Turkey*, judgment of 22/09/2009. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94238 (accessed on 13/04/2014)

[159] Case of *Gavriel v. Turkey*, judgment of 20/01/2009. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90751 (accessed on 13/04/2014)

[160] Case of *Solomonides v. Turkey*, judgment of 20/01/2009. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90738 (accessed on 13/04/2014)

[161] Case of *Kyriakou v. Turkey*, judgment of 22/06/2010. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99587 (accessed on 13/04/2014)

[162] Case of *Alexandrou v. Turkey*, judgment of 20/01/2009. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90812 (accessed on 13/04/2014)

The Court also reached a similar conclusion in the case *Varnava* case[163], acknowledging Turkey's responsibility for the breach of procedural obligations arising from Article 2 and Article 3 of the Convention in respect of the relatives of the applicants, who had disappeared after their capture and detention by the Turkish armed forces. It is remarkable that in the present case the presence of Turkish jurisdiction TRNC territory was not disputed any longer. This follows from the circumstances of the case, which are essentially similar to those in the case of *Cyprus v. Turkey*, as well as from the Court's conclusion, which dismissed the Government's preliminary objection of non-application of the Convention due to the High Court's incompatibility *ratione temporis* concerning the procedural positive obligation of States to investigate the disappearance of people in life-threatening circumstances[164]. Turkey objected that it had not had to exercise this obligation since it joined the instrument that allowed individual applications after the moment of the alleged disappearance. Given the fact that in the light of Article 2 of the ECHR the procedural obligation to investigate operates differently from the substantial obligation to respect/protect the right to life, the Court concluded that the disappearance of a person is a special phenomenon, characterized by the element of time. For the relatives of potential victims it follows from the uncertainty and lack of accountability arising from the disappearance of the person, which removes the instantaneous character of the obligation. Therefore, the procedural obligation to investigate the disappearance of persons may also operate retrospectively, the death of the missing person occurring presumably at a later moment.

[163] Case of *Varnava and Others v. Turkey*, judgment of 18/09/2009. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-1322 (accessed on 13/04/2014)
[164] *Idem*, para. 150.

Having examined the merits of the obligations under Article 2 of the Convention, given the state of armed conflict as the dominant circumstances of the case, the Court held that Article 2 of the ECHR had to be interpreted in the light of the international humanitarian law governing the universal protection of civilians and those not, or no longer, engaged in hostilities, including gathering information on the identity and fate of the victims[165]. Therefore, the respondent Government failed to comply with its obligation to provide concrete information on the persons gone missing during the armed conflict.

The Court also found a violation of Article 3 of the ECHR in respect of the non-compliance with same obligation to investigate. In this respect, it reached a conclusion identical with that of the *Cyprus* case. Thus, it held that the respondent Government's long-lasting inaction in respect of the aforementioned obligation amounts to inhuman treatment for the relatives of the disappeared people, whose fate is unknown[166].

According to the materials of the case, two of those nine victims were last seen in the custody of the Turkish or TRNC armed forces by the International Committee of the Red Cross, they appearing in its lists as prisoners. On the basis of the findings on the violation of Article 2, the Court has also established the violation of Article 5 of the ECHR.

In the present case, it can be seen how a simple long-lasting procedural omission of the respondent State engaged the violation of its positive obligations arising from Articles 2, 3 and 5 of the ECHR concurrently. However, from the text of the judgment it can be deduced that the Court also applied the overall control criterion as a basis for engaging the extraterritorial responsibility of the ECHR in

[165] *Idem*, para. 185.
[166] *Idem*, para. 202.

respect of the Turkish government. This follows from the general circumstances of the case similar with those in the cases of *Loizidou v. Turkey* and *Cyprus v. Turkey.*

A more specific extraterritorial application of the ECHR on the Cyprus conflict can be identified in the *Isaak* case[167]. Anastasios Isaak, along with other motorcyclists, took part in a demonstration against the Turkish occupation of Northern Cyprus. The demonstration began in Berlin and continued in Cyprus. Mr. Isaak entered the buffer zone between the territories controlled by the Cypriot Government and the TRNC, under the authority of UN peacekeeping forces. Once the demonstrators entered the buffer zone, Turkish militants and TRNC police officers, along with a group of members of a Turkish neo-Nazi organization, armed with batons and iron bars, started moving towards them. The demonstrators were attacked, and Mr. Isaak died as a result of multiple blows to his head. This case differs by the place of committing the act. Since the buffer zone is neutral, it is not *de jure* under Turkish jurisdiction. However, relying on its previous case-law, the Court extended the jurisdiction of Turkey on the neutral zone controlled by the UN peacekeeping forces, as well.

In its decision as to the admissibility, the Court established in respect of Turkey's jurisdiction in the buffer zone, as follows: "*Even if the acts complained of took place in the neutral UN buffer zone, the Court considers that the deceased was under the authority and/or effective control of the state defendant through its agents … [the actions/omissions complained of by the applicants] engaging the respondent State's responsibility under the Convention*"[168]. During the examination of the merits of the case, the issue of jurisdiction did not become the object of dispute, and,

[167] Case of *Isaak v. Turkey*, judgment of 24/06/2008. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87146 (accessed on 15/04/2014)
[168] Case of *Isaak v. Turkey*, decision of 28/09/2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77533 (accessed on 15/04/2014)

therefore, the High Court did not initiate the interpretation of the italicized phrase of above. The test of effective control *per se* is not applicable in this case for the reasons analyzed in the *Loizidou* case. However, neither the overall control criterion is applicable because the territory of the buffer zone was under the exclusive authority of the UNFICYP[169], following that the only criterion applicable would be the *"State agent authority",* covering perfectly the circumstances in which the agent exercises the extraterritorial act outside of the territory or premises under the jurisdiction of the Turkish State. Nonetheless, in this case the Court's text is somewhat vague making it difficult to reach reliable conclusions.

Finally, the Court stated that the respondent Government failed to comply with its positive obligation resulting from Article 2 of the ECHR, the evidence presented demonstrating both the inaction of Turkish officials during the process of murdering Mr. Isaak, and their failure to investigate his death. Also, the Court stated the violation of the victim's right to life due to the tacit and explicit actions of the Turkish soldiers, at least 5 of them having participated in the act of murder.

In a similar way, in the case of *Solomou v. Turkey*, the applicant complained of the violation of substantive and procedural obligations arising from Article 2 of the ECHR due to the killing of Mr. Solomou, killed by Turkish armed forces during his protest against the murder of the victim in *Isaak* case on the day of the latter's funeral. The circumstances are similar: Mr. Solomou passed the buffer zone, and entered the TRNC. Having tried to take down the Turkish flag from a pole, he died after being hit by five (head)shots. As in the *Isaak* case, during the impugned

[169] UN Security Council resolution on the Cyprus, no.186 din 04.03.1964. [online]: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/186(1964) (accessed on 15/04/2014)

violation, the victim was also on the territory controlled by the TRNC authorities, i.e. under the jurisdiction of Turkey as to the classical overall control criterion[170].

More specific circumstances can be seen in the case of *Andreou v. Turkey*. Immediately after the events described in the *Solomou* case, Turkish or Turkish-Cypriot soldiers then proceeded to fire some 25 to 50 rounds indiscriminately into the crowd inside the buffer zone, in the absence of any real danger from that crowd. The applicant was injured. Thus, there was an unjustified interference with her right to life by endangering the applicant's life.

The respondent Government again objected that the buffer zone was not under the jurisdiction of the TRNC and, given the overall control criterion, the potential victims were not under Turkish jurisdiction. The Court took an elegant position, and stated in this decision on the admissibility that, since – while shooting – the Turkish and/or the TRNC soldiers were on the territory controlled by the TRNC; the applicant being near the Greek-Cypriot checkpoint, the Turkish jurisdiction was recognized based on the same overall control criterion[171]. Having a fair end, we believe that the criterion of effective control should not have been applied in the present case because the victim of the violation was outside the control zone itself. The victim was undoubtedly under the authority of the agent who committed the offence. However, she was in no case under the agent's jurisdiction in relation to the overall control exercised over the northeast of the island. The criterion of "State agent authority" would have been more appropriate, although – relying on the existing case-law – we cannot overlook the "convenience" of the erroneous application of the *overall control*.

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[170] Case of *Solomou v. Turkey*, judgment of 24/06/2008. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87144 (accessed on 17/04/2014)

[171] Case of *Andreou v. Turkey*, decision of 03/06/2008. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88068 (accessed on 17/04/2014)

As a conclusion to this subject, it has to be mentioned that the cases concerning the conflict in Northern Cyprus have two main features, and namely:

- as a rule the Court only applied the *overall control* criterion, which led to the protection of the entire set of rights and freedoms under the Convention;

- the Court found that Turkey had been responsible for the actions/omissions of both its soldiers and the TRNC officials (*de jure* unsubordinated to Turkey), as well of private agents, such as the neo-Nazi Turkish formations;

- the Court also awarded compensation for pecuniary damage in inter-State cases.

4.2. Yugoslavia – extraterritorial (non-)application of the ECHR and convergence with the UN Security Council resolutions

Although the Yugoslav conflict implied more of the extraterritorial non-application of the Convention on the territory of Yugoslavia, rather than the application thereof, the case-law in this respect caused major consequences for the subsequent practice of the High Court.

The most prominent, yet controversial, case in which the applicants insisted on the extraterritorial application of the ECHR is, of course, *Banković and Others v. Belgium and Others*, where the Court refused those six applicants the extraterritorial protection.

As a result of the conflict between Kosovar Serbs and Albanians in the Kosovo autonomous region during the years 1998-1999, NATO unilaterally declared its willingness to exercise air strikes on certain areas of the Federal Republic of Yugoslavia (FRY), which took in the period of 24 March – 8 June 1999. A missile

launched from a NATO forces' aircraft hit one of the buildings of *Radio Televizije Srbije* (hereinafter "RTS"), in which there were operating three television channels and four radio stations. As a consequence, relatives of the first five applicants died, and the sixth applicant was injured.

The applicants alleged the violation of Articles 2, 10 and 13 by the NATO Member States participating in that attack. The Court did not examine the merits of the case because it declared the application inadmissible on the ground of absence of jurisdiction between the respondent States and the alleged victims, although there had been raised several issues of concern. Among them there were the responsibility of States for their actions under the aegis of an international organization; the responsibility of States for their extraterritorial acts, having an adverse effect on the territory of non-Member State of the CoE; the standards and interconnection between the international humanitarian law and the ECHR law outside of the *espace juridique* of the Council of Europe; and the main issue: whether States can behave differently outside of this space, i.e. if they can "violate their obligations" when they conduct military operations in Botswana or Madagascar, for example.

First, the Court held that there had been an extraterritorial act, but avoided being excessively specific in this regard[172]. Thus, the High Court implicitly found the imputability of the respondent States for the act by which they had destroyed the RTS building; therefore, *de facto* there was a jurisdictional link between the act committed and the alleged violation of the Convention.

In its *dicta* the Court recalled that the principles underlying the Convention could not be interpreted and applied in a vacuum. The Court also had to take into

[172] Case of *Banković…*para. 54.

account any relevant rules of international law when examining questions concerning its jurisdiction in particular[173], whereas the notion of jurisdiction was exceptionally interpreted extraterritorially. The Court concluded that extraterritorial act in question did not fall into any of the exceptions to the principle of territoriality, inserted in the relevant case-law. Having referring to the need for interpretation of the ECHR in the light of public international law, the Court immediately refers to the *travaux préparatoires*, indicating that the original intention of the drafters of the Convention was to apply it preferentially in the territory of the Contracting States[174]. Even at first glance, the text of the Court's decision does not seem to have clarified ambiguities.

It is not very clear exactly what criteria the Court attempted to apply in terms of determine actual responsibility of the respondent States. The applicants suggested the Court to fragmentarily apply the criterion of *effective control* in order to identify the legal relationship between the Contracting States and the formally detached soldiers, given the share of control over the operation performed by them. The fragmentation of the effective control criterion implies the partial application of the Convention, whereas the respondent States are bound to comply with their positive obligations "only" proportional to the level of the control exercised, depending on the specifics of each extraterritorial act[175]. Later, the Court will have accepted this concept in the *Al-Skeini* case; in the present case, however, it has concluded that the respective criterion is not contained in Article 1 of the Convention, thus "*depriving it of a certain purpose*". Due to the violations committed by the United Kingdom in the armed conflict in Iraq, this purpose was found.

[173] *Idem*, para. 57.
[174] *Idem*, para. 63-65.
[175] *Idem*, para. 75.

The Court notes that the rights and freedoms entailed in the ECHR cannot be "divided and tailored", meaning that in order for a State to exercise extraterritorial jurisdiction in the light of Article 1, it must have territorial control, which would allow the protection of all rights and freedoms defined in the Convention, without any exceptions, this being only possible in case of military occupation or at least exclusive control over an area. The Court tried to spread the idea in the circumstances of an armed conflict a single criterion can be applied: the effective control of an area, in a form or another. Generally, the concept of "divided and tailored", or "undivided and untailored", rights is too fictitious and devoid of conventional and judicial support. Even in their "national" cases, the States do not always have the opportunity to observe fundamental rights and freedoms, for example in respect of the obligations to protect; therefore, it appears from the circumstances of each case individually. The State is a not a colossus or a guardian angel to protect people constantly. The application of the Convention always arises from certain circumstances. The very idea that it would (not) fully apply is unrealistic and utopian. Given the indivisibility of human rights it is natural that the State has the obligation to respect the rights enshrined in the Convention. However, when it comes to extraterritoriality, the State can protect rights, but also interfere with the rights and freedoms set out primarily in Articles 2, 3, 5, (rarely) 6, and more rarely in the other articles, due to States' limited capacity in such situations (the problem consisting in the impossibility to comply with positive obligations). In any case, this is not a reason to refuse the remedy offered by the ECHR to individuals. If agents of a State unlawfully kill or torture people outside of its territory, the State must effectively investigate the respective facts; if a State destroys the properties of the

nationals of another State, it must offer just satisfaction for the losses etc., i.e. it must act in accordance with the principle of universality of human rights.

Moreover, in the *Ilașcu* case, there was a fragmentation of the obligations arising from the Convention, the Court stating that the Republic of Moldova is only responsible for acts proportionate to the extent of its exercising jurisdiction over the Transdniestrian territory, being *de facto* beyond its control[176].

This narrow interpretation of the concept of jurisdiction is also to some extent contrary to the Court's former case-law. The Court applies, where appropriate, the "State agent authority" criterion in the cases concerning the diplomatic missions of the Contracting Parties or the exercise of jurisdiction by their intelligence services. The "State agent authority" criterion is not in principle limitative, and provides space for interpretation; however, the Court had apparently a different approach.

The Court also proceeded to the regional character of the Convention to declare the application inadmissible. Thus, unlike the cases on the conflict in northern Cyprus, FRY is not covered by the notion of legal space under the Convention, and, as the Court explained, "the FRY clearly does not fall within [it]. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. […] 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 […] would normally be covered by the Convention"[177].

In our opinion, this conclusion is somewhat vague and in no way increased the clarity and quality of that decision. From the case-law prior to the *Banković* case, it can be seen just how rigorously the Court interprets the concept of jurisdiction. In

[176] Case of *Ilaşcu*…para. 448.
[177] Case of *Banković*...para. 80.

that case, however, the Court raised the territoriality principle to another level, in a specific manner. The correlation of the notion of legal space (*espace juridique*) with the Court's case-law prior to prior to the *Banković* case in terms of application of the Convention outside of the legal space of the Council of Europe was not clear either because there had been no difficulties whatsoever in this regard before that. Moreover, the Court did not provide any legal support to the respective conclusion; in our opinion, it merely gave a somewhat erroneous interpretation to its *dicta* from the *Loizidou* case, where it held that the Convention was a constitutional instrument of European public order, whose purpose was to ensure the observance of the engagements undertaken by the High Contracting Parties[178]. It still remains a question how the respective phrase from the *Loizidou* case could be interpreted as a limitation of the extraterritoriality of the Convention. Or, *ad absurdum*, does European law allow violation of the universal rights outside of the CoE? Was the RFY not part of the territory of the continental Europe?

Returning to the analysis of the criterion of effective/overall control in the *Banković* case, the Court limited itself to mere generalizations. It is remarkable that the High Court did not specify whether the military actions exercised extraterritorially, without that the agent of the State stepped into another State, may engage jurisdiction under Article 1 of the ECHR. The *raison d'être* leading to the overall conclusion of the Court in the present case was apparently the following: the State must exercise its jurisdiction, based on criteria of effective/overall control, in an exclusive way. This means that in order to exercise jurisdiction extraterritorially, the State participating in military action should have exclusive authority over the territory where it interfered with the person's rights at that time, unless there is an

[178] Case of *Loizidou*, judgment on the preliminary objections…para. 93.

arrangement with the respective State in this regard. Such a situation is only possible when the first State is the invader for the purposes of article 42 of the Hague Regulations, or exercises exclusive control through its agents. Thus, it is irrelevant whether the state has title over the area; it is important to have a *de facto* control over it. Even in 2001, such a limited approach did not reflect the realities of conducting armed conflicts, which were much more diversified.

We consider that in the present case the Court misapplied both the Convention and the norms of international responsibility of States, especially of responsibility of the agents for the actions of States, as well as contradicted its case-law prior to *Banković*.

In the context of the same facts, the relatives of victims of the RTS building bombing also tried to lodge complaints before Italian national courts[179]. Given the political and logistical support provided by Italy to NATO member States, they filed civil actions, based on Italian tort law against the Italian Prime Minister, Minister of Defence, and the Command of NATO's Allied Forces in Southern Europe. The Italian Court of Cassation held that, as the acts of war of the Italian State had been manifestations of political decisions, no national court was competent to adjudicate the State in the respective circumstances. Moreover, the Italian national law did not provide for the right to adjudge compensation from the State for violations of international norms. Therefore, the national courts had no jurisdiction *ratione materiae* in such situations. As to the alleged violation of rights under Article 6 para. 1 of the Convention, the Court concluded that since applicants brought an action in the Italian civil courts, there was undoubtedly a jurisdictional link, i.e. under Italian

[179] Case of *Markovic and Others v. Italy*, judgment of 14.12.2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-78623 (accessed on 29/06/2014)

jurisdiction[180], the access to justice only extended to procedural aspect, without covering the substantive one[181].

In the *Markovic* case, the Court gave priority to national regulations, impeding individuals to file an action against the State in respect of its "political" acts. In our opinion, in the present case the *access to justice* was deprived of its substance, even considering that the access to justice is not an absolute right, and the concept of "acts of State" does not enjoy an interpretation that would enhance the predictability of the relevant case-law. The decision of the Grand Chamber was indeed controversial, given that seven judges voted against it.

The Court's decision becomes clearer if it is looked at through the concept of jurisdictional immunity of States. We believe that the terms "political act" or "act of State" (including acts of war committed by (non-)breaching international law) in the present case largely overlap with the functional immunity of States. However, States are not subject to liability when "sovereign acts" are invoked against them in the national courts. The concept of sovereign acts cannot be broadly interpreted, but there are some examples: acts deriving from the functions of foreign policy, national defence, or general State security. The Court usually gives priority to State interests in terms of sovereign acts which may explain to some extent its decision in *Markovic* case.

The Grand Chamber developed a different approach in its decision in the cases of *Behrami* and *Saramati*[182]. The applicants invoked the responsibility of the States, whose high-ranking military officers, by their acts, violated the Convention while

[180] *Idem*, para.55.
[181] *Idem*, para.115.
[182] Cases of *Behrami and Behrami v. France* and *Saramati v. France, Norway and Germany*, decision of 02.05.2007. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80830 (accessed on 29/06/2014)

being on the territory of Kosovo under the UN Security Council resolution. Although the alleged interference occurred on the territory of Kosovo, the Court did not give its view on the (non-)applicability of the ECHR outside of its legal space.

The first group of applicants claimed violation of Article 2 due to the respondent States' failure to defuse the undetonated cluster bomb units, previously planted on the territory of Kosovo. The second group of applicants complained under Articles 5, 6 and 13 of the Convention due to their arrest and unjustified detention by KFOR members.

At the moment the impugned acts were performed, the territory of Kosovo was under the exclusive control of the KFOR and UNMIK, authorities in UN subordination, and this fact legitimately raised the question whether the actions/omissions of its Members were generally imputable to the respondent States. This circumstance makes a difference between the impugned decision and the one in the *Banković* case, the Court focusing mainly on whether it had jurisdiction *ratione personae* to examine the merits of the case. Thus, having stated that the acts alleged of above were attributable to the agents (soldiers) of the Contracting States, the Court had to decide whether the respondent States exercised on them such a control as to engage their extraterritorial responsibility, i.e. to decide whether the acts were imputable to the States or the UN. The High Court was generally protective in respect of the authorities subordinated to the UN, establishing a presumption of legality of their actions if they are performed in accordance with Chapter VII of the UN Charter, since one of their goals explicitly or implicitly is to protect the human rights, identical to those provided for in the Convention. Just in the case of obvious deficiencies in the protection of fundamental rights and freedoms, the States' responsibility could be engaged. The Court found

that States generally involve in their detached soldiers' actions, but they "do not interfere in operational matters"[183]. Therefore, the Court implicitly recognized that the acts of the high-ranking military officers detached by the armed forces of the respondent States could be basically attributed to the latter, however, it did not find sufficient control from them.

In the above cases, the realization of the decisions taken in accordance with the UN Charter was delegated to some authorities, subsidiary to the organization. The situation is somewhat different when States are required to take certain measures emerging from the UN Security Council resolutions, not in a collective way, but independently, as in the *Bosphorus*[184] and *Nada*[185] cases. In both cases, the applicants claimed violation of the Convention due to the prohibitions established by the UN Security Council resolutions, the realization of which being the obligation of every State. In the *Bosphorus* case, the State authorities seized an aircraft leased by the applicant, a legal entity registered in Turkey, from a Yugoslav airline, in the context of economic sanctions against Yugoslavia. In the *Nada* case, the applicant was not able to leave the Italian enclave of *Campione d'Italia*, surrounded by the territory of Switzerland, because he was suspected by the Security Council to be a member of a terrorist organization. So, in both cases the alleged actions were imputable to the respondent States exclusively.

As in the *Behrami* case, the Court relied on the presumption of legality of the State's actions, whenever the respective resolution of the Security Council was directed towards ensuring an equivalent number of rights and freedoms as defined

[183] *Idem*, para.138.
[184] Case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Andrketi v. Ireland,* judgment of 30.06.2005. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69564 (accessed on 30/06/2014)
[185] Case of *Nada v. Switzerland*, judgment of 12/09/2012. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113118 (accessed on 30/06/2014)

in the Convention. The equivalence only refers to the means or objectives of the tools, not to the results that could be obtained after completion of the UN policies. Only in case of obvious shortcomings of those means, the presumption of equivalence, i.e. of the legality of the measures taken by individual States, could be overturned. Only in the *Nada* case, the Court established obvious deficiency, given that the Security Council resolution involved restricting human rights; thus, it was the first time in the Court's case-law that the respective presumption was overturned[186]. Nevertheless, the resolution in the *Bosphorus* case implicitly also provided for the violation of some economic agents' rights, but the Court's assessment was different from that in the *Nada* case. The presumption of legality in the first case was also founded by relying on the decision of the Court of Justice of the European Union (ECJ), which bound Ireland to comply with that resolution, the Court considering the fact that the respondent State was not entitled to a contrary behaviour[187].

It is curious that the possibility of attributing actions to State agents also depends on the moment of delivery of the relevant resolution of the UN Security Council in relation to the *de facto* committing the extraterritorial act. Thus, in the cases of *Behrami*, *Bosphorus* and *Nada*, the extraterritorial act was preceded by a resolution, which caused a certain behaviour of State authorities (*Bosphorus, Nada*), or determined the institution of a coalition authority intended to govern affairs within Kosovo (*Behrami*).

As it can be seen, the implementation of UN policies and the compliance with the international obligations assumed do not exempt the High Contracting Parties from respecting the rights and freedoms provided for by the ECHR, the States being

[186] *Idem*, para.172.
[187] Case of *Bosphorus*…para.165-166.

practically liable to conviction for the violation of the Convention, even for the implementation of a Security Council resolution. The obligations under international treaties cannot be interpreted in a vacuum, especially without taking into account the human rights protection instruments to which the State is (or not) a party, as provided for by the Vienna Convention on the Law of Treaties: "There shall be taken into account any relevant rules of international law applicable between the parties".[188]

4.3. Iraq – implementation of the State-Agent criterion to armed conflict circumstances

The actions of the United Kingdom armed forces in the Iraq war produced a positive development of the case-law with extraterritorial implications, overcoming in a great measure the precedent following the Yugoslav conflict.

The Iraq armed conflict can be separated into two phases. The first relates to the invasion by US and UK armed forces, which began on 20 March 2003, and ended on 1 May 2003. Subsequently, the second phase of the conflict started, and the US and UK armed forces became occupying authorities in the purpose of international humanitarian law. They created by the Coalition Provisional Authority (hereinafter "APC") designed to act as a transitional government to restore security and political stability[189], whereas the United States and the United Kingdom split Iraq into regional areas, and they were each "responsible" for their spaces. According to the CPA Regulation, the British armed forces had two main functions: to ensure security and to support the civil administration, including Al-Basrah and Maysan provinces,

[188] Article 31 para.3 (c) of the Vienna Convention on the law of treaties.
[189] Case of *Al-Skeini*…para. 12.

where multiple violations of the Convention are alleged to have been committed. The security-related tasks included patrol, arrests, anti-terrorist operations, control of civil demonstrations etc. According to the Rules of Engagement (as in the CPA Regulation), the armed forces had the right to use force only in self-defence and for the protection human life, if absolutely necessary. The cases of application of force had to be duly reported to superiors, and investigations were to be carried out at the discretion of the military authorities, the "Special Investigations Branch", a formally independent organ of the British armed forces[190].

In the *Al-Skeini* case, all six applicants alleged non-compliance with the positive obligation under Article 2 of the ECHR to conduct an investigation into the situation of the applicants' relatives killed by the British armed forces, and under Article 3 of the ECHR in respect of the sixth applicant. All applicants were killed in different circumstances, each of them being important in a separate way. All violations were committed on the territory controlled by the British armed forces, because of the actions and omissions of British soldiers in their capacity as agents of the United Kingdom.

As to jurisdiction, having reiterated the principle of territoriality, the Court gave a broad interpretation of those two existing criteria for attracting extraterritorial responsibility: the "State agent authority", and effective control. Given the fact that the UK was an occupying State and was obviously exercising jurisdiction over south-eastern Iraq, actually substituting the government of the occupied State by the APC, the Court could have applied the "classic" criterion without any difficulty. However, it advocated for the broad interpretation of the criterion of *"State agent authority"* and clarified many contradictions arising after its

[190] *Idem*, para. 28.

decision in the *Banković* case, by stating the following: "It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be *divided and tailored*"[191]. This paragraph is a genuine standard on the extraterritorial application of the Convention, whenever the State acts through its *ex lege* or private agents. Moreover, the respective State is bound to ensure only those rights and obligations which they can objectively guarantee. However, we must not be misled by the illusion that the High Court indeed analyzed the state of occupation exercised by the respondent Government in great detail in terms of choosing the criterion applied. The Court held that the United Kingdom had exercised on Iraqi territory powers similar to those of a viable government, which is an additional argument on the exercise of extraterritorial jurisdiction over persons within Iraq.

In the *Al-Skeini* case, the Court could have identified the jurisdictional element through the effective control criterion (although questionable because "in determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area"[192]), since the latter, as already noted, is a form of occupation, which may involve actual control. Accordingly, the territories on which the UK exercised governmental powers were also under its effective control. However, the Court decided to renovate its previous practice because since *Al-Skeini*, the "State agent authority" criterion had not been applied in circumstances of armed conflicts. Although the Court's approach can be only commended, the problem of applying the "State agent authority" is not that

[191] *Idem*, para. 137.
[192] Case of *Al-Skeini*…para.139.

simple. If we look at it from the perspective of benefit of potential applicants, it proves to be somewhat limiting, if compared with the effective control. The effective control imposes the obligation to guarantee human rights and freedoms in spatial terms, i.e. anytime to anyone on the territory placed under effective control, whereas the jurisdictional link exists from the moment of exercising effective control. On the other hand, the "State agent authority" test imposes an obligation in "personal" terms, i.e. the jurisdictional link between the victim and the State exercising extraterritorial jurisdiction shall be determined separately for each violation. The moment of appearance of the jurisdictional link coincides with the moment when the violation of the right or freedom is committed. At the same time, the "State agent authority" criterion attracts a higher standard of proof: beyond reasonable doubt. This means that *in abstractio* none of the respective criteria provides benefits to each other, in terms of protecting the victim of an eventual violation, since the their applicability is determined depending on the circumstances of the case.

The relative of the first applicant – *Al-Skeini* – was killed in the street on his way to a funeral ceremony, where it is customary for guns to be discharged in the air. He was suspicious to the British soldier, and the latter applied his firearm from a distance of about 10 meters from the victim[193]. The relative of the second applicant – *Salim* – was shot dead inside a private estate, where he entered openly carrying firearms. The members of the armed forces stormed the building though the victims did not present an imminent danger[194]. The third applicant – *Shmailawi* – acted on behalf of his wife and son[195]. All three lived in the building of the Institute of

[193] *Idem*, para. 34.
[194] *Idem*, para. 39.
[195] *Idem*, para. 43.

Education, where the applicant used to teach. Following military actions, his wife was wounded in the head, and his son in the arm, while all three were having dinner inside the building. The fourth applicant – *Muzban* – represented his brother, who was shot dead while driving a van, being unarmed, due to seeming suspicious to a British agent[196]. The fifth applicant, his father – *Kareem Ali* – was last seen being beaten by British soldiers; he was later found dead in a river[197]. The sixth victim – *Baha Mousa* – represented by her father, used to work at the reception of a hotel. After a military operation, she was taken into custody by British armed forces. She later died of asphyxiation after 93 injuries identified on her body. The body showed signs of blood and bruises; her nose was broken, and part of her facial skin was torn[198].

From the circumstances of the case there may have noticed that all the applicants, except of the sixth one, died outside of the premises under the control of the British armed forces. The Court concluded that there had been a violation of the positive obligation under Article 2 of the ECHR because the respondent government had failed to carry out an effective investigation into the death of the first five applicants' relatives. The Court held that an investigation carried out by a non-independent body cannot be considered effective.

Given the circumstances of the case, there can be distinguished two types of the "State agent authority" relationships. Firstly, it is the case when the alleged victim is inside the premises under the exclusive jurisdiction of the State, as is the case of the sixth applicant. This situation is analogous to that of the State exercising extraterritorial jurisdiction in the premises of diplomatic and consular missions, as

[196] *Idem*, para. 47.
[197] *Idem*, para. 55.
[198] *Idem*, para. 63.

reflected in the previous relevant case-law of the Court. Another situation relates to the broad interpretation of that criterion, when people are under the jurisdiction of the State whenever there is a causal link between the direct or private agent of the State and the violation committed extraterritorially; thus, a jurisdictional link is formed between the State action and the interference with the rights and freedoms of a person outside of that State's respective territory.

The case has the following important aspects:

1. The Court reinforced the autonomy of the notion of jurisdiction by applying for the first time the "State agent authority" criterion in circumstances of armed conflicts. The notion of jurisdiction under Article 1 of the ECHR reflects its traditional perception of public international law.

2. The ECHR is applied extraterritorially whenever a State agent commits a violation outside its territory; this can be views as a starting point diverging from the concept of "exceptions to the principle of territoriality", which was aggressively promoted by the Court in its previous case-law.

3. The concept of *espace juridique* (legal space) is no longer viable to limit the extraterritorial application of the Convention.

4. When the Court applies the "State agent authority" criterion, the Contracting Party shall be responsible for the respect of fundamental rights and freedoms proportionally to its actions/omissions.

5. In order for extraterritorial responsibility to be engaged, it is not necessary that the State exercise the powers of a civil administration (Court's argument in the *Banković* case).

Also, it shall be pointed to the "functional jurisdiction" test developed by the Maltese Judge Bonello in a concurring opinion in the *Al-Skeini* case, who proposed

the application of a single criterion: "authority and control". Moreover, this criterion had been long applied by other international jurisdictions without any technical or doctrinal difficulties.

As to the judge, "*the Court's case-law on Article 1 of the Convention (the jurisdiction of the Contracting Parties) has, so far, been bedevilled by an inability or an unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies*"[199].

According to the judge, people would fall under the jurisdiction of the State whenever the State fails to ensure the observance of human rights in any of the following five primordial ways:

- Respect for human rights;
- Implementation of systems to prevent violations;
- Investigation of complaints of human rights abuses;
- Scourging of State officials who infringe human rights;
- Compensating the victims of breaches of human rights[200].

The functions proposed by the Maltese judge are nothing more than a specific classification of obligations that States are bound to comply with under the ECHR. Therefore, these "functions" should not cause additional difficulties in interpretation.

According to the concept of *functional jurisdiction* the State would have "extraterritorial" jurisdiction whenever it exercises authority over people through its agent, or has a degree of sufficient control over a territory or premises (the premises of diplomatic or consular missions, ships or aircrafts, or of any immovable property), in which the victim of the act causing interference with the fundamental rights and

[199] Case of *Al-Skeini*…Concurrent opinion of Judge Bonello, para. 4.
[200] *Idem*, para.10.

freedoms is found. In other words, it could be interpreted as to what extent the victim depended on the respondent State's agent in case of violation.

The case of *Al-Jedda*[201], similarly to that above, refers to the violation of Article 5 para. 1 of the Convention due to the illegal detention of the applicant for 3 years in British premises without being charged. The Court applied again the "State agent authority", using the same wording as in Al-Skeini that "the applicant had been under the authority and control of the United Kingdom throughout his detention", thus analogously referring exclusively to the premises under British control. If the present case does not generate controversial issues on jurisdiction, at least it raised issues related to the existence of infringements. The respondent Government considered that the applicant's detention was imputable to the United Nations. The Court noted that at the time of the invasion of Iraq in March 2003, there had been no Security Council resolution providing for the manner of distribution of roles in Iraq in the event of regime change. According to the Court, the UN assumed the role in humanitarian assistance, supporting the reconstruction of Iraq, and support in establishing a provisional Iraqi authority, but not security. For the Court, the subsequent resolutions of the Security Council did not change the situation at all, and, therefore, the applicant's detention was not imputable to the United Nations, but rather to the United Kingdom. The Government's second argument was the fact that the Security Council resolution 1546 provided for the United Kingdom's obligation to resort to detentions in Iraq, and that, under Article 103 of the UN Charter, the obligations set out in the resolution prevailed on the ones arising of Article 5 para. 1 of the Convention. In the Court's view, the United Nations was not created with the sole purpose of maintaining international peace and security, but

[201] Case of *Al-Jedda v. the United Kingdom*, judgment of 07/07/2011. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105612 (accessed on 22/04/2014)

equally to “achieve international cooperation”, developing and encouraging respect for human rights and fundamental freedoms. The Court is of the opinion that a resolution of the UNSC must be interpreted as a presumption that it does not involve obligations which would contravene the fundamental principles in the protection of human rights. In case of ambiguity regarding the contents of such a resolution, the Court is the one to decide which interpretation best meets the conventional requirements in order to avoid any conflict between obligations. Given the importance of the United Nations’ role in the development and protection of human rights, the Security Council, as to the Court, must use clear and explicit instructions if it intends that States adopt specific measures likely to conflict with their obligations under international standards for the protection of human rights. In the absence of clear provisions to the contrary, the Court assumed that UNSC expected the multinational force of its Member States to help maintain security in Iraq in compliance with their obligations under international human rights law, the European Convention being part thereof. Finally, the Court considered that the UNSC Resolution 1546 had authorized the United Kingdom to take measures to help maintain security and stability in Iraq, but never to imprison, without time limit and indictment, someone who according to authorities was a risk to Iraqi security.

However we do not fully agree with the Court’s position. If we could agree with the majority of judges on jurisdictional issues, then we do not consider that in this case there was a violation of Article 5 para. 1 of the Convention[202]. The disagreement is based on the character of Article 103 of the UN Charter, which provides that the obligations of the Member States under this text shall prevail over any other obligation under international law. In paragraph 10 of the United Nations

[202] See the partly dissenting opinion of Judge M. Poalelungi to the judgment in the case *of Al-Jedda v. the United Kingdom* of 07/07/2011.

Security Council Resolution 1546, adopted on 8 June 2004, the UNSC ruled that the multinational force was "empowered to take all necessary measures to contribute to maintaining security and stability in Iraq", in accordance with the letters appearing in the Annex to this resolution. One of these letters, addressed to the Secretary of State Colin Powell confirmed that the multinational force was ready to take on a whole range of tasks, and in particular to resort to internment that necessary for imperative reasons of security. The majority of the Court concluded that the provisions of Resolution 1546 were not sufficiently clear. Unfortunately, we consider that it is unrealistic to request the Security Council to express in advance in detail each measure that military force might adopt in order to contribute to peace and security by virtue of the mandate in question. Detention, or internment, is a measure often used in situations of conflict, and humanitarian law has long recognized it. We believe that from the text of the resolution, given the context in which the multinational force has been already functioning and used to resort to detentions in Iraq, it is clear that the Member States were allowed to continue taking such measures as necessary. Therefore, the obligation in respect of the applicant's internment, incumbent on the United Kingdom under the Security Council authorization, prevailed over the obligation arising from Article 5 para. 1 of the Convention.

Another case – *Al-Saadoon and Mufdhi*[203] – refers to the period after 28 June 2004, when Iraq's occupation by British armed forces ended, this being important in terms of the applicable criterion. In general, it is about two Iraqi nationals accused of committing war crimes, who originally (from March 2003) were detained in the premises under the control of the British armed forces, subsequently transmitted to

[203] Case of *Al-Saadoon and Mufdhi v. the United Kingdom*, judgment of 02/03/2010. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97575 (accessed on 22/04/2014)

the Iraqi authorities (on 31 December 2008). Both were later sent to Iraq, in breach of the obligation imposed by the European Court by the interim measure not to transfer them to the Iraqi authorities, for the reason that they could face the death penalty without a fair trial. The Court concluded that the applicants' psychological suffering due to the fear of execution by Iraqi authorities qualifies as inhuman treatment within the meaning of Article 3 of the ECHR[204].

The Court was not excessively specific in its conclusion regarding the jurisdiction of the United Kingdom on the applicants in question, namely: "The Court considers that, given full and *de facto* and *de jure* exclusive control, exercised by the UK authorities on the office in question, the persons held there, including the applicants, were under the jurisdiction of the United Kingdom (see *Hess v. the United Kingdom*)". Two elements can be highlighted in the High Court's conclusion. Firstly, it only refers to the premises under the control of the United Kingdom, and not to the territory occupied by the British armed forces. Secondly, the Court refers to the case of *Hess v. the United Kingdom*, where it held only that, in certain circumstances, the State can be responsible – in terms of the ECHR – for the actions/omissions of its authorities outside of its territory[205]. At the same time, the circumstances of the case are similar to those of the sixth victim – Baha Mousa – in the *Al-Skeini* case. Therefore, we consider that the High Court intended to apply the "State agent authority" criterion in the narrow sense of it, i.e. on the premises controlled by the respondent Government.

[204] *Ibid*, para. 144

[205] Case of *Hess v. the United Kingdom*, decision of 28/05/1975. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70003 (accessed on 22/04/2014)

The Court faced new challenges in the case of *Hassan v. the United Kingdom*[206]. The applicant complained under Articles 2, 3, and 5 of the Convention in respect of his brother, Tareh Hassan. Being captured by the British armed forces, and detained in premises under the priority control of the American armed forces, the applicant's brother was later found 700 km away from the place of detention, with eight bullet wounds and multiple injuries.

The case raised several issues previously not addressed specifically in the High Court's case-law. Firstly, we are interested in the question of jurisdiction and imputability of the facts alleged by the applicant to the United Kingdom. Having been captured, he undoubtedly was under the control and authority of British agents; however, later he was transferred to the American premises where British agents had a certain degree of control over the persons captured by them. The degree of control necessary to engage the jurisdictional element was disputed by the parties. The main controversy lies in the applicability of the existing criteria. The effective/overall control over the space could not be applied for two reasons: the capture and detention occurred during the active phase of the armed conflict, which obviously preceded the period of occupation; and the victim was found 700 km away from the place of detention, the space being under the control of neither the American nor the British armed forces. The only criterion applicable remains the "State agent authority", which also raises difficulties of interpretation. The "State agent authority" requires a high degree of proof, whereas the State had to exercise control over the victim and commit the alleged violation beyond reasonable doubt[207]. The situation is more difficult for the second phase, i.e. proving causality

[206] Case of *Hassan v. the United Kingdom*, judgment of 16/09/2014. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146501 (accessed on 17/09/2014)
[207] *Idem*, para. 48.

between Tareh's detention and the subsequent finding of his dead body with multiple wounds and bruises. However, as to the applicant, the victim had not been in contact with anyone after his capture, and even after his release from detention. The actual imputability of the violation of Articles 2 and 3 to the United Kingdom is somewhat doubtful, except for under procedural aspect. Indeed, the applicant failed to prove beyond reasonable doubt that the British government had reasons to ill-treat the victim, which would have imposed a procedural obligation to investigate the alleged torture[208]. The absence of evidence equally refers to the causality between the actions of the British soldiers and Tareh's death[209].

As to the jurisdiction, the Court disregarded the effective control criterion in favour of the "State agent authority" one[210], without summarizing the principles of application of Article 1 developed in the *Al-Skeini* case. Having analyzed the applicability and the purpose of Article 5, the Court held that the United Kingdom held the authority and control over Tareh from the moment of his capture until his release[211]. Therefore, the principle of monetary gold (see Section 5.2) was ignored, without considered the US jurisdiction over the detention premises. The jurisdiction of the United Kingdom was only engaged in terms of relevance of the application of the right to liberty under the rule previously established in the *Al-Skeini* case, i.e. the rights can be "divided and tailored".

The most important moment of the judgment refers to the same alleged breach of Article 5 in respect of the temporary detention in order for Tareh's status

[208] *Idem*, para. 57.
[209] *Idem*, para. 62-63.
[210] *Idem*, para. 75.
[211] *Idem*, para. 78, 82.

(of a combatant or civilian) to be determined under the Geneva Convention (III)[212], given the fact that the latter allows temporary detention of individuals to determine their status. Thus, as to respondent State, after Tareh's apprehension/detention and interrogation by British and Americans agents, he was determined to be a non-combatant, and was subsequently released. The problem lays in the fact that Article 5 para. 1 provides for exceptions to the right to liberty in a limited and exhaustive way. Among those exceptions there is none referring to the "temporary detention in order to identify the status of the person in accordance with international humanitarian law". Hence, we are confronted with the problem that under international humanitarian law Tareh's detention was lawful, whereas under the ECHR it was not. It shall be reiterated that the United Kingdom had not made any declaration pursuant to Article 15 of the Convention to suspend/limit the application of Article 5. The Court held that Article 5 was to be applied differently in respect of the arrests made in peacetime and wartime. Thus, even in the absence of express limitations, the High Contracting Parties may detain individuals under the Geneva Conventions as long as: the detention is not arbitrary; it is legitimate for the purposes of humanitarian law; it is in compliance with procedural standards adapted to humanitarian law; and there is a biannual assessment of the detention by a non-judicial body[213]. Moreover, for such an interpretation of Article 5 no derogation is necessary, in the light of Article 15[214].

By "adjusting" Article 5 to the circumstances of an armed conflict, the Grand Chamber modified jurisprudentially the content of Article 5, which provides for permissible limits in para. 1 thereof. Thus, the Court did not merely interpret the

[212] Convention (III) relative to the Treatment of Prisoners of War, signed on 12/08/1949 in Geneva. [online]: http://www.icrc.org/ihl/INTRO/375?OpenDocument (accessed on 28/06/2014)
[213] Case of *Hassan*…para. 97, 105, 106.
[214] *Idem*, para. 104.

article broadly, but rather has changed its purpose. In order to substantiate the reasoning, the Court relied on the following. Firstly, it applied Article 31 para. 3 (c) of the Vienna Convention on the Law of Treaties[215], which allowed the interpretation of Article 5 in the light of the humanitarian law[216]. However, the Court invoked a more important argument following from Article 31 para. 3 (b) of the Vienna Convention, according to which the text of the Convention could be changed on the basis of consistent practice on the part of the High Contracting Parties[217]. Because after the adoption of the ECHR, as the Court notes, States have made derogatory statements in circumstances of international armed conflict (not internal conflicts), the Grand Chamber held that the respective inaction could be considered sufficient to amend the Convention. It is true that in certain circumstances the content of the treaty may be modified by the practices of States, but in this case the Contracting Party's intention seems to be doubtable. Moreover, whenever States chose not to apply the Convention, a possible jurisprudential alteration thereof might occur. In any event, the present judgment will have major repercussions on the practice of applying the ECHR in circumstances of armed conflict.

The analysis of the Court's case-law in respect of the Iraqi conflict demonstrates primarily the evolution of the extraterritorial application of the European Convention, because the responsibility of a State would engage more easily whenever the applicant could prove the authority and control exercised over him/her by the agent of a State in circumstances of armed conflict. Secondly, it highlights the difficulties faced by the Court: the application of the existing criteria to

[215] There shall be taken into account, together with the context:
(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) Any relevant rules of international law applicable in the relations between the parties.
[216] Case of *Hassan*…para. 102.
[217] *Idem*, para. 101.

determine jurisdiction, and the correlation of the Convention with the rules of the international humanitarian law.

4.4. Transdniestria – negative aspect of the concept of jurisdiction

The Court's case-law on the extraterritorial responsibility of the Russian Federation in respect of the Transdniestrian conflict and its support to the separatist regime in Tiraspol was mostly influenced by the case-law developed in the context of the Cyprus conflict. However, the cases mainly concerning the actions of the Transdniestrian authorities have their peculiarities, such as engaging responsibility of the State having acted extraterritorially, as well as of the State on the territory of which the extraterritorial acts took effect; and the negative, or limited, definition of the concept of jurisdiction in relation to the Republic of Moldova's obligations arising from the Convention, regarding its own territories outside of its effective control.

As a result of the secessionist actions of the separatists in the Transdniestrian region, who proclaimed independence of the region, the active phase of the Transdniestrian conflict took place in 1991-1992. The separatist administration received at that time, and continues to receive today, military, political and economic support from the Russian Federation. Accordingly, the Moldovan Government has no effective control over the territory *de facto* administered by the separatist authorities. The circumstances are, in principle, analogous with those in the Northern Cyprus conflict. This influenced the findings of the Grand Chamber in terms of the responsibility of the Russian Federation in the light of the ECHR for the actions/omissions of the separatist administration, and, respectively, the liability of

the Republic of Moldova for the interferences committed on the territory under its *de jure* jurisdiction.

The Court established the extraterritorial responsibility of the Russian federation in the cases of *Ilaşcu and Others*, *Ivanţoc and Others*, and *Catan and Others v. the Russian Federation and Moldova*.

In the *Ilaşcu* case, the applicants complained that they had been arrested, detained, and prosecuted in breach of the rights and obligations under the ECHR. Having been initially taken into custody of the Russian armed forces, and later transferred to the Transdniestrian authorities, they claimed to have been tortured and detained in conditions contrary to Article 3, in violation of the right to freedom provided for by Article 5 para. 1.

The High Court held that the responsibility of the Russian Federation engaged in respect of unlawful acts committed by the Transdniestrian separatists, with the Russian military (due to the presence of its 14th Army), political, and economic support. The Court concluded that "the "MRT" ("Moldavian Republic of Transdniestria"), set up in 1991-92 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation"[218]. Therefore, the Court applied the criterion of *overall control* by implicitly stating that any unlawful action/omission of Transdniestria was imputable to the Russian Federation, and there was no need to prove the detailed link between the respondent State and its Transdniestrian agents in respect of the unlawful acts committed by the latter.

[218] Case of *Ilaşcu*... para. 392.

Thus, the Court took the approach analogous to that in the case of *Loizidou* and *Cyprus v. Turkey*. In the *Ivanţoc* case, similarly to *Ilaşcu* in substantial terms and in respect of the obligations of the Russian Federation, the Court reached a similar conclusion[219]. The findings of the Court in the *Ilaşcu* case were also applicable *mutatis mutandis* in respect of the jurisdiction of the Russian Federation in the *Catan* case[220].

After delivery of the judgment in the *Ilaşcu* case, there was a presumption of the responsibility of the Russian Federation for the illegal actions/omissions of the Transdniestrian authorities, it also extending to the actions of private individuals[221], whereas the burden of proving the contrary lied on the respondent Government [222]. Furthermore, in the *Catan* case, the Court held that it was not necessary to prove the causal link between the Russian government and actions of the Transdniestrian administration in infringing with the Moldovan nationals' right to education, guaranteed by Article 2 of Protocol No. 1, by closing educational institutions using the Latin alphabet in schools[223].

The situation is more specific concerning Moldova's jurisdiction over the applicants in the above cases. In this respect, it was established that even in the event of no *effective control* over a part of the territory because of the actions of a separatist regime the State continues to exercise jurisdiction over that territory in the light of Article 1 of the ECHR. However, jurisdiction in such cases has a distinct connotation, being limited exclusively to positive obligations endeavour, with all the legal and diplomatic means available *vis-à-vis* foreign States and international

[219] Case of *Ivanţoc*… para. 116-120.
[220] Case of *Catan and Others v. Moldova and Russia*, judgment of 19/1/2012. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114082 (accessed on 23/04/2014)
[221] Case of *Ilaşcu*... para. 318 .
[222] Case of Catan…para. 112.
[223] *Idem*, para. 114.

organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention[224]. Therefore, a State's responsibility for the violations committed on the territories beyond its *effective control* will be limited, and will only engage within a range of special positive obligations that the State must discharge[225]. These obligations merely include diplomatic, political, and judicial means arising from international law tools available to the State, without specifying expressly what measures Moldova should undertake. Therefore, the Court is the one to appreciate the relevance and sufficiency for the assessment of conformity. The Court also stated that Moldova could not be held responsible for international illegal acts (regarded as such in international law) under Article 1, which again emphasizes the independent nature of the concept of jurisdiction defined in Article 1.

In the above situation, the Conventional obligations are fragmented, and their imputability has its specifics.

Thus, in the *Ilaşcu* case, Moldova's responsibility for the alleged violations engaged due to the non-compliance with the aforementioned positive obligations, whereas in the *Ivanţoc* and *Catan* cases, the High Court concluded that the objection of the Moldovan government concerning its inability to exercise effective control over the Transdniestrian region had to be admitted. The Court established each time the presence of Moldova's jurisdiction, and examined the alleged violations of the Convention merely in the light of specific positive obligations, as mentioned above. Since Moldova fulfilled those obligations, as specified, its responsibility under the Convention could not be engaged[226]. This fact should not be interpreted as lack of jurisdiction as such. In the Ilaşcu case, the responsibility of the respondent States

[224] Case of *Ilaşcu*… para. 333.
[225] Case of *Ivanţoc*…para. 111; Case of *Ilaşcu*…para. 448, 453; Case of *Catan*...para. 148.
[226] Case of *Ivanţoc*...para.111; Case of *Catan*...para.148.

engaged proportionally to the degree of jurisdiction exercised by each Contracting Party on the territory of Transdniestria. In the other two cases, the overall circumstances were the same, and the Court assigned to Moldova the same limited "set" of positive obligations that had already been fulfilled.

A fortiori, the State's responsibility is also engaged due to the actions/omissions of local authorities, which, while refusing to execute the orders of the central (higher) authorities, are nevertheless formally and *de jure* under the State's empire. Therefore, the persons, being subject to the authority of local government, will be presumed to be under the jurisdiction of the State which allegedly committed the violation; hence this is a natural effect of the principle of jurisdiction territoriality. Especially in the absence of separatist aspirations from those local authorities, the respective presumption will be virtually impossible to be tackled due to the legal relationship, existing at administrative and constitutional level, between the local authority and the State, whereas all acts performed by local authority officers are attributable to the State. Thus, in a case against Georgia, the applicant invoked the State's responsibility for the acts of Ajaria (an autonomous administrative unit within Georgia, however, without the status of a federal state)[227]. The applicant was convicted by an Ajarian court to 12 years' imprisonment for kidnapping. The applicant appealed. The Supreme Court of Georgia quashed that judgment and ordered the applicant's release from the custody of the Adjarian authorities. That decision was not enforced, the applicant being deprived of his liberty without any legal basis, by the Ajarian Ministry of Security. The specifics of the case is that the Georgian central authorities took legal and political measures that in an "ordinary" situation would have been sufficient to prevent violation of

[227] Case of *Assanidze v. Georgia*, judgment of 08.04.2014. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61875 (accessed on 20/07/2014)

Article 5, but Ajaria continued refusing to release the applicant. The Court held that although the act of detention was directly attributable to the Autonomous Republic of Ajaria, Georgia was presumed to be responsible for the acts to that effect despite the difficulties in ensuring control over the Ajarian authorities. Moreover, Ajaria was not subject to effective outside control (as in the cases of the TRNC and Transdniestria), and did not have separatist aspirations. If the European Court had reached a different conclusion, there would have appeared an imminent risk of lack of protection of individuals with regard to several territories/authorities uncontrolled *de facto* by the High Contracting Parties, and subsequently the Convention would have lost its efficiency.

The Court adopted several decisions differing from the "Transdniestrian" cases where the plaintiff, a citizen of Kosovo, alleged violation of Article 6 para. 1 of the ECHR by Serbia in respect of the actions of the Kosovo court of law[228]. In terms of exercise of its extraterritorial jurisdiction, Kosovo differs from Transdniestria and the TRNC in that its civil administration was under the effective control of UNMIK, and all its local authorities were not controlled or supported in any way by the Serbian State. Also, at the time of examination of the impugned case, Kosovo was recognized as an independent State by at least 89 countries, which – at the conjuncture of the Western tendency on the problem – gives it a different status compared to that of Transdniestria or the TRNC. This finding conflicts with Serbia's obligation to secure human rights and freedoms on the territory under exclusive control of an entity, the independence of which is merely recognized by about 50% of the UN Member States.

[228] Case of *Azemi v. Serbia*, decision of 05.11.2013. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-139052 (accessed on 03/07/2014)

The Court ruled that the Serbia had not had any positive obligations in respect of the applicant, and that it generally could not be held liable under Article 1. The Court concluded that the application was incompatible *ratione personae* and had to be rejected[229]. This means that the Court established Serbia's lack of jurisdiction over the territory of Kosovo.

In general, the principle of territorial jurisdiction also has some other limitations, such as the presence of the International Criminal Tribunal for the former Yugoslavia at The Hague. It is obvious that the Netherlands will not be responsible for the work of the tribunal on its territory, given its subsidiarity to the UN Security Council[230].

The importance of the Court's case-law regarding the Transdniestrian conflict lies in the following:

- Even if the State does not exercise effective control over a portion of its territory, it still has a limited set of obligations towards the individuals within the respective territory, even if the violations are committed by an entity depending totally on external economic and military support;

- The economic and military support of a separatist regime may entail extraterritorial responsibility of the State, it being proportional to the degree of control exercised over the breakaway entity, and, accordingly, over the territory controlled by the latter. Despite the fact that territorial disputes are outside the Court's jurisdiction *ratione materiae*, people suffering from the actions of regimes,

[229] *Idem*, para.49.

[230] Case of *Blagojevic v. the Netherlands*, decision of 09/06/2009. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-93401 (accessed on 24/04/2014); Case of *Galic v. the Netherlands*, decision of 09/06/2009. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-93400 (accessed on 24/04/2014)

backed by a third country, may still seek respect for their rights and freedoms guaranteed by the Convention;

- The Court's case-law concerning the Transdniestrian conflict will largely influence the Court's judgments in the inter-State applications of *Ukraine v. the Russian Federation*, filed in connection with the annexation[231] of the Crimean peninsula by the Russian Federation[232] and Ukraine's positive obligations towards the population of the territory of the peninsula; and *Georgia v. the Russian Federation*[233]*(II)* in connection with the alleged extraterritorial acts of the Russian army that violated fundamental rights and freedoms in the Georgian regions of Abkhazia and South Ossetia.

4.5. Other cases on the exercise of extraterritorial jurisdiction of the Russian Federation – armed conflicts in Georgia and Ukraine

i. Abkhazia and South Ossetia

Georgia can be considered the most "aggressive" actor before international courts in the cases against the Russian Federation. In a recent application lodged before the International Court of Justice, Georgia claimed that Russia had breached the provisions of the Convention on the Elimination of All Forms of Racial Discrimination on the territories of Abkhazia and South Ossetia. By a judgment, the

[231] Resolution of the Parliamentary Assembly of the Council of Europe concerning the „Recent developments in Ukraine: threats to the functioning of democratic institutions", No. 1988 of 09/04/2014, para.12-16. [online]: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20873&lang=en (accessed on 30.06.2014)

[232] On 03.13.2014 an inter-State application, registered under no. 20958/14, was lodged before the Court. Under Article 39 of the Rules of Court, on the same day the Court applied the interim measure to call upon both Contracting Parties concerned (Russia and Ukraine) to refrain from taking any measures, in particular military actions, which might entail breaches of the Convention rights, notably in respect of Articles 2 and 3 of the Convention. Press release of 13/03/2014. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-4699472-5703982 (accessed on 30/06/2014)

[233] Case of *Georgia v. Russia*, decision of 13.12.2011. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108097 (accessed on 30/06/2014)

ICJ decided to strike that application off its list of cases on the grounds that the Applicant State had not started negotiations, and thus it had not complied with the procedures laid down in the Convention, for the extrajudicial settlement of the dispute[234].

The armed internationalized conflict of August 2008, which primarily took place in the breakaway regions of northern and north-western Georgia, has sparked a wave of claims against the Russian Federation and Georgia due to the acts of aggression on the population of Abkhazia and South Ossetia.

Before the European Court of Human Rights, Georgia filed three inter-State applications against the Russian Federation. The first one refers to the expulsion of Georgian nationals by the Russian Federation, after Georgian authorities had arrested in Tbilisi four persons suspected of espionage; these events had preceded the active phase of the armed conflict in Abkhazia and South Ossetia. In a recent judgment, the Grand Chamber stated the existence of repetitive acts, tolerated by the Russian government, of arbitrarily depriving Georgian citizens of their liberty and their subsequent collective expulsion[235]. The second group of applications refers directly to the armed conflict in August 2008, as a result of which there were submitted over 3300 individual applications against Georgia and the Russian Federation due to the hostilities on both sides[236], and two inter-State applications.

[234] *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, judgment of 01/04/2011 on the preliminary objections. [online]: http://www.icj-cij.org/docket/files/140/16398.pdf (accessed on 26/07/2014)

[235] Case of *Georgia v. Russia (I)*, judgment of 03/07/2014. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145546 (accessed on 26/07/2014)

[236] See the press release of the Court's Registry concerning striking out 1549 applications against Georgia. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3391240-3803578 (accessed on 26/07/2014)

The last one, referring to the detention of four underage Georgian national by South Ossetian authorities was struck out due to their release[237].

In the other inter-State application that has yet to be examined on the merits by the Court in Strasbourg, Georgia invoked the responsibility of the Russian Federation for the various violations of the Convention committed by the armed forces of the breakaway Abkhazia and South Ossetia, which, as to the Georgian Government, had exercised overall control over those two regions, as agents of the Russian Federation. Moreover, Georgia also claimed that Russia had been responsible for violations committed by its agents who had exercised effective control over Abkhazia and South Ossetia during the relevant period[238].

From substantial point of view, this case will have a high degree of complexity, raising difficulties both in terms of the jurisdiction of the Russian Federation and of correlation of provisions in the international humanitarian law and the international human rights law.

Under substantive aspect, the High Court has to decide on the violation of Article 2 due to the alleged non-discriminatory bombing and disproportionate killings of civilians, including through the use of cluster bomb units, arbitrary executions, as well as their ineffective investigations. Also, the Applicant Government invoked torture of *hors de combat* persons, rape of civilians, arbitrary deprivation of liberty of children and aged people, expropriation of people of their immovable properties, and violation of the freedom of movement, especially of Georgians. It can be noted that from substantial point of view the present case is not easy at all, its level of complexity being similar to that of *Cyprus v. Turkey*. The Council of Europe criticized

[237] Case of *Georgia v. Russia*, decision of 16/03/2010. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98167 (accessed on 26/07/2014)

[238] Case of *Georgia v. Russia (II)*, decision of 13/12/2011. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108097 (accessed on 26/07/2014)

the actions of both parties to the conflict, and decided to send an international fact-finding mission to the regions affected by the armed conflict[239].

As to the admissibility of the case, the most difficult problem will be to establish the extraterritorial jurisdiction of the Russian Federation. Both in its application and during the hearing before the Grand Chamber, Georgia argued that Russia had to be held responsible for the actions of its direct agents, i.e. of the members of the Russian military contingents involved in conflict, because the effective control over that space had been exercised through them. Also, Russia's responsibility should engage due to the acts of the Abkhaz and Ossetian authorities/armed forces since the overall control over that area had been exercised by them, those authorities surviving only because of the military, political and financial support offered by the respondent State. Although by the hearing in that case [240] the Grand Chamber had already ruled in the *Al-Skeini* case, the representatives of the Georgian government argued specifically for the criterion of overall/effective control over the space, which seems to be justified given that Russia had provided political support to the regions by recognition of their statehood, and by providing direct military support. According to the Reuters agency, two thirds of South Ossetia's budget comes from the support provided by the Russian Federation[241]. Moreover, probably it cannot be disputed that the control exercised by the separatist authorities over the territories concerned is exclusively. In aggregate, these factors could involve without difficulty the extraterritorial

[239] PACE Resolution No. 1633(2008) on the consequences of the war between Georgia and Russia. [online]: http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=17681&lang=en (accessed on 26/07/2014). PACE Resolution No. 1647(2009) implementation of Resolution 1633 (2008). [online]: http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=17708&lang=en (accessed on 26/07/2014)

[240] Record of the hearing in the case of *Georgia v. Russia (II)*, of 22/09/2011, 9:00. [online]: http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=3826308_22092011&language=lang (accessed on 26/07/2014)

[241] "FACTBOX-What is Georgia's rebel South Ossetia region?" of 08/08/2008. [online]: http://www.reuters.com/article/2008/08/08/idUSL8557850 (accessed on 26/07/2014)

applicability of the Convention on basis of the criterion of effective/overall control since the circumstances are equivalent to those in the cases of *Loizidou* or *Ilaşcu*. By applying this criterion to the mentioned circumstances, the persons being subsequently under Russian jurisdiction could benefit from a highest degree of protection and/or remedy due to the damage suffered.

In its observations and at the hearing, the respondent government relied on the justification of the Russian military intervention by reiterating the "doctrine of protection of nationals abroad" and on the general inapplicability of the European Convention by advancing several somewhat original arguments, given the difficult position of the respondent State.

The Russian representative asked the Court to reassess its relevant case-law on the extraterritorial application of the Convention in time of armed conflict by raising three arguments. Firstly, the Convention should not have to be applied extraterritorially except for in the cases expressly provided for in the Convention, referring to the colonial clause, because by applying it extraterritorially, the Convention would stray away from the limits set by the High Contracting Parties, thus Article 1 not having to be subjected to a "live interpretation". Secondly, the ECHR should not have to be applied during armed conflict because its effectiveness would be diminished during the respective period, which could have a negative influence on the case-law at national level. The Russian government also used the argument of Turkey in the cases involving the TRNC, arguing that Abkhazia and South Ossetia were independent democratic States. We are not sure whether such an approach could be justified, and whether the effectiveness of the Convention would improve as a result non-application thereof in armed conflicts.

In any event, the question will not be whether Russia has exercised authority and control over the respective territories; it would rather impose the situation to determine whether the degree of the control exercised by Russia over South Ossetia and Abkhazia has been sufficient to attract the extraterritorial applicability of the Convention.

ii. Crimea and the eastern regions of Ukraine

As a result of the refusal of the former Ukrainian President to sign the Association Agreement with the EU and the subsequent public disorder in Kiev, the political stability in many parts of south-eastern Ukraine had to suffer from the internal instability created in that way, and due to the geopolitical interests of the Russian Federation.

Three days prior to the Crimean "referendum" on determining its status, leading to its annexation by the Russian Federation, which was "condemned" by the UNGA[242] and PACE[243], Ukraine lodged the inter-State application no. 20958/14 against the Russian Federation. Although the case has not yet been communicated to the respondent State, it is foreseeable that the Applicant State would invoke the violations of the ECHR committed by the Russian Federation, particularly, on territories under its previous control.

Under substantive aspect, the worst violations of the Convention may involve primarily the collateral damages caused by acts of war[244] (both the lives of civilians and their property) and investigations in that respect, as well as kidnapping and

[242] UNGA Resolution No. 11493 of 27/03/2014 Calling upon States Not to Recognize Changes in Status of Crimea Region. [online]: http://www.un.org/News/Press/docs/2014/ga11493.doc.htm (accessed on 26/07/2014)
[243] PACE Resolution No. 1988(2014) on the recent developments in Ukraine: threats to the functioning of democratic institutions. [online]: http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20873&lang=en (accessed on 26/07/2014)
[244] Report on the human rights situation in Ukraine of 15/06/2014. Office of the United Nations High Commissioner for Human Rights, para. 28. [online]: http://www.ohchr.org/Documents/Countries/UA/HRMMUReport15June2014.pdf (accessed on 27/07/2014)

detention of civilians[245] (mostly journalists and public officials), torture and inhuman treatment, arbitrary executions (which may raise questions as to the legality of the tribunals of armed groups under Articles 5 and 6 of the Convention). Regarding the violations across the peninsula, especially in the period after its annexation, there are two main issues: violation of the minorities' rights – mainly of Tatars[246]; and the specific situation of law enforcement – Russia is applying its law in Crimea, regardless of when a legal relationship occurred, so that adjudication is only exercised under Russian law, whereas the appellate proceedings are also exercised under material and procedural provisions of Russian law, regardless of the law applied on the merits of the case[247].

The present case differs from the others concerning Russia's exercise of extraterritorial jurisdiction in that its forces were never involved directly and openly in regions of Crimea, Luhansk, and Donetsk. In this respect there are to be distinguished two situations: before and after the annexation of the Crimean peninsula by the Russian Federation.

With respect to the period after the annexation of the peninsula, we believe that the annexation amounts to the exercise of effective control over the peninsula area, which will not prejudice the illegitimacy of the act of annexation itself, so that Russia would bear responsibility according to Article 1 in respect of all Crimean inhabitants. It would be more difficult to identify the jurisdiction of the Russian Federation over some Crimean territories, or over the entire peninsula, in the period before the referendum and annexation, i.e. when the local authority buildings began

[245] *Idem*, para. 35.
[246] *Idem*, para. 185, 187, 192.
[247] Report on the human rights situation in Ukraine of 15/06/2014. Office of the United Nations High Commissioner for Human Rights para. 285-286. [online]: http://www.ohchr.org/Documents/Countries/UA/HRMMUReport15June2014.pdf (accessed on 27/07/2014)

to be controlled by unidentified armed groups, as well as the armed groups acting in Luhansk and Donetsk. In order to establish the jurisdiction of the Russian Federation in the last two cases, (a reasonable and predictable objective, which will most likely be determined by the request of the Applicant State) Ukraine will not have to prove the existence of specific orders/directives of the Russian federal authorities; it will need to prove that the existence of the respective armed groups was determined by the Russian military, financial and political support, relying on which the Court will determine the degree of control and its compliance with the criterion of effective/overall control. We consider that the "State agent authority" will be inapplicable in these particular circumstances because of lack of direct military involvement of the Russian Federation through its military contingents.

4.6. Importance hierarchy of the procedural obligations under Article 2 of the ECHR

The extraterritorial obligations of States under the Convention have certain peculiarities, which are highlighted by the general range of duties. It is also commonly recognized that there is no formal hierarchy among the rights and freedoms set out in the ECHR; however, there is a so-called *hard core* of the Convention, which incorporates the most important rights and freedoms such as the right to life, prohibition torture and inhuman or degrading treatment or punishment, prohibition of slavery, the *nullum crimen sine lege* and the *ne bis in idem*, and the prohibition of capital punishment. The provisions of the hard core are invoked most often in cases involving extraterritorial implications, and the procedural obligations evolved of Article 2 of the Convention appear to have an important role.

This is primarily due to the observation that the extraterritorial obligations are of a secondary nature to the act causing interference, as previously stated. The obligation to investigate is easier to be proved if compared with the substance of Article 2, and States are required to investigate the death of a person, especially in circumstances where there is a reasonable suspicion that the victim's death was caused by the actions of State agents. Therefore, due to a practical reason the applicants often invoke specifically the violation of Article 2 alleging lack of an effective investigation. The standard of proof to the substance of Article 2 is *beyond reasonable doubt*, whereas proving the State's inaction in respect of the investigation is less difficult, in factual terms. It is clear that for the effective and practical protection of the right to life, the State has to conduct an effective investigation into the killing of persons under its jurisdiction (but not be limited to it), especially when there are signs that the victim's death occurred due to the arbitrary actions of a State agent[248]. The obligation to conduct an effective investigation is, as noted in this chapter, especially relevant in the circumstances of armed conflicts, when the risks of such arbitrariness reach considerable magnitude. The investigation should reflect promptness, efficiency, and carried out by an independent body[249].

As regards the right to life, the High Contracting Parties rarely have the objective opportunity to fulfil their extraterritorial positive obligation to protect it. However, in absolutely all cases they have the procedural obligation to investigate the interference with the victim's rights[250], especially if the person died as a result of the actions of State agents.

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[248] See in this respect: Case of *McCann and Others v. the United Kingdom*, judgment of 27.09.1995, para. 146-148. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57943 (accessed on 23/06/2014)

[249] Case of *Al-Skeini…*para. 167.

[250] Case of *Kaya v. Turkey*, judgment of 10.02.1998. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58138 (accessed on 23/06/2014)

From formal point of view, Article 2 does not change its structure. However, depending on the criterion applied to identify jurisdictional element, Article 2 has a diverse structure in terms of the exercise of extraterritorial jurisdiction. In case of an effective control over space, the State has the same obligations derived from Article 2 as if it exercised territorial jurisdiction. The situation is more difficult in case of the "State agent authority" criterion because the State rarely has a positive obligation to protect the right to life, whereas proving the non-compliance with negative obligation is more difficult. However, the procedural obligation arising from Article 2 is continuous, the Convention being applicable retroactively. Proving the violation of Article 3 under substantive aspect has fewer deficiencies because interference usually occurs inside the premises under the control of the respondent State.

As to the obligation to investigate the violation of the right to life of a person, committed outside the territory of a Contracting Party, there have to be distinguished two situations: *i*. when a State agent commits a violation of Article 2 extraterritorially, and the respondent State fails to conduct an effective investigation; *ii*. when the murder is committed outside of the territory of a State by a non-agent, who later finds refuge on the territory of a Contracting Party.

The first situation is most common in the practice of extraterritorial application of the Convention. There will be one example of each, depending on the criterion applied.

Criterion of effective control. In the case of *Varnava* analyzed above, given the fact that in the light of Article 2 of the ECHR the procedural obligation to investigate operates differently from the substantial obligation to respect/protect the right to life, the Court concluded that the disappearance of a person is a special phenomenon, characterized by the element of time. The latter results from the

uncertainty and lack of accountability for the disappearance of the person, prolonging thus the torment of the potential victim's relatives, and removes the instantaneousness of the obligation[251]. Therefore, the procedural obligation to investigate the disappearance of persons may operate retroactively. The Court also found violation of Article 3 of the Convention in respect of the obligation to investigate. This conclusion was also reached in the *Cyprus*[252]case, where the Court held that the respondent Government's long inaction, in terms of the obligation to investigate death of a person, represented inhumane treatment for the relatives of people whose fate was unknown.

One of the rare cases where the Court found a violation of Article 2 under substantive aspect is the *Isaak* case, analyzed above. The applicant complained about the aggressive actions of the members of the Turkish and Turkish-Cypriot armed forces and (in their capacity as agents of Turkey), causing the death of Anastasios Isaak. Although the Turkish agents were not the only ones who participated at the beating of Mr. Isaak, from the videos submitted by the applicant, as well as other evidence adduced, it was proven beyond reasonable doubt that Turkish agents caused unjustified interference with the victim's right to life[253]. At the same time, the Court also found a violation of the procedural obligation arising from Article 2 due to lack of investigation into the death of the applicants' close relative[254].

Criterion of "State agent authority". The non-compliance with the procedural obligation under Article 2 in the *Al-Skeini* case shall be mentioned in that respect. The applicants did not claim violation of the substantial obligations. Although there

[251] Case of *Varnava…*para. 148.
[252] Case of *Cyprus v. Turkey…*para.130-131.
[253] Case of *Isaak…*para.120.
[254] *Ibid…*para.125.

was an investigation into the death of those six victims killed by British agents, it was not deemed efficient and independent. In its judgment, the Court held that the UK body which empowered with the investigation of the unlawful killings of civilians was subordinated, as the soldiers who committed the murders, to the Ministry of Defence, whereas the Defence Secretary refused initiation of criminal proceedings in respect of the murder of those six victims[255]. Similarly, in the *Hassan* case, the applicant only alleged violation of Articles 2 and 3 under procedural aspect, i.e. in respect of the disappearance and death of the applicant's brother immediately after his release from custody of British forces without conducting an investigation into it[256].

The second category refers to cases where persons perform an extraterritorial act prohibited by the law of the State where it is committed, then take refuge on the territory of a Contracting Party, and the latter does not carry out an effective investigation in that respect. The character of the acts performed extraterritorially shall have a certain threshold of severity to determine the initiation of an investigation, such as murder, torture etc. In this sense, the respective category is close to situation when a State agent commits an offence extraterritorially, and the State subsequently refuses to start an investigation. The extraterritorial act manifests itself through the extraterritorial effect of the violation committed by that State's prosecuting organs on the victim.

In the recent case of *Gray v. Germany*[257], the applicants complained about the lack of an effective investigation into their father's death. The latter died as a result of malpractice while receiving a treatment from a German physician in the United

[255] Case of *Al-Skeini*…para.168-177.
[256] Case of *Hassan*…para.2.
[257] Case of *Gray v. Germany*, judgment of 22.05.2014. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144123 (accessed on 30/06/2014)

Kingdom. Shortly after the death of the applicants' father, the doctor moved to Germany. After the impugned death, the United Kingdom authorities initiated an investigation on malpractice requesting the extradition of the German physician. The extradition was refused because, at the moment of filing the request for extradition, Germany had already carried out an *ex officio* investigation in respect of the doctor, who had been fined for his actions, as to a summary judgment in that respect. The applicants alleged violation of the Convention on the grounds that they had not been informed of the investigation, considering it contrary to Article 2 in conjunction with Article 1. In fact, the Court found that the German authorities had had no obligation to inform them – on their own initiative – about conducting criminal proceedings against the doctor in that regard, and there had been no obligation under Article 2, concluding that the investigation had been sufficient[258].

Nevertheless, the Court's reasoning raises an interest as to the admissibility of the case in terms of the concept of jurisdiction in Article 1. The parties did not raise the issue of jurisdiction of Germany concerning its positive obligation to investigate the offence committed in the United Kingdom. In the light of the extraterritorial obligations, such an approach can hypothetically extend the extraterritorial application of the Convention to situations where any private person, having committed a murder outside of his/her State, and subsequently taken refuge in his/her country, will engage the responsibility of the receiving State due to the procedural obligation under Article 2. The concept of jurisdiction in these situations would basically have to raise difficulties in interpretation, meaning that the State always has jurisdiction over its prosecution bodies. This approach could be also extrapolated to situations where any State agent (for instance, a soldier) commits an

[258] *Idem*, para.87-95.

offence extraterritorially, and then takes refuge on his/her territory. Hypothetically, the State could not be held liable for the extraterritorial act because of the lack of effective control and due to the impossibility to prove the "State agent authority". However, it could be responsible for the lack of an effective investigation into the extraterritorial offence committed by its agent.

V. LIMITATIONS TO THE EXTRATERRITORIAL APPLICATION OF THE ECHR

In the Convention, as well as in the Court's case-law, there were developed general limitations (derogation clause, jurisdictional immunity) and specific limitations (legal space, colonial clause) in respect of the extraterritorial application of the ECHR. Whenever the Court discovers at least one of them, the effects meant to be produced by the Convention will be removed in a relative or absolute manner, and, accordingly, the potential beneficiaries will not be able to invoke the violation thereof.

5.1. Legal space

The legal space is a limitation specific to only the extraterritoriality of the ECHR. It is the concept according to which the Convention is an instrument of European public order, and its application must be limited to the area of the Member States of the Council of Europe, even if the State exercised extraterritorial jurisdiction under Article 1.

The concept can be only applied in case of application of the spatial criterion, and not of the "State agent authority" one, which also created interpretation problems in the light of the Court's case-law prior to the *Banković* case. Paradoxically, the same

concept of a single European public order was used for the extraterritorial application of the Convention within the legal space as well.

The concept of legal space has no conventional or judicial support. The impulse in that respect was transmitted in the *Banković* case, which created a dangerous precedent by denying the protection of fundamental rights and freedoms when they objectively must be protected. The Court ignored the previous case-law, when the jurisdiction of a Member State was recognized outside of the legal space of the Council of Europe (*Issa* and *Ocalan*) by noting that the respondent States in the respective cases had not objected in that respect[259]. The impugned argument is more than doubtful, since the jurisdiction in the light of Article 1 is somehow an objective state of facts that would not have to depend on the contradictory character, whereas the latter shall not be addressed in its absolute sense. Moreover, the Court examined the question of jurisdiction in its final judgment in present *Issa* case (three years after *Banković*), noting that Turkey had exercised its jurisdiction extraterritorially through its agents[260], operating in northern Iraq, and ignored tacitly the legal space argument in the *Banković* case.

The Court examined the question of jurisdiction in the case of *M. v. Denmark*[261], which had involved the respondent State's embassy on the territory of the former GDR, which obviously had not been a member of the Council of Europe (as well as the Federal Republic of Yugoslavia in the *Banković* case), but had lain in the heart of the continental Europe. However, in the *Pad* case[262], the Court found jurisdiction of Turkey due to its agents acting on the territory of Iran. Therefore, the Court obviously ignored the concept interpreted in the *Banković* case; nevertheless it did not expressly assert against it.

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[259] Case of *Banković*…para. 81.
[260] Case of *Issa*…para. 55.
[261] Case of *M. v. Denmark*... para. 3.
[262] Case of *Pad and Others v. Turkey*, decision of 28/06/2007. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81672 (accessed on 12/05/2014)

The concept of *espace juridique* (legal space) became obsolete with the adoption of the decision in the *Al-Skeini* case, where the Court has limited its purpose: to not require States, which have not adhered to the Convention, standards arising from it. This does not mean, however, that the ECHR should not be applied outside of the Council of Europe. Apparently, the Court excluded the vacuum created after the *Banković* case. Ironically, the Court referred to the same case-law as in *Banković*[263], but already toward the extraterritorial application of the Convention.

5.2. Monetary gold principle

The principle of monetary gold is a specific limitation mainly with extraterritorial application developed by the ICJ in the case of *The Monetary Gold Removed from Rome in 1943*[264]. It consists in the rule that the Court cannot judge the respondent State without establishing the responsibility of a third country, absent in the process. Thus, it is a specific case of jurisdictional immunity of States, which are not subject to the authority of other States or "third" institutions created by them. In the event of a lawsuit before the European Court, this principle might be relevant for the cases where the dominant circumstance would be the collective military action involving States under aegis of NATO or UN, for example.

In practice, this principle represents the procedural obligation of the applicant to prove the respondent State's specific performance in a collective action, as a result of which there was an interference with the rights and freedoms of the applicant. In other words, it would consist in proving the causal link, but by emphasizing the specific performance of the State, it being really problematic not only in factual terms,

[263] Case of *Al-Skeini*...para. 141-142.
[264] Case of *The Monetary Gold Removed from Rome in 1943. Preliminary objections.* ICJ judgment of 15/06/1954. [online]: http://www.icj-cij.org/docket/files/19/4761.pdf (accessed on 03/05/2014)

but also in terms of the responsibility. In this regard, the respondent States objected in the following cases: *Banković*[265] – in respect of the NATO actions in the FRY; *Behrami*[266] – due to the collective actions of the UN peacekeeping forces in Kosovo; or in the case of *Saddam Hussein v. the Coalition Forces*[267]. Therefore, the principle of monetary gold represents a relative limitation, being able to remove the extraterritorial effects of the Convention along with proving the absence of State jurisdiction in some circumstances.

5.3. Derogation clause (Article 15 of the ECHR)

Article 15 of the Convention represents a general temporary limitation of the applicability of the ECHR in circumstances of war or imminent public danger, threatening the constitutional order of the State. For the application of Article 15, the State concerned shall notify the Secretary General of the Council of Europe in this respect. As to other rights and freedoms, States have a wide margin of appreciation in respect of the relationship between the limited scope of the exemption and the rights whose violation is "necessary"[268], they being in a better position to decide on the respective issue. Throughout the existence of the Convention, Article 15 was applied only 6 times, most recently in 2001 by Britain following the terrorist actions of 11September 2001 in New York, limiting the application of Article 5 para. 1 in respect of the non-expellable foreigners[269]. In the recent case of *A. and Others v. the*

[265] Case of *Banković*... para. 31.
[266] Case of *Behrami and Behrami v. France, decision of* 02/05/2007. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80830 (accessed on 12/05/2014)
[267] Case of *Saddam Hussein v. Albania, Bulgaria, Croatia and Others (21 States)*, decision of 14.03.2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-1618258-1694937 (accessed on 03/07/2014)
[268] Case of *Ireland v. the United Kingdom*, judgment of 18/01/1978. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57506 (accessed on 12/05/2014)
[269] Corneliu Bîrsan. Convenţia Europeană a drepturilor omului. Comentariu pe articole. Vol I: drepturi and libertăţi. Bucureşti: ALL Beck, 2005, p.925

United Kingdom, the Grand Chamber stated that the derogation from Article 5 aiming at the detention without charge in respect of non-nationals only had been disproportionate and unjustified[270].

At the same, the applicability of other international instruments, such as the Geneva Conventions Relative to the Protection of Civilian Persons in Time of War, is not affected. The exemption cannot be absolute, and the State is obliged to protect the hard core rights, as provided for in Article 15 para. 2.

The derogation clause could be used in the future to improve the "conflict" between the ECHR and international humanitarian law. For instance, in case of a detention authorized by the international humanitarian law in order to determine combatant status of the person, but prohibited by Article 5 of the Convention (as in the circumstances of the *Hassan* case, mentioned above), the declaration made pursuant to Article 15 may limit the applicability of Article 5 in circumstances of armed conflict.

It seems that the only case concerning the extraterritorial implications of the derogation clause was the *Cyprus* case. During the respective period, the island was under the administration of the United Kingdom, and Greece alleged violation of Cypriot nationals' rights by the British government. UK invoked the application of Article 15, i.e. the status of "public danger" for the partial non-application of the Convention[271].

5.4. Colonial clause (Article 56 of the ECHR)

[270] Case of *A. v. the United Kingdom*, judgment of 19/02/2009, para. 190. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403 (accessed on 12/05/2014)

[271] Norris R., Reiton P. The Suspension of Guarantees: A Comparative Analysis of the American Convention on Human Rights and the Constitutions of the States Parties. In: American University Law Review. Volume 30: 189. p. 198-223. [online]: http://www.wcl.american.edu/journal/lawrev/30/norris.pdf (accessed on 11/05/2014)

The colonial clause was incorporated in the Convention to limit the obligations of States in respect of former colonies. Article 56 has another purpose, wider than the mere exercise of jurisdiction, referring not only to its territorial expansion under Article 1 of the Convention, but also to the accountability of the metropolis for the actions/omissions of local authorities in those territories. Due to apparently political reasons it was decided to condition that responsibility to a special declaration. In order for the Convention to be applied to the persons in the former colonies, the State shall make a declaration to extend its jurisdiction over them, as is provided for in Article 56 para. 4.

The applicability of the colonial clause also depends, to some extent, on the national laws of the metropolis. In the case of the United Kingdom, for example, at constitutional level there is a difference between the entities through with it bears responsibility, i.e. being part of the United Kingdom *per se* and/or a declaration pursuant to Article 56 having been made, and territories, which – although being under the control, sovereignty and *de facto* jurisdiction of the British Crown – though are not part of the United Kingdom. It is a distinction tolerated by the High Court[272]. On the other hand, overseas territories of France are, according to its Constitution, part of the territory of the Republic, and the declarations within the meaning of Article 56 are thus somewhat useless[273].

In the *Loizidou* case, Turkey invoked the colonial clause in order not to apply the Convention on the territory of Cyprus, on the grounds that in the unilateral declaration of recognition of the right of individual petition before the ECmHR, Turkey had tried to limit the applications to only those relating to violations committed by Turkish authorities on its territory only[274]. The Court examined the

[272] Case of *Chagos Islanders v. the United Kingdom*, decision of 11/12/2012, para 63-64. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115714 (accessed on 12/05/2014)
[273] Charrier J.-L., Chiriac A. Codul Convenţiei Europene a Drepturilor Omului. Paris: Litec, 2008, p. 669.
[274] Case of *Loizidou*, preliminary objections…para.17,25-27.

limited purpose of the colonial clause, noting that there was no need for a declaration under Article 56 for the purpose of the extraterritorial application of the ECHR, and ruled thus on the invalidity of the territorial restrictions from the Turkish declarations.

At first glance it would seem that the exercise of extraterritorial jurisdiction would automatically involve liability of the ECHR Member State for the territories in respect of the international relations provided for by the latter. The relationship between Article 1 and Article 56 however leads to another conclusion: in case of a "conflict" between the articles in question, which is inevitable in case of exercise of extraterritorial jurisdiction on the territories in respect of which a declaration has been made, the colonial clause will prevail, signifying that the extraterritoriality of the Convention is limited by the territories of the former colonies.

That limitation is absolute, and the ECHR will not apply in the former colonies in the absence of a declaration under Article 56. There are no exceptions, even if the State exercises effective/overall control in the former colonies[275].

For example, in the *Quark Fishing Ltd.* case[276] the Court declared inadmissible the application in which the applicant claimed violation its right to property by limiting its fishing activity on South Georgia and the South Sandwich Islands, former colony of the United Kingdom, the territory over which the State was exercising effective control. Despite the fact that British legal acts were effective on the island, the Court refused to apply the Convention due to the absence of a declaration under Article 56.

Similarly, in the case of *Chagos Islanders v. UK*, the applicants claimed violation of Article 1 of Protocol No. 1 to the ECHR to prevent access to their property assets located on the islands of the Chagos Archipelago. In the 1970s and 1980s, the United Kingdom took steps to expel the applicants from the territories of

[275] Case of *Al-Skeini*….para. 140.
[276] Case of *Quark Fishing Ltd. v. the United Kingdom*, decision of 19/09/2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77008 (accessed on 12/05/2014)

the islands to facilitate the construction of a military base, which was to be controlled by the USA. Since 1965 the Chagos Archipelago has been part of the British Indian Ocean Territory, likely to be the object of the colonial clause. Until 1965 the Chagos Archipelago was part of Mauritius, another British dominion, in respect of which Great Britain made the declaration under Article 56 in 1966. However, shortly thereafter Mauritius proclaimed independence, and the Chagos Archipelago was outside the scope of the declaration. The Court held that, even in the event of exercising effective control over the area (in this case, the islands), the State will bear responsibility for the actions of its agents in their respective territories, since the criteria developed in the case-law meant to identify jurisdiction are inapplicable in the case of that declaration under Article 56[277].

The High Court reached the same conclusions in relation to the extradition of the applicant from Macau (former Portuguese colony) to China [278], or to the jurisdiction of the United Kingdom in respect of persons in Hong Kong[279].

Contrary to the above-mentioned case-law, in the *Matthews* case[280] the Court applied the Convention on the territory Gibraltar, *the United Kingdom being responsible for its international relations*. The applicant claimed violation of the right to free elections due to the failure to hold free elections fro the European Parliament on the territory of Gibraltar. The High Court established that the Convention and Protocol No. 1 thereto were also opposable to the respondent State in respect of the people in Gibraltar. Thus, the Court recognized the territorial jurisdiction of the United Kingdom on the island because the United Kingdom had made the relevant declaration for the purposes of Article 56.

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[277] *Idem*,. para. 72.

[278] Case of *Yonghong v. Portugal*, decision of 25/11/1999. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-5646 (accessed on 20/07/2014)

[279] Case of *Bui Van Thanh and Others v. the United Kingdom*, decision of 12/03/1990. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-647 (accessed on 20/07/2014)

[280] Case of *Matthews v. the United Kingdom*, judgment of 18/02/1999. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58910 (accessed on 20/07/2014)

This case raises attention due to the interpretation offered by the Court to the concept of "legislative body", as is provided for in Article 3 of Protocol No. 1. Since the Community acquis had effect in respect of the Gibraltar residents as well, the Court found the latter had been treated unfairly by being denied the right to vote in the European Parliament. Thus, the notion of "legislative" would not have to be limited to national bodies, because it also has effects on supranational bodies since the decisions taken by the European Parliament directly affect Gibraltar residents. Subsequently, the United Kingdom extended one of its electoral districts on Gibraltar.

The purpose of the colonial clause can intersect with a situation where State officials exercise some judicial or police powers on the territory of another State, according to a bilateral legal custom or a pre-established agreement, but they are not to be mistaken.

Thus, as mentioned above in the case of *Drozd and Janousek v. France and Spain*, it was established that the jurisdiction of a State may in certain circumstances also extend to a judge seconded to another State. That specific case represents a *sui generis* situation in terms of Article 56. The applicants invoked, *inter alia*, the responsibility of the respondent States for violating the right to a fair trial by retired or simply seconded French judges, who had exercised judicial functions within Andorra due to their knowledge of the language and local laws. The problem consisted in determining the legal nature of the relationship between Andorra and the respondent States. The latter established in 1278 a diarchic management system in Andorra, where the French president and the Bishop of Urgel were recognized as co-princes, the system being still viable nowadays. Therefore, it was necessary to be established whether the Andorran territory was likely to be classified as a territory for the international relations of which the respondent States were responsible.

During the examination of the case, Andorra was not a party to the Convention; it did not have a clear legal standing in terms of international law either. Since

Andorra was not Member of the Council of Europe at that time, and had signed up to 3 treaties in its own capacity, the Court called into question its quality of a subject of international law[281]. The Court held that Andorra was neither a condominium, i.e. a territory commonly owned by Spain and France, nor the private property of each of these countries separately. Thus, the Convention was automatically inapplicable in that territory. It was stated that the functions performed by the French president as co-prince of Andorra were distinct, and therefore cannot be regarded as the exercise of French sovereignty. The Bishop of Urgel is appointed by the Holy See, who sometimes is not a Spanish citizen, his acts being not imputable to Spain.

The Spanish Government objected that only a declaration of territorial extension made in accordance with Article 56 of the Convention would have been able to engage Spain's responsibility on the Andorran territory, adding that there was a legal obstacle in that respect – the Co-Princes exclusively were responsible for the international relations of Andorra. An at least questionable argument was that of France, which tolerates its President's duties of Co-Head of Andorra. However, the French President does not express his consent as a private individual to be Co-Prince of Andorra. Nevertheless, the Court upheld the view of the Spanish Government[282], Andorra being classified as a territory for the international relations of which the respondent States had not been responsible, despite its ambiguous nature. Regarding the judges seconded by France, the High Court found that, while applying the Andorran law, they had exercised their duties in Andorra acting as Andorran, and not French, judges, and their status was governed by Andorra as well. Thus, the acts performed by the French judges seconded to Andorra were not imputable to the French government[283].

[281] Case of *Drozd and Janousek*...para. 89.
[282] *Idem,* para. 89; See: Joint dissenting opinion of Judges Pettiti, Valticos and Lopes Rocha, approved by Judges Walsh and Spielmann.
[283] *Idem,* para. 94.

Therefore, in respect of both the seconded judges and the French President, who acts as Head of State of Andorra, the Court strictly delimited their capacity as agents of Andorra and France. However, if the issue were viewed in light of the need to collectively secure human rights, as well as the evolution of the law of international responsibility[284], the relevance and actuality of the judgment of the Plenary session of the Court could be called in question, at least in terms of responsibility of France.

The ECmHR faced a similar problem in the case of *X and Y. v. Switzerland*[285]. On the basis of an agreement between Liechtenstein and Switzerland, decisions of the Federal Aliens' Police of Switzerland were legally binding on the territory of Liechtenstein, which signified that Switzerland had exercised extraterritorially its executive and legislative jurisdiction (because decisions were taken under Swiss federal law), with the consent of Liechtenstein. The first applicant, being a citizen of neither of the States concerned, was banned from entering the territory of Liechtenstein by the Swiss aliens' police for a period of two years. When the case was examined, Liechtenstein was not yet party to the Convention; therefore the Commission had to decide on the imputability of relevant actions of Switzerland with extraterritorial effects.

The Commission established that, according to the aforementioned treaty, Liechtenstein had been unable to exclude the extraterritorial effect of the decisions taken by the Swiss aliens' police (because Swiss authorities only had been able to exclude it, and only if such an effect was provided for therein). Therefore, Switzerland was to be held responsible for acts that had effects on the territory of Liechtenstein, whereas the people affected in that respect had been under Swiss jurisdiction under Article 1[286].

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[284] See Articles 16,17 of the ILC Draft on Responsibility of States for Internationally Wrongful Acts.
[285] Case of *X. and Y. v. Switzerland*, ECmHR decision of 14/07/1977. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-74512 (accessed on 25/06/2014);
[286] *Idem*, p. 73.

A curious aspect of the opposability of the ECHR to Moldova in respect of Transdniestrian region is the fact that the Moldovan government that attempted – by means of a declaration (!) – to limit the application of the Convention on the territory beyond its control concerning several articles until the end of the conflict, in respect of the actions undertaken by the separatist administration. This means that the people on the respective territory would have been deprived of the ECHR guarantees. Article 57 of the ECHR provides for the possibility to make a reservation, when signing the Convention. However, reservations of a general character are not permitted, i.e. they shall not be ambiguous, or make reference to specific provisions of the Convention.

The representative of the Government suggested the interpretation of Article 57 in conjunction with Article 56, requiring an extensive interpretation of the latter for the purpose of a "negative" approach of the notion of jurisdiction in the light of Article 1, in order to exonerate Moldova of any obligation under the ECHR in respect of the population on the territory of Transdniestria. In its decision as to the admissibility in the *Ilașcu* case, the Court held that Article 56 could not be interpreted "negatively", noting that the statement made by the Moldovan government in respect of the Transdniestrian region could not be classified as a reservation in the light of the Convention since it was general, under Article 57[287].

5.5. Jurisdictional immunity

The jurisdictional immunity is a general limitation of the Convention with important contacts with the extraterritorial (non-)applicability thereof. For the last few

[287] Case of *Ilaşcu and Others v. Moldova and Russia,* decision of 04/07/2001, p.20. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-5948 (accessed on 03/07/2014)

decades there have been animated discussions on the relationship between the concept of immunity of States and violations of the compelling law (*jus cogens*) by States. That generated the question whether it was appropriate that State immunity serves as a barrier for engaging responsibility for breach of *jus cogens*[288], based on the principle *par in parem non habet imperium* (equals do not have authority over one another, i.e. a State, subject of international law cannot be under the jurisdiction of another State). In this category, the extraterritoriality is manifested in a more specific way, whereas the problem of interpretation of jurisdiction is omitted because rights are alleged to be violated by the judicial branch of the State, in respect of acts of other States. Axiomatically, the applicants complain about violation of their right to a fair trial in respect of the immunity of a third State.

Thus, in the first case where the Court concluded on the immunity of a State – *Al-Adsani* [289] – concerning an application lodged in the UK against a Kuwaiti Government official, the applicant alleged to have been tortured by the latter; however, the Court ruled in favour of Kuwait's immunity. Subsequently, in a similar way the Court declared inadmissible an application against Greece and Germany, where 257 applicants alleged violation of Article 6 para. 1 of the ECHR due to the non-enforcement of the judgment delivered by the Greek authorities against Germany in respect of the atrocities (therefore, a violation of imperative rights) committed by the latter during the Second World War in Greece[290].

[288] Sevrine Knuchel. State Immunity and the Promise of Jus Cogens, 9 Nw.J.Intl.Hum.Rts. 149, 2011. [online]: http://scholarlycommons.law.northwestern.edu/njihr/vol9/iss2/2 (accessed on 25/04/2014); Andrea Bianchi. Human Rights and the Magic of Jus Cogens. EJIL 2008, Vol.19, No.3. p. 491-508. [online]: http://www.ejil.org/pdfs/19/3/1625.pdf (accessed on 25/04/2014)

[289] Case of *Al-Adsani v. the United Kingdom*, judgment of 21/11/2001. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59885 (accessed on 10/05/2014). Also see Case of *McElhinney v. Ireland*, judgment of 21/11/2001. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-59887 (accessed on 10/05/2014)

[290] Case of *Kalageropoulou and Others v. Greece and Germany*, decision of 12/12/2002. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-23539 (accessed on 10/05/2014)

A similar perception is also reflected in respect of the UN jurisdictional immunity in cases lodged against it before a court of law of a Member State, as for instance in *Stichting Mothers of Srebrenica*[291]. In 1993, the Bosnian town of Srebrenica became part of the territory declared by UN as a safe area. Despite this, in 1995 the atrocious massacre in Srebrenica took place, as a result of the attack committed by the Bosnian Serb armed forces. The applicants argued that the genocide in Srebrenica had occurred because of UN and the Netherlands' inaction for its prevention.

In that case, the Court held that the UN immunity was similar to that of States, and public international law contains no clear practice regarding genocide (read "in respect of *jus cogens* norms") as an exception from invoking UN immunity, since it had pursued a legitimate aim and had not been disproportionate.

Article 6 is, in principle, applicable to actions against a State for seeking compensation for personal injury caused to individuals; however, State immunity would be a proportional (and thus, admissible) procedural barrier concerning torture and genocide. In the respective assessment, the Court was not absolutely categorical, and the proportionality of each exception from the concept of proportionality of States had to be evaluated separately in each case, taking into account the evolution of public international law and the contemporary approaches to customary principles of jurisdictional immunity of States, including in the light of the practice of other international jurisdictions[292].

[291] Case of *Stichting Mothers of Srebrenica and Others v. the Netherlands*, decision of 11/06/2013. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122255 (accessed on 10/05/2014)

[292] Nica A. Abordările actuale ale principiului imunităţii de jurisdicţie a statelor în lumina hotărârii Curţii Internaţionale de Justiţie din 03 February 2012. In Materialele Conferinţei ştiinţifice internaţionale anuale a tinerilor cercetători „Tendințe contemporane ale dezvoltării științei în contextul valorificării opțiunii europene: viziuni ale tinerilor cercetători", Ediția a-VII, Chișinău, 30 mai 2013, Vol. I, p. 243-252.

In a recent case, the Court considered the latest developments of international law in this regard[293]. The applicants claimed violation of Article 6 of the ECHR due to the striking out of a case. They alleged that they had been tortured in Saudi Arabia; subsequently they sued Saudi Arabia and its officials in British courts. As to the acts of torture invoked against Saudi Arabia, the Court held that there was no crystallised exception in respect of the jurisdictional immunity in this regard, finding no violation of the applicants' right to a fair trial.

The analysis in respect of the officials was less rigid, because they only enjoy functional immunity, which signifies that is merely limited to acts committed by them in their official capacity, concluding: "In light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States". Thus, the Court made it clear that in the near future the rigid concept of "State" immunity of officials in cases of torture could move out of place. Later, it will lead to the overall review of the correlation between the notions of jurisdictional immunity and breach of imperative norms.

Relying on the classification of actions of States in *acta jure imperii* and *acta jure gestionis*, all unlawful acts as listed above can thus be seen as actions arising from State sovereignty. However, the distinction between these two categories is subtle enough to cause difficulties in the classification of State actions, especially when they relate to its real rights. For example, immovable goods (at least) in the use of diplomatic missions are exempt from acts of execution of judicial decisions, regardless of the legitimacy of the title of the private individual, the violation of Article 6 and Article 1 of Protocol No. 1 being thus proportional[294]. At the same time,

[293] Case of *Jones and Others v. the United Kingdom*, judgment of 14/01/2014. On the date of accessing the link, the case was relinquished to the Grand Chamber. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-140005 (accessed on 08/05/2014)

[294] Case of *Manoilescu and Dobrescu v. Romania and Russia*, decision of 03/03/2005. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72683 (accessed on 11/05/2014); Case of *Kirovi v. Bulgaria*

the interference resulting from the non-payment of compensation in lieu of restitution of the property used by a diplomatic mission would be seen as disproportionate.[295]

VI. SPECIAL CASES OF EXTRATERRITORIAL APPLICATION OF THE ECHR

6.1. Extraterritorial activity of the security services of Member States

This category of cases refers to the recognition of the extraterritorial jurisdiction of States due to the actions of their agents committed for the purposes of criminal justice, such as forced abduction, from another State, of a person accused of committing a crime, or in case of seizure of ships, suspected of carrying prohibited goods.

Thus, in the case of *Ramirez Sanchez*[296], the applicant was arrested by Sudanese authorities and handed over to French officers who forcedly brought him to a military aircraft. It landed at the military base in France, where the charge was brought. The applicant complained under Articles 3 and 5 of the ECHR, arguing that the extradition procedure had been illegal. The former ECmHR recognized the jurisdiction of France in the act of extradition, noting that from the moment he had been handed over to the

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and Turkey, decision of 02/10/2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77726 (accessed on 11/05/2014).

[295] Case of *Vrioni and Others v. Albania and Italy*, judgment of 29/09/2009. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94452 (accessed on 11/05/2014)

[296] Case of *Ramirez Sanchez v. France*….

French officers, the applicant been under the authority, i.e. "jurisdiction", of the respondent State. In another case, where the applicant, being in Liechtenstein, was "fooled" by the German authorities to get on an aircraft, and subsequently was brought in front of a German court of law, the Court also presumed the extraterritorial jurisdiction of Germany[297]. Similarly, the Court recognized the jurisdiction of Turkey in case of an arrest made by its agents, in an aircraft on the Nairobi airport (Kenya)[298], presuming it explicitly. Therefore, in the event of arrests and capturing people, the State is perceived as exercising its sovereign powers. Whenever a Contracting Party to the ECHR is involved in acts of "unordinary" rendition, the High Court applies the "State agent authority" to determine the jurisdiction of the respondent Member States.

In case of seizure of ships, on the high seas, registered under the flag of a third State, the Court also argued in favour of extraterritorial jurisdiction of the State. Thus, in the case of *Medvedyev v. France*[299], the Court found that France – due to its special forces' seizure of a ship registered in Cambodia, suspected of transporting narcotics – had had exercised at least *de facto* full and exclusive control of the vessel, from the moment of its seizure until handing the applicants over to the French authorities[300]. As a conclusion, whenever the State exercise control over a ship or aircraft, it exercises jurisdiction under Article 1 of the ECHR, given the authority exercised over individuals. It seems to be confusing, but a double criterion is used in such cases: over the ship – effective control; and over persons – "State agent authority". However, given that Article 1 provides for "jurisdiction over persons", the second criterion applies.

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[297] Case of *Stoke v. Germany*, judgment of 19/03/1991. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57673 (accessed on 28/04/2014)

[298] Case of *Ocalan v. Turkey*, judgment of 12/05/2005. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69022 (accessed on 28/04/2014)

[299] Case of *Medvedyev and Others v. France*, judgment of 29/03/2010. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97979 (accessed on 28/04/2014)

[300] *Ibid.* para. 67

In addition, the exercise of extraterritorial jurisdiction of States by seizing ships can be seen as protection against expulsion of aliens, these being prevented from reaching the territory of the respondent States. The Court has established on multiple occasions the jurisdiction of States' seizing ships with migrants, which had been brought back to the place of departure[301].

6.2. Responsibility of States for their acts with extraterritorial effect

This category of cases can be summarized as follows: if the action or inaction of the State Party, because of which the person was expelled or extradited, caused a subsequent violation committed by another State, whether it is a party to the Convention or not, the violation of the respective right shall be imputed to the first State, if its authorities knew or ought to have known about the possible violation. At the same time, it is less problematic in terms of "legal technique" because it does not involve the exercise of extraterritorial jurisdiction of Member States, the application of criteria being unnecessary. In other words, the responsibility of High Contracting Parties engages indirectly, given the risks in respect of the illegal acts that may be committed by a third country. The previously mentioned cases are also particularly relevant for the protection of refugees.

The Convention does not guarantee the right *per se* not to be extradited, but the Court may prohibit the extradition of a person as an interim measure to protect the rights set forth in the hard core, and then it asserts on the consequences of extradition:

[301] Case of *Xhavara and Others v. Italy and Albania*, decision of 11/01/2001. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-31884 (accessed on 30/04/2014); Case of *Hirsi Jamaa and Others v. Italy*, judgment of 23/02/2012. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231 (accessed on 30/04/2014)

for example, if there is a reasonable risk that the applicant be subjected to torture, inhuman or degrading treatment, or the death penalty. The risk of a treatment contrary to the ECHR is assessed in respect of the State in which the applicant is to be extradited, depending on the law, its application practice, and the State's reputation in the field of protection of human rights. The obligation to obtain such information, i.e. to be aware of the risks the extraditable person might be subject to, is borne primarily by the Contracting Party.

It is referred essentially to the cases of extradition of persons from a State Party to the ECHR to a third country. In the notorious case of *Soering v. the United Kingdom*[302], the applicant was accused of committing murder in the USA. While he was in the United Kingdom, the United States requested his extradition. The applicant appealed to the Court alleging, *inter alia*, breach of Article 3 in the event of extradition because there was a real risk of being subjected to the death penalty, namely the "death row phenomenon", which can be described as a combination of degrading circumstances that the applicant would have been exposed to, if extradited, while awaiting the death penalty for murder committed[303]. The death penalty itself was not disputed: the Court was realistic in assessing the *de facto* prohibition (for the time of the judgment delivery) of death penalty at regional level, and admitted that Contracting State cannot impose that prohibition to other countries. However, despite the apparent perfection of the American judicial system, the Court proceeded to examine the individual circumstances of the applicant, and if they – being combined with the "death row" and the long period of time between the conviction and the execution of the sentence – could amount to a violation of Article 3. Thus, the Court concluded: "Having regard to the very long period of time spent on death row in such extreme conditions, […] anguish of awaiting execution of the death penalty, and to

[302] Case of *Soering v. the United Kingdom*, judgment of 07/07/1989. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57619 (accessed on 03/05/2014)
[303] *Idem*, para. 81.

the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3. […] The legitimate purpose of extradition could be achieved by another means […]"[304].It is important to mention that the death row is just a feature of capital punishment. Notwithstanding the "age" of the judgment, the Court had not given a broad interpretation of its reasoning. The Court did not consider that the extradition to the USA where the person would risk life imprisonment in a maximum secure prison, with limited communication, would amount to a violation of Article 3[305]. The Court ruled on the inadmissibility of the application, where the applicant invoked the risk of being tortured after his extradition to the USA[306].

The Court examines objectively the general conditions and the state of protection of fundamental rights in countries where people are to be extradited. Thus, in another case related to extradition, the applicant, having a refugee status in the UK, under UK legislation and according to bilateral agreements, had to be extradited to Jordan, being convicted there *in absentia*. Having intended to appeal the sentence, the applicant alleged violation of Article 6 on the risk of being subjected to torture during the retrial. The Court accepted that argument, relying on the practices of Jordan in this respect, by using the test of "flagrant denial of justice"[307]. In a recent case against the Russian Federation, the High Court held that the extradition of a Kyrgyz citizen from Russia to Kyrgyzstan would be a violation of Article 3 because of the negative

[304] *Idem*, para. 111.
[305] Case of *Babar Ahmad and Others v. the United Kingdom*, judgment of 10/04/2012. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110267 (accessed on 04/05/2014); Case of *Harkins and Edwards v. the United Kingdom*, judgment of 17/01/2012. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108599 (accessed on 04/05/2014)
[306] Case of *Al-Moayad v. Germany*, decision of 20/02/2007. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79710 (accessed on 04/05/2014)
[307] Case of *Othman(Abu Qatada) v. the United Kingdom*, judgment of 17/01/2012. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108629 (accessed on 07/05/2014)

information on the overall protection of human rights and the high probability that the applicant would be subjected to treatment contrary to Article 3[308].

Attention shall be drawn to the incriminated offence, for which extradition is requested, and the punishment the extradited is likely to be given. In a recent case against Latvia, the applicant argued that the perception of the American justice on cyber crime, which he had been accused of, was equivalent to terrorist crimes. Therefore, he could have been subjected to degrading treatment within the meaning of Article 3, and later punished with imprisonment for a term which considerably would have exceeded the time limit referred to by the Latvian criminal law. The Court neither found any reason to believe that the person would be subjected to ill-treatment, nor considered the punishment disproportionate[309]. *Per a contrario,* the reason would have been the opposite had the applicant been subject to extradition for terrorist activities.

Moreover, the Court has also punished the High Contracting Parties for allowing – i.e. due their inaction – American practices of "extraordinary rendition" resulting in violation of fundamental rights and freedoms. This signifies the extrajudicial transfer of persons from the territorial jurisdiction of one State to another State in order for that individual to be detained and interrogated outside of the "regular" legal framework, where the detained person is exposed to a real risk of being subjected to torture, cruel inhuman and degrading treatment, with a high probability of violation of Article 3 of the Convention[310].

In 2001, the US President George W. Bush authorized the Central Intelligence Agency (hereinafter "the CIA") to carry out the so-called "*High-Value Detainees*"

[308] Case of *Mamadaliyev v. Russia,* judgment of 24/07/2014. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145746 (accessed on 25/07/2014)
[309] Case of *Čalovskis v. Latvia*, judgment of 24/07/ 2014, para. 136-147. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145791 (accessed on 25/07/2014)
[310] Case of *El-Masri v. the Former Yugoslav Republic of Macedonia*, judgment of 13/12/212, para. 218. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621 (accessed on 07/05/2014)

Programme, which involved secret extraterritorial capturing of persons suspected to be involved in terrorist acts against the United States, with their subsequent illegal detention at the US military bases, or of other countries, being at the disposal of the USA, where people could be questioned in the most "efficient" way, by applying not very orthodox techniques of interrogation. The detention of suspects was carried out extraterritorially for the purpose of applying neither the constitutional rights nor those guaranteed by international treaties (such as the Convention against Torture), whereas the USA expressed a traditional scepticism regarding its extraterritorial obligations on human rights. Therefore, people were deprived of basic rights resulting from the application of torture techniques and from their interrogation by military commissions only, composed of military officers, who could accept evidence obtained through torture, whereas the suspects had been detained in the absence of *habeas corpus* rights, being arbitrarily deprived of their liberty for periods exceeding 10 years.

Thus, while crossing the Macedonian border, the applicant, a German national, created suspicions in respect of his duly issued passport[311]. He was brought forcibly and secretly to a hotel room in Skopje, i.e. outside of the legal framework, where was held for 30 days, being threatened with a firearm when he had tried to escape. Later the authorities forcibly took him to the Skopje airport, where he was caused bodily injuries, and subsequently he was embarked on a CIA aircraft. The applicant was transported to Kabul (Afghanistan), spending five months there. Having been escorted to Germany by the CIA, the applicant informed the public prosecutor of Skopje that he had been ill-treated by Macedonian State agents; however, the authorities refused to carry out an investigating into the facts alleged. Considering the inefficiency of the latter, the Court found *inter alia* violation of the procedural obligation arising from Article 3. As to the substantive aspect under Article 3, the Court stated the responsibility of Macedonia for the actions of agents in the hotel, for torturing the

[311] *Idem.*

applicant at the Skopje airport, and the applicant's extradition outside of the legal framework, by subjecting him to the risk of a treatment contrary to Article 3. In this case, the actions, and then the omissions, of Macedonia in respect of a person served as the basis for its liability due to the actions of agents under US authority, and accordingly, its jurisdiction (because their judicial system is more democratic than the executive). In a similar way, the Court found Malta responsible for having issued an unlawful arrest warrant, on the basis of which the applicant was unfoundedly detained in Spain[312].

In two recent cases, the Court has had a highly critical approach regarding the procedures extraordinary rendition, fascinating both in substantive and procedural terms.

In fact, it is referred to the applicants in the *Al-Nashiri*[313] and *Husayn*[314] cases, both being subjected to extraordinary rendition in 2002 from the United Arab Emirates and Pakistan, respectively. They were separately transferred to several secret black sites: "Salt Pit" in Afghanistan, "Cat's Eye" in Thailand, Romania[315], and by the end of that year they were moved to a Polish black site next to Stare Kiejkuty, where they were detained until June 2003, and subsequently transported to the United States Guantánamo Bay Naval Base in Cuba, being detained there at the time of delivery of the judgment, 24 June 2014. That signifies that the applicants have been illegally deprived of liberty for 12 years without being charged, lacking fundamental procedural guarantees, and detained *incommunicado*. The applicants were in direct contact just with American agents. They alleged violation of the Convention under

[312] Case of *Stephens v. Malta*, judgment of 21/04/2009. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92351 (accessed on 07/05/2014)
[313] Case of *Al Nashiri v. Poland*, judgment of 24/07/2014. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146044 (accessed on 25/07/2014)
[314] Case of *Husayn (Abu Zubaydah) v. Poland*, judgment of 24/07/2014.HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146047 (accessed on 25/07/2014)
[315] The Court has yet to examine a case with similar circumstances, lodged by the applicant *Al Nashiri* against Romania. [online]: http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=002-7210 (accessed on 25/07/2014)

several heads by Poland, as an accomplice[316], due to assisting the US in exercising extraterritorial acts in respect of the applicants during their stay in Poland and due to the consequences of allowing their transfer to Guantánamo Bay. The Court held that the overflight of the Polish airspace, the landing of the CIA aircraft (carrying the applicants) in Poland, and the control of secret permits near Stare Kiejkuty could not be done without the pre-existent consent of that State. Relying on the information disseminated by US authorities about the abuse and ill-treatment inflicted by the suspects while committing acts of terrorism, the Polish government should have realized that by supporting the United States, it had exposed the applicants to a risk of treatment contrary to the Convention[317]. Thus, Poland was not directly involved in committing international illegal acts; it merely assisted the US. Therefore, the US actions were imputed to Poland because they could not be exercised without the logistics provided by the latter.

It is curious, that – relying only on Polish law – the Polish government has repeatedly refused to adduce the evidence requested by the High Court, raising the issue of confidentiality on detention and existence of an American secret base. Poland conditioned the submission of evidence by insisting on a limited administration of copies thereof to only the Court judges directly involved in examining the case, whereas copies were only to be presented to the applicants' representatives with Polish citizenship. Considering that the burden of proof in respect of the violation of Articles 2 and 3 lies on the State, the failure to submit evidence amounted to several consequences. Firstly, the Court found the violation of a State's obligation to comply with the procedural requirement under Article 38 of the Convention, which provides the High Contracting Parties' obligation to cooperate with the High Court, whenever

[316] ILC Draft on Responsibility of States for Internationally Wrongful Acts provides for in Article 16:
A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."
[317] Case of *Husayn*…para. 444; Case of *Al Nashiri*…para. 442.

requested, including the submission of evidence. The argument that Polish national law restricted transmission of the allegedly "secret" data was obviously rejected. Secondly, the Court based its reasoning in respect of the alleged violation of rights mainly on the reports of international organizations, such as the European Parliament, the reports and resolutions of the PACE of the CoE, and the UNGA. A separate place in the administration of evidence was taken by the ICRC and CIA reports that demonstrated in detail the applicants' detention in the custody of the CIA, and the "investigative techniques" used to acquire evidence against them. Thirdly, because the Polish government did not present evidence to refute the data from the reports submitted by the applicants and due to its unwillingness to cooperate, it was from the outset in a "weaker" procedural position than the applicants. The Court held that while it was for the applicant to make a *prima facie* case and adduce appropriate evidence, if the respondent Government in their response to his allegations had failed to disclose crucial documents to enable the Court to establish the facts or otherwise provide a satisfactory and convincing explanation of how the events in question had occurred, strong inferences could have be drawn[318], even in the absence of direct evidence on the applicants' transportation to Poland.

From substantial points of view, the present cases are of no less interest. The Court found a violation of Article 3 under procedural aspect and of two heads under substantive aspect. Under procedural aspect, the Court stated the lack of an effective investigation into the allegations of extraordinary rendition with subsequent detention of the applicants in Poland. Although in 2008 the national prosecution authorities initiated such an investigation, it could be deemed neither prompt (because the applicants had been held in Poland in 2002-2003) nor effective (since by the date of delivery of the judgment by the High Court that investigation had had no results, and the data in that respect had been secret). It shall be recalled that given the

[318] Case of *Al Nashiri…*para. 395.

confidentiality of the relevant investigation documents, the Polish government has not provided the Court any specific data. In the absence of an effective investigation, the Court emphasized the positive obligation of the High Contracting Parties to adopt and implement measures to protect individuals against potential abuses by secret services, the presence of which in the Polish legal system was called in question[319]. Due to the lack of effective investigation the High Court also found that there had been a violation of Article 13 of the Convention[320].

Under substantive aspect, the Court found a violation of Article 3 due to the treatment the applicants had been subjected to during their detention at the Polish black site. In this respect, the Court considered the CIA and ICRC reports sufficient in which, *inter alia*, the following treatment methods had been specified: mock executions, including the use of drills while the interrogated person was standing, blindfolded; stressful positions; threats to family members; walling technique etc. The gravity thereof was sufficient enough to qualify for torture within the meaning of Article 3. The Court also found a violation of Article 3 due to the risk the applicants had been exposed to by their subsequent transportation from Poland[321]. Regarding the "admission" of the subsequent transportation of the applicant Al-Nashiri, the Court also found a violation of Article 1 of Protocol No. 6 due to real risk of the applicant being subjected to capital punishment after trial before a military commission[322], which indicates an original approach to the problem of extradition of persons to the United States.

The secret detention of the applicants having been proved, the Court similarly established Poland's responsibility for the violation of Article 5 due to the period of detention and their transfer from Poland, their imprisonment being thus unlawful

[319] *Idem,* para. 488.
[320] *Idem,* para. 550.
[321] Case of *Al Nashiri…*para. 518; Case of *Husayn…*para. 51.
[322] Case of *Al Nashiri…*para. 578.

because the very nature of extraordinary rendition, which involves depriving the individual of essential procedural guarantees[323]. The applicants were detained *incommunicado*, i.e. deprived of the right to maintain contact with the outside world, or their families, which constituted a violation of their right to private life provided for by Article 8[324]. During their detention, the applicants were interrogated by the American military commission composed of military officers, who were empowered to convict people even by means of the evidence gained through torture, which constituted flagrant denial of justice, and, accordingly, a violation of Article 6 para. 1[325].

The most stringent problem of the case, with all its complexity, was the government's absence and reluctance to establish State control measures in respect of the actions of the security services, if we were to neglect the political interests that may be involved in such a situation. Nevertheless, if the state had complied with its positive obligation to provide effective mechanisms for the prevention of cases of secret detention, then the other negative consequences would have been annihilated. It is regrettable, however, that – given the specifics of the security services – the secret detention of persons is denotes their existence, and torture is not a rare practice for obtaining information, which in no way removes the positive obligations mentioned above.

6.3. Activity of diplomatic missions abroad and diplomatic relations of the Member States

The activity of the diplomatic missions is a classic exception to the principle of territoriality, the Court having in this respect an old practice of recognizing the

[323] Case of *Al Nashiri…*para. 530-531; Case of *Husayn…*para. 524-526.
[324] Case of *Al Nashiri…*para. 539; Case of *Husayn…*para. 533.
[325] Case of *Al Nashiri…*para. 567-568; Case of *Husayn…*para. 553-554.

jurisdiction of States for the acts performed by diplomatic and consular agents, they being *ex lege* representatives of the State. The extraterritoriality of the ECHR in such cases is manifested by the effect a State has over another State entity, usually this influence being abstract.

Thus, "X" was under German jurisdiction, invoking the conspiracy of the German consul in Morocco to force his expulsion from that State, in violation of Article 3 of the Convention[326]. The Court approached the issue in terms of citizenship, stating that because of the special status of the citizens of a State, the latter may exercise its jurisdiction over them outside of its territory as well. Similarly, to extraterritorial responsibility of the United Kingdom was engaged due to the extraterritorial actions of the British consul, who had had to intervene in favour of "X", a British citizen, involved in a dispute concerning the custody of her and her Jordanian husband's common child[327]. In these two cases, the Court applied the "State agent authority", the Convention being only applied to the actions of the consular (or diplomatic) agents.

The situation is different where a person is within the premises of the consulate, the latter being perceived as a separate entity. The Commission established that 18 applicants were under the jurisdiction of Denmark, when they had tried to escape from the German Democratic Republic to the German Federal Republic through the Embassy of Denmark in Berlin, where they had requested negotiations with the competent authorities of the GDR to leave the country. Subsequently, the ambassador appealed to the GDR police, and the applicants were detained and interrogated. The Danish diplomatic mission premises were inviolable for GDR authorities. Thus, there

[326] Case of *X. v. Germany*, decision of 25/09/1965. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-82912 (accessed on 30/04/2014)
[327] Case of *X. v. the United Kingdom*, decision of 15/12/1977. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-74380 (accessed on 30/04/2014)

was an exclusive authority over those persons and their property[328]. When private persons and property are within the premises protected in the light of diplomatic and consular law, they are under the jurisdiction of the respective State.

Moreover, the jurisdiction will be also engaged when the State does not take sufficient measures to protect diplomatic correspondence from the intervention in another State's authorities[329].

In cases related to disputes on employment relationships of diplomatic representations between the State and its employees, the Court applies the classic proportionality test when people resort to domestic courts. Thus, being fired from her position as Chief Accountant of the Kuwait Embassy in France, the applicant challenged the act before French courts. Her application was rejected at national level, the French authorities invoking Kuwait's jurisdictional immunity. Subsequently the applicant lodged her application before the Court, invoking violation of Article 6. The High Court relied on the functions exercised by the applicant and stated that the applicant's work competencies could not constitute *acta jure empirii* (acts of sovereignty), and none of her obligations had been able to affect Kuwait's sovereign interests[330], it thus finding a disproportionate violation of Article 6 para. 1 of the ECHR. The Court reached the same conclusion in respect of late payment of wages to the person, who was employed as a photographer at the US Embassy in Vienna[331].

It is obvious that in order to "remove" immunity, the Court relied in its reasoning on the distinction between *acta jure empirii* and *acta jure gestionis* in terms of State immunity claimed a by the respondent Government.

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[328] Case of *M. v. Denmark*, ECmHR decision of 14/10/1992. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-1390 (accessed on 02/05/2014)

[329] Case of *Bertrand Russell Foundation ltd. v. the United Kingdom*, ECmHR decision of 02/05/1978. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-73447 (accessed on 02/05/2014)

[330] Case of *Sabeh El Leil v. France*, judgment of 29/06/2011. Para. 61-67. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105378 (accessed on 02/05/2014)

[331] Case of *Wallishauer v. Austria*, judgment of 17/07/2012. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-6294 (accessed on 02/05/2014)

The Court also found a violation of Article 6 due to the Russian domestic courts' failure to examine an application, where the applicant had sought payment of the debt by the embassy of the Democratic Republic of North Korea[332]. The debt was generated by a loan granted by a private individual to the Korean Embassy Commercial Counsellor. The Court's reasoning was similar to the previous one, the signing of the loan agreement (as in case of any other commercial transaction) is an *acta jure gestionis* – which is a reasonable exception to the principle of absolute judicial immunity of the State.

From the mentioned case-law, it follows that the High Contracting Parties cannot invoke immunity of other States, and international organizations, analogously, when the fundamental rights and freedoms of persons are injured by the *acta jure gestionis* (private relations dimension).

[332] Case of *Oleynikov v. Russia*, judgment of 14/03/2013. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117124 (Accessed on 03/05/2014)

POSTFACE

In public international law there is generally no territorial limitation on extraterritorial obligations arising from treaties in international human rights law. Moreover, under the UN Charter and other instruments with universal vocation, the States are bound to act collectively and independently for the universal protection of human rights and fundamental freedoms, regardless of their location.

The extraterritorial obligations do not differ in content from those "ordinary" in the ECHR law, the extraterritorial acts of the Member States involving both positive and negative obligations. But from practical point of view, the positive obligations, especially those related to the core of the Convention, have a special importance both in terms of the real possibilities of a State to control the territory of a third country, and in terms of lack of control over its own territory.

However, apparently for political reasons, at the elaboration of the ECHR there was an intention to proceed to a restrictive interpretation of the concept of jurisdiction, forming the principle of territoriality.

Hence, in the cases with extraterritorial implications there was created a true presumption of lack of jurisdiction, whereas the applicants, in our opinion, unjustifiably had the burden of proof, and the standard of proof was close to that in criminal proceedings in common law: beyond reasonable doubt. Accordingly, the Court did not have the possibility to focus on blatant violations of human rights and fundamental freedoms, but had to consider a tacit criterion of admissibility – the jurisdiction.

Nonetheless, the States must comply with human rights obligations not only in their territory, but also abroad, when exercising there some kind of authority or

power, regardless of whether persons under their authority or power are nationals of that State or not.

To be implemented effectively, any treaty of international human rights law does not have to be limited to a particular State. Otherwise, there will be a double standard: the State will comply with obligations on its territory, whereas the violations of the human rights and freedoms will be inevitable outside of its territory. Thanks to the drafters of the European Convention on Human Rights, it was decided not to limit the applicability thereof to the concepts of residence or territory, but to that of jurisdiction. The notion of jurisdiction provides space for interpretation, meaning that it can also be exercised outside of the territory of the Contracting States. The notion of jurisdiction in Article 1 of the ECHR only refers to the jurisdiction of the States, and not to that of the Court, although there is a close connection between them. The jurisdictional clause, as far as the extraterritorial application of the Convention is concerned, is also a special admissibility criterion, for the fulfilment of which the Court will have to find jurisdiction under the criteria of effective/overall control exercised over a territory, or on the basis of the link between the agent and the State, whenever the latter exercises its authority beyond its territory. The exercise of authority is not only the manifestation of sovereign power or competence (legislative, law enforcement etc.), but also any exercise of power, even if it is limited in time (for example, use of military forces in an international armed conflict)[333].

Instead, the practice of the Pan-American system for the protection of human rights and other international systems proves to be more coherent and beneficial in the sense of access to a remedy. The Inter-American Court of Human Rights does not

[333] Cassesse A. International Law. Oxford: OUP, 2001, p. 362

perceive jurisdiction in territorial terms, unlike the European Court of Human Rights. In the cases with extraterritorial implications, it applies the flexible authority and control, and invokes the principle of non-discrimination on the victim, giving protection regardless of the place of the interference.

It is also highlighted that the Court applies fragmentary criteria for the circumstances of armed conflict, and other cases of extraterritorial application of the Convention. We realize that the cases with major military implications have a political connotation; however, the application of various criteria in similar situations seems to be unjustified due to the "simple" reason of reducing the predictability and efficiency of the ECHR application, and, considering the main purpose of the Convention: to protect human rights and fundamental freedoms without separate treatment of applicants based on *locus delicti*. In other circumstances, such as extraterritorial actions of a State's intelligence officers in "pseudo" extradition proceedings, or in cases where States act extraterritorially on ships, or when a diplomatic or consular mission interfere with human rights beyond their State's territory, the "*State agent authority*" criterion is always applied, based on the control exercised by an agent on the alleged victim. In this area, the Court does not have difficulties in applying the Convention, those persons being protected regardless of the *locus delicti*. In this regard, the ECHR protects human rights and fundamental freedoms all over the world: on the territory of the State Party, outside the Council of Europe, or on the high seas. However, as we have tried to emphasize throughout the monograph, each of the criteria applied by the Court in order to identify the exercise of extraterritorial jurisdiction of the State over the victim of an alleged violation has its advantages and disadvantages.

For the extraterritorial application of the ECHR, the Court proceeds to the delimitation of exceptions from the principle of territoriality, which are deemed

justified. Thus, besides the state of armed conflict, the Convention can be also applied in respect of the acts performed/committed by security and intelligent agents of a Contracting Party, such as in cases of "extraordinary" rendition, or extradition to a country outside of the Council of Europe, where the person could be obviously subjected to a treatment against the standards of the Convention; actions committed by diplomatic or consular agents and the control over goods and people within diplomatic or consular premises; as well as the "classical" exception – exercising jurisdiction on a ship, even if it is registered under the flag of a third country.

The extraterritorial application of the Convention may be limited by State immunity in respect of the *acta jure empirii*; the colonial clause and the derogation clause provided for by the ECHR; and the principle of monetary gold. The *espace juridique* limitation applied in the *Banković* case can be considered obsolete.

The Court's case-law on extraterritorial obligations evolved from a narrow interpretation of the concept of extraterritorial jurisdiction of States, thus implicitly imposing restrictions on the exercise of the applicants' rights by limiting the application of the Convention to the legal of the Council of Europe; from not admitting the engagement of States' responsibility for collective military actions without exercising effective control over an area to the relatively clear practice of punishing States for violations committed by them beyond their territories, and even beyond the Council of Europe area.

In spite of some deficiencies in the case-law of the Strasbourg Court in respect of extraterritoriality, we must recognize that the responsibility of States for the acts committed outside of their boundaries, the act of protection of human rights and

fundamental freedoms amplifies, and the safeguards embedded in the European Convention become more reliable and universal.

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