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POSITIVE AND NEGATIVE OBLIGATIONS OF THE STATE UNDER THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

MONOGRAPH

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ABREVIATIONS

UNGA	United Nations General Assembly
PACE	Parliamentary Assembly of the Council of Europe
ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
CIA	Central Intelligence Agency
ILC	International Law Commission of the United Nations Organization
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
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
KFOR	North Atlantic Treaty Organization Peacekeeping Force in Kosovo
NATO	North Atlantic Treaty Organization
UN	United Nations (Organization)
§	paragraph
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural 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

The nature of the positive and negative obligations requires the High Contracting Parties to the Convention to implement prompt solutions likely to meet the commitments under the international treaty. According to the findings in the monograph, these commitments exceed the perimeter of a State's territory, and its jurisdiction is likely to expand across borders. Besides the theoretical and scientific aspect of the issue of identifying positive and negative obligations imposed on the State, including extraterritorial obligations, by prescribing inherent characters and elements and by listing the conditions for the exercise of the State's jurisdiction in terms of respecting its assumed obligations, also beyond the Council of Europe's boundaries, the States are facing real difficulties related to the adoption of the most appropriate measures in the domestic legal order to avoid possible condemnations from the European judicial forum.

Because the thematic of the present paper is quite specific, and the jurisprudential approach of the European Court of Human Rights of the States' positive and negative obligations under the under the European Convention of Human Rights has grown since the 1980s, and it currently continues to manifest itself, the doctrine of international law, in particular concerning the regional continental aspect and the international human rights law, does not contain numerous and specific papers on this matter. Hence, the issue of positive and negative obligations imposed on the Convention Member States, unlike other concepts evolved from the content thereof, emerged later and it has not peaked yet. Year by year, subject to the particular circumstances of the case and by interpreting the relevant conventional rules, the European Court formulates new specific obligations each time, and imposes them on the litigant States.

Thus, from *a theoretical perspective*, the monograph is based on a true theory of positive and negative obligations imposed on the State, including the extraterritorial obligations, with the prescription of inherent characters and elements, and by listing the conditions for the exercise of the State's jurisdiction in terms of respecting its assumed obligations, also beyond the Council of Europe's boundaries. The paper analyzes the concept of extraterritorial obligations resulting from overall or effective control over a foreign territory and the State agent criterion in establishing a State's liability for acts committed beyond its boundaries. From *a practical standpoint*, the paper reviews the main positive and negative obligations grounded in the text of the European Convention. Hence, the specific limits of the respective obligations became clear, and they could establish certain patterns on the possible outcomes given by the European Court in the still unexamined complaints lodged before it.

This is a genuine scientific research, which is mainly aimed at identifying specific positive and negative obligations imposed on the ECHR High Contracting Parties, as well as at

setting limits and researching the features of States' jurisdiction under the Convention. The monograph proves the hypotheses of the European Convention's extraterritoriality and the liability of the Member States for the violation of positive and negative obligations beyond their national borders. The paper substantiates certain new institutions of international human rights law, which actually determine the legal contents of the specific human rights and freedoms. It consequently develops the domestic and continental theoretical basis on the institution of States' obligations under the European Convention.

The practical value of the study is aimed at a wide circle of recipients: senior civil servants, especially employees of governments, ministries of justice and internal affairs, as representatives of state power and guarantors of human rights, as well as philistines in their capacity as ordinary or special litigants before various international courts of human rights.

The scientific reflections referring to the core and contents of the positive and negative obligations, as mentioned in the paper, could serve to supply the legal awareness of officials authorized to carry out international justice, elected or appointed in the name of the Republic of Moldova, for example at the European Court of Human Rights, the International Criminal Court or the International Court of Justice.

Finally, the monograph represents an added value for the national judges in order to broaden their legal horizons and to maintain a resultative dialogue between internal and external legal cultures, by adjusting the domestic provisions to the requirements, standards and practices of the Strasbourg jurisdiction. The practical value is recommended to especially legal professions in the application of the European Convention on Human Right, as interpreted in its case-law by the European Court of Human Rights. The elements of structure and content of the conventional obligations in the present research will facilitate the orientation in the process of identifying relevant case-law to settle a certain case.

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INTRODUCTION

The protection of human rights and fundamental freedoms has taken a spectacular new turn since the second half of the 20th century, following the terrible horrors that the humanity collided with prior and during the World War II. In principle, that the reality to the Auschwitz-Birkenau- and Gulag-type camps be never repeated, the world states decided with a large consensus on the establishment of a new world order in which the *supremacy of human value* should not have been just a simple declarative phrase. Having consolidated joint efforts, and being determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind; to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small; to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained; to promote social progress and better standards of life in larger freedom[1], the States first arrived at the idea of founding the United Nations, and signed in this respect the UN Charter which sets out the rules of the new world order and, later, the Universal Declaration of Human Rights[2] which recognized the human being's main prerogatives inherent to freedom and dignity.

Under the established international system of universal jurisdiction, countries began to seek alternative arrangements in terms of regional protection of the main human rights and freedoms. It is not surprising at all that the European countries, which suffered greatly from the atrocities of the world wars, were the protagonists in establishing such mechanisms on 4 November 1950 at the meeting in Rome, when the European Convention for the Protection of Human Rights and Fundamental Freedoms, hereinafter called the European Convention on Human Rights (ECHR)[3], was opened for signature. Once entered into force on 3 September 1953, it became the main regional instrument for the protection of human rights.

Apart from the criticism that the system established by the UN Charter has been subjected to for seven decades, and avoiding focusing much on the armed conflicts and crises which occurred in Korea, Vietnam, the Caribbean, Afghanistan, the Middle East etc., and continue to take place in Israel, Syria, Egypt, Libya, and very regretfully in Ukraine, one cannot assert that the goal set by the States when adopting the UN Charter has not been achieved, at least in part. The European system of human rights protection established under the ECHR and

[1] UN Charter of 26 June 1945. [online]: http://www.un.org/en/documents/charter/index.shtml (Accessed on 10.04.2015).
[2] Universal Declaration of Human Rights, adopted by the UNGA Resolution No. 217A(III) on 10 December 1948 [online]:http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (Accessed on 10.04.2014)
[3] European Convention on Human Rights adopted on 4 November 1950 in Rome, Italy. [online]: http://echr.coe.int/Documents/Convention_RON.pdf (Accessed on 25.01.2015).

ensured through the supervision of the European Court of Human Rights, following the transposition into practice of the UN Charter provisions concerning international regional cooperation among countries in terms of promoting human rights, has given outstanding and indisputable results for more than 60 years of existence.

Originally designed as an international treaty which enshrines a certain number of apparently limited and elementary fundamental rights and freedoms, the European Convention, through evolutionary interpretation given by the Court in Strasbourg today, has reached connotations exceeding the initial goals projected by its authors.

Based on the case-law developed by the European Court of Human Rights on various categories of individual, or more rarely interstate, cases about alleged violations of rights and freedoms, a genuine ECHR law was created, under which for each freedom or right enshrined there are established, according to the particular circumstances of the case, certain limitations of protection. Unless the Member States offer the applicants the necessary limits of protection, they incur international liability under the Convention provisions concerning either substantive rights or procedural safeguards. In any event, once the European Court receives an application, it has to determine whether, under the specific circumstances of that particular case, the respondent State fulfilled its negative and/or positive obligations it had been responsible for under the Convention European.

Accordingly, any private individual's conventionally recognized right implies the existence of certain obligations for signatory States. The reality of the 21st century imposes on the States the obligation to guarantee individual rights to a greater extent than ever before. It is clear that currently there is no human right which, in the absence of the State's corresponding obligations, can be considered fully guaranteed.

The European Court of Human Rights has opted for a bifurcated approach to the States' obligations by dividing them into two categories: negative and positive obligations.

The negative obligations set the limits of the State's actions in respect of the individuals in its jurisdiction. These ones protect any individual's rights of any undue interference of State bodies or officials, or of third parties.

On the other hand, it is widely recognized that human rights not only provide protection for individual liberty against an intrusive State, but they can also request that the State take positive steps to ensure an effective guarantee of a right. The Strasbourg Court has progressively recognized implicit positive obligations of the Member States arising from the rights stipulated

in the Convention. Lately, as stated by Mowbray, the positive obligations are of a growing importance for the European Court[4].

In its practice of application of the conventional provisions, the Court has mostly detailed the contents of the States' obligations on the grounds that it intended to give a clear interpretation of the common approaches on the human rights concept and on all aspects regarding their protection. The legal principles contained in the Court's judgments are intended for a coherent use of this concept in its case-law, and also in the High Contracting Parties' legal systems where they become mandatory. The Court has relatively rarely asserted on common approaches to State obligations, while it has often focused on the failure to fulfil them, which consequently led to specific violations of individual rights guaranteed by the Convention.

The development of positive and negative obligations is one of the clear ways the Convention has evolved. All articles of the Convention can be interpreted, and most of them have been interpreted as such by the Court as to require the State to either refrain from certain actions that would enable reaching the very essence of the rights protected, or take some positive actions to ensure protection thereof. The continued development of the theory of obligations must be seen as a genuine pillar for strengthening the rule of law.[5]

Over the last few decades, the Council of Europe Member States have been facing new challenges related to the rights of transsexuals, same-sex couples, immigrants, refugees, victims of armed conflicts etc., which undoubtedly raise difficult and delicate issues before the European Court concerning the broadening and specification of the negative and, especially, positive obligations to be taken under the Convention since they change contours each year.

At the same time, the 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 was committed or the harmful effects of the respondent State's interference was produced, by extrapolating a State's jurisdiction outside its boundaries, extraterritorially.

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.

[4] Mowbray A.R., The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights. Oxford-Portland-Oregon: Hart Publishing, 2004, p. 229.
[5] Lautenbach G., The Concept of the Rule of Law and the European Court of Human Rights. Oxford: Oxford University Press, 2013, p.179.

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. The States have thus to fulfil their positive and negative obligations beyond their boundaries.

Given the considerations set out above, and reiterating the need for effective protection of fundamental rights and freedoms to the widest possible scale, this scientific paper identifies the role and particularities of positive and negative obligations binding the Signatory States of the European Convention of Human Rights to respect some standards. It also examines the appropriate case-law solutions suitable to the new challenges that the Member States face domestically.

Taking into account the timeliness and necessity premises, this research can be considered an academic provocation likely to stimulate the curiosity and research capabilities of all those interested in the complex field of human rights.

1. ECHR MEMBER STATES' GENERAL OBLIGATION TO PROTECT HUMAN RIGHTS

1.1. Concept of the universalism of human rights

The problematic of the States' 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 within and outside their territories, provided for primarily in the Human Rights Charter and in the Covenants on civil, political, social, economic, and cultural rights, 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 States' 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 universality. However, as Professor S. Skogly[6] 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

[6] 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)

position on the extraterritoriality treaties of the international human right law; 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 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 the States' 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 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*[7], 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 actions.

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 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 protection of individuals.

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*

[7] 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)

the rights and freedoms forth in this Declaration can be ***fully realized***". 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[8];
- Declaration on the Right to Development[9];
- Vienna Declaration and Programme of Action[10] etc.

The main legal foundation of the universality of human rights is contained in Article 1, §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"[11]. 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 (substantive) 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*".

In addition to the UN Charter, the International Covenant on Economic, Social and Cultural Rights, 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*

[8] United Nations Millennium Declaration, adopted by the UNGA Resolution No. 55/2 on 18.09.2000, [online]: http://www.un.org/millennium/declaration/ares552e.pdf (accessed on 10.04.2014)
[9] 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)
[10] 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)
[11] 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)

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, such as for example the case of the International Covenant on Civil and Political Rights.

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, including extraterritorial, application of basic international human rights law instruments.

1.2. Foundation of the general obligation to protect

The general obligation to protect human rights includes the States' obligation to prevent human rights violations and to repress and redress them.

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 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 § 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 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 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 those reasonable and appropriate measures are.

Having focused on the first question, it shall be highlighted that 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.[12] For example, in the case of *Siliadin v. France* [13], 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 follow-up case of *Sorensen and Rasmussen v. Denmark*[14], the Court noted that, under Article 1 of the

[12] 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.
[13] Case of *Siliadin v. France*, judgment of 26.07.2005, final on 26.10.2005, § 77. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69891 (accessed on 13.07.2014)
[14] Case of *Sorensen and Rasmussen v. Denmark*, judgment of 11.01.2006, § 57. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72015 (accessed on 13.07.2014)

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 and/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*[15], 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 for instance in the case of *M.C. v. Bulgaria*[16]. 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*[17], 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 viable framework aiming at eradicating the risk of violation of rights and freedoms protected by the Convention. Unless the national

[15] 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)
[16] 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)
[17] 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)

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

As to the States' obligation to repress and redress the 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 substantive 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*[19], 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

[18] Panoussis I., *op. cit*., p. 452.
[19] Case of *Panigua Morales and Others v. Guatemala*, judgment on the merits of 08.03.1998, § 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)

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, 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*[20], 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*[21], 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

[20] 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)

[21] 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)

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 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.[22] Thus, in the case of *Bamaca Velasquez v. Guatemala*[23], 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 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 analysed 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*

[22] Panoussis I., *op.cit*., p. 455.
[23] 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)

Kingdom[24] (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.

In the follow-up case of *Bursuc v. Romania*[25], 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*[26], 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.

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[24] 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)

[25] 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)

[26] 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)

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 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.[27]

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.

1.3. Nature of the obligations to be respected by the ECHR Member States

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

[27] 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)

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[28]. 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 interpreted in an evolutionary manner aiming at the effective protection of human rights and fundamental freedoms[29]. Moreover the protection standards had to increase along with the development of the society and its correlative requirements[30].

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[31] 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[32], the concept of positive or affirmative obligations of the High Contracting Parties definite (!) and implicitly present in

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[28] 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)

[29] 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.

[30] Case of *Tyrer v. the United Kingdom*, judgment of 25.04.1978, § 31. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57587 (accessed on 25.07.2014)

[31] Urbaite, *op. cit.*, p.214.

[32] 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 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 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 materials 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.

It has to be mentioned that 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 in Article 2. In the case of *McCann*, it stated that Article 2 § 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[33].

[33] Case of *McCann and Others v. the United Kingdom*, judgment of 27.09.1995, § 161. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57943 (accessed on 25.07.2014)

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[34]. 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 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

[34] Case of *Platform Ärzte für das Leben v. Austria,* judgment of 21.06.1988, § 31. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57558 (accessed on 25.07.2014)

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[35].

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 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.[36]

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.

Therefore, 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.

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[35] Case of *Osman v. the United Kingdom*, judgment of 28.10.1998, § 116. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58257 (accessed on 25.07.2014)

[36] Case of *Ilaşcu and Others v. Moldova and Russia*, judgment of 08.07.2004, § 333. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61886 (accessed on 25.07.2014)

1.4. ECHR Member States' extraterritorial obligations

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.

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 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 could also exercise its jurisdiction directly on an individual (and not on the space) through an agent in its service.

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 (for instance, in the case of extradition with infringed individual rights). In terms of content, the extraterritorial obligations will be only limited to the respective action and the violated right.

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*"[37]. 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, can everyone, regardless of nationality or place of residence, 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 treaties on human rights and fundamental freedoms. 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, being some added value;
- their *content* – to take action through cooperation and independently – involves both a negative obligation (i.e. not to interfere with the human rights and 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

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

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 territory*"[38]. This definition falls into the situation of a State's extraterritorial act, liable 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

[38] *Ibidem*

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

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[39]. 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*" [40]. 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 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

[39] 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)

[40] 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)

the Court stated that the rights and freedoms defined in the Convention could be "*divided and tailored*".[41]

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".

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.

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,* it (rules prohibiting the use of force for the

[41] Case of *Al-Skeini and Others v. the United Kingdom*, judgment of 7.07.2011. § 137. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606 (accessed on 25.03.2014)

settlement of disputes, such as those embedded in the text of Article 2 § 4 of the UN Charter) 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 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 terms of "personal", 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 subsidiary implications.

The interpretation of the presence and extent of extraterritorial obligations in respect of each international human rights law 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. [42]

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.

International Covenant on Civil and Political Rights

[42] Concurring Opinion of Judge Giovanni Bonello in the case of *Al-Skeini and Others v. the United Kingdom*, judgment of 07.07.2011. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606 (Accessed on 25.03.2014).

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*[43], the Human Rights 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 unconscionable to interpret the liability under article 2 § 1 (*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*) 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. 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 successful for a long time.

Another case where 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*[44], 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

[43] 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 § 12(3) (accessed on 22.04.2014)

[44] 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)

State's act and the consequence occurring outside its jurisdiction. Thus, the 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*[45].

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, in the case on *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 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[46]. The ICJ concluded expressly that the International Covenant on Civil and Political Rights is applicable to acts committed outside their territory.

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[47], 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 Protocols 9 and 11. The Organization of the American States consists of two main bodies – the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights. The main legal instruments of protection are the American Declaration of Human Rights, the American Convention on Human Rights, and the Charter of the Organization[48].

[45] General Comment No. 31 (80) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenants, 29.03.2004, § 10 [online]: http://www.refworld.org/docid/478b26ae2.html (accessed on 22.04.2014)
[46] Case on *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*…§ 109
[47] Official website of the Organization of American States [online]: http://www.oas.org/en/default.asp (accessed on 23.04.2014)
[48] 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)

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 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*[49], the Inter-American Commission on Human Rights 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 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 respective Convention. Referring to the *causal link* between the deaths 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 Cuba's responsibility for its internationally wrongful act, and namely:

a) violation of an international obligation;

b) imputability of the offence the 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*[50] the Commission applied the Convention extraterritorially in the circumstances of the armed conflict in Grenada. The applicants invoked that the US Government had violated their right to a fair trial and to freedom, 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 international human rights law during an armed conflict. As to the Commission,

[49] 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)
[50] 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)

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 beneficiaries, whereas States are obliged to protect these rights whenever they are subject to their authority and control.

Given the analysed 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".

International Court of Justice (ICJ)

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[51], which 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[52]. In its turn, Russia argued that the obligations arising from Articles 2 and 5 of the Convention only applied within States Parties[53] since 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.

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[51] 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)

[52] *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)

[53] *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. § 153. http://www.icj-cij.org/docket/files/140/16099.pdf (accessed on 18.04.2014)

Committee against Torture

In accordance with Article 2 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[54] "*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 § 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), the Committee recommended the State to implement the "full jurisdiction in the extraterritorial application of the Convention against Torture.[55]

[54] 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)

[55] 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)

2. CONDITIONS FOR THE FULFILMENT OF THE POSITIVE AND NEGATIVE OBLIGATION

2.1. Jurisdiction of the ECHR Member States

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*"[56]. 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 an international dispute through a binding decision taken in accordance with the international law [...] by identifying its activity iuris dictio*"[57].

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

[56] Лукашук И.В., Медународное право. Общая часть. Москва: Волтерс Клувер 2008, p. 330.
[57] Sârcu-Scobioală D., Actul jurisdicţional internaţional. Chişinău: 2013, p.28.

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[58] 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[59]. 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.

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[60]. 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[61]. 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 obligations of States involve primarily the executive and legislative powers: executive because they "enable" their agents to commit interferences outside their boundaries.

[58] Brownlie I., Principles of Public International Law. 7th edition. Oxford University Press, 2008, p. 299.
[59] Burian A. and Others, Drept Internaţional Public. Ediția a IV-a. Chișinău: Elena V.I., 2012, p. 158.
[60] 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)
[61] 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)

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 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 to a third State powers of control over customs and foreigners[62].

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 Argentinean 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, 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*"[63]. 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'

[62] 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)
[63] 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, § 109 (accessed on 18.04.2014)

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.

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.

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.[64] 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.[65] 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 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)[66], 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

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[64] 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)

[65] Velu J., Ergec R. La convention européene des droits de l'homme. Bruxelles: Bruylant, 1990, p. 68.

[66] 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)

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, whereas, in evaluating alleged violations, it relies on the relationship between the State and the individual, rather than on the *locus delicti*.[67]

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.

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

[67] 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.

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[68]. 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 Treaty of Saint-Germain in 1919*[69]. 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".[70]

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 (§ 1) of the International Covenant on Civil and Political Rights, Article 1 of the CIS Convention on Human Rights and Fundamental Freedoms[71], Article 3 (§ 1) of the Arab Charter on Human Rights (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.

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

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[68] 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)

[69] 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)

[70] 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)

[71] 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)

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.

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 [...]"[72]. 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 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 were 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""[73]. 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.

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[72] Preparatory Work on Article 1 of the ECHR. [online]: http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART1-COUR(77)9-EN1290551.PDF (accessed on 20.04.2014)

[73] Case of *Banković and Others v. Belgium and Others*, decision of 12.12.01, § 61. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22099 (accessed on 25.03.2014)

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.

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[74]. 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[75] 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"[76]. 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 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[77]. 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

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

[75] 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)

[76] Case of *Tyrer v. the United Kingdom*, judgment of 25.04.1978, §31. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57587 (accessed on 24.06.2014)

[77] Case of *Issa v. Turkey*, judgment of 16.11.2004, § 67. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67460 (Accessed on 24.06.2014)

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 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 admissibility criterion. However, it is different from the classical admissibility 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 in respect of the violation invoked; and whether the victim had a right correlative to the respective obligation. Relying on jurisdiction, the Court arrives at the conclusion whether the applicant can claim a violation. In terms of procedure, the question of

the respondent State's jurisdiction can be solved at the stage of examining both the admissibility and the merits, depending on the complexity of the circumstances, and the challenges the Court might face.

In order to avoid confusion, it needs to be specified 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.

The State is not the only subject of legal relations in terms of international liability. The international organizations' responsibility remains a disputed issue.[78]

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[79] and the current Article 59 (§ 2) of the ECHR[80], it would be appropriate to analyse the 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[81].

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.[82] Thus, there is a legal vacuum in the protection of fundamental rights and freedoms of persons "within the jurisdiction" of the

[78] 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)

[79] 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)

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

[81] 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)

[82] 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.

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)[83]. 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 to Article 14 of the Maastricht Treaty[84]. 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[85].

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[86]. 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[87], and the second case it will be only imputable to satisfy the test of *effective control*[88]. That difference, at least in respect of the European Union, seems somewhat artificial, considering that States will always keep (even limited) control on its military contingents.

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

[84] Maastricht Treaty of 7 February 1992. [online]: http://www.eurotreaties.com/maastrichtec.pdf (accessed on 10.04.2014)

[85] 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)

[86] 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)

[87] 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)

[88] 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)

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 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[89]. 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[90].

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[91] (hereinafter Draft on Accession). Article 3 (§ 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 (§ 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.

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*[92].

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

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[89] Case of *Confédération Française Démocratique du Travail v. European Communities, d*ecision of the ECmHR of 10.07.1978, § 4. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-74373 (accessed on 06.04.2014)

[90] 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)

[91] 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)

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

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 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.

2.2. Liability for extraterritorial acts

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[93], 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*"[94]; That responsibility is also exercised depending on the obligation of 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

[93] Лукашук И. В., Право Международной Ответственности. Москва: Wolters Kluwer Russia, 2004, p. 17.
[94] 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)

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[95]. This principle is reiterated in many cases of the European Court. Thus, in the case of *A. v. the United Kingdom*[96], 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*[97], 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.

[95] 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)

[96] 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)

[97] 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)

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*"[98]. Thus, whenever a State fails to respect the fundamental rights and freedoms set out in the ECHR, its international responsibility is automatically[99] 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 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 admitted an 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*[100] 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*".

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[98] 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)

[99] 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)

[100] 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)

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*"[101]. 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[102].

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[103]. Therefore, there is a sort of fiction when *de jure* the primary act is not punished under the ECHR, and in 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[104].

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

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[101] Case of *Prosecutor v. Duško Tadic*, Appeals Chamber of the International Tribunal for Former Yugoslavia, judgment of 15.07.1999. § 117 [online]: http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf (accessed on 16.04.2014)

[102] 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*...§74

[103] 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)

[104] 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)

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 several landmark cases such as *Loizidou v. Turkey*[105]*; Ilich Ramirez Sanchez v. France*[106]*; Öcalan v. Turkey*[107]*; Issa v. Turkey*[108] 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 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:

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[105] 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)

[106] 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)

[107] 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)

[108] 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)

- 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 analysed 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 s/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).

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*"[109]. 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[110], 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.

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[109] Case of *Banković and Others v. Belgium and Others*, decision of 12.12.01, § 54. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22099 (accessed on 25.03.2014)

[110] 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)

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 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*[111]. 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. Belgium and Others, Loizidou v. Turkey; Ilaşcu 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 *Ilaşcu and Others v.*

[111] 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)

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.

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[112].

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 ultimate role of the concept of jurisdiction because, whenever the State shall exercise its extraterritorial jurisdiction for the

[112] 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)

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 analysed 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 connection 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[113], 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*[114] 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 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.

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[113] 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)

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

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[115], as well as in the international criminal law[116] 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[117], whereas *overall control* only presumes proving the existence of 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*[118]*; Banković and Others v. Belgium and Others* etc. In the above cases, as well as in the cases of *Ilaşcu v. Moldova and the*

[115] Case of *Nicaragua v. USA*, ICJ judgment din 27 June 1986, § 242, 277. [online]: http://www.icj-cij.org/docket/files/70/6503.pdf (accessed on 16.04.2014)

[116] Case of *Prosecutor v. Duško Tadic*, Appeals Chamber of the International Tribunal for Former Yugoslavia, judgment of 15.07.1999, § 137 [online]: http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf (accessed on 16.04.2014)

[117] 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)

[118] 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)

Russian Federation and *Ivanţoc v. Moldova and the Russian Federation*[119], 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*[120] and *Georgia v. Russia*[121] – 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 element of effective control to the spatial criterion, 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 control is a simple manifestation of military occupation[122], certainly involving it. The State can be a simple 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".

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[119] 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)

[120] 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)

[121] 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)

[122] 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)

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 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*[123]; *X v. the United Kingdom*[124]; a ship or aircraft: *Medvedyev*

[123] 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)
[124] 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)

and Others v. France[125]; 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*[126].

Having analysed 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 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

[125] 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)
[126] 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)

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 examination of the *Al-Skeini* case 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.

The last element needed to engage the extraterritorial responsibility of States in the light of the ECHR is the jurisdictional connection 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*[127].

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.

[127] Case of *Drozd and Janousek v. France and* Spain, judgment of 26.06.1992, § 84-97. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57774 (accessed on 01.07.2014)

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

2.3. Situations of exoneration from liability

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.

Espace juridique

The *espace juridique* or 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.[128] 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*[129] and *Ocalan*[130]) by noting that the

[128] Case of *Bankovic and Others v. Belgium and Others*, decision of 12.12.01. HUDOC database. [on-line]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22099 (accessed on 25.03.2015).
[129] Case of *Issa v. Turkey*, judgment of 16.11.2004. HUDOC database. [on-line]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67460 (accessed on 25.03.2015).
[130] Case of *Ocalan v. Turkey*, judgment of 12.05.2005. HUDOC database. [on-line]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69022 (accessed on 25.03.2015).

respondent States in the respective cases had not objected in that respect. 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, 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*[131], 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[132], 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.

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*[133], but already toward the extraterritorial application of the Convention.

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*[134]. 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

[131] Case of *M. v. Denmark*, decision of the ECmHR of 14.10.1992. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-1390 (accessed on 25.03.2015).
[132] 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 25.03.2015)
[133] Case of *Al-Skeini and Others v. the United Kingdom*, judgment of 07.07.2011. § 137. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606 (accessed on 25.03.2015)
[134] 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 25.03.2015)

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, but also in terms of the responsibility. In this regard, the respondent States objected in the following cases: *Banković*[135] – in respect of the NATO actions in the FRY; *Behrami*[136] – due to the collective actions of the UN peacekeeping forces in Kosovo; or in the case of *Saddam Hussein v. the Coalition Forces*[137]. 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.

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"[138], 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 § 1 in respect of the non-expellable foreigners[139]. In the recent case of *A. and Others v. the 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[140].

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

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[135] Case of *Banković*, precited.

[136] 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 25.03.2015)

[137] 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 25.03.2015)

[138] 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 25.03.2015)

[139] Corneliu Bîrsan. Convenţia Europeană a drepturilor omului. Comentariu pe articole. Vol I: drepturi and libertăţi. Bucureşti: ALL Beck, 2005, p.925

[140] Case of *A. v. the United Kingdom*, judgment of 19.02.2009, § 190. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403 (accessed on 25.03.2015)

exemption cannot be absolute, and the State is obliged to protect the hard core rights, as provided for in Article 15 § 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[141]), 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[142].

Colonial clause (Article 56 of the ECHR)

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 § 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[143]. On the other hand, overseas territories of France are, according to its Constitution, part

[141] 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 25/03/2015).

[142] 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)

[143] 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)

of the territory of the Republic, and the declarations within the meaning of Article 56 are thus somewhat useless[144].

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[145]. The Court examined the 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.

For example, in the *Quark Fishing Ltd.* case[146], 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 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

[144] Charrier J.-L., Chiriac A. Codul Convenţiei Europene a Drepturilor Omului. Paris: Litec, 2008, p. 669.
[145] 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 25.03.2015).
[146] 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 25.03.2015)

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.

The High Court reached the same conclusions in relation to the extradition of the applicant from Macau (former Portuguese colony) to China[147], or to the jurisdiction of the United Kingdom in respect of persons in Hong Kong[148].

Contrary to the above-mentioned case-law, in the *Matthews* case[149] 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 for 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.

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.

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[147] 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 25.03.2015)

[148] 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 25.03.2015)

[149] 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 25.03.2015)

Thus, in the case of *Drozd and Janousek v. France and Spain*[150], 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. 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, 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

[150] 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 25.03.2015).

Andorra as well. Thus, the acts performed by the French judges seconded to Andorra were not imputable to the French government.

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, 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*[151]. 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.

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.

[151] 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 25.03.2015)

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[152].

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 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*[153], 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*[154] – 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 § 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[155].

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[152] 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 25.03.2015)

[153] Bianchi A., Human Rights and the Magic of Jus Cogens. EJIL 2008, Vol.19, No.3. p. 491-508.

[154] 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 25.03.2015)

[155] 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 25.03.2015)

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*[156]. 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[157].

In a recent case, the Court considered the latest developments of international law in this regard[158]. 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".

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[156] 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 25.03.2015)

[157] Nica A., Abordările actuale ale principiului imunității de jurisdicție a statelor în lumina hotărârii Curții Internaționale de Justiție din 03 February 2012. In Materialele Conferinței științifice internaționale 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, pp. 243-252.

[158] 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 25.03.2015)

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[159]. At the same time, 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.[160]

3.4. Special cases of extraterritorial liability

Extraterritorial activity of States' security services. 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*[161], 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 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

[159] 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 25.03.2015); Case of *Kirovi v. Bulgaria 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 25.03.2015)

[160] 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 25.03.2015)

[161] Case of *Ramirez Sanchez v. France*….

jurisdiction of Germany[162]. 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)[163], 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*[164], 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[165]. 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.

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[166].

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

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[162] 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)

[163] 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)

[164] 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)

[165] *Ibid.* § 67

[166] 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)

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: 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*[167], 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[168]. 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 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 […]"[169].It is important to mention that the death row is just

[167] 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)
[168] *Idem*, § 81.
[169] *Idem*, § 111.

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[170]. The Court ruled on the inadmissibility of the application, where the applicant invoked the risk of being tortured after his extradition to the USA[171].

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"[172]. 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 information on the overall protection of human rights and the high probability that the applicant would be subjected to treatment contrary to Article 3[173].

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 cybercrime, 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[174]. *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

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[170] 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)

[171] 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)

[172] 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)

[173] 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)

[174] Case of *Čalovskis v. Latvia*, judgment of 24.07. 2014, § 136-147. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145791 (accessed on 25.07.2014)

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[175].

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*" 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[176]. 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 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

[175] Case of *El-Masri v. the Former Yugoslav Republic of Macedonia*, judgment of 13.12.212, § 218. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621 (accessed on 07.05.2014)
[176] *Idem.*

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[177].

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*[178] and *Husayn*[179] 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[180], 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 several heads by Poland, as an accomplice[181], 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[182]. 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.

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[177] 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)

[178] 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)

[179] 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)

[180] 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)

[181] 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."

[182] Case of *Husayn*…§ 444; Case of *Al Nashiri*…§ 442.

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 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[183], 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 confidentiality of the relevant investigation documents, the Polish government has not provided

[183] Case of *Al Nashiri…*§ 395.

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[184]. Due to the lack of effective investigation the High Court also found that there had been a violation of Article 13 of the Convention[185].

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[186]. 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[187], 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 because the very nature of extraordinary rendition, which involves depriving the individual of essential procedural guarantees[188]. 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[189]. 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 § 1[190].

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

[184] *Idem,* § 488.
[185] *Idem,* § 550.
[186] Case of *Al Nashiri…*§ 518; Case of *Husayn…*§ 51.
[187] Case of *Al Nashiri…*§ 578.
[188] Case of *Al Nashiri…*§ 530-531; Case of *Husayn…*§ 524-526.
[189] Case of *Al Nashiri…*§ 539; Case of *Husayn…*§ 533.
[190] Case of *Al Nashiri…*§ 567-568; Case of *Husayn…*§ 553-554.

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.

Activity of diplomatic missions abroad and States' diplomatic relations. 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 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[191]. 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[192]. 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 was an exclusive authority over those persons and their property[193]. 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.

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[191] 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)

[192] 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)

[193] 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)

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[194].

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[195], it thus finding a disproportionate violation of Article 6 § 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[196].

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.

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[197]. 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).

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[194] 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)

[195] Case of *Sabeh El Leil v. France*, judgment of 29.06.2011. § 61-67. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105378 (accessed on 02.05.2014)

[196] 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)

[197] 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)

3. EXTENT OF THE POSITIVE OBLIGATIONS OF STATES UNDER THE ECHR

3.1. Structure of the positive obligation

The European Court of Human Rights has developed a particular legal practice in the field of positive obligations of States on the protection of substantive rights guaranteed by the ECHR. In its case-law, it has established that the Contracting States were obliged to provide an effective guarantee against the arbitrary for the exercise of the rights and freedoms enshrined in the European Convention, granting protection against both violations committed by private individuals and interference by state agents. Although the text of the Convention does not establish *in termenis* any obligations on the Member States to ensure certain enshrined rights and freedoms, the Strasbourg Court, by virtue of its unique role to interpret conventional provisions, concluded that such obligations are inherent to the European protection system of human rights, whereas even the ECHR's authors mentioned in Article 1 of the travaux préparatoires[198] that "*Every State a party to this Convention shall guarantee to all persons within its territory the following rights*…". However, later they replaced it with the current version: "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*."

The absence of an express provision on the positive obligations in the contents of the ECHR has conditioned the idea that charging the States with the respective obligations would be counterbalanced by the recognition of a large margin of appreciation in adopting specific measures to efficiently protect fundamental rights. In this sense, it has been noted more than once that although the positive obligations imposed on the Member States are not expressly included in the text of the Convention, and given that they can subject the States to a considerable financial and organizational burden, it was justified for the Court to introduce the concept of positive obligations and simultaneously to admit a large margin of appreciation to the respective States in order to determine a certain measure required for the right or freedom concerned to be effective.[199]

Thus, while the Member States were required to comply with certain positive obligations to guarantee the effective protection of human rights, they were authorized a wide discretion concerning the choice of specific mechanisms and methods in this regard.

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[198] Travaux préparatoires la art. 1 din Convenţia Europeană a Drepturilor Omului. [online]: http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART1-COUR(77)9-EN1290551.PDF (Accessed on 25.03.2015).

[199] Dijk v. P. *Op. Cit*. p. 22.

Nevertheless, the Strasbourg Court, by virtue of its higher supervisory role, preserved its powers to check whether those specific mechanisms and methods adopted by the Member States were sufficient and conclusive to streamline the protection of a right or freedom of a certain applicant alleging the respondent State's failure to comply with positive obligations incumbent under the ECHR.

Cu Although the concept of positive obligation is often used in the Court's decisions, a general definition has not been developed. However, such a definition can be easily reconstituted given the case-law of the European forum. In the case of the *Belgian linguistics*[200], the applicants argued in their complaints that such obligations should have been recognized as "obligations to do something". The Court refused to approve this legal standpoint and preferred to state that the impugned provision of Article 2 of Protocol no. 1 (right to education) by its nature requires regulation by the State.

It was only in 1979 in the case of *Airey v. Ireland*[201] that the European Court set the real basis for the positive obligation by condemning not a positive obstacle by the State, but the latter's passivity causing obstruction in the effective exercise of a guaranteed right. In the European Court's opinion, the first characteristic of the positive obligations is that they require in practice the national authorities to take the necessary measures to protect a right or, more precisely, to take reasonable and appropriate measures to protect individual rights.

When referring to the structure and characteristics of positive obligations, it shall be emphasized that the latter are indivisible, and actually involve the Signatory States' fundamental duties consisting of either to protect or to fulfil. The obligation to *protect* requires the State to prevent third parties from interfering with individual rights; whereas the obligation to *fulfil* requires to either ensure the right directly or facilitate the disposal thereof, by assisting individuals and communities at creating their own provisions. It also requires the State to promote the right by disseminating that information and by instructing citizens about their recognized rights.

Given the current case-law developed by the Court, the diversity of measures that States are required to undertake is impressive. They include the obligation to adopt an effective legal framework to protect the guaranteed rights; the duty to investigate complaints about violation of some specific rights; the obligation to take operative measures in some cases in order to protect

[200] Case *"Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (Belgian linguistic* case), judgment of 23.07.1968. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57525 (Accessed on 25.03.2015).

[201] Case of *Airey v. Ireland*, judgment of 09.10.1979. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57420 (Accessed on 25.03.2015).

individual rights from being violated; the duty to provide information on threats to individual rights; the obligation to provide resources and training, and others.[202]

The positive obligations are indeterminate and planned. They require resources and gradual implementation upon resources' availability. The concept that an obligation is indeterminate means that it is impossible to define what a body should undertake to execute the obligation. Indeterminacy may indicate inaccuracies or incommensurability and radical misunderstanding. Uncertainty implies that the content of the obligation cannot be derived from the law. For example, protection against poverty does not specify a certain minimum. Incommensurability is more problematic because it means that different values or goods cannot be measured by the same calculation system.[203]

The obligation to protect

This obligation means that the State must protect individuals from violations of their rights by other individuals. By protecting the rights of X, the State must consider that Y has rights as well. However, X's protection should not be effected by excessive constraint on B.

The European Court was first confronted with such a situation under the right of association. In the case of *Platform "Ärzte für das Leben" v. Austria*[204], where a demonstration against abortion was interrupted by a demonstration in support thereof. Demonstrators (X) claimed that the Austrian Government failed to protect their right from counter-demonstrators (Y). The first principle identified by the Court was the obligation to protect the demonstrators from others, namely: "In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate. Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere."

A similar analysis can be applied to Article 2: the right to life. In the case of *Osman v. the United Kingdom*[205], the applicants (X) stated that the authorities had failed to protect them from the offender (Y) despite the clear indications that the latter had posed a serious threat to their physical safety. The European Court identified two major principles here. The first is the obligation to protect X from Y by taking preventive measures. The second one was the obligation to restrict by respecting the rights of Y. Both principles must be optimized in the light of factual constraints, such as "the difficulties involved in the politics of modern societies and the unpredictability of human behaviour."

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[202] O'Connell R. Releasing political equality: the European Court of Human Rights and positive obligations in a democracy. In: Northern Ireland Legal Quarterly, 2010, no. 61 (3), p. 263-279.

[203] Fredman S. Human Rights Transformed: Positive rights and positive duties. Oxford: Oxford University Press, 2008, p. 71

[204] Case of Platform "*Ärzte für das Leben*" v. Austria, judgment of 21.06.1988. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57558 (Accessed on 15.05.2015)

[205] Case of *Osman v. the United Kingdom*, judgment of 28.10.1998. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58257 (Accessed on 15.05.2015)

As to Article 3, the Court reiterated in the case of *Z and Others v. the United Kingdom*[206] that the respective Article prohibits torture and inhuman or degrading treatment or punishment in absolute terms. The State's obligation in this case is to take measures to ensure that individuals under its jurisdiction be not subjected to torture or inhuman treatment, as well as that such treatments be not inflicted by private individuals.

The obligation to fulfil

The indeterminacy is most often invoked in respect of the obligations to fulfil. In order to reject this accusation it is necessary to separate the protected right of its corresponding obligation. The right is the goal, and the obligation is a way of achieving it. The right may not be fulfilled immediately because either other principles have priority or the necessary resources are not available. Nevertheless, the right cannot be reduced to a mere aspiration. There is still an obligation to fulfil the right. The fact that the requirement is complex and subject to competing factors is not a reason for reducing the importance of the right. The aim is to optimize it to the greatest possible legal and material extent.

The positive obligations aim at ensuring everyone the ability to exercise his/her rights. For this purpose, four parameters can be derived. The first is effectiveness: regardless of the actual guarantee level at some point or of the steps taken for self-guarantee, they must be appropriate and to pursue fulfilment of the right. The second is participation: the involvement in the process of those affected is essential for the result to be significant. The third is liability: the authorities must be able to explain and justify the steps taken to optimize the right. The fourth parameter is equality: the positive obligations should be focused on disadvantaged people who cannot enjoy their rights in the same way as others do.

For example, in the case of *Airey v. Ireland*, cited above, the Strasbourg Court recognized that the right to a fair trial may in some circumstances give rise to a positive obligation to provide legal assistance to the applicant overshadowed by her husband.

In essence, the obligation to fulfil requires time for implementation. Even if the obligation to optimize is progressive, it is not appropriate to postpone the elaboration of suitable conditions for the implementation of the respective right. Firstly, the State is obliged to take immediate actions to achieve the objective to the extent possible, at the same time tending to reach the greatest fulfilment of the rights, despite inadequate resources. Secondly, there is an immediate obligation to monitor the process of achievement. Thirdly, there is an immediate obligation to ensure that the relevant rights be exercised without discrimination.

[206] Case of *Z. and Others v. the United Kingdom*, judgment of 10.05.2001. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59455 (Accessed on 15.05.2015)

3.2. Positive obligations and substantive rights

In what follows, we will analyse the European Court's case-law on positive obligations and the substantive rights guaranteed by the Convention, by elucidating the clear obligations imposed by the Court on, and attributed to, the Member States.

The positive obligations enshrined in the text of Article 2 (right to life). From the content of this Article there arise a number of specific obligations, as follows.

Protection of an individual's right to life

This obligation is fundamental in a democratic society. In its relevant case-law, the Court has noting on numerous occasions that Article 2, which safeguards the right to life and prescribes a number of circumstances when deprivation of life may be justified, is one of the basic provisions of the Convention, and no derogation is allowed.[207] Together with Article 3, Article 2 enshrines one of the fundamental values of democratic societies creating the Council of Europe. Therefore, the circumstances in which deprivation of life may be justified must be strictly stipulated. The object and purpose of the Convention as a tool to protect the fundamental rights and freedoms require that Article 2 be interpreted and applied in such a way that its guarantees be practical and effective.[208]

Also, in the case of *Makaratzis v. Greece*[209], the European Court expressly pointed out that under Article 2 of the ECHR the Contracting State should not only refrain from the intentional and unlawful deprivation of life, but also take appropriate measures in the domestic legal order to safeguard the lives of the persons under its jurisdiction. This includes the State's basic obligation to ensure the right to life by implementing an adequate legal and administrative framework to prevent the commission of offenses against the person, followed by the establishment of a legal machinery aimed at preventing, suppressing and punishing the violations of these rules.

In the recent case of *Pisari v. Moldova and Russia*[210], the Strasbourg Judges noted that the exceptions contained in Article 2 § 2 extend, but do not prescribe exclusively, the premeditated murder. The content of Article 2, read in its entirety, demonstrates that § 2 does not define any situations where the premeditated murder of an individual is allowed. However, it describes where the use of lethal force is accepted, which may result – as an unintended

[207] Case of *Velikova v. Bulgaria*, judgment of 18.05.2000, final on 04.10.2000. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58831 (Accessed on 25.03.2015).
[208] Case of *Salman v. Turkey*, judgment of 27.06.2000. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58735 (Accessed on 25.03.2015).
[209] Case of *Makaratzis v. Greece*, judgment of 20.12.2004. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67820 (Accessed on 25.03.2015).
[210] Case of *Pisari v. Moldova and Russia*, judgment of 21.04.2015. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-153925 (Accessed on 25.04.2015).

consequence – in the deprivation of life. In any case, the use of force must always be no more than "absolutely necessary" to achieve one of the goals stipulated in the text of Article 2. In this way, the term "absolutely necessary" requires a stricter and more convincing test of necessity: especially the lethal force used must be strictly proportionate to the aims stipulated in Article 2 § 2. The Court also noted that in principle there is no such a need unless it is known that the person to be detained poses a threat to life and safety of others and committed a violent crime.

Therefore, the European Court considers that the positive obligation of States to protect the life of every individual under its jurisdiction is fundamental and prominent, given the supreme value protected by Article 2 of the Convention. Although the use of force is permitted, it has to be absolutely necessary and in strict compliance with the purposes set out in Article 2 § 2.

Planning and control of the operations carried out by security forces

The use of lethal force by police or security forces is the subject of a thorough examination by the Court, both in terms of legal framework and planning, and the direct development of the operation concerned. In this way, the use of lethal force by police officers may be justified in certain circumstances, but Article 2 does not offer the States a *carte blanche*. The irregular and arbitrary actions committed by the States through their agents are incompatible with the efficient application of human rights. This means that by being authorized by national legislation, the special operations carried out by police or law-enforcement agencies must be sufficiently regulated, and certain appropriate safeguards against arbitrary and abuse of power must be prescribed.

In the case of *McCann and Others v. the United Kingdom*[211], the first case in which the Court ruled on the merits of the violation of Article 2, the applicants argued that paragraph 1 of that article imposes on the State the positive obligation to "protect" life. They argued that this provision obliges the State to provide appropriate training and exercise strict control over the operations of the security forces involving the use of lethal force. From the perspective of the applicants, the organisation and development of the British forces' operation, resulting in the death of three people, did not comply with the requirements of Article 2 of the Convention. In its turn, the Grand Chamber of the Court agreed with the majority of the applicant's arguments, and decided that in the respective case there was indeed a violation of Article 2. It established that the British Government had failed to prove that the use of lethal force by state agents in that case had been absolutely necessary in order to ensure the protection of any person from unlawful violence under Article 2 § 2.

[211] 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 25.03.2015).

It shall be noted that since that judgment the Member States have been obliged to be diligent in planning and controlling the development of any special operation by security forces.

In the follow-up case of *Andronicou and Constantinou v. Cyprus*[212], as a result of the police operation to release the hostages, both the offender and the hostage were killed. The applicants argued that the authorities had failed to minimize the use of lethal force in the planning and control of the rescue operation. The Commission found a partial violation of Article 2 regarding the use of special police forces to end a domestic conflict. However, with a qualified majority of votes (5 to 4), the Court did not find a violation of Article 2, and stipulated that it had not been convinced that the impugned operation would not have been organized in a way that the use of lethal force would not have been minimized. Additionally, the Court concluded that the use of lethal force in the circumstances of the case, although regrettable, had not exceeded the absolutely necessary limits to protect the lives of police officers and the third parties involved, and the respondent State had complied with the obligations under Article 2.

In the more recent case of *Makaratzis v. Greece*, cited above, the driver of the car pursued by the police was seriously injured as a result of use of firearms by security forces. The Grand Chamber of the Court recognized the legitimacy of applying lethal force in the case, but nevertheless concluded that this had been excessive. It noted that the excessive nature of the application of force had been due, *inter alia*, to the shortcomings of the legal framework, this one being "obsolete and incomplete" because the police had not been provided with clear guidelines and criteria on the use of force in peacetime.

In the case of *Avşar v. Turkey*[213], the Court considered the respondent State liable for the actions of civilian volunteers (popular guards subordinated to the local gendarmerie), who had acted in conjunction with security forces. Mehmet Avşar was arrested by civilian police and killed while in their custody. The European Court ruled on the responsibility under Article 2 under its substantive aspect, and namely to guarantee the right to life of everyone within its jurisdiction.

It is noteworthy that the judgment in question defines the Member States' responsibility for the actions of both the regular security forces, and the civilian volunteers. The States wishing to use civil force in maintaining public order must provide them with a thorough preparation on the exercise and limit of their powers, and maintain effective control over civil forces.

The protection of individuals against threats from third parties

[212] Case of *Andronicou and Constantinou v. Cyprus*, judgment of 09.10.1997. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58102 (Accessed on 25.03.2015).
[213] Case of *Avşar v. Turkey*, judgment of 10.07.2001, final on 27 martie 2002. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59562 (Accessed on 25.04.2015).

The State's obligation to protect individuals in their relations with others was confirmed for the first time by the Court in the reference case of *Osman v. the United Kingdom*[214]. The Grand Chamber of the Court established that the authorities had a duty to prevent and punish crimes, if found that: (1) the authorities had known or ought to have known at the time about the existence of a real and immediate risk to the life of identified individuals from the criminal acts of a third party, and (2) they had failed to take action within the scope of their powers that would have prevented this risk. In fact, in this case, the applicants complained that their husband and father had been killed by their son's teacher, who had had a special attitude towards the latter. Given the teacher's exclusive "attachment" to his student and the numerous registered conflicts with the Osman family, that the police had been aware of, the applicants considered that the family should have received special protection from the authorities. However, the Court noted that the various indices offered by the behaviour of the person in question had not suggested that he would have made an attempt on the life of the Osman family member. Although the authorities had been accordingly informed about the teacher's unusual behaviour, the risk of death did not seem real or immediate enough at that moment. Therefore, with a majority of votes (17 to 3) the Court found no violation of Article 2 in respect of the official London, but expressly stated the positive obligation of the State through its specialized agencies to protect individuals against threats to their lives from third parties.

In its turn, the Court found a violation of Article 2 in a more recent case of *Dink v. Turkey*[215], regarding the murder of the Turkish journalist Firat Dink, who had written extensively about the Turkish-Armenian relations, which had been always addressed in a special way in that State. Following his publications, the journalist was criminally convicted, and also threatened by Turkish nationalist extremists. He was shot dead in 2007. The Court stated that not only the Turkish security forces had been aware of the intense hostility in the ultra-nationalist community towards the applicant, but also that the police and gendarmerie had been informed about the likelihood of an assassination attempt, and even on the suspected instigators' identities. Nevertheless, the national authorities failed to take the necessary measures to protect the life of Firat Dink, and the fact that he had not asked for police protection does not exonerate the State from its obligation to protect life in case of real threats.

Providing medical services

The Court considers that Article 2 can cover the State's obligation to provide a limited range of medical services and facilities. This possibility was examined in the case of *L.C.B. v.*

[214] Case of *Osman v. the United Kingdom*, judgment of 28.10.1998. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58257 (Accessed on 25.04.2015).
[215] Case of *Dink v. Turkey*, judgment of 14.09.2010, final on 14 December 2010. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100383 (Accessed on 25.04.2015).

the United Kingdom[216], where the applicant, the daughter of a soldier present on the Christmas Island during nuclear tests, argued that the failure to inform her parents about the possible consequences of exposure to radiation was a violation of the State's obligations under Article 2. Although the Court did not find a violation of that article, it considered that by virtue thereof, the State should not only refrain from the intentional and unlawful violation of any individual's right to life, but must also take necessary measures to safeguard the lives of those under its jurisdiction.

In the follow-up case of *Velikova v. Bulgaria*, cited above, the European Court unanimously ruled on the national authorities' failure to provide adequate medical services for a seriously wounded prisoner. In fact, the applicant's Rom partner, Slavtcho Tsonchev, died while in police custody. He had been arrested on suspicion of theft of cattle, and a few hours later he complained that he felt bad. As to the statements of the police officers who had called an ambulance, the doctor considered that Tsonchev was drunk, which made impossible the latter's examination. Several hours later an ambulance was called again, and the same doctor found that Tsonchev had died because of the acute loss of blood. The Government was not able to provide any documents that would have attested that the medical services provided to Slavtcho Tsonchev had been adequate. Given the existence of sufficient evidence proving beyond any reasonable doubt that he had died as a result of injuries while in police custody, the respondent State's liability being thus engaged, the Court found a violation the Article 2 in its substantive aspect.

In the case of *Anguelova v. Bulgaria*[217], the Court found a separate violation of Article 2 due to the national authorities' failure to provide prompt medical care to another seriously wounded prisoner. The applicant's son received no medical care while in police custody although he obviously felt bad, and died later. The court found that the police officers' negligent conduct and their lack of reaction, by failing to ensure the applicant's son adequate medical services, considering the submitted expert report that the delay in providing medical care had been fatal, constituted a violation of the State's obligation to protect persons in its custody.

The obligation to conduct an effective investigation (the procedural aspect of Article 2 of the ECHR)

This obligation was highlighted for the first time in the above cited case of *McCann and Others v. the United Kingdom*. The Court expressly stated as a general principle that there must be some form of effective official investigation when individuals had been killed as a result of use of force by State agents.

[216] Case of *L.C.B. v. the United Kingdom*, judgment of 09.06.1998. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58176 (Accessed on 25.04.2015).
[217] Case of *Anguelova v. Bulgaria*, judgment of 13.06.2002, final on 13.09.2002. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60505 (Accessed on 25.04.2015).

In the follow-up case of *Kelly and Others v. the United Kingdom*[218], the Court pointed out a double justification for the obligation to organize internal investigations: "the essential purpose of the investigation is to ensure effective implementation of domestic laws protecting the right to life, and, in cases where State agents or agencies are involved, to ensure accountability for deaths that occurred under their responsibility". The European Court outlined the key elements of an effective investigation in accordance with the requirements established by Article 2: initiation by the State's own initiative; independence; efficiency; publicity and transparency; reasonable promptness; involving relatives/family.

The extent and nature of the obligation to investigate fatal incidents by State agencies was clarified, in particular through a series of cases (for example, *Ergi*[219], *Tanrikulu*[220], *Kaya*[221] *v. Turkey*) concerning the south-eastern Turkey, the Kurdistan Region, in the 1990s. The Strasbourg magistrates found that the authorities had failed to investigate the allegations about the security forces killing sympathizers of the Kurdish nationalist party PKK, and found the violation of the procedural obligation under Article 2. In the case of *Tanrikulu v. Turkey*, the Grand Chamber of the Court noted that the authorities had failed to conduct an effective investigation of the circumstances of the applicant's husband's death, and stated that the official Ankara ignored its tasks for that matter. It expressly stated that any loss of life is a tragic and frequent practice in the south-eastern regions of the country, which can prevent the collection of conclusive evidence. However, such conditions do not exempt the State from the obligation imposed by Article 2 to carry out an effective investigation. Moreover, neither the existence of armed clashes nor the high frequency of fatal cases can affect the State's obligation under Article 2 to ensure an effective and independent investigation of deaths as a result of clashes involving security forces, even if their circumstances in many aspects remain unclear.[222]

The Court also found a violation of Article 2 in a number of relatively recent applications against Bulgaria on the use of force by the police, inadequate investigation and prosecution concerning the death and injuries inflicted on victims (*Angelova and Iliev*[223], *Ognyanov and*

[218] Case of *Kelly and Others v. the United Kingdom*, judgment of 04.05.2001, final on 04.08.2001. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59453 (Accessed on 25.04.2015).
[219] Case of *Ergi v. Turkey*, judgment of 28.07.1998. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58200 (Accessed on 25.04.2015).
[220] Case of *Tanrikulu v. Turkey*, judgment of 08.07.1999. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58289 (Accessed on 25.04.2015).
[221] Case of *Kaya v. Turkey*, judgment of 19.02.1998. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58138 (Accessed on 25.04.2015).
[222] Case of *Ergi v. Turkey*, judgment of 28.07.1998. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58200 (Accessed on 25.04.2015).
[223] Case of *Angelova and Iliev v. Bulgaria*, judgment of 26.07.2007, final on 26.10.2007. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81906(Accessed on 25.04.2015).

Choban[224], *Anguelova v. Bulgaria*). The Court emphasized in those case that the absence of a direct responsibility of the State in respect of the death of the applicants' relatives does not exclude the applicability of Article 2 of the Convention. The circumstances of the cases require the State to efficiently organize and conduct the investigations when there are reasons to believe that the individual suffered serious injuries in suspicious circumstances. The investigation must be able to identify the source of the injuries and to punish those responsible. In homicide cases, the investigation has an even greater importance given the fact that its essential purpose is to ensure the proper implementation of national rules on the protection of the right to life (see the case of *Angelova and Iliev v. Bulgaria*, cited above).

The Court also reiterated that in the cases involving allegations that State agents were responsible for the death of person, the purpose of the respective obligation to investigate is the one of means and not of result. In this way, the authorities must take appropriate measures to secure evidence concerning the incident, including witness testimony, forensic examination, and autopsy reports, which would include a full and exact exposure on injuries, as well as an objective analysis on clinical findings in respect of the cause of death. Any deficiency in the investigation undermining the ability to establish the cause of death, or the persons responsible for that, risks failing to meet the required standards (the case of *Ognyanov and Choban*)..

In the reference case of *Nachova and Others v. Bulgaria*[225], the applicants alleged that the authorities had failed to meet the positive obligations under Article 2 regarding the death of their Rom relatives, the Grand Chamber of the Court emphasized that some strict obligations would arise in the investigation of racist violence. If there are suspicions that racial attitudes induced a violent act, it is particularly important that the official investigation to be conducted with vigour and impartiality, given the need to continually reaffirm the condemnation of racism and ethnic hatred within the society, and to maintain the confidence of minorities in the authorities' ability to protect them from the threat of racist violence. The compliance with the State's positive obligations under Article 2 of the Convention requires the domestic legal system to demonstrate the ability to enforce criminal law against those who unlawfully took the life of another, regardless of the victim's race or ethnic origin.

The ineffective investigation into death was the subject of several cases against Moldova. Thus in the case of *Railean v. Moldova*[226], the applicant complained that the prosecution, instituted following his son's death in a road accident, was inconsistent with the procedural

[224] Case of *Ognyanova and Choban v. Bulgaria*, judgment of 23.02.2006, final on 23.05.2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72549 (Accessed on 25.04.2015).
[225] Case of *Nachova and Others v. Bulgaria*, judgment of 06.07.2005. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69630 (Accessed on 25.04.2015).
[226] Case of *Railean v. Moldova*, judgment of 05.01.2010, final on 28.06.2010. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96449 (Accessed on 25.04.2015).

diligence obligation imposed under Article 2. The European Court noted that the national authorities themselves (the prosecutor) stated that the prosecution had been carried out "in a clearly unilateral and superficial way", and identified a number of serious deficiencies in the investigation, whereas the prosecution took more than five years. In such circumstances, the Court concluded unanimously that there had been a violation of Article 2 in its procedural aspect.

In the case of *Iorga v. Moldova*[227], concerning the investigating into the death of the applicant's son, found hanged during his service in the national armed forces, the Court held that the failure to inform the applicant about his procedural rights and about the course of the investigation, the failure to ensure the exercise of these rights, the tergiversation and the unexplained delays in carrying out important investigative measures, as well as the final decision to terminate the investigation, taken in the absence of the applicant, had been inconsistent with the respondent State's procedural obligations imposed under Article 2 of the Convention.

As seen above, Article 2 of the ECHR establishes the Member States' obligations on both the substance of the right to life and the procedure to investigate various attempts on life.

The positive obligations under Article 3 (prohibition of torture): Article 3 of the ECHR is more laconic compared with other substantive rights guaranteed by the Convention. However, this fact has not prevented the development of a vast and rich case-law in this context. Article 3 has given rise to the following Contracting States' positive obligations.

Protection measures against ill-treatment and abuse

The European Court found that the States are obliged to take effective actions to protect individuals against serious ill-treatment which violates the main prohibition under Article 3. The issue of violation of positive obligations under Article 3 arises, in particular:

- where the violation was possible because of inadequate legislation on protection. This was in the case *A. v. the United Kingdom*[228], where the (underage) applicant claimed that – although mistreated by his stepfather – the latter had been acquitted by the domestic courts in accordance with the relevant British law, establishing the legality of corporal punishment of children. In this case, the Court concluded on the need to establish criminal legislation regarding the criminalization of physical punishment applied by parents to their children.

where the national law provides for sufficient protection, and the authorities, being informed of mistreatment, nevertheless remained passive and failed to react effectively, or

[227] Case of *Iorga v. Moldova*, judgment of 23.03.2010, final on 23.06.2010. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97883 (Accessed on 25.04.2015).
[228] 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 25.04.2015).

reacted too late. For example, in the case of *Z. and Others v. the United Kingdom*[229], the social services did not take action on the placement of children abused over four and a half years after they had been informed about the odious practices in their family. The Grand Chamber of the Court noted that although it recognizes the difficulty and sensitivity of the issues placed before social services and the important principle of respect for family life, in that case there was no doubt about the fact that the national system failed to protect children against a long and serious abuse.

Another case in which the Strasbourg Court ruled on protective measures on behalf of the State under Article 3, specifically referring to the limits thereof, is *Pretty v. the United Kingdom*[230]. The circumstances of the case reveal a rare and interesting situation. In fact, the applicant suffering from a serious illness characterized by acute pain decided to commit suicide. Since she was physically incapable of committing such an act, she wanted her husband to assist her and urged the authorities upon not prosecuting him. As expected, her request was rejected. Before the European Court, the applicant claimed that the sufferings caused by her illness equalled to a genuine degrading treatment. The Court found no breach of Article 3, stating that the applicant's request went too far beyond the acceptable parameters of the State's positive obligation under Article 3. The claim that the State had to provide assistance in suicide was contrary to both national and international legal provisions, and was as such incompatible with the State's obligation to protect the life of the person under Article 2.

Providing acceptable conditions of detention

Since the turn of the millennium the European Court has examined the detention in poor conditions as a violation of Article 3. In the case of *Dougoz v. Greece*[231], the applicant, Syrian national, was placed in detention until his deportation home. He argued that the detention centre for foreigners he had been temporarily placed in was overpopulated; there were not enough beds, mattresses and blankets, and hygiene and sanitation had been neglected. The Court classified the poor conditions of detention as degrading treatment, noting that population of cells, heating and ventilating, sanitation, enough places to sleep, food quality, the possibility of contacting with the outside world etc. constitute the basic criteria to be assessed cumulatively in determining whether or not the individual detention comply with the requirements established by Article 3.

[229] Case of *Z. and Others v. the United Kingdom*, judgment of 10.05.2001. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59455 (Accessed on 25.04.2015).
[230] Case of *Pretty v. the United Kingdom*, judgment of 29.04.2009, final on 29.07.2002. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60448 (Accessed on 25.04.2015).
[231] Case of *Dougoz v. Greece*, judgment of 06.03.2001, final on 06.06.2001. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-63896 (Accessed on 25.04.2015).

The unsatisfactory conditions of detention also constituted a violation of Article 3 in another case against Greece, namely in *Peers v. Greece*[232], where the Court concluded that the authorities had not taken any action to improve the conditions of the applicant's detention in breach of the positive obligation incumbent on the State in this regard.

In the case of *Price v. the United Kingdom*[233], the applicant suffering from a physical disability was placed in detention for one night, and claimed thereafter that the cell conditions had not met her special needs. The Court unanimously criticized the responsible national judge's behaviour, and found a violation of Article 3, noting that the conditions in which the applicant had been placed amounted to degrading treatment, and, thus, the State failed to respect its obligation in that respect. The judgment in this case suggests that the Court will take into account the particular needs of prisoners. The greater the physical or medical needs of detainees with disabilities are, the more steps the State should take to ensure their detention in acceptable conditions.

Regretfully, the poor conditions of detention contrary to the requirements of Article 3 of the ECHR have not been an exception for our State, there being several cases where Moldova was condemned in that respect. For example, in *Ostrovar v. Moldova*[234], the Strasbourg Court emphasized that the State must ensure the detention of individuals in conditions compatible with respect for his human dignity; that the manner and method of execution of the sentence should not cause a person suffering or hardship of an intensity exceeding the threshold of suffering inherent in his/her detention; and that, given the exigency of imprisonment, the detainee's health and well-being be adequately ensured by, among other things, providing necessary medical assistance. When assessing the conditions of detention, the Court must take into account the cumulative effects of these conditions and length of detention. The same reasons were reiterated by the Court in the follow-up cases of *Sarban v. Moldova*[235] and *Ciorap v. Moldova*[236], where it underlined the right of all prisoners to conditions of detention compatible with human dignity, and the fact that the measures imposed during their detention should not subject detainees to distress or hardship of an intensity exceeding the level of suffering inherent to their current placement. In addition, besides the health of prisoners, their welfare should be adequately secured, given the practical demands of imprisonment.

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[232] Case of *Peers v. Greece*, judgment of 19.04.2001. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59413 (Accessed on 25.04.2015).

[233] Case of *Price v. the United Kingdom*, judgment of 10.07.2001, final on 10.10.2001. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59565 (Accessed on 25.04.2015).

[234] Case of *Ostrovar v. Moldova*, judgment of 13.09.2005, final on 15.02.2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70138 (Accessed on 25.04.2015).

[235] Case of *Şarban v. Moldova*, judgment of 04.10.2005, final on 04.01.2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70371 (Accessed on 25.04.2015).

[236] Case of *Ciorap v. Moldova*, judgment of 19.06.2007, final on 19.09.2007. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81136 (Accessed on 25.04.2015).

Providing prisoners with adequate medical treatment

In the case of *Hurtado v. Switzerland*[237], the applicant complained that while in prison he asked to be examined by a doctor, and he had to wait for six days for his request to be satisfied. Following the medical examination, it was established that the applicant had a fractured rib. Before the Court, he claimed that the failure of the Swiss authorities to provide prompt medical treatment was a violation of Article 3. The former European Commission of Human Rights concluded that under Article 3 of the Convention the State has a specific positive obligation to protect the physical wellbeing of inmates, and lack of adequate medical treatment in such circumstances had to be classified as inhuman treatment. Although the applicant's complaint was struck out off the European Court's list of cases due a friendly settlement of the case, the Commission's findings demonstrate the important rationales on the need and obligation to provide adequate and prompt medical services to persons in state custody.

In the case of *Ilhan v. Turkey*[238], the applicant's brother was arrested by police during an anti-terrorist operation. The arrestee was beaten during apprehension, suffering major injuries, including brain trauma. However, the Turkish authorities have provided medical assistance only after 36 hours of the incident. The Grand Chamber of the Court, after hearing the results of the investigation *in situ* organized by the European Commission, ruled that considering the severe mistreatment suffered by the prisoner and the particular circumstances of the case, including the significant time range prior to receiving appropriate medical treatment, the applicant had been the victim of a serious and cruel suffering that might be characterized as torture.

In the notorious case of *Kudla v. Poland*[239], the Grand Chamber of the Court ruled that under Article 3 "the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance."

In the case of *Paladi v. Moldova*[240], the Grand Chamber of the European Court noted that the State must ensure that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical

[237] Case of *Hurtado v. Switzerland*, decision to strike off dated 28.01.1994. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57868 (Accessed on 25.04.2015).
[238] Case of *Ilhan v. Turkey*, judgment of 27.06.2000. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58734 (Accessed on 25.04.2015).
[239] Case of *Kudla v. Poland*, judgment of 26.10.2000. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58920 (Accessed on 25.04.2015).
[240] Case of *Paladi v. Moldova*, judgment of 10.03.2009. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91702 (Accessed on 25.04.2015).

assistance. The fact that the applicant was in a serious medical condition, being confirmed by several doctors, and that he was not granted the necessary medical care for his condition, amounted to a treatment contrary to Article 3 of the Convention. Thus, the Republic of Moldova failed to fulfil its positive obligations it is bound to under that Article.

Ensuring the physical and moral integrity of the person in the custody of authorities

In the reference case under Article 3 in its substantive aspect of *Aydin v. Turkey*[241], the applicant of Kurdish origin complained that during her detention on remand, when she was only 17 years old, she was severely beaten up and raped by police officers at the station she was brought to due to suspicions that her family would have links with members of the PKK (Kurdistan Workers' Party, partisan organization fighting for the independence of the regions populated by ethnic Kurds, involved in several diversions). The Grand Chamber of the European Court, having heard the European Commission's report on the *in situ* investigation, noted that Article 3 enshrines one of the basic values of a democratic society, and thus prohibits in absolute terms torture or inhuman or degrading treatment. Article 3 does not permit any exception or derogation, even in cases where it would be presumed that the person concerned may be involved in terrorist activities or other serious criminal activities. To determine whether certain conduct is likely to be qualified as torture, it must be borne in mind that it requires a deliberate treatment causing very serious and cruel sufferings. In the instant case, the Chamber concluded that while the applicant in detention was beaten and then raped by an individual whose identity has yet to be determined, and the rape of a detainee by state agents constitutes an extremely serious and repulsive form of treatment given the ease with which the offender can exploit the vulnerability of the victim and weak resistance, as well as taking account of the fact that the rape leaves deep psychological wounds which do not heal with the passage of time as fast as in other physical or mental violence, the ill-treatment she was subjected to amounted to genuine acts of torture, and the State manifestly failed to comply with the positive obligation to protect detainees in custody.

Investigating into the allegations of ill-treatment by State agents (the procedural aspect of Article 3 of the ECHR)

In the above mentioned case of *Aydin v. Turkey*, the applicant argued that the authorities' failure to conduct an effective investigation into her complaint concerning rape and mistreatment by prison employees also constituted a violation of Article 3 in its procedural aspect. The Grand Chamber of the Court decided, however, to examine the case under Article 13[242]. In this way, the

[241] Case of *Aydin v. Turkey*, judgment of 25.09.1997. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58371 (Accessed on 25.04.2015).
[242] Mowbray A.R. The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights. Oxford-Portland-Oregon: Hart Publishing, 2004, p.59.

European Court was initially reluctant to examine complaints about alleged inefficient investigations into ill-treatment. However, a year later, the State's positive obligation to investigate allegations about committing acts of torture was approved unanimously.

In the case of *Assenov and Others v. Bulgaria*[243], the Court noted that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other agents of the State unlawfully and in breach of Article 3, that provision, in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in the Convention", requires implicitly that there should be an effective official investigation. This obligation, like that under Article 2, should be capable of leading to the identification and punishment of those responsible. If this does not happen, the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental importance, would be ineffective in practice, and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.

In the case of *Sevtap Veznedaroglu v. Turkey*[244], the applicant argued that during her detention she had been subjected to torture and the relevant authorities had not taken any action to examine her complaint. The Court held that given the circumstances of the respective case, the applicant had raised a questionable complaint about her torture, insisting on her allegations before the national courts. However, despite the applicant's complaint and the medical expert's opinion after her release from state custody, certifying the injuries, the national authorities failed to adopt any measures to investigate the case, to obtain further details from the applicant or to hear the police officers from the detention facility, whereas the investigating judge dismissed the complaint without any investigation. The European Court concluded that the authorities' inertia in response to the victim's allegations was inconsistent with their procedural obligation under Article 3 of the Convention, and found a violation of the Article concerned.

In the above mentioned cases, the Court was unable to determine whether the applicants had been ill-treated by State agents as they had claimed, but found a violation of the positive obligation under Article 3 in its procedural aspect, namely to conduct an effective investigation.

In the case of *Satik and Others v. Turkey*[245], the Court unanimously found a violation of both the substantive aspect, and the procedural aspect of Article 3. In fact, the applicants argued that they had been ill-treated during their detention by State agents. Under procedural aspect, the Court found that the inefficiency of the conducted investigation had been in itself incompatible

[243] Case of *Assenov and Others v. Bulgaria*, judgment of 28.10.1998. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58261 (Accessed on 25.04.2015).
[244] Case of *Sevtap Veznedaroglu v. Turkey*, judgment of 11.04.2000, final on 18.10.2000. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58897 (Accessed on 25.04.2015).
[245] Case of *Satik and Others v. Turkey*, judgment of 10.10.2000, final on 10.01.2001. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58851 (Accessed on 25.04.2015).

with the State's obligation under Article 3 of the Convention to initiate an investigation based on an arguable complaint about a person's severe ill-treatment by State officials. The Court also noted that the investigation should be capable of leading to the identification and punishment of those responsible for the alleged ill-treatment.

Regretfully, our state has been also condemned several times by the officials in Strasbourg. The Court found that the internal investigation conducted into the alleged abuses and ill-treatment had been ineffective.

Thus, in the very recent case of *I.P. v. Moldova*[246], the applicant alleged a violation of Article 3 in its procedural aspect due to the State's failure to conduct an effective investigation into her alleged rape by her friend. The European Court pointed out that Article 3 of the ECHR gives rise to the State's positive obligation to organize and carry out an effective investigation, which is not limited to investigating cases of ill-treatment by State agents only. Therefore, the Contracting States have the positive obligation inherent under Article 3 to regulate a legal framework aimed at effectively punishing rape, and to apply it in practice by organizing an a resultative investigation and a criminal prosecution. In the instant case, the Court unanimously decided that the investigation conducted by the Moldovan officials had had several shortcomings and the applicant's complaint had not been taken seriously. As a result, the European Forum found a violation of the respondent State's positive obligation under Article 3 of the Convention to investigate and punish the rape and sexual abuse.

Positive obligations arising from Article 8 of the ECHR (right to respect for private and family life): From the content of that article (compared to the rights arising from other articles), the Court has emphasized several positive obligations for Member States to the ECHR, and namely: official acknowledgment of the choice of name; acknowledgment of ethnic identity; providing access to official information; establishing paternity/maternity; securing physical, moral, and sexual inviolability of persons; official acknowledgment of transsexuals; formalizing family relationship between parents and children born out of wedlock; separation of spouses; consulting biological parents in case of children being taken in state custody and/or adoption; re-unification of children with their biological parents; providing facilities for handicapped or ill individuals; admission of non-national family members in case of decisions on immigration; protection against pollution; protection of personal data; protection of individual image; protection of telephone communications; protection of health information; protection of written correspondence against censorship.

Official acknowledgment of the choice of name

[246] Case of *I.P. v. Moldova*, judgment of 28.04.2015. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-154152(Accessed on 25.04.2015).

The acknowledgment by national authorities of the choice of the name of a person under Article 8 was accepted for examination by the Court for the first time in the case of *Burghartz v. Switzerland*[247], where the applicants complained about the refusal of the Swiss authorities to modify their acts of civil status after marriage and, respectively, the change of name, whereas the husband intended to add his wife's surname to his. The Court ruled that although Article 8 of the Convention contains no explicit provision regarding the name as a means of personal identification and connection to the family, the name of a person still refers to his/her private and family life. The fact that society and the State have an interest in regulating the use of names does not exclude this, since these public-law aspects are compatible with private life conceived of as including, to a certain degree, the right to establish and develop relationships with other human beings, in professional or business contexts as in others (paragraph 24). In the instant case, the Court noted that according to the applicant the surname of his choice became known in academic circles and the authorities' refusal to register the changes in the acts of civil status may significantly affect his scientific career. The Court found a violation of Article 8 combined with Article 14 (prohibition of discrimination), stressing that the case does not raise any issues of compliance with the historical tradition on the choice of the name after marriage and promoting gender equality is a major goal of the Member States of the Council of Europe. Therefore, the ban instituted for men to choose a common surname composed of his wife's and his own is not compatible with the ECHR in terms of private and family life and the prohibition of discrimination.

For comparison, in an ulterior case, *Stjerna v. Finland*[248], the applicant requested the authorities to allow the change of name, claiming that the current one only partially represented the surname borne by his Swedish ancestors (Tawaststjerna), and invoked the difficult pronouncement thereof, which created inconveniences due to its similarity to a pejorative nickname. The Court found a violation of Article 8 stating that despite the increased use of personal identification numbers in Finland and in other Contracting States, the names retain a crucial role in identifying people. While acknowledging, therefore, that there might be genuine reasons causing a person to want to change his/her name, the Court accepts that the legal restrictions on such a possibility may be justified by the public interest, as for example in order to ensure accurate population registration or to safeguard the means of personal identification, and to link the bearers of a name to a family. In the respective case, the Court concluded that the applicant failed to present sufficient evidence to have it reach a conclusion different from the

[247] Case of *Burghartz v. Switzerland*, judgment of 22.02.1994. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57865 (Accessed on 25.03.2015).
[248] Case of *Stjerna v. Finland*, judgment of 25.11.1994. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57912 (Accessed on 25.03.2015).

Finnish authorities, having denied the change of name, since the national authorities are better placed than an international court to evaluate the inconvenience on the use of certain names in the national society. It went on by stating that the possibility of using the name in question as a nickname for defaming the applicant did not constitute sufficient grounds for the impugned change, given that many names are likely to be distorted. Accordingly, the Court held that the respondent Government's refusal had not overstepped the margin of appreciation afforded to national authorities, and in the present case the applicant's claims did not involve the State's positive obligation to acknowledge the change/choice of a name other than the existing one.

A similar conclusion was reached in the case of *Guillot v. France*[249], where the applicants complained about the refusal of the French authorities to register the their new-born daughter's first name as "***Fleur de Marie***, Armine, Angèle", the girl being registered in official documents as "***Fleur-Marie***, Armine, Angèle". Thus, the parents' wishes on this subject did not prevail the officials' ones, and they were not satisfied. With a majority of votes (7 to 2), the European Judges considered that the refusal to register the forename "Fleur de Marie", taking into account the child's interests and the overall interests of the society, does not amount to a breach of the positive obligation to respect the applicants' private and family life, whereas the parents' discomfort and psychological upset due to the rejection of that forename for their child, although totally understandable, does not constitute sufficient grounds for admission of the complaint, and to rule on the respondent State's liability. In this context, the dissenting opinion of Judges MacDonald and De Meyer[250] is interesting. They considered that the respondent State committed an unjustified interference with the applicants' right to respect for private and family life due to its failure to comply with the positive obligation to acknowledge the name because it was not clear how the alleged forename "Fleur de Marie" could harm the child's interests. Such harm would be invoked in case of known forenames of saints or known figures of ancient history, such as "Cléopâtre", "Hérodiade", "Messaline", "Pilate", "Caligula" or "Néron", but not in the case of the forename "Fleur de Marie", which was very close to "Fleur-Marie", entered in the official documents.

Acknowledgment of ethnic identity

In its case-law, the European Court of Human Rights has charged the ECHR Signatory States with the positive obligation to recognize a certain ethnic identity claimed by the individual, as long as the respective identity results from veracious circumstances. In its recent case of *S. and*

[249] Case of *Guillot v. France*, judgment of 24.10.1996. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58069 (Accessed on 25.03.2015).
[250] Dissenting Opinion of Judges Macdonald and De Meyer in the case of *Guillot v. France*, HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58069 (Accessed on 25.03.2015).

Marper v. the United Kingdom[251], the Court ruled that the ethnic identity must be undoubtedly regarded as an inherent element of private life falling within the scope of the protection provided for by Article 8 of the Convention.

In this regard, in another recent case, *Ciubotaru v. Moldova*[252], the applicant alleged violation of Article 8 due to the national authorities' refusal to register his ethnicity as a Romanian in his acts of civil status, because his parents' identity acts, issued during Soviet times, had not specified that ethnic group. The Strasbourg Court emphasized the highly sensitive nature of the issues arising from the circumstances of the case, and stated that it did not challenge the Government's right to seek specific objective evidence on the alleged ethnicity. However, in this case the European Judges concluded that the national authorities had placed an excessive burden on the applicant to prove such that at least one of his parents had been of Romanian origin, and officially registered as such. That situation represented a disproportionate burden of proof in view of the historical realities in the Republic of Moldova. The Court stressed that the relevant internal law did not provide for the possibility to adduce evidence other than the record of ancestors' ethnicity in order to prove the affiliation to a particular ethnic group, such as native language, name, empathy and others. Finally, the Court concluded that the respondent State had failed to fulfil its positive obligation to respect the applicant's right to private life under Article 8 in that respect, and the refusal to acknowledge a certain ethnic identity was considered contrary to the Convention.

Providing access to official information

The Court examined a number of cases where the applicants had claimed the right to access to the information held by public authorities, for which they had had a particular interest. In the reference case of *Gaskin v. the United Kingdom*[253], the applicant was in state custody his entire childhood after his mother's death. He was boarded out with various foster parents, who according to him had abused and ill-treated him. Having reached legal adulthood, the applicant asked the national authorities to grant him access to his personal file in order to know his past and to determine the circle of people in whose care he had been temporarily placed. However, the request was denied because the information was confidential; the disclosure thereof could have jeopardized the entire system of temporary custody of children without parental care; third parties would have been involved; and the professional reputation of specialized personnel contained in the files would have been affected.

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[251] Case of *S. and Marper v. the United Kingdom*, judgment of 04.12.2008. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90051 (Accessed on 25.03.2015).

[252] Case of *Ciubotaru v. Moldova*, judgment of 27.04.2010, final on 27.07.2010. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98445 (Accessed on 25.03.2015).

[253] Case of *Gaskin v. the United Kingdom*, judgment of 08.07.1989. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57491 (Accessed on 25.03.2015).

The Court found a violation of Article 8 considering that the British system had not ensured sufficient institutional guarantees to respect the applicant's right to access to the information contained in his personal file. It noted that persons in the situation of the applicant have a vital interest in receiving the information on their childhood and early development, whereas, on the other hand, there was a strong public interest to ensure the confidentiality of the records of the relevant custodian authorities in order to protect the persons involved, the Member States beneficiating from a certain margin of appreciation in that respect. Nevertheless, in the present case, the applicant's interest prevailed, and the interdiction contained in the British system to refuse issuing information from the personal file without analyzing the reasonableness of the request, was contrary to the Convention. Thus, the respondent Government failed to fulfil its positive obligation to secure the individual's right to protection of his private life.

In the case of *Guerra and Others v. Italy*[254], the Court found a violation of Article 8 because over several years the authorities had failed to provide the local residents information about the state of the environment of the town they lived in, in the proximity of which there was a chemical factory for the production of fertilizers, where there had been frequent incidents of uncontrolled emissions. The Court stated that the national authorities' failure to adopt measures to protect the private and family life of the applicants living near the chemical factory, which continued to be a source of increased danger in the absence of official information on the environment of the related area, was contrary to the Member States' obligation under Article 8. The impugned judgment suggests that the States have a positive obligation to take proactive measures to protect the right of individuals to private and family life in similar situations. It is well-known that the case also raised issues under Article 10 (freedom of expression) and Article 2 (right to life), but they were not considered to be applicable in the present case.

Establishing paternity/maternity

The European Court has developed a specific case-law on the State's obligation to create a legal mechanism allowing prompt establishing of paternity. Thus, in this relatively recent case of *Mikulic v. Croatia*[255], the Court held that the respect for private life implies that every person should be able to determine the details of his/her identity as an individual human being, and that an individual's right to such information is important in terms of formative implications of the personality. The Court held that Article 8 did not require the States to compel the alleged parent to DNA testing. However, unless the testing is mandatory in that State, the legal system should provide alternative measures that enable an independent authority to quickly examine such

[254] Case of *Guerra and Others v. Italy*, judgment of 19.02.1998. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58135 (Accessed on 25.03.2015).
[255] Case of *Mikulic v. Croatia*, judgment of 07.02.2002, final on 04.09.2002. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60035 (Accessed on 25.03.2015).

requests for paternity. In fact, the case concerned the establishing of paternity of a child born out of wedlock, and the alleged father avoided appearing at the hospital for 4 years in order to undergo DNA testing, as ordered by the court. The first instance court determined paternity, relying on the mother's testimonies and interpreting the continuing refusal of the applicant to undergo the DNA test as an implicit acknowledgment of his paternity. In its turn, having examined the alleged father's appeal, the appellate court sent the case for fresh examination, arguing that the refusal to undergo the DNA testing could not be regarded as sufficient and conclusive evidence to establish paternity. When the case was considered for examination by Court in Strasbourg, the Croatian court proceedings had not yet been completed. The European Judges believed that the national courts had failed to guide themselves by the interests of the child, which are fundamental in such cases. The Court noted that the domestic legal framework and the relevant national proceedings had not ensured a fair balance of proportionality between the minor's right to remove uncertainty regarding her personal identity and that of the alleged father not to be subjected to DNA testing. The Court concluded that the respondent State failed to fulfil its incumbent positive obligation to protect the minor's right to private life, contrary to the requirements of Article 8 in that respect.

For comparison, in the case of *Ostace v. Romania*[256], the European Court analysed the national authorities' refusal to review a previous court judgment (dated 1981) on establishing the applicant's paternity in respect of a child born out of wedlock, whereas in 2003 he had obtained the conclusion of a DNA test according to which he was not the biological father of that child. The revision request was dismissed as inadmissible, invoking the principle of legal certainty, on the grounds that the relevant document had not been existent at the moment of the delivery of the reviewable judgment. The Strasbourg Court noted that under the existing legal framework, the applicant had not had any opportunity to contest his paternity, as previously established by the domestic courts. The Court could admit that the impugned impossibility could be justified to ensure public safety, as well as the stability in family relationships and children's rights. However, having rejecting the applicant's request for review of the relevant judgment, the national authorities did not find a fair balance between the involved competing interests, and failed to fulfil their obligation to ensure the applicant's right to private life.

Securing physical, moral, and sexual inviolability of persons

In the case of *X and Y v. the Netherlands*[257], the European Court stated that, although the object of Article 8 is essentially to protect the individual against arbitrary interference by public

[256] Case of *Ostace v. Romania*, judgment of 07.02.2002, final on 25.02.2014. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-141171 (Accessed on 25.03.2015).
[257] Case of *X and Y v. the Netherlands*, judgment of 26.03.1985. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57603 (Accessed on 25.03.2015).

authorities, it requires not only the State to refrain from such interference (the respective negative obligation being able to be completed with the inseparable positive obligation to respect for private and family life); these obligations may involve the adoption of effective measures to also ensure the respect for private life even in relations between individuals.

The judgment in the respective case is significant in the context of the Court's promptness to require States to take positive measures to regulate the relations between individuals. The case of *X and Y v. the Netherlands* is about the sexual abuse of the 16-year-old minor Y with mental disabilities, who was unable to defend her interests independently during the criminal proceedings instituted at the request of her father X against the sex offender. Because of gaps in the domestic legal framework, according to which a person of 16 years and older was to independently file a complaint with the investigating authorities for punishment of persons guilty of the alleged rape, the perpetrator could not face prosecution, as well as be criminally liable, and escaped unpunished. The Court found that the Dutch Government had failed to ensure the right of applicant Y to respect for her private life in terms of her physical and moral (including sexual) integrity, and asked the respondent State to intervene through adopting certain criminal law provisions aimed at protecting especially that type of vulnerable persons.

In this context, it is interesting that although the European Court *in termenis* asked the State to intervene in order to ensure the protection of that category of individuals, it did not refer to any specific justification for imposing the positive obligations arising from Article 8.[258]

In the follow-up case of *Stubbings and Others v. the United Kingdom*[259], four women complained that they had suffered from sexual abuse in their childhood, and had realized the effects of the acts they had been subjected to much later, when they had become adults. The applicants filed civil actions for damages against those they considered guilty of sexual abuse, but these were rejected as being filed outside the limitation period of six years, calculated from the day the alleged victims attained their majority. Before the Court, the applicants alleged lack of effective remedies to redress the sexual abuse they had been subjected to, and subsequently the State had failed to protect their private life. *Ad contrario*, the British Government argued that the English law did not provide for any limitation period for prosecuting offenders guilty of serious crimes such as rape. In that case the applicants had not used that option and had failed to file criminal charges, yet filing civil actions subject to limitation periods.

The European Court reiterated the findings set out in the case of *X and Y against the Netherlands* and stressed that sexual abuse undeniably belongs to the repulsive category of

[258] Mowbray A.R. The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights. Oxford-Portland-Oregon: Hart Publishing, 2004, p.129.
[259] Case of *Stubbings and Others v. the United Kingdom*, judgment of 22.10.1996. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58079 (Accessed on 25.03.2015).

unacceptable behaviour with a gruesome effect on the victim, whereas children and other vulnerable persons enjoy protection from the State in the form of an effective deterrence of potential offenders from committing such interference with essential aspects of private life. However, in that case it concluded that such protection was granted because rape was adequately regulated by the English criminal law and subject to maximum penalties, whereas the presentation of evidence was secured; the prosecution could therefore begin at any time, and it still could be started then. With reference to the period of limitation for initiating civil actions, the European Judges established that Article 8 did not provide compulsorily that a State fulfil its positive obligations to protect the right to private life by regulating unlimited civil actions in the circumstances where criminal penalties might be operated at any time.

Therefore, the Court determined that the presence of an extended English criminal legislation on the interdiction of sexual abuse with subsequent civil remedies fulfilled the positive obligation of the State under Article 8.

The judgment in this case shows that, by assessing the fulfilment of positive obligations to secure the physical, moral and sexual integrity of a person, the Court will consider all available criminal and civil legal remedies of the respondent State, recalling that mere civil remedies are insufficient.

Official acknowledgment of transsexuals

This issue was the subject of the case-law turnover with the development of social and legal approach on transsexuals around the world, and directly in the legal space of the Council of Europe. The European Court went from denying the positive obligation of the State to acknowledge the respective people a certain status in law to the prescription of such an obligation, once again proving that in practice the ECHR is a living instrument, capable of being interpreted in the light of the circumstances of today's world.[260]

The first notorious case where the European Court ruled on the claims of transsexuals to protection under Article 8 of the Convention was *Rees v. the United Kingdom*[261]. The applicant complained that the British government had not taken effective measures to lawfully acknowledge his new status (as a man) following a sex reassignment surgery. He claimed that Article 8 required Contracting Party to modify or, at least, amend the national registry of civil status for the sex change to be registered accordingly. The applicant also alleged that the Government had been obliged to release a new birth certificate corresponding to his new status.

[260] Case of *Tyrer v. the United Kingdom*, judgment of 25.04.1978. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57587 (Accessed on 25.03.2015).
[261] Case of *Rees v. the United Kingdom*, judgment of 17.10.1986. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57564 (Accessed on 25.03.2015).

In its turn, the Court did not agree with these statements. Having relied on scientific uncertainties regarding the differences in law and practice of the Member States to the ECHR, namely the lack of consensus on the subject of acknowledgment of transsexuals in the space of the Council of Europe, it decided that for that moment, the State was to determine to what extent it could meet the demands of transsexuals. However, in any case, Article 8 could not be interpreted as requiring the Contracting Parties to amend the information contained in the national births registries, even partially.

In fact, this position did not entirely ruled out the possibility of States to take positive obligations towards transsexuals. The attitude of the British Government, which, while excluding the legal acknowledgment of that category of individuals, accepted sexual self-determination and took steps to minimize the disadvantages of lack of legal recognition, was of some importance.

Nevertheless, in the case of *Cossey v. the United Kingdom*[262], the Court stressed that although in some States of the Council of Europe there were amendments on the issue of transsexuals, it had been was done so within the margin of appreciation of that respective State, whereas the European Judges had not been informed about any essential scientific developments in that respect. As a result, the European Forum rejected, by a majority of 10 votes to 8, the applicant's allegations about the violation of Article 8 due to the authorities' refusal to issue her a new birth certificate with amended information on her gender following a sex reassignment surgery, concluding that the State had not had any positive obligation in that respect.

Subsequently, in the case of *B. v. France*[263] (1992), the European Court noted the already existing progress in terms of transsexualism, stressing that the legal situations related to this concept are extremely complex from anatomical, biological, psychological and moral points of view. It reiterated that the Member States of the Council of Europe had not reached a sufficiently broad consensus in this regard to determine the Court to review its earlier case-law and to impose positive obligations on States to regulate the legal status of transsexuals. Nevertheless, the Court found a violation of Article 8 of the ECHR, comparing the English and French legal frameworks on the civil status, name change procedures, issuing identification documents etc. It concluded that the French legal system, unlike the one of the United Kingdom, had not even provided for the possibility for transsexuals to change the name.

The European Court's approach in that respect changed radically in 2002 by delivering the judgment in the case of *Christine Goodwin v. the United Kingdom*[264]. Taking into account the

[262] Case of *Cossey v. the United Kingdom*, judgment of 27.09.1990. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57641 (Accessed on 25.03.2015).
[263] Case of *B. v. France*, judgment of 25.03.1992. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57770 (Accessed on 25.03.2015).
[264] Case of *Christine Goodwin v. the United Kingdom*, judgment of 11.07.2002. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60596 (Accessed on 25.03.2015).

scientific developments and international practice, as well as the need for compatibility of national legal systems and the growing disadvantages of transsexuals due to the States' failure to acknowledge their rights, the Court changed its position and concluded that Member States to the Convention had not had a large margin of appreciation in that matter, being thus held to recognize the individual right to sexual self-determination.

In the present case, the Grand Chamber of the Court noted the growing consensus of the Contracting States on the legal recognition of individuals who had changed sex, this being part of the international trends of acknowledgment of transsexuals, and stressed that in such circumstances there were no longer any essential factors of public interest to balance the individual interests of the applicant to obtain legal recognition of change of her gender, whereas the United Kingdom could not claim any longer that the matter fell within its margin of appreciation (paragraphs 85, 93).

Guaranteeing a legal status to transsexuals is currently a clear obligation of the Member States to the ECHR, as there are no different interpretations on this matter.

Formalizing family relationship between parents and children born out of wedlock

The State's obligation to provide formal recognition of the relationship between the parent and the child born out of wedlock was first established in the judgment in the reference case of *Marcks v. Belgium*[265]. The applicant argued that the Belgian law, stipulating that the unmarried mother was obliged to undertake certain legal proceedings to obtain recognition of maternal affiliation with her children, violated her right to private and family life guaranteed by Article 8. The European Court stated that the Article does not make any distinction between "legitimate" and "illegitimate" families, and a natural link between the applicant and her daughter falls within the ambit of private life. The Court considered that the applicant's need to seek legal recognition of her affiliation with her daughter was a violation of Article 8 since the Belgian authorities had failed to ensure the recognition of this relationship from the birth of the girl. Given the indisputable fact of her daughter's presence in the care and education of the applicant since her birth, between them there had been real family relationship. In addition, the need of a parent to undergo a legal recognition procedure of maternity/paternity has repercussions on the child's ability to inherit different forms of property.

It is noteworthy that the judgment in the case of *Marcks v. Belgium* has a historic significance exceeding the area of the family law as it is the first case in which the European Court found a violation of a positive obligation under Article 8. However, despite the importance

[265] Case of *Marcks v. Belgium*, judgment of 13.06.1979. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57534 (Accessed on 25.03.2015).

of this case-law turnover, the Court had a superficial justification for the introduction of these obligations to ensure the effective respect by the State of the family life of the individual.[266]

In another case, *Johnston and Others v. Ireland*[267], the first two applicants lived together but were unable to marry because of the prohibition of divorce in Ireland, which did not allow the first applicant to divorce his wife. The third applicant was a daughter of the first two applicants born out of (her father's) wedlock. Before the Strasbourg Court, the applicants complained about the violation of the right to family life because of the limited recognition of paternal affiliation between daughter and father. The Court determined that although States enjoy a margin of appreciation in determining the steps needed to harmonize national legislation with the Convention, Ireland had not established a sufficient legal framework for appropriate regulation of family relations between daughter born out of wedlock and her father. It is noteworthy that as to the claim of the first two applicants related to the mandatory introduction of the institution of divorce in Irish civil system, the Court emphasized that the effective respect for their family life cannot be interpreted as imposing any positive obligation on the State to formalize the divorce. The violation of Article 8 with reference to the girl born out of wedlock should not be regarded as an indirect suggestion to allow her father's divorce, and his subsequent remarriage. However, Ireland was invited to improve the legal framework relating to illegitimate children, maintaining the ban on divorce if deemed necessary (paragraph 75).

In the relatively recent case of *Krušković v. Croatia*[268], The European Court examined the national authorities' refusal to register the applicant's paternity of his daughter born in an unofficial relationship since his legal capacity had been judicially limited for drug abuse, and he did not benefit from the right to independently make statements before the civil status authority. The European Judges found that the respondent State failed to fulfil its positive obligations under Article 8, because the applicant was left in a legal vacuum until the completion of the court proceedings for recognition of paternity filed by his legal representative, which was still pending on the day of examination of the case before the Strasbourg Court. The problem was that the civil status authority, which had been originally charged with the examination of the application for recognition of paternity, had not had any powers to register the information about the applicant's paternity due to his limited legal capacity. The Court noted that the case concerned raised issues of vital concern both for the applicant and for his daughter, a child born out of wedlock, having undoubtedly a keen interest to receive truthful information about aspects of her

[266] Mowbray A.R. The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights. Oxford-Portland-Oregon: Hart Publishing, 2004, p.152-153.
[267] Case of *Johnston and Others v. Ireland*, judgment of 18.12.1986. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57508 (Accessed on 25.03.2015).
[268] Case of *Krušković v. Croatia*, judgment of 21.06.2011, final on 21.09.2011. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105197 (Accessed on 25.03.2015).

personal identity, including who her biological parents were. In that case the Court concluded that the applicant's request on the registration of paternity, as well as the child's mother's declarations to this effect, had been neglected by the Croatian authorities apparently without any justification.

Separation of spouses

The Court concluded that the obligation of States to respect the right to family life may also include the obligation to facilitate the separation of married couples when their relationship ended irreparably. In the reference case of *Airey v. Ireland*[269], where the applicant complained inter alia about the absence in the Irish legal framework of accessible proceedings on the separation in marriage and family relations, the European Court ruled that regarding marriage, the husband and the wife are in principle obliged to live together, but in some cases have the right to petition for judicial separation. This amounts to recognition that the private or family life may sometimes require the release of the obligation to live together. It is noteworthy that in the respective case, as in the above-cited case of *Johnston and Others v. Ireland*, the European Court was quite reticent in approaching the issue of formalizing the divorce, stressing that this area was subject to a broad regulation by national authorities, falling under the large margin of appreciation afforded to the Member States under the ECHR.

Consulting biological parents in case of children being taken in state custody and/or adoption

The decisions to alienate children from their parents, their placement in State custody, and adoption constitute a serious interference in family life protected by Article 8 of the ECHR, especially when that is irreversible. This sensitive issue was first examined by the European Court in the case of *W. v. the United Kingdom*[270], where it was established that in taking such decisions, the authorities should have secured the parents their procedural rights. The case concerned the situation when, because of some matrimonial and financial problems, as well as excessive alcohol consumption, the biological parents of two minors and a baby aged a few months voluntarily placed the latter in the custody of foster parents, sometimes taking him over back, temporarily. After a period of time, with the consent of the natural parents, the competent authorities sent the child for adoption, and the links to the biological parents were cut off. Before the Court, the applicant (father) claimed *inter alia* that he and his wife had not been sufficiently informed about the consequences of an agreement to transmit the child for adoption, because he only understood it as a temporary placement in a foreign family. The Court found a violation of

[269] Case of *Airey v. Ireland*, judgment of 09.10.1979. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57420 (Accessed on 25.03.2015).
[270] Case of *W. v. the United Kingdom*, judgment of 08.07.1987. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57600 (Accessed on 25.03.2015).

Article 8 of the ECHR and noted that, in taking some decisions involving children, the relevant national authorities ought to have taken into consideration the interests of the natural parents as well. In the instant case, there was no evidence that the applicant and/or his wife had been consulted by the authorities before issuing the decision on the restriction of links and the subsequent transmission of the minor for adoption, it thus being uncertain whether the authorities had involved the natural parents in the pre-adoption procedures. Although the Court pointed out certain problems in the applicant's family, including his wife's alcohol abuse, who nevertheless underwent treatment, it considered that the failure to appropriately inform the biological parents about the consequences of transmitting the minor to third parties and for an eventual adoption was a violation of the positive obligations by the respondent Government under Article 8.

Currently, the involvement of natural parents in the proceedings of this kind, either administrative or judicial, is a well-established rule. It is crucial that their interests be properly taken into account. Only in exceptional circumstances, for example where a measure had to be taken to protect a child in an emergency situation, or those who have custody of the child are seen as a source of immediate threat, the Court considers that the State did not violate its positive obligations in that respect. In such circumstances, however, the Court must be convinced that there were indeed certain circumstances that justified the sudden removal of a child from the care of his parents by the authorities without any prior contact or consultation. In considering such a case, particular importance will be given to whether the State carried out an assessment on the impact of the proposed measure on the parents and child, and whether possible alternatives have been investigated. Thus, in the recent case of *Venema v. the Netherlands*[271], the European Court examined the interference of national authorities by taking the child only a few months old from her natural parents because of a reasonable suspicion that her mother had suffered from a postnatal mental disorder (*Münchausen syndrome by proxy*), characterized by abusing and harming the new-born child. The baby had to be sent to a medical investigation and subsequent treatment, because of the symptoms caused by abuse. Without consulting the biological parents and explaining them the reasons for prohibiting any contact with the child, the Dutch authorities temporarily placed the latter in a medical institution, and banned the parents' access to their child. The Strasbourg Court held that the situation when the parents had been simply presented with the fait accompli concerning the final removal of the child and the prohibition of any contact with her, without any justification, even given the mother's mental disorder, was sufficient to conclude that the State failed to fulfil its positive obligation, contrary to the standards set by Article 8.

[271] Case of *Venema v. the Netherlands*, judgment of 17.12.2002, final on 17.03.2003. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60824 (Accessed on 25.03.2015).

Reunification of children with their biological parents

The court ruled that the States have the obligation to take measures to facilitate the reunification of children taken into state custody with their natural parents. In the case of *Olsson v. Sweden*[272], the applicants, being mentally retarded, complained about the State taking their three minor children into custody and the subsequent rejection of any meeting. The Court held mainly that the reunification of the natural parents with their children who had lived for some time in a foster family needed preparation, whereas the nature and scale of these preparations might depend on the circumstances of each case. However, it always requires an active cooperation and understanding of all involved parties. While the national authorities must do everything possible to achieve such cooperation, their possibilities of applying coercion in this respect are limited, because the interests, rights and freedoms of all concerned must be taken into account, especially, the interests of freedoms of the children under Article 8 of the Convention. If any contact with their natural parents harmed those interests or interfered with those rights, it would be for the national authorities to strike a fair balance.

The Court ruled that this obligation also extends to the private agreements concerning the custody of children. In the case of *Hokkanen v. Finland*[273], the Court examined the applicant's inability to reunite with his natural daughter after voluntary placing her for temporary care and education in his parents-in-law's family, after his wife's death. The in-laws refused to return the girl to her father, considering that they were better placed to provide parental care, and a long series of lawsuits between the three people involved followed. After many years of trial, the applicant obtained the right to visit his daughter, but the visits had not been possible due to his parents-in-law's refusal to grant access. The European Court considered that despite the continued refusal of the in-laws and the obvious enmity relations between them and the applicant, the national authorities had not adopted sufficient and resultative measures to achieve the reunification of the father with his daughter, who at that time had already been 10 years old, being in the custody of her grandparents for over 9 years. The inaction of the competent authorities placed the applicant in a situation where the time had elapsed without him effectively benefiting from the remedies for the legitimate exercise of his parental rights.

In the recent case of *R.M.S. v. Spain*[274], the European Court analysed the interference of the national authorities having separated a minor daughter from her biological mother because of the latter's financial difficulties and her living conditions. The Court expressly noted, as a general

[272] Case of *Olsson v. Sweden*, judgment of 24.03.1988. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57548 (Accessed on 25.03.2015).
[273] Case of *Hokkanen v. Finland*, judgment of 23.09.1994. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57911 (Accessed on 25.03.2015).
[274] Case of *R.M.S. v. Spain*, judgment of 18.06.2013, final on 18.09.2013. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-121906 (Accessed on 25.03.2015).

principle applicable to this category of cases, that each Contracting Party was to equip itself with an appropriate and sufficient legal arsenal to ensure the fulfilment of the positive obligations imposed by Article 8 of the European Convention, and it was therefore for the Court to assess whether the national authorities in the application and interpretation of the legal provisions had provided guarantees prescribed by Article 8, particularly taking into account the main interests of the child (paragraph 72). In that case, the Court concluded that the respondent Government failed to fulfil their positive obligation, since the Spanish authorities had failed to take all necessary and appropriate measures reasonably expected to be taken in order to assess whether a minor might have been leaving a normal life in her family before her placement in a foster family, contrary to the requirements of Article 8 in this context. In fact, the case concerned the takeover of the minor daughter from the applicant of Guinean origin, who had been living in temporary accommodation and poor conditions with other relatives and her other two minor children, often being absent from home, and had not been able to provide the child with proper care. The European Court decided that the interests of the child to live within her natural family, as well as the applicant's interests as a parent, had been apparently neglected without proper justification.

For comparison, in another recent case, *Y.C. v. the United Kingdom*[275], the applicant complained of the takeover of her minor son in state custody because of some violent incidents between herself and her son's father suffering from movement disabilities, both parents having abused alcohol. The European Court concluded that the relevant national authorities had fulfilled their obligations arising from Article 8 of the ECHR, guided by the paramount interests of the child. The Court also noted that, having examined the applicant's request to reunite with her son, the British government had concluded that the rehabilitation of the minor son in his biological family had not been possible because the testimonies of social workers and police officers visiting the family in question, and the expert opinions of the psychologist involved in the process, had shown the opposite. The European Judges also noted that the applicant had been invited before national courts to present her position and any argument deemed essential in the context of the evidence set out above, but she had not clarified in any way the circumstances important for the eventual court order.

Providing facilities for handicapped or ill individuals

In the case of *Marzari v. Italy*[276], the applicant suffering from a rare disease called metabolic myopathy (characterized by myalgia, respiratory failure, exhaustion, loss of ability to speak, thermic disability and muscle pain) complained to the Court that the house made available by

[275] Case of *Y.C. v. the United Kingdom*, judgment of 13.03.2012, final on 24.09.2012. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109557 (Accessed on 25.03.2015).
[276] Case of *Marzari v. Italy*, decision on the admissibility of 04.05.1999. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22827 (Accessed on 25.03.2015).

municipal authorities had not been appropriate for his special needs. The European Court established that although Article 8 does not guarantee the right to solve the housing problem by relevant authorities, their refusal to provide assistance in this regard to an individual suffering from a severe illness could in certain circumstances raise an issue under the Convention because of the impact of such a refusal on an individual's private life. Although in this case the Court found no breach of Article 8, the impugned judgment suggests that the authorities' failure to provide support to seriously ill persons who cannot afford to pay housing with specific conditions, may constitute a violation of the Convention under Article 8.

In another case, *Botta v. Italy*[277], the Court examined the complaint of an applicant, suffering from physical disability, about the violation of Articles 8 and 14 of the ECHR by the Italian authorities having failed to adopt sufficient measures to ensure that private beach operators in the Ravenna region promote certain facilities for the disabled (ramps and special toilets). The European Magistrates decided that the items raised by the applicant were not applicable to the case at issue, noting that the State's positive obligations under Article 8 arise in situations where there is/can be definitely established a direct causal link between the measures sought by the applicant and his private or family life. In this case, however, the right claimed by the applicant, namely the access to the beach and the sea while on vacation in a region remote from his habitual residence, aimed at interpersonal relationships in such a broad and indeterminable field, that there is no admissible and direct link between the measures that had to be adopted by the State to remedy the omissions of private persons in arranging a holiday stay at the sea and the applicant's private life. Therefore, any allegations regarding the respondent State's failure to fulfil its obligations to ensure the protection of the applicant's right to private life are inconsistent and unsubstantiated.

Admission of non-national family members in case of decisions on immigration

In the case-law of the European Court, there are some cases where the applicants claimed that States refused to authorize the entry into the country of non-national family members, thus violating their right to respect for private and family life. The Court's answer on this sensitive subject is mainly negative. The European Court considers that the State cannot be obliged under the Convention to accept such persons and allow them to settle, except in cases where family life cannot be lived elsewhere than on the claimed territory. Thus, in most cases, the Court noted that family life of non-national or mixed couples could take place in another country. For example, in the reference case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*[278], the European

[277] Case of *Botta v. Italy*, judgment of 24.02.1998. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58140 (Accessed on 25.03.2015).
[278] Case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28.05.1985. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57416 (Accessed on 25.03.2015).

Judges pointed out that the State's obligation to admit on their territory relatives of immigrants residing legally varies depending on the particular circumstances relating to persons involved. Moreover, the Court could not ignore the fact that the case concerned not only issues of family life, but also those of immigration, and thus, given the international law on the matter and obligations arising from international treaties to which it is party, the State has the right to control the entry of persons and foreign nationals on its territory. The Court noted that the case did not refer to immigrants who had already founded a family and left it in another country until receiving a permanent resident status in the United Kingdom, but to applicants after arrival in the UK, as unmarried people, who then got married. The obligations imposed under Article 8 may not be interpreted as a general duty of the State to respect the choice of married couples of a particular country as a matrimonial residence, and to accept foreign spouses to settle in this country. In this case, the European Court noted that the applicants had proven neither any obstacles in establishing a family life in their own home states or the ones of their spouses, nor the presence of specific reasons justifying the applicability of these requirements.

The Court reached a similar conclusion in the recent case of *Berisha v. Switzerland*[279], where the applicants of Kosovar descendants, having benefited from the legal right to reside in the country, complained of the refusal of national authorities to issue a residence permit to their minor children, brought illegally to Switzerland. The European Judges pointed out that the respondent State had managed to establish the right balance between the special interest of the applicants for family reunification and the general interest to control immigration, even in the situation when the applicants had sought to strengthen their family ties, namely on Swiss territory. Therefore, Article 8 is cannot be interpreted as guaranteeing the right to choose the most suitable place to develop one's family life. Thus, the Court concluded that the Swiss State had fulfilled its obligations under Article 8 of the ECHR, and the applicants' claims were unfounded and rejected.

Nevertheless, in some cases the Court has reached a different conclusion than the one analysed above. Thus, in the case of *Şen* v. the Netherlands[280] the European Magistrates decided that the official Amsterdam had failed to honour its positive obligations under Article 8 of the ECHR, stressing that national authorities' refusal to issue a residence permit to the minor applicant born in Turkey, the daughter of two other applicants (Turkish nationals) legally residing in Rotterdam with two other children born in the Netherlands, was contrary to the Convention because the family had been established for many years in the Netherlands, whereas

[279] Case of *Berisha v. Switzerland*, judgment of 30.06.2013, final on 30.01.2014. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122978 (Accessed on 25.03.2015).

[280] Case of *Şen v. the Netherlands*, judgment of 21.12.2001. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-64569 (Accessed on 25.03.2015).

two of their children had been born there, who had lived continuously in that State, having been included in its cultural environment and schooled there, basically having no links with the country of origin (Turkey) other than their nationality. There would have been certain obstacles in the transfer of the family life into Turkey. Thus, the arrival of their daughter born in Turkey, who had lived there for a while with their relatives, was the most appropriate means to develop family life among all members, taking account of the young girl's age and the need to foster her integration in the family unit created by parents. It is true that the first daughter was left by her parents in Turkey, while her mother reunited with her father long before, but that fact cannot be regarded as a final decision to set their permanent resident in the country of origin, and, despite episodic and distant connections, to abandon the idea of this family's reunification.

The same reasons were invoked by the Strasbourg Court in the follow-up case of *Tuquabo-Tekle v. the Netherlands*[281], which concerned the refusal of the Dutch authorities to issue a residence permit to the minor daughter of the Eritrean applicant, whereas the latter had been living in Europe for many years and had created a new family there. In this case, the Court held that although the applicant's daughter obviously had close ties with the country of origin, and had reached an age when she no longer had a pressing need for her mother's care, given the conditions of her life in Eritrea (according to local traditions she was removed from school by her grandmother who prepared her to get married, whereas the mother, despite being against the choice made by the relatives for the girl, was unable to do something as long as her daughter lived on the African continent) the reunification of the daughter with her mother and her new family was legitimate and necessary.

Protection against pollution

The right to a healthy environment has a special place in the content of Article 8 of the ECHR. The first reason for this is that it is not presented as an independent right. The second is that it has links with several elements protected by that provision. As shown in the judgment in the case of *López Ostra v. Spain*[282], severe environmental pollution may affect the welfare of people and prevent them enjoying their homes in a way that negatively affect private and family life. Therefore, the State is bound to provide people under their jurisdiction with a suitable environment unaffected by any form of serious (chemical, physical, sound / acoustics, nuclear etc.) pollution that would affect the private life of individuals, especially in terms of respect for home.

[281] Case of *Tuquabo-Tekle v. the Netherlands*, judgment of 01.12.2005, final on 01.03.2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-71439 (Accessed on 25.03.2015).
[282] Case of *López Ostra v. Spain*, judgment of 09.12.1994. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57905 (Accessed on 25.03.2015).

The Court's case-law on this subject provides a variety of situations where the environment is influenced in a way that raises issues under Article 8, namely the State engaging in hazardous activities that could affect human health (such as nuclear tests in *McGinley and Egan v. the United Kingdom*[283]); private persons' activities, authorized by the State, causing harmful pollution to the health and welfare of inhabitants (*López Ostra v. Spain, Guerra and Others v. Italy*, cited above, *Moreno Gomez v. Spain*[284]); activities of airlines and airports creating inconvenience to people living in the nearby area (*Hatton and Others v. the United Kingdom*[285]). Although the European Court has not found a violation of the respondent State's obligations under Article 8 in all lodged applications, it continuously noted that the protection of the private life of individuals, with reference to their residence, from such undue influence as pollution remains a fundamental duty of the State in the field of Article 8 of the ECHR.

In general, given the growing importance of the issue of pollution in the world and its continued highlight on the agenda of many international meetings, the private life of individuals in terms of protection against pollution has recently gained a new momentum, and in the current cases the European Court analyses very meticulously the circumstances of the cases concerned by the complaints raised by Europeans, it mostly deciding on the failure of the respondent State to fulfil its positive obligations in this context. A simple dynamic analysis of the Court's case-law proves this fact, because as a rule the verdicts reached in the respective cases raising – in one way or another – issues on protection from pollution, not only under Article 8, are judgments with at least one violation.[286]

For comparison, in a very recent case, *Smaltini v. Italy*[287], the European Court declared inadmissible the applicant's complaint on the protection from chemical pollution, claimed however, under Article 2 of the Convention, because she had not invoked the national authorities' failure to take effective measures to protect her life and health (she being diagnosed with leukaemia residing in the immediate vicinity of the Europe's largest steel processing plant) but complained that the Italian courts had not established a causal link between the polluting emissions a her illness, whereas she had not adduced any convincing proof to support her allegation. The Court examined the medical reports provided by the authorities, according to which the rates persons suffering from leukaemia in the area of the applicant's residence had

[283] Case of *McGinley and Egan v. the United Kingdom*, judgment of 09.06.1998. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58175 (Accessed on 25.03.2015).
[284] Case of *Moreno Gomez v. Spain*, judgment of 16.11.2004, final on 16.02.2005. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67478 (Accessed on 25.03.2015).
[285] Case of *Hatton and Others v. the United Kingdom*, judgment of 08.07.2003. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61188 (Accessed on 25.03.2015).
[286] Factsheet of the Registry of the European Court of Human Rights on the Environment of April 2015. [online]: http://www.echr.coe.int/Documents/FS_Environment_ENG.pdf (Accessed on 25.04.2015).
[287] Case of *Smaltini v. Italy*, decision on the admissibility of 24.03.2015.HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-153980 (Accessed on 25.04.2015).

been clearly higher than the national average, and decided that the claims as formulated by the applicant were inadmissible under the ECHR. We believe that the complaints in the respective case ought to have been communicated specifically under Article 8. If the applicant had formulated her complaint in a different way and had invoked lack of protection from the State against pollution, the European Court – as proven by its recent case-law in this respect (*Guerra and Others v. Italy*, *Vilnes and Others v. Norway* [288]), would have considered the application under Article 8, and not Article 2 of the ECHR.

Protection of personal data

Given the recent developments in specific segments of information technology, the issue of protection of personal data starting the 1990s onwards has taken a different outline: the European Court more frequently receives applications on the alleged violation of private and family life in terms of the inviolability of personal data.

Therefore, in the reference case of *Z v. Finland*[289], the European Court noted that the protection of personal data, including information about the state of health of the person, is of paramount importance for the respect of individual rights to private and family life guaranteed by Article 8 of the ECHR. Respecting the confidentiality of personal data is a vital principle of the law systems of the States Parties to the Convention, and the domestic law has to provide adequate safeguards to prevent the release or disclosure of personal data contrary to the guarantees enshrined in the text of Article 8.

In the case of *Peck v. the United Kingdom*[290], the Strasbourg Court emphasized a general principle that the monitoring of individuals' actions in a public place via CCTV does not constitute an interference with private life. However, the interception of data on a permanent or systematic basis may give rise to a violation of private life. Likewise, compilation of data on specific individuals by security forces, even without using surveillance mechanisms, is an interference with the private life of the subjects. The records of prisoners' answers to certain questions, made by police in cells, for later analysis also constitute interference with the applicants' right to private life, because the gathered information can be seen as some sort of processing their personal data.

In the case of *S and Marper v. the United Kingdom*[291], the Grand Chamber of the Court concluded that the protection guaranteed by Article 8 of the ECHR would be unacceptably

[288] Case of *Vilnes and Others v. Norway*, judgment of 05.12.2013, final on 24.03.2014.HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-138597 (Accessed on 25.04.2015).
[289] Case of *Z v. Finland*, judgment of 25.02.1997. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58033 (Accessed on 25.04.2015).
[290] Case of *Peck v. the United Kingdom*, judgment of 28.01.2003, final on 28.04.2003. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60898 (Accessed on 25.04.2015).
[291] Case of *S. and Marper v. the United Kingdom*, judgment of 04.12.2008. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90051 (Accessed on 25.04.2015).

prejudiced by the use of modern scientific techniques in the criminal justice system operating at any cost and without carefully balancing the potential benefits of the extensive use of these techniques against the essential interests of private life. In the Court's view, the strong consensus existing between Contracting States in this respect is of considerable importance and narrows the margin of appreciation afforded to the respondent State to establish permissible limits of interference with private life in that aspect. Any State claiming to be a pioneer in the development of new technology holds special responsibility to establish a balance in that area.

It is notorious that the obligation to protect personal data under Article 8 by the Member States to the ECHR include the task to take all measures necessary to ensure the effective exercise of the right to private life in its various aspects, and may refer to the ***protection of the image of the individual*** (*Peck v. the United Kingdom*, cited above; cases of *Von Hannover v. Germany* (no. 1[292], 2[293], 3[294]); ***telephone conversations*** (*Malone v. the United Kingdom*[295], *Van Vondel v. the Netherlands* [296], *Association 21 December 1989 and Others v. Romania*[297]); ***information on health*** (*Z v. Finland*[298], *Avilkina and Others v. Russia*[299], *Radu v. Moldova*[300]); ***written correspondence, including correspondence of prisoners with the European Court against censorship*** (*Cotleţ v. Romania*[301], *Pisk-Piskowski v. Poland*[302]) etc.

As we see, Article 8 of the Convention affords the Council of Europe Member States a very large margin of appreciation in respect of the positive obligations. In fact most positive obligations imposed on the States under the ECHR arise namely from Article 8, which is not surprising given the many elements of protection guaranteed to European individuals thereby. As the European Court of Human Rights often stressed, Article 8 requests the Member States to fulfil certain positive obligations to ensure the effective respect for private and family life, which

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[292] Case of *Von Hannover v. Germany*, judgment of 24.06.2004, final on 24.09.2004. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61853(Accessed on 25.04.2015).

[293] Case of *Von Hannover v. Germany (no. 2)*, judgment of 07.02.2012. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109029(Accessed on 25.04.2015).

[294] Case of *Von Hannover v. Germany (no. 3)*, judgment of 19.09.2013, final on 17.02.2014. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-126362 (Accessed on 25.04.2015).

[295] Case of *Malone v. the United Kingdom*, judgment of 02.08.1984. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57533(Accessed on 25.04.2015).

[296] Case of *Van Vondel v. the Netherlands,* judgment of 25.10.2007, final on 25.01.2008. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-82962 (Accessed on 25.04.2015).

[297] Case of *Association "21 December 1989" and Others v. Romania,* judgment of 24.05.2011. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104864 (Accessed on 25.04.2015).

[298] Case of *Z v. Finland*, judgment of 25.02.1997. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58033(Accessed on 25.04.2015).

[299] Case of *Avilkina and Others v. Russia*, judgment of 06.06.2013, final on 07.10.2013. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-120071 (Accessed on 25.04.2015).

[300] Case of *Radu v. Moldova*, judgment of 15.04.2014, final on 15.07.2014. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-142398 (Accessed on 25.04.2015).

[301] Case of *Cotleţ v. Romania*, judgment of 03.06.2003, final on 03.09.2003. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-65680 (Accessed on 25.04.2015).

[302] Case of *Pisk-Piskowski v. Poland*, judgment of 14.06.2005, final on 14.09.2005. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69356 (Accessed on 25.04.2015).

may involve the need to adopt measures to protect private life, even with regard to relations between individuals. That is, each Contracting State is held to equip itself with an appropriate and sufficient legal arsenal to ensure the fulfilment of the positive obligations imposed by Article 8 of the European Convention.[303]

Positive obligations under Article 9 of the ECHR (freedom of thought, conscience and religion): Under Article 9 paragraph 1 of the Convention, three distinct freedoms form the content thereof and are covered by the protection offered by it. The freedom of thought, the freedom of conscience, and the freedom of religion are, however, configured to be viewed by the European Court through one single prism. Nevertheless, as explained below, under Article 9 the State has most positive obligations in terms of religious freedom. In this regard, it is noteworthy that neither the Convention nor the case-law permits the identification of general criteria according to which certain spiritual representations would qualify as having the significance of a religion or a cult.[304]

Ensuring the State's neutrality and impartiality

The State's actions of favouring one leader of a religious community or forcing individuals to join a certain religious community against their will constitute an unacceptable interference in the freedom of religion of the person. In democratic societies the State should not influence the existing religious groups except for in accordance with the restrictions authorized by Article 9 § 2 of the ECHR. However, Article 9 excludes any assessment by the State of the legitimacy of religious beliefs and ways of expressing them.

In the reference case of *Religionsgemeinschaft Der Zeugen Jehovas and Others v. Austria*[305], the European Court pointed out expressly that the obligation under Article 9 encumbers the State authorities to remain neutral in the exercise of their duties in that respect without any discriminatory attitude towards certain cults (paragraph 92). In the case of *Hasan and Chaush v. Bulgaria*[306], the Grand Chamber of the Court noted that freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the ECHR, and pluralism is inextricable to the that association. The individual's right to freedom of religion must be guaranteed so as to function in a peaceful manner, free from arbitrary interference of the State. The existing autonomy of religious communities is indispensable to the

[303] Bîrsan C., Convenţia europeană a drepturilor omului: comentariu pe articole. Bucureşti: C.H. Beck, 2010, p. 598.
[304] Bîrsan C., *Op. cit*., p. 742.
[305] Case of *Religionsgemeinschaft Der Zeugen Jehovas and Others v. Austria*, judgment of 31.07.2008, final on 31.10.2008. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88022 (Accessed on 25.04.2015).
[306] Case of *Hasan and Chaush v. Bulgaria*, judgment of 26.10.2000. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58921 (Accessed on 25.04.2015).

existing pluralism in a democratic society, and thus constitutes the very core of the protection provided by Article 9.

In the first case examined by the Court in Strasbourg against our State where it found a violation of Article 9, *The Metropolitan Church of Bessarabia and Others v. Moldova*[307], the European Judges reiterated that in a democratic society in which several religions coexist it may be necessary to restrict this freedom to reconcile the interests of various groups and to ensure respect for the beliefs of each person. At the same time, the State must be neutral and impartial in exercising its right to regulate this area and in its relations with the various religions, faiths and beliefs. It is about maintaining pluralism and the proper functioning of democracy, which is one of the main features that provide the ability to solve problems faced by a State through dialogue and without violence, even when these problems bother. Consequently, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the conflicting groups tolerate each other.

Therefore, the State neutrality is a core element in ensuring effective respect for the individual right to religious freedom, whereas the national authorities are required to develop a fair and non-discriminatory attitude whenever their activities converge with the interest of religions.

Formalising a religious cult

In the case of *The Metropolitan Church of Bessarabia and Others v. Moldova* cited above, the applicant church invoked violation of Article 9 of the Convention due to the national authorities' refusal to officially recognize it, which consequently had led to the inability of the practiced religious cult to be exercised. In motivating their refusal, the domestic courts pointed out *inter alia* that the respective church was orthodox, and the persons interested in its formalization might manifest their religious beliefs within the officially recognized Moldovan Metropolitan Church. In his turn, in order to justify the legality and the proportionality of the interference with the applicants' right to freedom of religion, the Government's Representative before the European Court invoked the following reasons: the defence of legality and constitutional principles of the Republic of Moldova; threat to the territorial integrity of the State by the eventual formalization of the applicant church; protection of social peace and understanding among believers.

In motivating its final rationales in finding a violation of Article 9 by the Moldovan authorities, the Court reiterated a series of general principles, and namely: the freedom of thought, conscience and religion is one of the foundations of a "democratic society". It appears,

[307] Case of *Mitropolia Basarabiei and Others v. Moldova*, judgment of 13.12.2001, final on 27.03.2002. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59985 (Accessed on 25.04.2015).

in its religious dimension, among the most essential elements of the identity of believers and their conception of life, but it is equally a precious asset for atheists, agnostics, sceptics and the unconcerned. It is all about substantial pluralism in such a society which was an achievement at great cost over the centuries. Freedom of religion reveals first of all an interior faith; it also "implies" the freedom "to manifest religion" either individually or collectively, in private or in public, and within the circle of people sharing the same faith. Confession, either by words or deeds, is bound by the existence of religious convictions. This freedom entails, *inter alia*, the freedom to join and practice, or not, a religion; Article 9 lists a number of forms which may take the manifestation of religion or belief, i.e. worship, teaching, practice and fulfilment of rituals. However, Article 9 of the ECHR does not protect every act motivated or inspired by a religion or belief.

The Court also stressed that, in principle, the right to freedom of religion as defined by the Convention excludes the assessment by the State of the legitimacy of religious beliefs or the ways of expressing them. The State's measures that would favour a particular leader or an organ of a divided religious community, or would seek to compel the community or part thereof in order to place it, against its will, under a single leadership, would amount to a violation of the freedom of religion. In democratic societies, the State must take steps to ensure that religious communities remain, or be brought, under a unified leadership. Similarly, when the exercise of the right to freedom of religion or of one of its aspects is subject, under domestic law, to a system of prior authorization, the intervention of the recognised ecclesiastical authority into the procedure of granting the authorization will not be consistent with the standards of Article 9 § 2.

Moreover, since religious communities traditionally exist in the form of organized structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which protects the associative life from any unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community, provides that believers be able to associate freely, without any arbitrary intervention of the State. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and has its place in the very centre of the protection provided by Article 9 of the Convention. In addition, one of the means of exercising the right to manifest a religion, especially for religious communities in their collective dimension, is the possibility to ensure the legal protection of a community, its members and its assets, so that Article 9 be interpreted not only through Article 11, but also under Article 6.

In conclusion, the European Judges have indicated that without official recognition the applicant church could neither organize nor operate. Lacking legal personality, it could not file a court action in order to protect its assets necessary for worship, and its members would not be

entitled to meet to carry on religious activities without violating canon law. As to the alleged tolerance of the applicant church and its parishioners raised by the Government, the Court considered that such tolerance substituted recognition because the recognition only confers specific rights susceptible to effectively protect the persons concerned.

Therefore, unless the State adduces convincing and conclusive reasons to deny the request of a religious cult to be registered, according to the limitations expressly provided for by Article 9 § 2, the refusal to formalize a cult would be contrary to the Convention, and thus the national authorities would fail to comply with the positive obligation to register it.

Protection against incitement to violence and hatred against a religious community

The European Court point out that believers must tolerate and accept the denial of their religious beliefs by others and even the propagation of certain doctrines hostile to their faith. However, as specified in the case of *Otto-Preminger-Institut v. Austria*[308], the way in which beliefs and religious doctrines are opposed or denied is a matter which may engage the responsibility of the State, especially its responsibility to ensure the peaceful enjoyment guaranteed by Article 9 for the followers of such beliefs and doctrines. The Court stressed that the State may legitimately deem it necessary to adopt measures to suppress certain forms of behaviour, including sharing information and ideas, judged incompatible with respect for freedom of thought, conscience and religion of others. The respect for the feelings of believers guaranteed by Article 9 may be violated by the provocative portrayal of objects of religious worship, and this portrayal can be seen as a deliberate violation of the spirit of tolerance, which is one of the basic characteristics of a democratic society.

Thus, in the cases involving the protection of the members of a religious community or of the community *per se*, the Strasbourg Court will carefully analyse the circumstances of those cases to verify whether State authorities fulfilled their positive obligations imposed in this respect.

In the case of *Gündüz v. Turkey*[309], the Court declared inadmissible the application of a radical Islamic sect's leader convicted of inciting people to religious crimes and hatred against moderate Islamic intellectuals by publishing comments in the press. It considered that, given the violent content and the tone of the applicant's comments, they had amounted to hate speech glorifying violence, and therefore incompatible with the basic values of justice and peace expressed in the Preamble to the Convention. Although the European Judges analysed the present case in particular under Article 10 (freedom of expression), they referred to the rights of

[308] Case of *Otto-Preminger-Institut v. Austria*, judgment of 20.09.1994. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57897 (Accessed on 25.04.2015).
[309] Case of *Gündüz v. Turkey*, decision on the admissibility of 13.11.2003.HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-23973 (Accessed on 25.04.2015).

believers against incitement to violence and hatred, which interferes with the scope of protection under Article 9.

From the perspective of the State's obligations to protect the members of a religious community against violence or incitement to it, the very recent case of *Karaahmed v. Bulgaria*[310] presents a high interest. The applicant of Islamic confession complained about the failure of national authorities to adequately protect him from the Bulgarian militant political party Ataka, including members of the Parliament who had demonstrated against the use of loudspeakers by the largest mosque in Sofia, Banya Bashi Mosque, to call Muslims to prayer. The applicant also complained about the inefficient investigation of the violent incident that had occurred before that mosque. Thus, on 20 May 2011, the followers of the Ataka party and the Muslims arrived for the traditional Friday prayer were involved in a conflict with the use of force, as a result of which Muslims had been bullied, called vulgar and defamatory expressions and injured after attacks with eggs and stones. Some followers of the Bulgarian party were also injured. The police, and later also the National Investigation Service, conducted a criminal investigation, but by the time of examination of the respective application by the Strasbourg Court, it had not been finalized.

Before the Court, the applicant claimed that the Bulgarian authorities had not fulfilled their positive obligations arising from Article 9 to ensure the respect for freedom of religion, and that internal investigation had not been effective. Under Article 9 of the ECHR, the European Court specified that the case raised issues of convergence of freedom of religion and of expression. Since under the Convention they are neither absolute nor susceptible of being hierarchized, the State is thus bound to provide a legal framework sufficient to protect these rights and freedoms, and to take effective measures to ensure their practical respect. The Court also noted that namely the police were responsible for finding a fair balance between the competing interests in cases similar to the present one because it was not impossible for them to evaluate the situation and react adequately to the events of 20 May 2011. They had to fulfil their positive obligation of guaranteeing the rights of demonstrators, of the applicant and other believers, since there was no excessive or disproportional burden on the national authorities in this respect.

The Court ruled that the response of the police to the erupted violence had been insufficient. As a result, a large number of demonstrators had the opportunity to be very close to the mosque, to insult the believers, to make provocative and terrifying gestures, and to have access inside the mosque. They protested at the mosque all day, whereas the applicant and other

[310] Case of *Karaahmed v. Bulgaria*, judgment of 24.02.2015. HUDOC database. [online]: http://hudoc.echr.coe.int/eng?i=001-23973#{"fulltext":["karaahmed"],"itemid":["001-152382"]} (Accessed on 25.04.2015).

parishioners were forced to end their prayers. Thus, it was clear that the police actions were only focused on limiting the erupted violence, and failed to pay due attention to establishing a fair balance in ensuring respect for the effective exercise of rights of demonstrators and those of the applicant and other parishioners. Considering the circumstances elucidated, the Court concluded that the applicant and his mates had been victims of the violation of the freedom to practice religion as a result of the demonstrators' violent actions although the national authorities had had obligation to respond effectively to those actions.

Ensuring the freedom to manifest religion at work

In its case-law, the European Court had to determine the scope of positive obligations of (public and private) employers in protecting employees' rights under Article 9 of the ECHR; in other words, the European Judges had to determine to what extent the Government should impose a reasonable policy to accommodate different faiths, beliefs and practices in the workplace.

From this perspective, in the recent case of *Eweida and Others v. the United Kingdom*[311], the Court examined whether the official London to had fulfilled its positive obligations to ensure the rights of the freedom to manifest religion to four applicants: a flight attendant of the airline "British Airways", who – after approval of the new uniform standards – was not allowed to wear the Christian cross; a public hospital nurse who was prohibited to wear a cross necklace at work due to possible damages to patients; a registry office clerk transferred to another department after disciplinary proceedings due to her refusal (on religious grounds) to formalize same-sex marriages; and a public association advisor specializing in offering psychological conciliation dismissed for having refused (on religious grounds) to work with gay patients.

As to the first applicant – the flight attendant of an airline – the ECtHR found a violation of Article 9, considering the ban on wearing the cross as unlawful given that, although the employer company imposed a prohibition of wearing any jewellery, no distinction had been made between the jewellery itself and religious symbols, whereas other employees freely continued wearing Islamic veils and turbans. The Court concluded that the protection of the employer company's corporate image had played a smaller role than the individual's freedom to manifest religious beliefs. Thus, the individual interests prevail over corporate image. As to the other three applicants – the nurse, the civil registry clerk and the psychologist – the European Judges concluded that national authorities had put forward relevant and sufficient arguments in restricting their right to freedom to manifest their religion, and the obligation to reasonably ensure the rights of believers at the work had not been violated in those cases.

[311] Case of *Eweida and Others c.Regatului Unit*, judgment of 15.01.2013, final on 27.05.2013.HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881(Accessed on 25.04.2015).

Promoting alternative service for those whose religious beliefs prohibit military service

In the relatively recent case of *Bayatyan v. Armenia*[312], the Grand Chamber of the Court ruled on the infringement of the right to freedom of thought, conscience and religion resulting from the conviction of the applicant, follower of the Jehovah's Witnesses, due to his refusal for confessional reasons to perform military service. In analyzing the interference with the applicant's rights under Article 9 of the Convention, the Grand Chamber reiterated a number of general principles characteristic to this article, namely the fundamental nature of the freedom of religion in a democratic society; the vitality of religious freedom on the faithful, but also about atheists, agnostics, sceptics and indifferent, and the religious pluralism under Article 9 § 1; the freedom of religion containing the right to have or not certain religious convictions and to practice a particular religion; the individual and collective character of the freedom of religion, which includes the freedom to manifest belief through worship, teaching, practice and observance; the State's neutral and impartial role leading to public order, religious harmony and tolerance in a democratic society; recognition of the State's certain margin of appreciation on the need for interference, under the European legal scrutiny on imposing it; the European Court's role in determining the justification and proportionality of the measures taken at national level in the light of the evolved case-law.

Having analysed the above principles and applied them *in concreto* to the respective case, the Grand Chamber ruled on the violation of Article 9, citing the following: the reasonableness of the applicant's grounds to avoid military service; his readiness to an alternative service; the applicant's criminal conviction and imprisonment for refusing to join the army; the respondent Government's international commitments to introduce the option of civil service; lack of a pressing social need to condemn the applicant.

Therefore, the Court ruled on the Armenian State's responsibility and violation of its assumed positive obligations to ensure the effective exercise of the rights provided by Article 9 of the ECHR, reiterating its position on the obligation of a Member State to the Convention to promote alternative service for those whose religious beliefs prohibit their military service. It is noteworthy that with the adoption of the respective judgment by the Grand Chamber, there had been a definite opinion on the mandatory introduction of alternative service for Member States of the Council of Europe, and there have been reported no problems in this regard.

Positive obligations under Article 10 of the ECHR (freedom of expression): this Article imposes the following positive obligations for the Signatory States:

Ensuring the media pluralism

[312] Case of *Bayatyan v. Armenia*, judgment of 07.07.2011. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105611 (Accessed on 25.04.2015).

The European Court has repeatedly stressed the fundamental role of freedom of expression in a democratic society, in particular where, the press imparts information and ideas of general interest, which the public is entitled to receive. Such a commitment cannot be successful unless it is grounded in the principle of pluralism, the State being whose guarantor thereof. For the first time the Court examined the issue on the public monopoly on broadcasting in the case of *Informationsverein Lentia and Others v. Austria*[313], finding a violation of Article 10. It considered that far-reaching character of the restrictions imposed by a state monopoly on the freedom of expression can only be justified if they correspond to a pressing social need. Today, however, the justification for these restrictions cannot be found, considering the number of frequencies and channels available.

In the case of *Radio ABC v. Austria*[314], the Court repeatedly examined the broadcasting monopoly in Austria. It concluded by noting "with satisfaction that Austria had introduced new legal provisions to ensure the fulfilment of its international obligations", i.e. a regional broadcasting law adopted in 1997 which put an end to the monopoly.

In the recent case of *Centro Europa 7 S.R.L. and Di Stefano v. Italy*[315], the Grand Chamber of the Court found a violation of Article 10 because the applicants had not been allocated to any of the requested television frequencies, the reasoning being very simple. First, there can be no democracy without pluralism. Secondly, political pluralism requires pluralism in the media. Thirdly, in order to ensure pluralism in the media, the State must effectively allow access to the market to ensure the diversity of the overall content of the program. The Court stated that "in a sensitive sector such as the media, apart from the negative obligation of non-intervention, the State has a positive obligation to implement an appropriate legislative and administrative framework to ensure effective pluralism".

Providing of information by the State

Such a positive obligation may also arise under Article 10, not just under Article 8 of the Convention. The Court had recalled on numerous occasions the crucial importance of the freedom of expression as one of the conditions for a sound functioning of democracy, the States being bound to ensure that individuals be able to effectively exercise their right to communication among them.

[313] Case of *Informationsverein Lentia and Others v. Austria*, judgment of 24.11.1993. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57854 (Accessed on 25.04.2015).
[314] Case of *Radio ABC v. Austria*, judgment of 20.10.1997. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58104 (Accessed on 25.04.2015).
[315] Case of *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, judgment of 07.06.2012. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111399 (Accessed on 25.04.2015).

The first case where the Court recognized the right of the public to receive information and the right of access to information was *Leander v. Sweden*[316], which "basically prohibited a Government to restrict any person's access to information that others wish or may provide it to him".

In fact, in this case the applicant complained about the refusal of national authorities to furnish the information about him contained in his personal confidential file, which had been the basis for the denial to offer him a technical position at a military sea base. Although the Court proclaimed the individual's right to receive information and ideas, it noted that Article 10 generally neither grants an individual the right of access to a specialized registry containing data about the candidacy of an individual for a particular job, nor establishes an obligation for the Government to share such information. Therefore, the applicant's claims about violation of Article 10 were rejected.

In the same context, in the case of *Guerra and Others v. Italy*, cited above, the applicants tried to argue that the public right to receive information, resulting from Article 10 involved the national authorities' duty to collect and distribute information, particularly where a dangerous activity was a threat to human health and private and family life. The Court held, however, that such a right cannot be inferred from this provision of the Convention. Nevertheless, that fact did not prevent the Court from finding a violation of the State's positive obligations under Article 8, given the same circumstances of the case.

Protection of freedom of expression of the individual from other people's threats

In the case of *Fuentes Bobo v. Spain*[317], the applicant was dismissed by the Spanish television company TVE for having criticized its management in a radio broadcast. In response to the Government's argument that TVE was a legal person and that authorities could not interfere in the management of its business and relationships with employees, the Court found that, by virtue of its positive obligations, the Spanish Government had the duty to protect the freedom of expression of the applicant from the threats generated by private persons; thus, the applicant's dismissal constituted disproportional interference with his freedom of expression, and the respondent State failed to honour its positive obligations in this respect.

In such circumstances, it is reasonable to question whether the state has a positive obligation to protect the freedom of expression in private premises open to the public. The European Court was faced with this specific question in the case of *Appleby and Others v. the*

[316] Case of *Leander v. Sweden*, judgment of 26.03.1987. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57519 (Accessed on 25.04.2015).
[317] Case of *Fuentes Bobo v. Spain*, judgment of 29.02.2000, final on 29.05.2000. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-63608 (Accessed on 25.04.2015).

United Kingdom[318], concerning a private company's refusal to allow installing a loudspeaker in order to distribute leaflets on the premises of its commercial centre. The Court's answer was negative, noting that the property rights of third parties (Article 1 of Protocol No. 1 to the ECHR) in such circumstances should prevail over the individual's right to freedom of expression.

Positive obligations arising from Article 11 of the European Convention (freedom of assembly and association): in fact, Article 11 enshrines the freedom of assembly, association and union without any distinction among them, whereas the latter freedom is seen as a part of the second. The positive obligations under Article 11 involve the adoption of necessary, appropriate and reasonable measures by Member States in order to ensure effective protection of the guaranteed rights. In this regard, the States enjoy some margin of appreciation as to the methods and tools to be used in the process of ensuring such protection, and the positive obligations are some means rather than the result. However, that margin of appreciation afforded to States is accompanied by the European Court's supervision.

In terms of the freedom of assembly, Article 11 guarantees the protection of all categories of meetings, including those that shock, disturb, and even lead to severe reactions of ideological opponents, as well as the protection of counter-demonstrators at an organized manifestation. The quintessence of the protection granted is the peaceful and democratic element of assemblies, in the absence of which the public authorizes are empowered to lawfully interfere with the respective freedom, by applying proportionate and even the most severe measures, if deemed necessary in a democratic society. The freedom of association protected by Article 11 § 1 covers the freedom to form and join an association or a trade union, the freedom to form and join political parties, the freedom not to associate, and, in separate cases, the right to strike.

Article 11 requires the following positive obligations for the Member States of the Council of Europe.

Protection of protesters attending a peaceful demonstration

In the case of *Oya Ataman v. Turkey*[319], the applicant (a lawyer), being the organizer of a protest demonstration against F-type prisons, complained that the State had violated the freedom of assembly by authorizing the police to disperse the march with the application of tear gas. The Strasbourg Court noted that the Signatory States, by virtue of their conventional obligations, not only had to safeguard the right to freedom of assembly, but also the refrain from applying unreasonable indirect restrictions. Although the main objective of Article 11 is the protection of

[318] Case of *Appleby and Others v. the United Kingdom*, judgment of 06.05.2003, final on 24.09.2003. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61080 (Accessed on 25.04.2015).
[319] Case of *Oya Ataman v. Turkey*, judgment of 05.12.2006, final on 05.03.2007. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-78330(Accessed on 25.04.2015).

the individual against any arbitrary interference of public authorities in the exercise of the guaranteed right, there are also certain positive obligations to ensure the effective realization of these rights. However, the procedures on the requests for prior authorization to organize the meeting and the regulation of associations are not contrary to the spirit of Article 11.

In the recent case of *Pekaslan and Others v. Turkey*[320], the applicants complained *inter alia* about the violation of the right guaranteed by Article 11 due to the interference and the application of violence by law-enforcement agents in the framework of a demonstration dedicated to the International Women's Day attended by the applicants. The Court referred to the aspects of basic protection granted to any demonstrator. The Court emphasized that unless the demonstrators commit acts of violence, it is of a notorious importance for public authorities to demonstrate a substantial degree of tolerance regarding peaceful meetings, when freedom of assembly guaranteed by Article 11 is not devoid of its substance. A peaceful demonstration in principle should not be exposed to a threat of criminal punishment.

In this context, the reasoning set out by the Court in its decision on the admissibility on the case of *Ziliberberg v. Moldova*[321] is notable; according to that decision a natural person shall not cease to enjoy the right to a peaceful assembly as a result of sporadic violence or other punishable acts, committed by others during the meeting, if the person in question remains peaceful in his/her own intentions or behaviour.

Protection of counter-demonstrators

The Court examines separately the specific situation on manifestations, the organization of which may dissatisfy the individuals with other ideas and concepts than the ones shared by the organizers, ending up eventually with brutality or clashes. In such cases, a positive obligation of a State goes towards providing the exercise of the right to demonstration (because in a democratic society the right to counter-demonstrate cannot paralyze the manifestation), the State being bound to provide the necessary exercise of conventional rights under Article 11 § 1, whereas the imposed positive obligation is still as to measures to be taken and not as to results to be achieved.

In the recent case of *Faber v. Hungary*[322], the applicant alleged violation of his freedom of expression and the freedom of assembly by being punished for the uplifting of a flag emblem of the Hungarian radical right organization *Jobbik*, which was counter-demonstrating at a meeting against racism and social hatred organized by the Hungarian Socialist Party. It is well-

[320] Case of *Pekaslan and Others v. Turkey*, judgment of 20.03.2012, final on 20.06.2012.HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109750 (Accessed on 25.04.2015).
[321] Decision on the admissibility in the case of *Ziliberberg v. Moldova* of 04.05.2004.HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-23889 (Accessed on 25.04.2015).
[322] Case of *Faber v. Hungary*, judgment of 24.07.2012, final on 24.10.2012.HUDOC database. [online]:http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112446 (Accessed on 25.04.2015).

known that the European Court examined the interference with the applicant's right guaranteed under Article 10 in conjunction with Article 11, and stressed that the freedom of assembly enshrined in Article 11 provides even the protection of a demonstration that bothers or offends people with other opposite ideas than those promoted by the participants in a meeting. The guarantees of this article apply to all meetings except for the ones where the organizers and participants have violent ideas or in any other way reject the foundations of a democratic society. The European Court reiterated that any other interference with the exercised freedom of assembly and expression, even if protesters exclaim some shocking ideas or opinions, unacceptable for the State authorities, except for the cases of incitement to public violence or denial of democratic principles, lead to prejudice and even jeopardize democracy.

The European Forum has noted on multiple occasions in cases of this type that the main obligation of the authorities is to take practical measures of protection required by the situation. It is not an obligation as to results to be achieved, but as to measures to be taken, and the Convention requires only "reasonable and appropriate measures", whereas the means and tactics to be used are left to the Member States' discretion.

Ensuring free activities for political parties

In its case-law jurisprudence, the European Court had highlighted multiple times the essential role of political parties in a democratic regime; they are a form of association essential for an effective functioning of democracy. Given their role, any measures taken against parties affect their freedom of association, and therefore the democracy in the State concerned.[323]

In the case of the *United Macedonian Organisation Ilinden-Pirin and Others v. Bulgaria*[324], the Court settled into shape multiple principles on the protection guaranteed to political parties under Article 11 of the ECHR, as well as the State's obligations to protect the parties in this context, i.e. the essential role of political parties in the effective functioning of democracy; only convincing and compelling reasons justifying a restriction on their right to association; the sanction with the dissolution of a party is a drastic measure implying serious justifiable reasons; a political party may campaign for changes in the structure of internal constitutional law and state subject to two essential conditions: the means used to achieve that objective to be legal and democratic, and that changes be compatible with the fundamental democratic principles; the mere fact that a political party opting for autonomy of certain regions or secession of national territory are not deemed to be sufficient to dissolve the party; in a democratic society based on the rule of law, the political ideas challenging the existing order

[323] Case of *Republican Party of Russia v. Russia*, judgment of 12.04.2011, final on 15.09.2011. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104495 (Accessed on 25.04.2015).
[324] Case of *the United Macedonian Organisation Ilinden – Pirin and Others v. Bulgaria*, judgment of 20.10.2005, final on 20.01.2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70731(Accessed on 25.04.2015).

without prejudicing the democratic principles with peaceful means must have a proper opportunity of expression and participation at the political process; the program of a political party incompatible with the principles and the existing structures of a State does not make it incompatible with the general rules and principles of democracy. The essence of democracy is to promote the proposal and discussion of various political programs, even of those targeting the current State organization, unless they affect the foundations of democracy.

Consequently, the States Parties to the Convention must by any adequate and appropriate means provide a functional framework sufficient for the political parties' activity, and the protection offered has to be very wide. It is noteworthy that the Court mostly condemned the respondent States in cases concerning the restriction of the activities of parties, the situation being different with the parties opting to come to power by violent and obviously undemocratic means and methods (the reference case of *Refah Partisi (The Welfare Party) and Others v. Turkey*[325]).

Protection of trade unions

The European Court's attitude has always been less intrepid towards the freedom of trade unions than in other areas. This excessive caution is also evident when it comes to supporting and developing positive obligations. In the early 1974 case of *Schmidt and Dahlstrom v. Sweden*[326], the Court held that "Article 11 § 1 did not provide for any special treatment of trade union members from the State, such as the right to retroactivity of benefits, for instance the salary increases, resulting from a new collective agreement".

The Court also excluded initially the notion of obligation under Article 11, in terms of requiring the States to consult the trade unions (case of *National Union of Belgian Police v. Belgium*[327]), or to organize collective agreements (case of *Swedish Engine Drivers' Union v. Sweden*[328]).

However, case-law has evolved and the Court, relying in particular on the European Social Charter and the decisions of the European Committee of Social Rights has extended the protection offered by Article 11 to include the negative trade union freedom (*Gustafsson v. Sweden*[329]), i.e. the right not to join any trade union, and a certain degree of protection of the

[325] Case of *Refah Partisi (the Welfare Party) and Others v. Turkey*, judgment of 13.02.2003.HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60936 (Accessed on 25.04.2015).
[326] Case of *Schmidt and Dahlstrom v. Sweden*, decision on the admissibility of 17.07.1974. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-73547 (Accessed on 25.04.2015).
[327] Case of *National Union of Belgian Police v. Belgium*, judgment of 27.10.1975. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57435 (Accessed on 25.04.2015).
[328] Case of *Swedish Engine Drivers' Union v. Sweden*, judgment of 06.02.1976. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57527 (Accessed on 25.04.2015).
[329] Case of *Gustafsson v. Sweden*, judgment of 25.04.1996. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57993 (Accessed on 25.04.2015).

right to collective agreements (*Wilson, National Union of Journalists and Others v. the United Kingdom*[330]).

In parallel with this development, the Court established the existence of positive obligations derived from Article 11 consisting in broadly protecting the freedom of association among individuals, and also in terms of the trade unions organized by civil servants. The Grand Chamber of the Strasbourg Court reiterated these principles in the relatively recent case, which reversed the case-law, of *Demir and Baykara v. Turkey*[331]. The applicants (members of the trade union composed of civil servants from various municipalities, employed on a contractual basis) alleged violation of their right to freedom of association in its aspect to form and join trade unions and the right to collective agreements. The Court expressly pointed out that Article 11 § 1 included the trade union freedom as a form or a special aspect of the freedom of association, the State being bound to respect the right to freedom of assembly and peaceful association in its capacity as employer, regardless of the fact whether the relations with employees were governed by public or private law. Therefore, a positive obligation to take appropriate measures to protect rights of individuals to trade unions is among the basic duties of the States Parties attributed on one hand by the authors of the European Convention, and on the other hand by the European Court's case-law.

Positive obligations enshrined in the text of Article 14 (prohibition of discrimination): Article 14 of the ECHR usually has no independent existence and is in conjunction with other substantive rights safeguarded by the Convention.

Paradoxically, although the title itself of the article in question provides expressly for the negative obligation of States, i.e. not to discriminate people for various reasons, in its case-law the Court also established ***the positive obligation of States to treat people differently***, it being actually the only positive obligation in that context. Thus, in the case of *Thlimmenos v. Greece*[332], the applicant stated that he had been subjected to discriminatory treatment by the Greek authorities due to their failure to distinguish his criminal conviction on religious grounds, and of other persons convicted relying on various factual and legal grounds. In essence, the applicant was sentenced to jail for refusing to wear the military uniform during a general mobilization in Greece because of his religious belief: he was a Jehovah's Witness. Later, in a competition for an accountant's position, his candidacy had been refused because he had had a

[330] Case of *Wilson, National Union of Journalists and Others v. the United Kingdom*, judgment of 02.07.2002, final on 02.10.2002. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60554 (Accessed on 25.04.2015).

[331] Case of *Demir and Baykara v. Turkey*, judgment of 12.11.2008.HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89558(Accessed on 25.04.2015).

[332] Case of *Thlimmenos v. Greece*, judgment of 06.04.2000. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58561 (Accessed on 25.04.2015).

criminal record. The Grand Chamber of the Court determined unanimously that a conviction for refusing on religious or philosophical grounds to wear the military uniform could not imply any dishonesty or moral turpitude likely to undermine the applicant's ability to exercise accountancy. Therefore, the authorities' failure to distinguish between the circumstances of the applicant's criminal case and other criminal cases where offenders had been convicted of serious crimes had not been justified in the present case; moreover, the treatment inflicted on the applicant was contrary to the positive obligation imposed on the Member States to the ECHR under Article 14. Finally, the European Court found a violation of that article in conjunction with Article 9.

Thus, the extent of the concept of discrimination in this case means that the Member States, in applying the Convention rights, have an obligation to treat people differently under varying circumstances of their situation.

Positive obligations arising from Article 1 of Protocol no. 1 to the European Convention (protection of property): the protection of property includes the following positive obligations.

Compensation for expropriation

The first positive requirement "discovered" by the European Court from the content of Article 1 of Protocol No. 1 was the State's obligation to compensate victims deprived of their possessions in the public interest (by expropriation or otherwise). As highlighted by the Court in the case of *James v. the United Kingdom*[333], the protection of the right to property would be largely illusory and ineffective in the absence of any equivalent principle. To meet the requirements of the Convention, the compensation must fulfil two conditions. First, it must be proportionate to the value of the property, although not necessarily represent a full compensation. Secondly, it should also be paid within a reasonable time.

Adopting legal and practical measures of protection

As established with reference to other substantive rights and freedoms, the State is bound to take appropriate measures to prevent violations of the rights protected, and specifically of property rights. These measures should be practical, especially when involving dangerous substances and activities causing damage to property (*Oneryildiz v. Turkey*[334]).

As for the State's obligation to compensate individuals for already produced violations, this was repeated each time the Court had received complaints on violation of the right to property. In the case of *Broniowski v. Poland*[335], the applicant complained of active obstruction

[333] Case of *James v. the United Kingdom*, decision on the admissibility of 11.05.1984. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-73433 (Accessed on 25.04.2015).
[334] Case of *Oneryildiz v. Turkey*, judgment of 30.11.2014. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67614 (Accessed on 25.04.2015).
[335] Case of *Broniowski v. Poland*, judgment of 22.06.2004. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61828 (Accessed on 25.04.2015).

and a certain degree of the public authorities' inertia, by preventing him from enjoying his possessions, and disposing of them. In fact, in his capacity as heir, the applicant was entitled to compensation, recognized and confirmed by a court decision, for a property that his family had lost at the end of the Second World War. The legislative changes had first made that impossible and, subsequently, possible by rotation until Poland finally had adopted a law definitively disabling the applicant's claims against the Polish State. The Court held that under those circumstances neither the deprivation of property had fallen within the meaning of the second sentence of paragraph 1 of Article 1 of Protocol no. 1, nor the implementation of property laws within the meaning of the second paragraph of this Article; it fell, however, under the rule laid down in the first sentence of paragraph 1.

The Grand Chamber of the Court stipulated that the rule of law of the Convention and the principle of legality enshrined in Article 1 of Protocol no. 1 requires States not only to predictably and consistently respect and apply laws they had adopted, but also as a corollary of this duty, to ensure the legal and practical implementation thereof. It was the duty of the Polish authorities to eliminate incompatibilities between the law and the State's practice that basically prevented the applicant from effectively exercising his right to property because the national authorities had failed to fulfil their positive obligations in that context.

In the case of *Păduraru v. Romania*[336], the respondent State failed to restitute the property as a result of legal uncertainty caused by the inaccuracy of the legislation and contradictions in the relevant case-law. The Court noted, first, that given the complexity of the problem of restitution, the Member States enjoy a margin of appreciation as regards the conditions and procedures under which such an operation could be carried out, moreover in the context of transition from a totalitarian to a democratic system. However, the Court ruled that once a solution had been adopted by a State, it had to be implemented with a reasonable degree of clarity and consistency in order to avoid, as much as possible, any legal insecurity and uncertainty for the people concerned. Furthermore, it is the duty of each Contracting State to assure itself by means of fair and sufficient legislation enabling the fulfilment of its positive obligations. The Court's only task was to examine whether the measures taken by the national authorities, in the present case the Romanian authorities, had been appropriate and sufficient. Given that the domestic legislation and case-law of the national courts had not satisfied the criteria of clarity and consistency, the applicant's complaint was not manifestly ill-founded, and therefore the European Judges admitted it, and condemned the respondent State.

The obligation of procedural diligence

[336] Case of *Păduraru v. Romania*, judgment on the merits of 01.12.2006, final on 01.03.2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-71444 (Accessed on 25.04.2015).

Besides the obligation to ensure that domestic law meet the requirements of Article 1 of Protocol no. 1, the case-law of the European Court in the recent years has appealed to the proclamation of procedural obligations based on the first sentence of the first paragraph of that Article, which also tend to become generalized in the Convention system.

As a consequence, the Court has also pointed out the positive obligation to investigate violations of property rights as, for example, in the case of *Novoseletskiy v. Ukraine*[337]. The national authorities are bound by this obligation whenever they are accused of violating the right to property. It is notable that the law relating to Article 1 of Protocol No. 1 does not make clear (yet) the conditions under which it is necessary to launch such an investigation and what their nature might be. On the other hand, this obligation lists the characteristics of the investigation, and namely that it must be thorough, prompt, impartial and detailed.

At the same time, the duty of procedural diligence of the Contracting States involves, as stated by the European Court in the case of *Sovtransavto Holding v. Ukraine*[338], an obligation to authorize legal proceedings, which provides the required procedural safeguards, and therefore enable the domestic courts and tribunals to effectively and fairly adjudicate any dispute between private parties. This obligation is applicable to disputes both between individuals and between individuals and the State. The main requirements of Article 6 of the Convention are also transposed here.

To complete this transposition, the Court also deduced from the content of Article 1 of Protocol no. 1 – in the context of non-enforcement of court judgments under Article 6 § 1 – the right to enforcement of judgments on the recognition of the right to property[339], on the claim of goods or on the award of compensation for them. In this way, a "claim" can constitute a "possession" within the meaning of Article 1 of Protocol no. 1 to the Convention if it is sufficiently certain to be enforceable.[340]

Therefore, whenever the applicant is impeded by the failure to enforce a judgment without any well-founded reasons to receive the awarded pecuniary compensation or the goods, his/her claims will be analysed not only under Article 6 § 1, but also under Article 1 of Protocol no. 1 to the ECHR.

3.3. Positive obligations and procedural guarantees

[337] Case of *Novoseletskiy v. Ukraine*, judgment of 22.02.2005, final on 22.05.2005. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68372 (Accessed on 25.04.2015).
[338] Case of *Sovtransavto Holding v. Ukraine*, judgment of 25.07.2002, final on 06.11.2002. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60634 (Accessed on 25.04.2015).
[339] Case of *Burdov v. Russia*, judgment of 07.05.2002, final on 04.09.2002. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60449 (Accessed on 25.04.2015).
[340] Case of *Prodan v. Moldova*, judgment of 18.05.2004, final on 10.11.2004. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61757 (Accessed on 25.04.2015).

Similarly to the positive obligations set out in the Articles of the European Convention enshrining the substantive rights, in its case-law, the European Court also finalized a number of positive obligations arising from the content of the Articles prescribing procedural safeguards in European legal system. Their conceptual variety and number is obviously much lower compared to the obligations in respect of the protected substantive rights. In fact, the positive obligations arise from only three Articles that establish the procedural guarantees on the ground of the Convention, and namely Articles 5, 6 and 13. The essence and their characteristics will be analysed below.

Positive obligations arising from Article 5 (right to liberty and security): according to the provisions of Article 5, the European Court pointed out the following positive obligations for the Member States of the Council of Europe.

Adopting effective measures to protect persons from the risk of disappearing while in State custody

This obligation was first outlined in the case of *Kurt v. Turkey*[341]. The applicant complained before the European Court that his son had disappeared while in custody of the national security forces. The Court noted that Article 5 guarantees a number of rights and guarantees of the detained person, whereas the unacknowledged detention of and individual is the complete negation of these guarantees. Having assumed the control over an individual, it is the authority's duty to be aware of his/her location. For this reason, Article 5 must be seen as an obligation for authorities to take effective measures to protect the person against the risk of disappearing and to conduct an effective prompt investigation of an arguable complaint that a prisoner was taken into State custody and has not been seen since.

The Court emphasized that the lack of information records on any individual's detention such as date, time and place of detention, detainee's name, the reasons for his/her detention, and the name of the person in charge, is incompatible with the purpose of Article 5. It ruled that the authorities had failed to provide any credible and reasonable explanation concerning the whereabouts and fate of the applicant's son after he had been arrested. Therefore, the State had failed to fulfil its obligations under Article 5.

In the case of *Orhan v. Turkey*[342], the Court decided unanimously to convict the respondent State due to the existing serious deficiencies in the practice of data recording at local police stations as to the name of prisoners, the reason and the body that conducted the arrest, the

[341] Case of *Kurt v. Turkey*, judgment of 25.05.1998. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58198 (Accessed on 25.04.2015).

[342] Case of *Orhan v. Turkey*, judgment of 18.06.2002. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60509 (Accessed on 25.04.2015).

period in detention and the date of the detainees' release. In so doing, the Court concluded that the deficiencies found indicated to the lack of effective measures to safeguard against the risk of disappearance of persons in State custody, which is not compatible with the standards embedded in the text of Article 5 of the ECHR.

The investigation of complaints concerning the disappearance of individuals in State custody

The Court also formulated this obligation for the first time in the case of *Kurt v. Turkey*, cited above, and established that in case of an allegation that a person had disappeared after being arrested by national authorities, the State was required to conduct an effective and prompt investigation of that complaint.

In the case of *Taş v. Turkey*[343], the applicant alleged that his son had been shot in the leg and arrested by gendarmes; he had never been seen since. The Court noted the ineffectiveness of the investigation carried out by the authorities, specifically referring the failure of the prosecutor to conduct an inquiry for over two years, and the lack of independence and transparency in the further investigation of the local council. The Court said that the investigation was neither prompt nor effective, and that fact led to the violation of the State's positive obligations under Article 5.

Promptly informing the arrested persons about the reasons for their detention

Article 5 § 2 expressly provides that any arrested person shall be informed promptly, in a language which he understands, of the reasons for arrest and of any charge against him. The Strasbourg Court significantly expanded the limits of that obligation in the reference case of *Vander Leer v. the Netherlands*[344]. In fact, the applicant was admitted to a psychiatric hospital on the orders of local mayor. A few days later the national court refused to extend her detention, but she remained in the hospital as a voluntary patient. Subsequently, at the request of the applicant's husband, the national court ordered her compulsory detention for six months. She was not informed about that court order, and learned about it 10 days later when she was isolated within the hospital. The applicant complained before the Court that her right guaranteed by Article 5 § 2, namely to be informed promptly of the reasons for her arrest, had been violated. The Dutch government argued that the provisions of this Article should have only applied to criminal law, but not to civil matters related to forced hospitalization. However, the European Court considered that neither the way nor the promptness of informing the applicant about her compulsory detention had satisfied the requirements of the positive obligation imposed on the

[343] Case of *Taş v. Turkey*, judgment of 14.11.2000. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58976 (Accessed on 25.04.2015).
[344] Case of *Van der Leer v. the Netherlands*, judgment of 21.02.1990. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57620 (Accessed on 25.04.2015).

State. In spite of the criminal connotation of the terms of Article 5 § 2, the Court deemed it necessary to interpret those provisions independently in accordance with the general purpose of Article 5. Therefore the term of arrest of § 2 extends beyond the criminal field, being also applicable to forced hospitalization.

It is notable that the judgment in the *Van der Leer* case has broadened the scope of the positive obligation of the state under Article 2, by providing procedural safeguards to the individuals detained under civil law.

In another reference case, *Fox, Campbell and Hartley v. the United Kingdom*[345], the applicants complained that they had not been sufficiently informed about the reasons for detention, having to infer those from the subsequent interrogations. The Court emphasized that any arrested person shall be informed promptly in a simple nontechnical language he understands of the essential legal and factual reasons for his arrest so that the detainee be able, if deemed necessary, to challenge the legality of his detention in accordance with Article 5 § 4 before a court. Although this information should be notified "promptly", they should not be fully explained by police officers during the arrest. The sufficiency of the content and the promptness of the information transmitted have to be assessed in each case according to its particular circumstances. In the present case, the Court determined that the interrogation had enabled the applicants to understand the reasons for their detention; therefore, the European Court did not find a violation of the State's positive obligations under Article 5.

Bringing promptly the detainee suspected of committing a crime before the judge

This obligation is expressly enshrined in Article 5 § 2, and its purpose is binding the domestic courts to determine whether the deprivation of liberty of the persons suspected of committing a crime is actually justified. The Court reiterated on multiple occasions that the judicial review at the first appearance of an arrested individual must above all be "prompt" in order to determine any ill-treatment and to keep to a minimum any unjustified interference with his personal freedom. The time restriction imposed by this obligation leaves little flexibility in interpretation; otherwise there is a serious weakening of a fundamental procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision (the recent case of *McKay v. the United Kingdom*[346]).

However, the European Court established in the case of *Oral and Atabay v. Turkey*[347] that any period exceeding four days to bring the detained suspect before a magistrate is considered

[345] Case of *Fox, Campbell and Hartley v. the United Kingdom*, judgment of 30.08.1990. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57721 (Accessed on 25.04.2015).
[346] Case of *McKay v. the United Kingdom*, judgment of 03.10.2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77177 (Accessed on 25.04.2015).
[347] Case of *Oral and Atabay v. Turkey*, judgment of 23.06.2009, final on 23.09.2009. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-93168 (Accessed on 25.04.2015).

too long and contrary to Article 5 of the ECHR. Shorter periods may also violate the promptness obligation where there are no particular difficulties or exceptional circumstances preventing the national authorities from bringing the arrested earlier before a judge (the recent case of *Gutsanov v. Bulgaria*[348]).

The Court specified separately the conditions to be met by the officer authorized by law to exercise judicial powers, where national law enshrines the option of bringing a suspect not before a magistrate, but before an officer performing the functions of an investigating judge. The independence and impartiality from the executive and the parties are among these conditions. This means that the magistrate may be to some extent subordinate to other judges or officers provided that they enjoy similar independence. A judicial officer with the jurisdiction to decide on detention may perform other functions, but there is a risk that his impartiality may arouse legitimate doubts from those subject to his decisions if he is authorized to intervene in the following procedure as a representative of the prosecuting authority (case of *Huber v. Switzerland*[349]).

Affording the detainees the right to redeem the possibility of bail, unless there are reasons of public interest justifying their detention until the court proceedings

The guarantee provided for by Article 5 § 3 of the Convention is designed to ensure not the reparation of loss but, in particular, the appearance of the accused at the hearing. Its amount paid in exchange for his release from provisional detention must therefore be assessed principally by reference to the accused, his assets and his relationship with the persons who are to provide the security, in other words to the degree of confidence that is possible that the prospect of loss of the security or of action against the guarantors in case of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond (reference case of *Mangouras v. Spain*[350]).

Bail may be required if the reasons justifying detention prevail (case of *Muşuc v. Moldova*[351]); and whenever the danger of absconding can be avoided by bail or other guarantees, the accused must be released, given that in case of an eventual lighter punishment, his low motivation to abscond would have to be considered (case of *Vrenčev v. Serbia*[352]). In addition, the amount set for bail must be adequately justified by the decision on bail (*Georgieva*

[348] Case of *Gutsanovi v. Bulgaria*, judgment of 15.10.2013. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-126982 (Accessed on 25.04.2015).
[349] Case of *Huber v. Switzerland*, judgment of 23.10.1990. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57644 (Accessed on 25.04.2015).
[350] Case of *Mangouras v. Spain*, judgment of 28.09.2000. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100686 (Accessed on 25.04.2015).
[351] Case of *Muşuc v. Moldova*, judgment of 06.11.2007, final on 06.02.2008. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83081 (Accessed on 25.04.2015).
[352] Case of *Vrenčev v. Serbia*, judgment of 23.09.2008, final on 23.12.2008. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88554 (Accessed on 25.04.2015).

v. Bulgaria[353]); the domestic courts should also take into account the means of the accused (*Hristova v. Bulgaria*[354]) and his ability to pay (*Toshev v. Bulgaria*[355]).

Ensuring the access of prisoners to a court to examine the legality of detention

Article 5 § 4 of the Convention guarantees that any arrested or detained person shall be entitled to appeal before a tribunal, which has to rule within a short period of time on the lawfulness of his detention, and order his release if the detention is illegal. The Strasbourg Court reiterated on numerous occasions that if a person is detained due to the suspicion of having committed an offense, the court must be empowered to examine whether there is sufficient evidence to raise a reasonable suspicion that he would have committed that offence; the existence of such suspicions is essential for the pre-trial detention to be "lawful" under the Convention (case of *Nikolova v. Bulgaria*[356]).

"The court" that a detainee has access to under does not necessarily have to be a court of law of the classic kind integrated within the standard judicial machinery of the country (case of *Weeks v. the United Kingdom*[357]). However, it must have a "judicial character" and provide guarantees appropriate to the kind of deprivation of liberty in question. The "court" must be independent from both the executive and the parties involved (case of *Stephens v. Malta no. 1*[358]).

In its case-law, the European Court established that the judicial reviews to meet the requirements of Article 5 § 4 may vary from one area to another, and will depend on the type of detention in a specific case (the recent case of *M.H. v. the United Kingdom*[359]). It is not excluded that an automatic review system on the lawfulness of detention be able to ensure the compliance with Article 5. However, if the automatic revision is introduced, the decisions on the legality of detention must follow "reasonable intervals of time". In fact, in the case of *M.H. v. the United Kingdom*, the applicant suffering from mental disabilities (Down syndrome) complained of the unlawfulness of his detention under Article 5 § 4 of the Convention, namely due to the impossibility of challenging his detention independently, as a disabled person, and in terms of lack of the regulation to challenge his detention under the Mental Health Act 1983. The Court

[353] Case of *Georgieva v. Bulgaria*, judgment of 03.07.2008, final on 03.10.2008. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87315 (Accessed on 25.04.2015).
[354] Case of *Hristova v. Bulgaria*, judgment of 03.12.2006, final on 07.03.2007. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-78367 (Accessed on 25.04.2015).
[355] Case of *Toshev v. Bulgaria*, judgment of 10.08.2006, final on 10.11.2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-76687 (Accessed on 25.04.2015).
[356] Case of *Nikolova v. Bulgaria*, judgment of 25.03.1999. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58228 (Accessed on 25.04.2015).
[357] Case of *Weeks v. the United Kingdom*, judgment of 02.03.1987. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57594 (Accessed on 25.04.2015).
[358] Case of *Stephens v. Malta (nr.1)*, judgment of 21.04.2009, final on 14.09.2009. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92351 (Accessed on 25.04.2015).
[359] Case of *M.H. v. the United Kingdom*, judgment of 22.10.2013, final on 22.01.2014. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-127107 (Accessed on 25.04.2015).

unanimously held that a person suffering from mental disabilities detained in a psychiatric institution for a long period of time, has the right to initiate proceedings "at reasonable intervals of time" to question the lawfulness of his detention.

Moreover, in the case of *X v. Finland*[360], the Court emphasized that a system of periodic review of the detention of persons forcedly hospitalized into a mental institution on the authorities' initiative is not sufficient in itself to meet the requirements of Article 5; thus, it established that the Contracting States are bound to grant detainees in specialized treatment institutions the right to challenge their detention individually.

Positive obligations under Article 6 of the Convention (right to a fair trial): from the perspective of Article 6 of the Convention, the Contracting States are bound by the following positive obligations.

Ensuring the right of access to court

As to the civil proceedings, the Court stated that the right of a person on the access to a court for the determination of his civil rights and obligations is inherent as to the right to a fair trial. In the case of *Terra Woningen B.V. v. the Netherlands*[361], the European Court noted that for the right of access to a court to be respected, it is necessary that the court before which the case is brought to have the powers of full jurisdiction; it shall be competent to consider both issues of fact and the merits of the case. The right of access to a court is an inherent element of all procedural safeguards provided for in the Convention. Without effective access to justice in civil matters, all other recognized and detailed procedural safeguards are unnecessary, as they obviously depend on the free access to a court of any instance.

The right of access to court was mentioned in the Court's case-law for the first time in the reference case of *Golder v. the United Kingdom*[362]: were Article 6 § 1 to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook. It would be inconceivable, in the opinion of the Court, that Article 6 § 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a

[360] Case of *X v. Finland*, judgment of 03.07.2012, final on 19.11.2012. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111938 (Accessed on 25.04.2015).
[361] Case of *Terra Woningen B.V. v. the Netherlands*, judgment of 17.12.1996. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58082 (Accessed on 25.04.2015).
[362] Case of *Golder v. the United Kingdom*, judgment of 21.02.1975. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57496 (Accessed on 25.04.2015).

pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court.

The European Convention imposes on the States an obligation that is in principle not susceptible to any derogation, and the implementation of the right of access to a court follows in its substantive and legal aspect. However, the access to a civil court sometimes also entails granting of mandatory legal assistance.

In the reference case of *Airey v. Ireland* cited above, the applicant was not allowed to file a civil complaint for lack of money. The Court found that the applicant was not granted access to a fair trial, which was a violation of Article 6 § 1, stipulating that the State can sometimes be bound to ensure the assistance of a lawyer, if the applicant proves that it would be indispensable for the effective access to a court. In the case of *Andronicou and Constantinou v. Cyprus*, the Court rejected the applicants' complaint that the State had been obliged to establish a system of civil legal aid. It noted that although the Convention guarantees access to a court for determination of civil rights and obligations, the means to ensure that right remain at the State's discretion.

However, even when some States establish a system of civil legal aid, the decision of these authorities can be challenged before the Court if the individual is indeed hindered to benefit from a fair trial. For example, in the case of *Aerts v. Belgium*[363], the applicant could not lodge a civil action because the national service for civil legal assistance had considered that the application had not been well-founded. The European Court concluded that the respective authority's refusal to provide legal assistance in filing the appeal interfered with the very essence of the applicant's right to a court, contrary to the requirements of Article 6 § 1 in this regard. At the same time, the European Forum held that it had been the domestic courts' duty to rule on the groundlessness of the applicant's appeal, since the service for legal aid had not been entitled to assert that his application had had no chance of success.

Another example on the violation of Article 6 for lack of civil legal assistance guaranteed by the State is the recent case of *P., C. and S. v. the United Kingdom*[364], where the applicant was forced to represent himself before the courts. Given the complexity of the case, the European Court found that the applicant had needed the assistance of a lawyer in order to benefit from her right to a fair trial.

In criminal cases, an important aspect of the right to fair trial is the obligation of the prosecution to notify the defence about the relevant evidence. In the case of *Rowe and Davis v.*

[363] Case of *Aerts v. Belgium*, judgment of 30.07.1998. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58209 (Accessed on 25.04.2015).
[364] Case of *P.,C. and S. v. the United Kingdom*, judgment of 16.07.2002, final on 16.10.2002. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60610 (Accessed on 25.04.2015).

the United Kingdom[365], the Court found that the omission of the prosecution to present the defence the information on the evidence of the case had blatantly violated the applicants' guaranteed right to a fair trial.

Ensuring a fair and public trial in civil and criminal cases

As to the publicity of proceedings before the court of law, it is also guaranteed by Article 6 § 1, but it also contains a number of exceptions listed in the text of the respective paragraph. In the case of *Helmers v. Sweden*[366], the European Court pointed out that, in fact, the public nature of the proceedings is designed to ensure a fair trial by protecting individuals against arbitrary decisions, and it also allows the society to control the administration of justice. Along with the requirement of public pronouncements of judgments, the public debates seek to inform public, especially through the press, and to ensure that justice is done in this regard. This therefore contributes to ensuring trust in justice.

In the recent case of *Khrabrova v. Russia*[367], the Court reiterated that the general rule laid down in Article 6 § 1 implies that the debate should be public. In such a way, the publicity of the debates protects litigants against an eventual biased administration of justice in the absence of public supervision, and it also constitutes a means of maintaining public confidence in the courts' activity. By operating a transparent justice, the publicity contributes to achieving the goal set in Article 6 § 1, i.e. that of a fair trial guaranteed inherent in any democratic society.

In the case of *LeCompte, Van Leuven and De Meyer v. Belgium*[368], the applicants were denied the right to a public trial. The Grand Chamber of the Court held that the circumstances of the case did not fall within the exceptions specified in Article 6 § 1 and, subsequently, the applicants had not benefitted from the right to publicity of the trial. In the instant case, the European Court concluded that the applicants had been denied the right to both a public trial and a public pronouncement of the judgment, contrary to the requirements of Article 6 § 1 in this respect; the respondent State had failed to comply with its positive obligations.

As to criminal cases, the Strasbourg Judges noted that although within criminal proceedings there is a great hope for publicity, occasionally it may be necessary, in accordance with Article 6, to limit the open and public nature of the proceedings, for example, in order to

[365] Case of *Rowe and Davis v. the United Kingdom*, judgment of 16.02.2000. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58496 (Accessed on 25.04.2015).
[366] Case of *Helmers v. Sweden*, judgment of 29.10.1991. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57701 (Accessed on 25.04.2015).
[367] Case of *Khrabrova v. Russia*, judgment of 02.10.1012, final on 11.02.2013. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113632 (Accessed on 25.04.2015).
[368] Case of *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23.06.1981. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57522 (Accessed on 25.04.2015).

protect the safety or private life of witnesses, or to promote the free exchange of information and views in the pursuit of justice (case of *B. and P. v. the United Kingdom*[369]).

In the recent case of *Krestovskiy v. Russia*[370], the Court noted that the security problems are a common feature of many criminal proceedings. However, only where security issues are justified, excluding the public from a trial is still rare. The security measures should be strictly adapted to respect the principles of necessity, whereas the judicial authorities are to consider all possible alternatives to ensure the safety and security in the courtroom, and to prioritize a less stringent measure to achieve the same purpose. Nevertheless, the Court noted that the issues of public order and safety may justify excluding the public in certain disciplinary proceedings against convicted prisoners (case of *Campbell and Fell v. the United Kingdom*[371]).

Therefore, the individual's right to publicity of the court proceedings may be subject to legitimate derogations, but the situation is quite different as to the publicity of judgments, and this right does not provide any derogations. As a general rule, the form of publicity to be given to the judgment under domestic law must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 § 1 of this context, i.e. to ensure the control of the public on the judiciary in order to guarantee the right to a fair trial (case of *Welk and Białek v. Poland*[372]).

The full concealment of a judgment from the public cannot be legally justified, and the legitimate security problems may be adapted through certain techniques such as hiding only that part of the judicial decision, the disclosure of which would prejudice the national security or the safety of others (case of *Raza v. Bulgaria*[373]).

It should be noted that the publicity of the judgments also means the accessibility of the reasons (the reasoning part of the judgment) for the public. For example, in the case of *Ryakib Biryukov v. Russia*[374], the Court noted that the purpose of Article 6 § 1 to ensure the control of the public justice was not achieved in that case, since the refusal of the court to make public the reasons for its decision had not been compatible with the provisions of the Convention.

Examination of civil and criminal cases within a reasonable period of time

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[369] Case of *B. and P. v. the United Kingdom*, judgment of 24.04.2001, final on 05.09.2001. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59422 (Accessed on 25.04.2015).

[370] Case of *Krestovskiy v. Russia*, judgment of 28.10.2010, final on 28.01.2011. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101314 (Accessed on 25.04.2015).

[371] Case of *Campbell and Fell v. the United Kingdom*, judgment of 28.06.1984. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57456 (Accessed on 25.04.2015).

[372] Case of *Welke and Białek v. Poland*, judgment of 01.03.2011, final on 15.09.2011. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103696 (Accessed on 25.04.2015).

[373] Case of *Raza v. Bulgaria*, judgment of 11.02.2010, final on 11.05.2010. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97292 (Accessed on 25.04.2015).

[374] Case of *Ryakib Biryukov v. Russia*, judgment of 17.01.2008, final on 07.07.2008. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-84452 (Accessed on 25.04.2015).

The requirement of compliance with the reasonable period of time requires that justice be not delayed as not to compromise its effectiveness and credibility. The estimation of the alleged violation of the right to trial within a reasonable time involves the applicability of specific criteria, in principle homogeneous ones, with respect to all disputes of a civil nature, which in fact determines the finalization of certain patterns for the classification of the period during which the case was susceptible to be examined.

The European Court emphasized on multiple occasions both in leading and in repetitive cases that Article 6 § 1 imposes a positive obligation on the Contracting States to organize their legal systems so that they meet all the requirements of the Convention, including the obligation to settle any dispute within a reasonable period of time (case of *Pélissier and Sassi v. France*[375]). The manner in which the State establishes mechanisms to comply with this condition either by increasing the number of judges or by setting stricter limits or instructions, or by any other methods, remains at its discretion. If the State extends the proceedings beyond the reasonable time prescribed by Article 6 without any action to speed up the examination thereof, it will be responsible for the delay caused. The criteria set out in the case-law are clear methodological patterns analysed by both the Court in the examination of a case, and especially by the domestic courts in the process of implementation of justice at national level.

In the recent case of *Nezihe Kaymaz v. Turkey*[376], the Strasbourg Court reiterated the criteria of the reasonable time of proceedings at national level, which are: the complexity of the case, the applicant's conduct, the conduct of national authorities and the importance of the process, stressing that the reasonable period of examination of the case must be evaluated in the light of the specific circumstances of the case submitted for settlement to the court. The criteria set are identical for both civil and criminal cases.

It is well-known that in cases where the respondent State takes concrete measures to address weaknesses in its internal framework adversely affecting the examination of cases within the unreasonable periods of time, the European Court notes such measures, and finds no violation of the respondent State's positive obligations. In the case of *Buchholz v. Germany*[377], the applicant complained that the authorities had examined the application concerning his alleged illegal dismissal for almost 5 years. The Government submitted that the long duration of the proceedings had been caused by the increasing number of labour disputes law caused by an economic downturn. The government also indicated that it had reacted to those changes by

[375] Case of *Pélissier and Sassi v. France,* judgment of25/031999. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58226 (Accessed on 25.04.2015).
[376] Case of *Nezihe Kaymaz v. Turkey,* judgment of31.07.2012. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112568 (Accessed on 25.04.2015).
[377] Case of *Buchholz v. Germany,* judgment of 06.05.1981. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57451 (Accessed on 25.04.2015).

increasing the number of judges. The European Court concluded that the national authorities had taken the necessary measures and found no of Article 6.

Ensuring the independence and impartiality of the court

Article 6 § 1 of the European Convention enshrines the mandatory nature of the courts' independence from the other branches of government – either executive or legislative – and also in respect of the parties to a lawsuit. In the leading case of *Campbell and Fell v. the United Kingdom*, cited above, the Court supplemented the relevant criteria for assessing the independence of a court under Article 6, namely:

- The appointment of the judges and their term of office;

- The existence of sufficient safeguards against external pressures;

- The appearance of independence.

As to the impartiality of the courts, in the case of *Piersack v. Belgium*[378], the European Court developed the criteria for determining the impartiality thereof, as follows:

- the subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case;

- the objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in respect of his impartiality.

Thus, in the recent case of *Tocono and Profesorii Prometeişti v. Moldova*[379], the European Forum noted that the court examining a case must be impartial, which normally presumes the absence of prejudice and bias; moreover, it is necessary to determine whether, besides the personal conduct of a judge, there are facts that can be established and may raise doubts regarding his impartiality, and in this respect even appearances may be of some importance.

Promptly informing the accused in detail and in a language which he understands of the nature and reasons of the accusation against him

The European Convention guarantees the fundamental right of the accused to be informed of the nature and reasons of the accusation brought against him. The term "information" implies actually acquainting the accused with the material facts, the committing of which he is charges with, and the communication of the legal characterization of the facts given by the competent authorities under national criminal law. In the case of *Block v. Hungary*[380], the European Court reiterated that the provisions Article 6 § 3 point to the need for special attention

[378] Case of *Piersack v. Belgium*, judgment of 01.10.1982. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57557 (Accessed on 25.04.2015).
[379] Case of *Tocono and Profesorii Prometeişti v. Moldova,* judgment of 26.07.2007, final on 26.09.2007. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81193 (Accessed on 25.04.2015).
[380] Case of *Block v. Hungary*, judgment of 25.01.2011, final on 25.04.2011. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103043 (Accessed on 25.04.2015).

to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him. Article 6 § 3 affords the defendant the right to be informed not only of the "cause" of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts.

In the case of *Penev v. Bulgaria*[381], the Court noted that the alleged violations of the right to be informed about the cause and nature of the accusation brought against the individual must be examined in light of the defendant's right to prepare his defence.

In the leading case of *Vaudelle v. France*[382], the European Court stressed that the Convention system requires that in certain cases the Contracting States take positive measures to guarantee effective compliance with the rights set out in Article 6, including that of being informed about the cause and nature of the charges that is brought against a person suspected of committing a crime. The States must exercise due diligence to ensure that individuals actually enjoy the rights guaranteed by Article 6 in their entirety.

At the same time, as concerns the changes in the charges against an individual, i.e. the re-qualifying the offense committed, in the case of *Mattoccia v. Italy*[383], the European Forum said that the accused must be duly and fully informed thereof and must be provided with adequate time and facilities to react to them and organise his defence on the basis of any new information or allegation.

As to the issue of the language used to inform the accused, in the reference case of *Brozicek v. Italy*[384], the Grand Chamber of the Court stated that if the accused is a foreigner who does not understand the state language, the national authorities are required to provide him the information in a respective language, unless they are in a position to prove that the applicant in fact has sufficient knowledge of the state language.

In the case of *Kamasinski v. Austria*[385], although the Court did not find a violation of Article 6 § 3, it nevertheless mentioned that Whilst this provision does not specify that the relevant information should be given in writing or translated in written form for a foreign defendant, it does point to the need for special attention to be paid to the notification of the

[381] Case of *Penev v. Bulgaria*, judgment of 07.01.2010, final on 07.04.2010. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96610 (Accessed on 25.04.2015).
[382] Case of *Vaudelle v. France*, judgment of 30.01.2001, final on 05.09.2001. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59167 (Accessed on 25.04.2015).
[383] Case of *Mattoccia v. Italy*, judgment of 25.07.2000. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58764 (Accessed on 25.04.2015).
[384] Case of *Brozicek v. Italy*, judgment of 19.12.1989. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57612 (Accessed on 25.04.2015).
[385] Case of *Kamasinski v. Austria*, judgment of 19.12.1989. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57614 (Accessed on 25.04.2015).

"accusation" to the defendant. An indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on written notice of the factual and legal basis of the charges against him. A defendant not conversant with the court's language may in fact be put at a disadvantage if he is not also provided with a written translation of the indictment in a language he understands.

Affording the defendant the time and facilities necessary for his defence

This right of the accused is presented as a counterbalance in respect of the prerogatives of the investigation bodies empowered to organize the investigation and the development of the criminal proceedings. The right to adequate time and facilities necessary for the defence should enable the defence to gather as much evidence as possible for an adequate organization thereof in order to efficiently challenge the accusation brought against the accused. This right finds its consecration in Article 6 § 3 (b) of the European Convention, and actually includes two correlative rights: to dispose of sufficient time to organize his defence, and, respectively, to have the necessary facilities.

In the recent case of *Gregačević v. Croatia*[386], the Court reiterated as a general principle that the concept of a fair criminal trial implies *inter alia* the right to adversarial proceedings, according to which the parties must have the opportunity not only to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision. It is possible that a procedural situation which does not place a party at any disadvantage vis-à-vis his or her opponent still represents a violation of the right to adversarial proceedings if the party concerned did not have an opportunity to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision. In this respect Article 6 § 3 (b) guarantees the accused "adequate time and facilities for the preparation of his defence" and therefore implies that the substantive defence activity on his behalf may comprise everything which is "necessary" to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the ability to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings. When assessing whether the accused had adequate time for the preparation of his defence, particular regard has to be had to the nature of the proceedings, as well as the complexity of the case and stage of the proceedings.

[386] Case of *Gregacevic v. Croatia*, judgment of 10.07.2012, final on 10.10.2012. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112090 (Accessed on 25.04.2015).

In the case of *AOA Neftyanaya Kompaniya Yukos v. Russia*[387], in addition to relevant general principles set out above, the European Court noted that according to the Convention each of the accused should benefit from the facilities necessary for his defence, including to get acquainted with the results of the investigations carried out throughout the process. With reference to the circumstances of the case, the Court established that the object of one of the trials, which the applicant company had been involved in, was the demand of the Ministry of Finance based on two audit reports and the evidence submitted by the relevant authorities subordinated to the ministry, which altogether amounted to at least 43,000 pages. In order to meet the requirements of Article 6 § 3 (b) the applicant company should have been given an adequate opportunity to study the entirety of these documents and, more generally, to prepare for the hearings of the merits of the case on reasonable terms.

At the same time, in the case of *Huseyn and Others v. Azerbaijan*[388], The European Court reiterated as a general principle that the issue on the time and facilities provided to the accused's defence must be assessed in the light of the circumstances of each particular case. Therefore, in the particular circumstances of each case, the Court will decide whether the State fulfilled its positive obligations under Article 6 § 3.

Providing the accused with free assistance of an attorney

That obligation refers to the quintessence of the legal guarantees of a fair trial under the Convention, recognized to individuals accused of committing a criminal offence.

In the recent case of *Nikolayenko v. Ukraine*[389], the Strasbourg Court reiterated that Article 6 § 3 of the Convention attaches two conditions to a defendant's right to receive legal: lack of sufficient means to pay for legal assistance, and the interests of justice required that the applicant be granted such assistance free of charge.

Additionally, in the case of *Zdravko Stanev v. Bulgaria*[390], the Court reiterated the specific circumstances denoting the existence and the applicability of the two conditions for granting legal aid. Thus, the Court noted that the lack of sufficient financial means could be proved by the defendant's unemployment. Being without a job does not automatically mean that the individual is unable to pay for the services provided by a public defender; however, the respondent Government has the obligation to prove that despite unemployment the person actually had enough financial means to remunerate the counsel. As to whether the interests of

[387] Case of *AOA Neftyanaya Kompaniya Yukos v. Russia*, judgment of 20.09.2011, final on 08.03.2012. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-106308 (Accessed on 25.04.2015).
[388] Case of *Huseyn and Others v. Azerbaijan*, judgment of 26.07.2011, final on 26.10.2011. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105823 (Accessed on 25.04.2015).
[389] Case of *Nikolayenko v. Ukraine*, judgment of 15.11.2012, final on 15.02.2013. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114457 (Accessed on 25.04.2015).
[390] Case of *Zdravko Stanev v. Bulgaria*, judgment of 06.11.2012, final on 06.02.2013. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114259 (Accessed on 25.04.2015).

justice required that the applicant receive free legal assistance in the form of court-appointed counsel, the Court recalled that it must have regard to the severity of the sanction which the applicant might incur, the complexity of the case and the personal situation of the applicant (lack of legal knowledge etc.). In the present case, these were relevant circumstances where the assistance of a lawyer had been crucial to the interests of justice in a democratic state. The Court has held that where deprivation of liberty is at stake, the interests of justice in principle call for legal representation and if the defendant cannot pay for it himself, public funds must be available in order to protect the right to free legal assistance under the Convention.

In another recent case, *Zamferesko v. Ukraine*[391], the European Judges noted that Article 6 § 1 requires that, as a rule, access to a lawyer should be provided from the first time a suspect is questioned by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such a restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during questioning by police without access to a lawyer are used for a conviction.

As to the effectiveness of the legal aid provided by the *ex officio* lawyers, the European Court reiterated in the case of *Nefedov v. Russia*[392] that while Article 6 § 3 (c) confers on everyone charged with a criminal offence the right to defend himself in person or through legal assistance, it does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial.

Providing the accused with the free assistance of an interpreter unless he knows the language of the criminal proceedings

In the recent case of *Şaman v. Turkey*[393], the European Court noted that the issue of the defendant's linguistic knowledge is vital and that it must also examine the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court. The assistance of an interpreter should be provided during the investigation stage unless it can be demonstrated in the light of the particular

[391] Case of *Zamferesko v. Ukraine,* judgment of 15.11.2012, final on 15.02.2013. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114455 (Accessed on 25.04.2015).
[392] Case of *Nefedov v. Russia,* judgment of 13.03.2012, final on 24.09.2012. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109550 (Accessed on 25.04.2015).
[393] Case of *Şaman v. Turkey,* judgment of 05.04.2011, final on 05.07.2011. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104355 (Accessed on 25.04.2015).

circumstances of the case that there are compelling reasons to restrict the accused's right to the assistance of an interpreter.

In the case of *Hermi v. Italy*[394], the Grand Chamber of the Court reiterated certain additional principles on the obligation on the State to provide the accused with the free assistance of an interpreter. Thus, that right under Article 6 § 3 applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings. An accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial.

It is important that the assistance of an interpreter be qualitative and efficient, as to enable the accused to understand the nature of the case and to defend himself, as well as especially to be able to plead before domestic courts for his version of the incriminated facts. Given the requirement that the safeguarded rights be practical and effective, the positive obligations of the national authorities under the Convention is not limited to a mere designation of an interpreter, but – depending on the particular circumstances of the case – these obligations extend to the subsequent control of the quality and adequacy of the interpretation.

Nevertheless, the positive obligation of the State in this context cannot be understood as authorizing the accused to require the conduction of the criminal proceedings in a language he knows, nor as giving the right of national minorities to request the use of a regional non-official language for the investigation and the trial.

Guaranteeing the right of the accused to question witnesses

Article 6 § 3 imposes on the Signatory States a positive obligation to create the conditions necessary for the accused during the criminal proceedings to present witnesses, whose testimonies prove his innocence, as well as to have opportunities equal to the prosecution, i.e. to ask questions and hear the answers provided by the witnesses of the prosecution.

In the recent case of *Hümmer v. Germany*[395], the European Judges underlined that Article 6 § 1 in conjunction with § 3 impose on the Contracting States the obligation to adopt positive measures to ensure that the accused hear the testimonies of all the witnesses who plead against him. These measures consist of the diligence attributed to the States to ensure that the rights safeguarded by Article 6 of the Convention be exercised by individuals in an effective manner.

[394] Case of *Hermi v. Italy,* judgment of 08.10.2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77543 (Accessed on 25.04.2015).
[395] Case of *Hümmer v. Germany,* judgment of 19.07.2012, final on 19.10.2012. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112280 (Accessed on 25.04.2015).

In another recent case, *Mitkus v. Latvia*[396], the Court mentioned that before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Two requirements follow from that principle. First is the so-called "sole or decisive" rule, according to which the applicant's right to a fair trial may be violated when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial. Secondly, even where the evidence of an absent witness has not been sole or decisive, the accused's right may be violated when no good reason has been shown for the failure to have the witness examined.

As to the absent or anonymous witnesses, the European Court reiterated in the recent case of *Pesukic v. Switzerland*[397], that Exceptions to the general principle enshrined in Article 6 are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings. In the context of absent witnesses, there are two considerations to be analysed: whether there was a good reason for the non-attendance of the witness, and the situation where a conviction was based solely or to a decisive extent on statements made by a non-attending person whom the accused had had no opportunity to examine. In the latter situation, the anonymous statements could prejudice the essence of the right to defence under the Convention, whereas the right to hear witnesses might be restricted to an extent incompatible in a democratic state. When the evidence of an absent witness was the sole or decisive basis for a conviction, sufficient counterbalancing factors were required, including the existence of strong procedural safeguards, which permitted a fair and proper assessment of the reliability of that evidence to take place.

Positive obligations enshrined in the content of Article 13 of the ECHR (right to an effective remedy): from the content of the given article there is only one positive obligation with a general character, demonstrating certain specific aspects, as follows.

Providing an effective domestic remedy concerning the redress for the violation of the rights and freedoms guaranteed by the European Convention (the general rule)

In the case of *Silver and Others v. the United Kingdom*[398], the Court stipulated three major principles underlying the positive obligation attributable to the State under Article 13. The first principle implies that the State is obliged to provide an effective remedy where people have

[396] Case of *Mitkus v. Latvia*, judgment of 02.10.2012, final on 02.01.2013. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113648 (Accessed on 25.04.2015).
[397] Case of *Pesukic v. Switzerland*, judgment of 06.12.2012, final on 06.03.2013. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114965 (Accessed on 25.04.2015).
[398] Case of *Silver and Others v. the United Kingdom*, judgment of 25.03.1983. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57577 (Accessed on 25.04.2015).

an "arguable claim" to be victims of a violation of the rights set forth in the Convention. The second principle states that countries can meet the obligation to provide an effective domestic remedy by the availability of appropriate non-judicial agencies. The third principle authorizes States to fulfil the obligation of the effective domestic remedy by combining different methods of compensation. The Court also stressed on multiple occasion that the remedy established by Article 13 must be effective both in practice and in law, in particular in the sense that its exercise must not be unjustifiably encumbered by the acts or omissions of the respondent State's authorities.

If any of these principles is not respected by national courts, the European Court will decide on the State's failure to honour its positive obligations incumbent on it to ensure an effective domestic remedy.

Providing an effective domestic remedy to resolve complaints of unjustified delay of civil and criminal proceedings

Over the recent years, more and more applicants complain before the Court under Article 6 § 1 about the alleged violations of the right to have their cases considered within a reasonable period of time. Given the abundance of complaints of this kind, the Court issued a new requirement for the States to implement the effective domestic measures in order to ensure the right of individuals to challenge the length of judicial proceedings, and to award compensations for the respective violations.

Thus, in the case of *Kudła v. Poland*[399], the Judges of the Grand Chamber of the Court noted that Article 13 had to be interpreted as a provision guaranteeing an effective remedy before a national authority for an alleged violation of Article 6 § 1. Otherwise, if Article 13 of the ECHR were appreciated as having no implications with respect to the right safeguarded by Article 6 § 1, individuals would be systematically forced to lodge such complaints to the Court; however, in the Court's opinion it would be more appropriate for those complaints to be first addressed in the national legal systems.

In the recent case of *Chirica v. Moldova*[400], the Court pointed out that Article 13 required the existence of a remedy at national level allowing the competent national courts to get acquainted with the content of the complaints under the Convention, and provide adequate redress even if the Contracting States have some discretion regarding how to comply with the obligations imposed by this provision. In this case, the Court found that the respondent State had violated the applicant's rights guaranteed by Article 6 § 1 of the Convention, and, therefore, the

[399] Case of *Kudla v. Poland*, judgment of 26.10.2000. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58920 (Accessed on 25.04.2015).
[400] Case of *Chirica v. Moldova*, judgment of 22.07.2014, final on 22.10.2014. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145709 (Accessed on 25.04.2015).

applicant had had a legitimate and arguable complaint in the light of the Court's case-law, and he had to dispose of a remedy according to the criteria of Article 13.

It is noteworthy that following the imposition of the respective obligation, at national level the State passed the Law no. 87 of 21 April 2011 on compensation by the State for the damage caused by the violation of the right to a trial within a reasonable period of time or the right to have a judgment enforced within a reasonable period of time[401].

Providing an effective remedy to solve complaints about inefficient investigation

Along with the obligation for the Member States to take prompt and effective measures to investigate cases of death, disappearance, alleged torture and unlawful detention under Articles 2, 3 and 5 of the European Convention, the Court also created sort of a positive obligation under Article 13. The first time such a positive obligation was mentioned under Article 2 of the ECHR in the case of *Kaya v. Turkey*, where the applicant complained of the lack of an effective remedy to challenge the ineffective investigation into his brother's death, followed by the lack of compensation for that unsatisfactory investigation. Given the deficiencies noted in the investigation carried out by the Turkish authorities, the European Court concluded that the applicant and his close relatives had been deprived of any effective remedy against the national authorities in respect of the investigation of his brother's death contrary to Article 13, and, therefore, no access to any other remedy had been available, including the one to claim compensation.

[401] Law on compensation by the State for the damage caused by the violation of the right to a trial within a reasonable period of time or the right to have a judgment enforced within a reasonable period of time no. 87 of 21 April 2011. In: Official Gazette of the Republic of Moldova, nos. 107-109/282 of 01.07.2011.

4. EXTENT OF THE NEGATIVE OBLIGATIONS

4.1. Concept of negative obligation

Conceptually, the negative obligation is the duty of the State (Government officials) to refrain from actions that impede the realization of a right guaranteed by the Convention and its Protocols. This statement must be related to the fact that the Convention contains numerous Articles providing, by setting clear boundaries, the possibility of the restriction of rights, as long as a democratic society benefits from these restrictions.[402] The situations allowing for certain exceptions, interference or limitations in the exercise of a right have to be justified and expressly provided by the European Convention, or explained by the European Court.

The existence of negative obligations is very controversial, and conceptually they are relatively easy to define because, undoubtedly, the relationship between the right and the respective duty is quite simply to be determined.[403]

In principle, unlike the positive obligation, which involves a series of specific measures to be taken to protect a particular right or freedom, thus making reference to various active measures to be taken by the State, the negative obligation requires the State to act passively: namely to refrain from violating, or improper interference with, any protected right.

In this respect, the vast majority of the Articles of the European Convention impose on the Member States primarily negative obligations: not to cause the person's death, to neither torture nor tolerate ill-treatment, not to subject any individual to forced labour or slavery, not to deprive of freedom illegally, not criminally punish any individual unlawfully, etc. All these obligations imply the State's duty *not to do* something likely to compromise the free exercise of an unconditionally guaranteed right.

Consequently, compared to the positive ones, the negative obligations can be more easily fulfilled since the standards inserted in specific Articles of the ECHR are always respected whenever the State simply refrains from actions impeding the realization of a certain right or freedom.

The concept of negative obligation, i.e. not to interfere in the exercise of the rights, shall retain its original meaning specified by the drafters of the Convention without any excessively restrictive goal. Thus, it covers the existing law and case-law, which in a way of prohibition, exclusion, discrimination, storage, use of private information or any other form, tends to impose

[402] Popescu C. L., Protecţia internaţională a drepturilor omului – surse, instituţii, proceduri, Editura All Beck, Bucureşti, 2000, p. 11.
[403] Haeck Y., Brems E., Human Rights and Civil Liberties in the 21st Century. Dordrecht: Springer, 2013, p.71.

a certain restraint aimed at achieving the efficient protection of a person's right or freedom. It does not cover situations where there is an ambiguity in legislation or case-law with repercussions on this achievement; if required by the effectiveness of the implementation of the right, then the State must fulfil its positive obligation, as provided for by Article 1, to fill that legal gap.[404]

Unlike the positive obligations, which with certain exceptions are not expressly stated in the text of the Convention and therefore were not submitted to the Member States for the ratification of the ECHR[405], the negative obligations arise directly from the provisions of the international instrument concerned, and the Signatory States are aware at the outset of their duties in that respect.

However, the considerable number of judgments where the European Court condemns the respondent Governments for failure to comply with their negative obligations, especially under Article 3 (prohibition of torture), Article 5 (right to liberty and security) and Article 14 (prohibition of discrimination), demonstrate that the State authorities perceive negative the negative obligations theoretically and formally, and in specific situations they fail to refrain from arbitrariness, there being still some shortcomings in this regard.

After an examination of the of negative obligations, the conclusion is that regretfully there are very few doctrinal views on the matter; most often they refer to some sort of the State's abstaining from infringing a protected right, whereas the *theory on negative obligations*, as an outlined theory in respect of positive obligations, is simply non-existent.

Both theoreticians and practitioners of international law of human rights and the ECHR law are focused on determining those measures which would require the States to ensure the effective respect for the recognized human rights. Since the negative obligations are generally regarded as essential duties obliging Member States or the individuals not to interfere with the freedoms of others, they therefore establish a general obligation of refraining.[406]

In this context, the interpretation of the negative obligations as the duty of the individual not to interfere with the rights of others is not casual because *in termenis* the negative obligation established in the international law of human rights has been taken from the private (civil) law, found in the relationship between the creditor and the debtor in terms of the debtor's performances.

The civil law doctrine states that the borrower's duty *not to do* is rather a negative behaviour, i.e. to refrain from anything that he could do if he had not been obligated to the creditor. The object of such an obligation is thus a negative performance, i.e. the abstention by

[404] Dijk P. van., *Op. cit.*, p. 25.
[405] Dijk P. van., *Op. cit.*, p. 22.
[406] Spielmann D., *Op. cit.*, p. 155-156.

which the debtor deliberately restrains his capacity to act and the ability to perform one or more actions.[407]

At a more complex level, a "deliberate self-restraint of the capacity to act" is somewhat similar to the situation of the negative obligations imposed on the States. However, it cannot be stated that the negative obligations in civil law and the negative obligations in the public international law are comparable concepts. In private law the ignored duty of not doing may have a malicious character either for the creditor or for others. In the public international law, the failure to respect the obligation not to interfere with human rights always has a deterrent effect in this respect. The respective constant deterrent effect does not necessarily lead to the violation of the Convention and the condemnation of the respondent State because the restriction imposed on a right may be admissible where it does not touch the substance thereof, and it correlates with the rules and principles of a democratic society.

Although at first glance the negative obligation is configured as a simple duty of abstention, the Strasbourg Court acknowledges that sometimes it is difficult to separate the limits of the positive and negative obligations imposed on the States.[408]

Moreover, the text of the international instrument itself sometimes operates with notions of negative obligation of the State, but the legal essence thereof leads to the necessity to adopt protective measures that characterize a positive obligation. That would be the case of Article 27 of the International Covenant on Civil and Political Rights, which states that in countries where there are ethnic, religious or linguistic minorities, persons belonging to such minorities *shall not be denied the right*, in community with other members of their group, their own culture, to profess and practice their own religion or to use their own language.

Therefore, the article in question imposes the world states the prevailing obligation not to deprive the minority representatives of their rights to cultural life, freedom of religion and mother tongue. Nevertheless, the enforcement of those rights inevitably involve the undertaking of effective, including legislative and administrative, measures aimed at establishing a corresponding field in this respect.

Thus, although seemingly the positive and negative obligations are separated into different categories, the effective interpretation of international rules enshrining certain rights and freedoms allows determining a number of positive obligations corresponding to the negative obligation provided for expressly by that rule. The theoretical debates regarding the specific of

[407] Baieș S. ș.a., Dreptul Civil. Drepturile reale. Teoria generală a obligaţiilor. Vol. II. Chișinău: Cartier juridic, 2005, p. 266.

[408] Case of *Odièvre v. France*, judgment of 13.02.2000. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60935 (Accessed on 19.04.2015).

positive/negative obligations arising from certain provisions of international human rights instruments are no longer current.[409]

In such circumstances, as to the concept of negative obligations, it shall be noted that although it involves a main task of the State to refrain from the interference with the right or freedom guaranteed to individuals, it cannot exist independently, but only in conjunction with the State's respective obligation to take other effective measures to ensure the protection of those rights or freedoms.

4.2. Negative obligations and substantive rights

As mentioned above, in its case-law, the European Court of Human Rights formulated numerically fewer negative obligations compared to the positive obligations imposed on the Member States. In this section the analysis will focus on the negative obligations under the European Convention enshrining substantive rights and freedoms.

The negative obligations imposed on the Signatory States under Article 2 of the ECHR (right to life): The content of the right to life brings forth the general ***primary negative obligation*** for Contracting States not to interfere with this right through their agents, i.e. ***not to cause a person's death***, except for the situations specified in the second paragraph of the Article, interpreted narrowly[410], and namely when an individual's death was caused (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

It is noteworthy that the provisions of Article 2 § 2 (b) of the European Convention on Human Rights, namely the terms "lawful arrest" and "lawfully detained" should be interpreted in accordance with Article 5 of the same Convention, which enshrines the liberty and security of a person. The death of an individual can be only justified if it occurred in order to effect a legal arrest or prevent the escape of a person lawfully detained; however, even in these cases the means applied by the authorities must be "absolutely necessary and proportionate".

The Court concluded that the exceptions provided for in Article 2 § 2, can be interpreted as intentional deprivation of life, but in reality it is not. Article 2 § 2 does not determine the circumstances allowing the deliberate murder of a person; it rather describes the possible situations authorizing the use of force, which can result in unintentional deprivation of life. Most

[409] Гусейнов Л.Г., Абдуллаев М.К. Позитивные и негативные обязательства в области прав человека. В: Научном журнале Проблемы Управления, 2011, №2 (39), с. 142.
[410] Bîrsan C., *Op. cit.*, p. 82.

of the cases examined by the Court, where applicants allege violation of Article 2, involve the use of force in the fight against terrorism.

In the case of *Stewart v. the United Kingdom*[411], security forces patrolling in Belfast clashed with a group of rebels, and a minor in the crowd was accidentally killed in a civil disturbance. Even if State agents had no intention to kill, the question was raised whether the use of such means was justified, considering the agents' duty to stop the disturbance and the risk to which they were subjected. Having examined the application of the deceased's mother, the former Human Rights Commission ruled that the State's actions had been justified, given the events that had been taking place in the Northern Ireland, and in view of the violent incidents caused by rebels. In such circumstances, the Commission decided that the use of force by State agents resulting in the death of the minor had been no less than necessary.

The case of *Gul v. Turkey*[412] illustrates an example of deprivation of life by Turkish anti-terrorist forces. A group of about 100 police officers surrounded a house supposedly with activists of the PKK (Kurdistan Workers' Party). Following this operation, the applicant's son was killed by automatic weapons triggered by the police; whereas no PKK representatives were found in the apartment. The Court concluded that the State's actions had been contrary to the negative obligation imposed on Turkey under Article 2, subjecting deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Use of force by State agents may be justified where it is based on an honest belief which is perceived for good reasons to be valid at the time but which subsequently turns out to be mistaken. In those circumstances, the firing of at least 50 shots at the door of the apartment presumably occupied by PKK members, whereas the apartment had been a simple block of flats inhabited by civilians, including women and children, was not justified by any reasonable belief of the officers that their lives were at risk from the occupants of the flat. Therefore, the use of force was not absolutely necessary.

Also, the issue on the validity of the use of force was analysed in some cases lodged by Chechens against the Russian Federation. In the case of *Isayeva, Yusupova and Bazayeva*[413], the Strasbourg Court assessed the absolute necessity to use lethal force in the bombing of Grozny by Russian authorities in 1999-2000. The applicants reported the indiscriminate bombing of a civilian convoy trying to leave Grozny in 1999 by the armed forces using extremely powerful

[411] Case of *Stewart v. the United Kingdom*, decision on the admissibility of 10.07.1984. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-23650#{"docname":["Stewart"]} (Accessed on 25.04.2015).

[412] Case of *Gul v. Turkey*, judgment of 14.12.2000. HUDOC database. [online]:http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59081 (Accessed on 25.04.2015).

[413] Case of *Isayeva, Yusupova and Bazayeva v. Russia*, judgment of 24.02.2005, final on 06.07.2005. HUDOC database. [online]:http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68379 (Accessed on 25.04.2015).

weapons: 12 non-guided air-to-ground missiles were fired at the civilians, threatening the lives of those being on that stretch of road. The Court refused to admit that the military operation had been planned and conducted in such a way as to avoid or minimize damage to civilians, as alleged by the respondent Government, and unanimously found that there had been a violation of Article 2 of the Convention.

Proving the State's responsibility for the occurrence of a death is very difficult. The Court has frequently found a violation of Article 2 not because the authorities had been directly responsible for the death of a person, but because it had not provided adequate protection for a person's life, or it had not carried out a proper investigation into the death. Those situations raised issues in respect of both the compliance with the general negative obligation concerning deprivation of life, and the compliance with the positive obligations analysed in the previous chapter.

The Court stated that to determine whether the State is guilty of deprivation of a person's life, its guilt must be established in accordance with the standard of proof "beyond any reasonable doubt" (case of *Orhan v. Turkey*). The Court also found that the necessary level of evidence may be determined by the coexistence of sufficiently compelling, clear, and consistent conclusions or hypotheses (case of *Tanrikulu v. Turkey*).

Nevertheless, the value of such irrefutable conclusions or hypotheses should be considered depending on the circumstances of each case, and the seriousness or nature of the charges brought. If the events are completely or largely known only by the authorities, such as in the case of a person in custody, there is a clear presumption of the State's guilt for that person's injury or death in custody. In this case, the burden of proof lies with the authorities, who must provide a satisfactory and convincing explanation for the facts that occurred.

The persons in custody are in a very vulnerable position and the authorities are obliged to ensure their rights. If a detained person in good health dies later, the Government must provide a plausible explanation of the events leading to his death. Failure to provide such explanations leads to the establishment of that State's responsibility because in case of death in the State's custody there is a certain presumption of the State agents' guilt.

Negative obligations arising from Article 3 (prohibition of torture): The European Court repeatedly held that, along with Article 2, Article 3 of the Convention enshrines one of the fundamental values of a democratic society, namely human dignity. An examination of its case-law leads to the conclusion that the text is required to be applied, usually in the context of the risk for an individual to be subjected to forms of treatment forbidden by its provisions, applied most often intentionally by agents of the State's public authorities. Therefore, the first obligation imposed by Article 3 on the Member States is essentially negative: its agents must refrain from

inflicting inhuman or degrading treatment on persons under their authority. From this point of view, the European Court held that the States bear responsibility for objective facts that constitute inhuman or degrading treatment or punishment within the meaning of Article 3.[414] That general negative obligation is followed by the State's obligation to refrain from extradition if the person concerned risks being subjected to torture or inhuman treatment in the destination State, regardless whether the ill-treatment could be inflicted by state agents or by non-governmental subjects.

State agents' refraining from subjecting persons under their authority to inhuman or degrading treatment

In the recent case of *Gorea v. Moldova*[415], the European Court enunciated the following, as a general principle: Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2, even in the event of a public emergency threatening the life of the nation. Any recourse to physical force which has not been made strictly necessary by his or her own conduct diminishes human dignity, and is in principle an infringement of the right set forth in Article 3 of the Convention. Where a person is injured while in detention or otherwise under the control of the police, any such injury will give rise to a strong presumption that the person was subjected to ill-treatment. It is incumbent on the State to provide a plausible explanation of how the injuries were caused, failing which a clear issue arises under Article 3 of the Convention.

The States Parties to the Convention are responsible for the actions of all government officials, such as police and security forces. The State's responsibility for acts contrary to Article 3 is not exempted, even if asserted that the State did not know about such activities. In this sense, in the interstate case of *Ireland v. the United Kingdom*[416], the State was found guilty of violating Article 3 in respect of the use of the "five techniques" of ill-treatment on people arrested in Northern Ireland, and namely: deprivation of sleep; deprivation of food and drink; subjection to noise; wall-standing; and hooding. The Court found that "It is inconceivable that the higher authorities of a State should be, or at least should be entitled to be, unaware of the existence of such a practice. Furthermore, under the Convention those authorities are strictly

[414] Bîrsan C., *Op. Cit.*, p. 173-174.
[415] Case of *Gorea v. Moldova*, judgment of 23.07.12013, final on 23.10.2013. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122891 (Accessed on 20.04.2015).
[416] 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 20.04.2015).

liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected."

No extradition or expulsion if the person concerned risks of being subjected to torture or inhuman treatment in the country of destination

The European Court ruled in the light of Article 3, considered in the context of Article 1 of the Convention, that the mere fact of extradition or expulsion of the person transported through the territory of another State, where that person will clearly or probably be subjected to torture or to inhuman or degrading treatment and punishment by State agents, places the responsibility on the State Signatory to the Convention. The Convention does not provide a direct right of asylum or protection against refoulement; however, under Article 1 the State must refrain from the active transfer of persons within its jurisdiction into another State, where the risk to which they are subject is considered to be inconsistent with the standards laid down in Article 3.

In the reference case of *Soering v. the United Kingdom*[417], the respondent Government wished to extradite the applicant to the US, where he was supposed to be tried for murder and risked being sentenced to death. The Court ruled that the respondent State had to waive extradition if there is "clear evidence" showing that the applicant risked being subjected to torture or inhuman or degrading treatment in the State requesting extradition, despite the brutality of the crime committed.

When deciding whether expulsion would entail a violation of Article 3, the Court draws attention to what the State knew or should have known at the time of the alleged extradition or expulsion. In addition, the Court may take into account the information that becomes known after the expulsion. The respective person has to be subjected to a real risk, and not just a threat. Adducing evidence about a real risk to be subjected to a treatment contrary to Article 3 is crucial for the applicant. In case of such a warning, it is the Government's duty to dispel any doubts about this. In order to determine the risk of ill-treatment, the Court must examine the foreseeable consequences of the expulsion of the applicant, taking into account the overall situation in the country of origin and the personal circumstances of the applicant.

In the case of *Bader and Kanbei v. Sweden*[418], the applicants, husband and wife, complained under Article 2 and Article 3 of the Convention that if the first applicant were extradited from Sweden to Syria, he would have a real risk of facing the death penalty because the Syrian courts had found him guilty of complicity in the murder and sentenced him to death.

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[417] 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 20.04.2015).

[418] Case of *Bader and Kanbor v. Sweden*, judgment of 08.11.2005, final on 08.02.2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70841 (Accessed on 20.04.2015).

In its turn, the European Court noted that justice in Syria was not fair, and if the applicant had been returned to Syria, he would have experience fear and pain, thinking of his future, because there was a real likelihood of execution. In this respect, the Court found that there was clear evidence of real risk for the first applicant to be executed and subjected to treatment contrary to Articles 2 and 3 in case of deportation to their country of origin.

In this case it is interesting that the first applicant had originally asked for asylum in Sweden, which was denied, and he later lodged this complaint before the European Forum. Before the Swedish courts he did not claim that if deported he would face a risk of torture; the European Court deemed it not necessary to examine those arguments *ex officio*, shifting its focus only on the complaint that relates to the risk of the applicant's execution on the basis of the decision rendered by the Syrian courts. The Court found a violation of both Article 2 and Article 3.

At the same time, in the case of *Saadi v. Italy*[419], concerning the Italian authorities' decision to deport the applicant of Tunisian nationality living legally in Italy back to his country, the applicant complained before the European Court about a real risk of his being subjected to torture and ill-treatment in Tunisia because he had been tried *in absentia* in the country of origin for terrorist offenses, and sentenced there to 20 years' imprisonment. Additionally, the complainant alleged that ill-treatment of suspected terrorists in Tunisia was a common practice, and in this respect there was clear documented evidence. The Grand Chamber of the European Court noted as a general principle that the expulsion of a person by a Contracting State may raise issues under Article 3 and thus this State's liability would engage when there are compelling reasons to believe that the person, in case of deportation, will face a real risk of being subjected to treatment contrary to Article 3. In such circumstances, Article 3 imposes a negative obligation not to deport the person in that country.

Similar rationales were formulated by the European Court in case of eventual ill-treatment that might be inflicted in the country of destination not by State agents, but by private subjects. Therefore, the State Party to the Convention is under an obligation not to extradite or expel not only in cases where there is a real risk that official authorities would subject an individual to measures contrary to Article 3, but also when such measures could be applied by private individuals.

In the case of *H.L.R. v. France*[420], the applicant, a Colombia national, was charged with crimes related to drug trafficking in France; he was then handed a deportation notice. Before his

[419] Case of *Saadi v. Italy*, judgment of 28.02.2008. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85276(Accessed on 20.04.2015).

[420] Case of *H.L.R. v. France*, judgment of 29.04.1997. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58041 (Accessed on 20.04.2015)

conviction, he helped the police by provided information that allowed the conviction of Colombian drug traffickers. He claimed under Article 3 that if deported to Colombia, traffickers could take revenge on him. The European Court held that based on the unconditional nature of Article 3, the possibility of its implementation cannot be ruled out, where the danger emanates from private individuals or groups. However, the applicant had to prove the reality of the risk and the incapacity of the State of destination to eliminate any risk by providing appropriate protection to the person concerned. In the present case, with a majority of votes the Grand Chamber of the Court held that the applicant had not shown that the Colombian authorities would be incapable of affording him appropriate protection from retaliation against private individuals.

For comparison, in the case of *N. v. Finland*[421], the Court added that the risk of ill-treatment to which the applicant would be exposed if returned to the Democratic Republic of Congo at that moment in time might not necessarily emanate from the current authorities but from relatives of dissidents who may seek revenge on the applicant for his past activities in the service of President Mobutu. The Court noted expressly that the current applicant's case differs from *H.L.R. v. France* in that the overall evidence before the Court supports his own account of his having worked in the DSP, having formed part of President Mobutu's inner circle and having taken part in various events during which dissidents seen as a threat to the President were singled out for harassment, detention and possibly execution. In such circumstances, there is reason to believe that the Congolese authorities would not necessarily be able or willing to protect him against the threats referred to.

Negative obligations under Article 4 of the ECHR (prohibition of slavery and forced labour): In fact, even the title of this Article suggests a negative obligation, namely not to subject a person to slavery, servitude or forced labour. There will be a separate examination of the obligation to prohibit slavery (this being the most serious form of dependence of the individual and humiliation of human dignity), and the obligation to prohibit forced labour, which is a less severe form of servitude.

Prohibition of subjecting a person to slavery or servitude

Taking into account the concept of "slavery" under Article 4, the European Court bases its classical definition on the one contained in the Convention on Slavery of 1926[422], defining slavery as "the status or condition of a person over whom any or all of their powers attaching to the right of ownership are exercised". Servitude is a particularly serious form of denial of

[421] Case of *N. v. Finland*, judgment of 26.07.2005, final on 30.11.2005. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69908 (Accessed on 20.04.2015)

[422] Slavery Convention, 25 September 1926, Geneva (Switzerland). [online]: https://treaties.un.org/doc/Treaties/1926.09.19260925%2003-12%20AM/Ch_XVIII_3p.pdf (Accessed on 17.04.2015).

freedom. Apart from the obligation to provide certain services to others, this also includes the "slave's" obligation to work for the benefit of another person, and his inability to change the situation.

In the relatively recent case of *Siliadin v. France*[423], the applicant, a Togo national living in France, complained before the Strasbourg Court that from the age of 16 he had been forced to work as unpaid housekeeper. Being illegal in France with her passport seized and having no financial resources, every day between 07:00 and 22:00 she had been forced to deal with bringing up the four children of the spouses B. The applicant endured this situation for some years, during which the spouses B. promised her constantly that his situation would be settled in France. Finally, alerted by a neighbour, the Committee against modern slavery notified the Prosecutor about the applicant's situation. The criminal case ended with the refusal to institute criminal prosecution; however, the civil action resulted in compensation for non-pecuniary damages paid to the applicant by the spouses B.

In its rationale, the European Court noted that in accordance with contemporary norms and trends in this field, the member States' positive obligations under Article 4 of the Convention must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in such a situation. In the present case, the applicant had been worked for many years without her consent and without receiving any remuneration for the work. Being a minor at the material time, she was residing unlawfully in a foreign country afraid to be arrested by the police. The spouses B. nurtured that fear while promising to secure her leave to remain. Therefore, the applicant was subjected to forced labour at least in the sense of Article 4. The problem however was to determine whether the applicant had been held in slavery or servitude under Article 4.

As to slavery, the Court noted that although the applicant was, in the instant case, clearly deprived of her personal autonomy, the evidence did not suggest that she had been held in slavery in the proper sense, in other words that the spouses B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an "object". Therefore, it cannot be considered that she had been kept in slavery in the classical sense of the term. With regard to the concept of servitude, it includes the obligation to provide services under the influence of threats, and it is close to the notion of slavery. The applicant was fully at the disposal of the spouses B., and she did not have the freedom of movement or free time. As a consequence, it can be considered that she was kept in a state of servitude. Given those findings, the Court concluded

[423] Case of *Siliadin v. France*, judgment of 26.07.2005, final on 26.10.2005. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69891 (Accessed on 17.04.2015).

expressly that the respondent State had failed to honour its obligations under Article 4 of the ECHR.

It is remarkable that in the impugned case the Court referred to the positive obligations of the State, which in our opinion is not exactly correct. In the present case, the essence of the applicant's complaint was based not on the failure of the official Paris to comply with its obligation to protect her against slavery, but rather on the fact that the French authorities had admitted and tolerated her situation of servitude, and allowed the impunity of this criminally punishable situation. In our opinion, it would have been appropriate to classify the aforementioned omissions of the respondent State as a violation of the negative obligation in respect of tolerating the servitude of persons, regardless of whether the servitude had been due to the behaviour of State agents or of private persons. On the other hand, the present legal situation can be seen in the light of the impossibility of separating the positive obligation (protection of the individual against slavery) from the negative one (prohibition of subjecting anyone to slavery or servitude), as often mentioned by the Court.

Zero tolerance for forced or compulsory labour

Article 4 of the Convention prohibits forced or compulsory labour without defining however the term of "forced labour". The various documents of the Council of Europe on the preparatory work on the Convention do not contain any indication in this respect either. Nevertheless, in its case-law the Court has tried to define this notion.

In the case of *Van der Mussele v. Belgium*[424], the Court appealed to the International Labour Organisation's Convention No. 29 concerning Forced or Compulsory Labour. For the purposes of that Convention, the term "forced or compulsory labour" means all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily. The Court accepted this definition as a starting point for interpreting Article 4. In fact, the applicant in that case, a trainee lawyer, complained to the European Court that the consulting services as a public defender provided by him, for which he had received no remuneration, was forced or compulsory labour under Article 4 of the ECHR. The European Court did not agree with that position, and noted that the applicant had voluntarily embraced the legal profession, being fully aware of the tasks attributed to him in the exercise of the profession. The services to be provided fell within the normal activities carried out by a lawyer; they were different from the traditional activities of members of the Bar Association neither by their nature nor by the restrictions on the freedom in treating the case. Moreover, the impugned services contributed to the applicant's professional training in the same amount as the

[424] Case of *Van der Mussele v. Belgium*, judgment of 23.11.1983. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57591 (Accessed on 17.04.2015).

cases he had to deal with upon request of his paying customers or his mentor. They gave him the opportunity to enrich his experience and enhance his reputation. In this regard, the general primary interest doubled by a personal interest.

The Court therefore concluded that at the material time the situation complained of indisputably caused some harm due to the applicant's lack of remuneration or reimbursement of expenses, but those losses were accompanied by certain advantages and were not proven to be excessive. He was not subjected to a disproportionate responsibility and the expenses in question did not reach a considerable amount. Thus, the applicant's complaint did not fall under Article 4 of the Convention, and his allegations, that the respondent State had failed to fulfil its negative obligations of prohibiting forced labour by requiring lawyers to offer free legal advice, were unfounded.

The negative obligations arising from Article 8 of the ECHR (right to respect for private and family life): It is sometimes difficult to categorically separate the positive from the negative obligations under this Article imposed on the States Parties to the European Convention. However, the State's obligation to protect certain rights arising from Article 8 can be doubled by the obligation of non-interference in the exercise of the same rights; the character of an obligation varies depending on the specific circumstances of the case. Even the European Court once stated in this context that the rather negative requirements included in Article 8 of the Convention, aiming primarily at protecting the person from the arbitrary interference of public authorities, may be supplemented with objectives obligations inherent in the effective respect for private life. The boundary between the positive and negative obligations of the State under Article 8 does not delineate to a precise definition; however, the applicable principles are comparable.[425]

Therefore, the apparently simple content of Article 8 leads to an initial finding that the respect the right to private and family life, the respect for home, and the privacy of one's correspondence, impose primarily a negative obligation on the State authorities of not doing anything likely to impede the persons from the exercise thereof: private persons or social entities. Nevertheless, to impose such obligations on State authorities only, i.e. to protect the individual against any interference of public authorities in the sphere of his private life, is not enough to effectively guarantee all its components, as listed in Article 8 of the Convention.[426]

State's non-interference with private and/or family life

[425] Case of *Haralambie v. Romania*, judgment of 27.10.2009, final on 27.01.2010. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95302 (Accessed on 19.04.2015).
[426] Bîrsan C., *Op. cit.*, p. 597, 598.

In the case of *Lebbink v. the Netherlands*[427], the European Court examined the Government's compliance with its negative obligations of non-interference with r applicant's family life. In fact, in the present case the applicant and his girlfriend became parents of a daughter, the latter being in the custody of her both parents (mother, as a principal guardian and the applicant as auxiliary guardian); however, no formal recognition of paternity of the child had been made. Once the relationship between the applicant and his girlfriend was over, the applicant requested the national courts to grant him access to his child, but his claims were rejected because there had been no family life between him and the girl; and even if previously there had been such a connection, it also would have ended with the completion of his relationship with the child's mother. Moreover, according to the specific behaviour towards the child, the applicant could not conclude that it had given rise to strong family ties. The Strasbourg Court did not agree with such an approach to the circumstances of the case, stating that indeed a simple biological relationship, in the absence of any other legal elements indicating a link between the child and a parent, was not sufficient for Article 8 to be applicable. However, given that the child was born as a result of a real relationship between the applicant and the girl's mother, and that after their separation he still visited constantly his daughter and inquired about her education and development, there was thus established a genuine family relationship – beyond a biological link – between the father and his child, which necessitated to be protected under Article 8. In so doing, the Court concluded that the Dutch authorities admitted an unjustified interference with the applicant's right to family life, and failed to fulfil their negative obligations of non-interference in this regard.

In another case, *Sabou and Pircălab v. Romania*[428], the applicants, career journalists, were convicted of libel and sentenced to 10 months' imprisonment, during the execution of which they were prohibited, automatically by way of sanction, all rights under Article 64 of the Romanian Criminal Code: to vote and be elected in public authorities bodies; to occupy positions involving the exercise of State authority; to practice the profession used to commit the offense; and to exercise parental rights. The first applicant complained under Article 8 that his limiting in the exercise of his parental rights had been contrary to the Romanian State's obligation not to interfere with his private and family life.

The Strasbourg Court actually agreed with the applicant's allegations in this regard, noting that in situations where the issue of rights in connection with raising children it is the child's interest that must always prevail. In the present case, it concluded that the offense that the

[427] Case of *Lebbink v. the Netherlands*, judgment of 01.06.2004, final on 01.09.2004. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61799 (Accessed on 19.04.2015).
[428] Case of *Sabou and Pircalab v. Romania*, judgment of 28.09.2004, final on 28.12.2004. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-66714 (Accessed on 19.04.2015).

applicant was convicted for had absolutely nothing to do with the parental authority, whereas by means of automatically applying those sanctions, the national authorities aimed at punishing the defendant, and not at the protection of rights and interests of the minor. Consequently, the Court concluded that the official Bucharest had failed to honour its negative obligations imposed on them under Article 8 due to their unjustifiable and unlawful interference with the applicant's family life.

As to the State's non-interference with the private lives of individuals, a special interest is expressed in Court's judgments concerning the taking of pictures and video recordings of private persons in public places in order to prevent and repress abuses and violations, where the national authorities must find the right balance between ensuring public order and safety and the non-interference with the private lives of individuals.

In the case of *Perry v. the United Kingdom*[429], the applicant, suspected of committing several robberies, was subjected to secret filming at the police station, and the obtained images were used in criminal investigations and shown to witnesses who later identified him. Based on the evidence obtained during the criminal investigation, the file was sent to the court, which refused to ignore the hidden records although it agreed that the police had not strictly adhered to its rules of conduct. The European Court stipulated as a general principle that the normal use of security cameras per se whether in the public street, where they served a legitimate and foreseeable purpose, did not raise issues under Article 8 § 1 of the Convention. In this case, however, the police regulated the security camera so that it could take clear footage of the applicant in the custody suite and inserted it in a montage of film of other persons to show to witnesses for the purposes of seeing whether they identified the applicant as the perpetrator of the robberies under investigation. The video was also shown during the applicant's trial in a public court room. It was pointed out that there was no indication that the applicant had had any expectation that footage was being taken of him within the police station for use in a video identification procedure and, potentially, as evidence prejudicial to his defence at trial. Accordingly, the Court concluded that since the pictures had not been taken during and for the normal use of the camera, and there had been no prior consent of the applicant in this respect, there was an unjustified interference with the applicant's private life. Even the domestic courts considered that the respective measure had not been provided for by the internal legal framework of the United Kingdom; therefore, the Court found the violation of Article 8, and noted that the respondent government had failed to fulfil its negative obligations of non-interference with the private life of the person by taking photographs and recording videos. In that case, it is

[429] Case of *Perry v. the United Kingdom*, judgment of 17.07.2003, final on 17.10.2003. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61228 (Accessed on 19.04.2015).

interesting that the applicant also complained under Articles 6 and 8. The European Judges, having adopted the decision on the admissibility in the aspect of the right to a fair trial, decided that in this case the use of evidence obtained in breach of the legal procedure had not affected the lawfulness of the applicant's conviction, and declared the inadmissibility of the application in this respect.[430]

In the context of the States' negative obligations under Article 8 of the European Convention, given the European society's changes of opinion on rather sensitive issues such as sexual freedom and homosexuality, the different approach of the European Court is notable in that respect. Currently it enshrines in a categorical manner the State's obligation to not to interfere with the private life of the individual in the sexual aspect of his/her life, whereas the sexual freedom is based on tolerance and social pluralism, which became fundamental values of a democratic society. In that respect, in the case of *ADT v. the United Kingdom*[431], the applicant, a practical homosexual, was arrested after a search under warrant of his home, as a result of which the police seized various items, including photographs and videotapes containing footages of sexual nature involving the applicant and four other men. Subsequently, he was convicted of indecent behaviour. Before the Court the applicant, who requested anonymity, complained that the national authorities' actions had been contrary to their obligations imposed on the official London under Article 8.

The European Court considered that if in certain circumstances the sexual activities may justify the interference of the State, this is not the case here. It noted that the applicant had been involved in sexual activities with a restricted number of friends in circumstances in which it was most unlikely that others would become aware of what was going on. It is true that the activities were recorded on videotape, but the Court noted that the applicant had been prosecuted for the activities themselves, and not for the recording. Additionally, the Court noted that in the absence of any public-health considerations and the purely private nature of the behaviour in the present case, the reasons submitted for the maintenance in force of legislation criminalising of such conduct, are not sufficient to justify the legislation and the prosecution. In conclusion, the European Judges unanimously found a violation of Article 8 of the ECHR and decided that the respondent State had failed to honour its negative obligations not to interference with the private life of a person in the sexual life aspect.

[430] Case of *Perry v. the United Kingdom*, decision on the admissibility of 26.09.2002. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22694(Accessed on 19.04.2015).
[431] Case of *ADT v. the United Kingdom*, judgment of 31.07.2000, final on 31.10.2000. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58922 (Accessed on 19.04.2015)

The State's non-interference with the exercise of the right to respect for correspondence

In the case of *Prado Bugallo v. Spain*[432], the applicant, the head of an important economic complex composed of several companies practicing international import and export of tobacco, had an extensive network of employees in Spain. During a judicial inquiry on a drug trafficking offense, the applicant's telephone conversations with his colleagues were intercepted. Subsequently, the applicant was convicted on the basis of the intercepted recordings. Before the European Court he claimed that the interception of his conversations had been contrary to Article 8 of the ECHR.

The Court found that the interception had been warranted under domestic law, and the question of the case referred to whether domestic law afforded the applicant sufficient guarantees against arbitrariness. The Court found that the domestic law revealed some gaps in this regard, especially due to the fact that it had not expressly provided for offenses which had allowed interception of conversations, whereas the duration of the measure had had an indeterminate character. The Court therefore found a violation of Article 8 of the Convention, stating that the applicant's interception of conversations had been operated improperly, without offering sufficient guarantees against an arbitrary application of the law. In principle, such a conclusion suggests that the State's non-interference in exercising the right to respect for correspondence is not categorical because the interference of the national authorities with the rights guaranteed under Article 8 can meet the requirements of the Convention if at domestic level there are sufficient guarantees against arbitrariness, and the interference itself is not disproportionate.

In the same context, in the case of *Taylor-Sabori v. the United Kingdom*[433], the applicant was subjected to police surveillance. Using a "clone" of the applicant's pager, the police were able to intercept messages sent to him. On the basis of the accumulated evidence, the applicant was arrested and charged with drug trafficking. The prosecution alleged that he had been one of the principal organisers of the importation to the United Kingdom from Amsterdam of the prohibited ecstasy tablets. Before the English courts, part of the prosecution case against the applicant consisted of the contemporaneous written notes of the pager messages which had been transcribed by the police. The applicant's counsel submitted that these notes should not be admitted in evidence because the police had not had a warrant for the interception of the pager messages. However, the trial judge ruled that, since the messages had been transmitted via a

[432] Case of *Prado Bugallo v. Spain*, judgment of 18.02.2003, final on 18.05.2003. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-65499(Accessed on 20.04.2015)
[433] Case of *Tailor-Sabori v. the United Kingdom*, judgment of 22.10.2002, final on 22.01.2003. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60696 (Accessed on 20.04.2015).

private system, the 1985 Act did not apply and no warrant had been necessary. The applicant was found guilty and sentenced to ten years' imprisonment.

Before the European Court, the applicant complained that the interception by the police of messages on his pager violated Article 8 of the Convention. In its turn, the Court noted that it was not disputed that the surveillance carried out by the police in the present case amounted to an interference with the applicant's rights under Article 8 § 1 of the Convention. In fact, the essence of the complaint referred to whether unauthorized interception of conversations transmitted through a private system, regulated insufficiently at domestic level, had been contrary to the Convention. The Court reiterated that domestic must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to resort to such covert measures as in the present case. At the time of the events in the present case there existed no statutory system to regulate the interception of pager messages transmitted via a private telecommunication system. There was, accordingly, a violation of Article 8.

In the respective case, it is interesting that the European Court asserted not so much on the respondent Government's failure to fulfil its general negative obligation not to interfere with the right of a person to respect for his correspondence, but rather on the positive obligation to establish an adequate and predictable internal legislative framework, which would exclude the risk of arbitrariness in case of *permissible non-compliance* with the obligation not to interfere.

State's non-interference with the home of a person

In the relatively recent case of *Ernst and Others v. Belgium*[434], the applicants, journalists working for known magazines and the national radio station, complained before the European Court alleging that the searches carried out by the prosecution at their homes, offices and cars, in connection with the investigation conducted under the accusation of the prosecutors of the Liège Court of Appeal for violating the duty of professional secrecy and disclosure of confidential information to the media, had been illegal and abusive, because they had been neither informed about the reasons for the search, nor provided with any procedural rights since they had not been participants in the impugned criminal case.

Under Article 8 of the ECHR, the European Court noted that searches had clearly constituted interference with the right to private life and with the respect for the inviolability of the applicants' homes; however, it was essential to establish whether the applicants had been provided with sufficient guarantees against arbitrariness. In this context, the Court found that the search warrants issued by the investigating judge had showed a very general content, since it had

[434] Case of *Ernst and Others v. Belgium*, judgment of 15.07.2003, final on 15.10.2003. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-65779(Accessed on 21.04.2015).

not specified anything about the investigation, places to be searched or the items to be seized. Hence, extremely important issues had been left at the investigators' discretion. As a result, a large number of items, including the computer hard drives of the applicants had been seized, while the latter remained in a state of complete ignorance as to the reasons for the conducted search. In such circumstances, the Court concluded that the State had admitted disproportionate interference with the applicants' right to inviolability of their homes, and thus had failed to fulfil its negative obligation of non-interference by violating Article 8.

In the case of *Van Rossem v. Belgium*[435], the applicant alleged the violation of Article 8 due to the prosecution's conducting a search under warrant of his home and companies' offices within a criminal investigation instituted against him for forgery, breach of trust and issuing bad checks. The European Court condemned the actions of the official Brussels under Article 8 stating that the search warrant issued by the investigating judge was formulated in general terms without referring to specific offenses prosecuted, or the items to be seized. Thus, the margin of appreciation afforded to the criminal investigators was very large, and the applicant was not provided any guarantees against arbitrariness. In this way, although the Court did not mention *in termenis* about the failure of the respondent government to fulfil their negative obligations arising from the Convention, it implicitly acknowledged this fact by finding the violation.

The negative obligations enshrined in the text of Article 9 of the European Convention (freedom of thought, conscience and religion): Guaranteeing the freedom of thought, conscience and religion implies primarily the negative obligation on the behalf of the State authorities not to take any action or not to be subjected to critique for any failure that might restrict the effective exercise of these freedoms; such restrictions are only permitted in strictly defined limits of the provisions of Article 9 § 2 of the Convention, and only in respect of the freedom of religion and conscience, not in terms of freedom of thought.[436] In principle, the main negative obligation under Article 9 is ***to refrain from any undue interference in the religious freedom of the individual***.

In the reference case of *Hasan and Chaoush v. Bulgaria*[437], the applicants, the Chief Mufti of the Bulgarian Muslims a teacher at the Islamic Institute in Sofia, complained before the Court of violation of their rights guaranteed by Article 9. In fact, the present case concerned the conflict erupted in the late 1980s between two rival factions of the Muslim community specifically focused on the differences over the nomination of the person to be proposed for the position of Grand Mufti. A third party, G., was elected as a Grand Mufti in 1988. In 1992, the

[435] Case of *Van Rossem v. Belgium*, judgment of 09.12.2004, final on 09.03.2005. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67709 (Accessed on 21.04.2015).
[436] Bîrsan C. *Op. cit.*, p. 735.
[437] Case of *Hasan and Chaush v. Bulgaria*, judgment of 26.10.2000. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58921(Accessed on 21.04.2015)

Directorate of Religious Denominations annulled G.'s election as Grand Mufti, and following a national conference, the first applicant was elected to this position with his ulterior registration at the Directorate of Religious Denomination. However, in 1994, supporters of G. organized a national conference where other leaders were elected, who then asked for their registration as the legitimate leadership of the Bulgarian Muslim community. Following a change of government, the new Deputy Prime Minister issued a decree approving the documents adopted at the last conference and appointed G. as the community leaders. That decree was not motivated and never served on the applicant. The new leaders forcibly evicted the applicants from the offices of the institution, and the prosecuting authorities refused to take action. Subsequently, another conference for unification of the Muslim factions took place where new leaders, registered by the Government, were chosen.

Before the European Court the applicants complained of the Government's interference with the election procedures of the Bulgarian Islamic community leaders, claiming that it had been incompatible with the principle of the State's neutrality and contrary to the requirements of Article 9 of the Convention.

In establishing its final rationale, the Strasbourg Court that personality of the religious ministers was undoubtedly of importance to every member of the community. Participation in the life of the community was thus a manifestation of one's religion. Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference. Seen in this perspective, the believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.

The Court also emphasized that in case of the authorities' breach of their duty of neutrality in registering religious communities, the conclusion is that the State violated the believers' right to religious expression. Except for extraordinary situations, the right to freedom of religion excludes any margin of appreciation of the State on the legitimacy of religious beliefs or ways of expressing them. Consequently, the measures taken by the State to promote one of the leaders of a divided religious community or those aimed at imposing a single community leader, against its wishes, constitute interference with the freedom of expression of religion. In this case, the change the religious leaders of the community was ordered by the government without stating any reasons, in order to favour a faction by recognizing its official status and by preventing the first applicant from continuing being part of the Muslim community. As long as these acts of the State fell within the absolute margin of appreciation of the Government, they

were incompatible with the negative obligation of the Bulgarian authorities to refrain from any arbitrary interference with the applicants' rights under Article 9.

In the case of the *Supreme Holy Council of the Muslim Community v. Bulgaria*[438], the applicant organization was the second rival faction led by G., who claimed to be the leader of the Muslim community in the country. In addition to the facts mentioned in the judgment in the previous case, the Court specified that the authorities could intervene to mediate conflicts between factions of the same community, but they need to fulfil this task with caution, since freedom of exercise of a religion is a sensitive area. The national authorities did everything possible to reach a unified Muslim community so that there be a unique leader, although the applicant organization and its parishioners were against that unification since the unification was achieved through various forms of coercion imposed by the State. Therefore, the Court concluded that the respondent State had not complied with its negative obligation, and admitted that interference prohibited by the ECHR with the applicant's right to freedom of religion.

In the reference case of *Serif v. Greece*[439], the European Court noted, as a general principle, that in a democratic society, the State must take steps to ensure that a religious community be placed under a single management. Even if it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.

Negative obligations arising from Article 10 of the ECHR (freedom of expression): In terms of the obligations imposed on State authorities by Article 10, it is obvious that the first one is negative: the State authorities are obliged to do nothing to hinder the exercise of the freedoms guaranteed to those considered by that text. However, the limit between the positive and negative obligations is not set precisely.[440] The main negative obligations imposed on the Member States under Article 10 are going to be analysed as follows.

Non-interference of the State with the freedom of the press

In the reference case of *Thorgeir Thorgeirson v. Iceland*[441], concerning the applicant's conviction for publishing two newspaper articles on the brutal actions of the police, the Court

[438] Case of *Supreme Holy Council of the Muslim Community v. Bulgaria*, judgment of 16.12.2004, final on 16.03.2005. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67795 (Accessed on 21.04.2015).

[439] Case of *Serif v. Greece*, judgment of 14.12.1999, final on 14.03.2000. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58518 (Accessed on 21.04.2015)

[440] Bîrsan C., *Op. cit.*, p. 770, 771.

[441] Case of *Thorgeir Thorgeirson v. Iceland*, judgment of 25.06.1992. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57795 (Accessed on 25.04.2015).

stated that there was a violation of his rights under Article 10 of the ECHR. The Court considered that the interference was not proportionate to the legitimate aim of "protecting the reputation of others". While the press must not overstep the bounds set, it is incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public is also entitled to receive them.

In the case of *Kommersant Moldovy v. Moldova*[442], the Strasbourg Court reiterated the following, as a general principle: freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. Whilst the press must not overstep the bounds set, inter alia, in the interest of "the protection of the reputation or rights of others", it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog". The most careful scrutiny on the part of the Court is called for when the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern. The right to freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any section of the community. In addition, journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation. Moreover, the European Court noted that Article 10 of the Convention does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article the exercise of this freedom carries with it "duties and responsibilities", which also apply to the press. By reason of the "duties and responsibilities" inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.

It can be seen that the State's negative obligation not to undermine the freedom of press is of a quite categorical nature, and journalists should enjoy the highest level of protection under Article 10 in comparison with other categories of people, such as politicians, civil servants, business people, judges etc.

In five cases examined on 8 July 1999 against Turkey (*Ceylan, Karataş, Okçuoğlu, Arslan,* and *Sürek and Özdemir*), the Grand Chamber of the Court stated its position in respect of

[442] Case of *Kommersant Moldovy v. Moldova*, judgment of 09.01.2007, final on 09.04.2007. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-78892 (Accessed on 25.04.2015).

the applicants' conviction for propaganda against the integrity of the State, following the publication, in magazines and newspapers, of some articles criticizing the official policy in south-eastern Turkey and the authorities' attitude towards Kurds.[443] In all these cases, the Court declared that media professionals had special responsibilities and obligations in situations of conflict and tension because they could become "a vehicle for spreading hate speech and promoting violence".[444] Nevertheless, in accordance with its case-law, the Court found that it was the duty of the press to impart information and ideas on political issues, even the most controversial, and it went along with the public's right to be informed.[445] It also recalled that "there are few opportunities under Article 10 § 2 of the Convention for restrictions on political speech.[446] Therefore, the criminal conviction of persons imparting information and ideas through the media, including journalists, is too drastic and disproportionate for the purposes of Article 10[447]. As a result, the national authorities exceeded the margin of appreciation afforded to them, and failed to fulfil their negative obligations of non-interference with the freedom of the press imposed by the ECHR.

State's refraining from identifying journalistic sources

The Court found that there was a violation of Article 10 in the case of *Goodwin v. the United Kingdom*[448], which concerned binding the applicant journalist to reveal the sources of information. By a majority of votes, the Grand Chamber of the Court noted that the protection of journalistic sources is one of the basic conditions for press freedom. The importance of this protection was stressed by many national professional codes of conduct, the Resolution on Journalistic Freedoms and Human Rights and the Resolution on the Confidentiality of Journalists' Sources by the European Parliament. Only "an overriding requirement in the public interest" could justify the interference with the protection of journalistic sources. In this case neither the order for disclosure nor the fine for contempt of court could be justified under Article 10 § 2.

[443]Case of *Ceylan v. Turkey*, judgment of 08.07.1998. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58270 (Accessed on 25.04.2015).
[444]Case of *Karataş v. Turkey*, judgment of 08.07.1998. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58274 (Accessed on 25.04.2015).
[445]Case of *Okçuoğlu v. Turkey*, judgment of 08.07.1998. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58277 (Accessed on 25.04.2015).
[446]Case of *Arslan v. Turkey*, judgment of 08.07.1998. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58271 (Accessed on 25.04.2015).
[447]Case of *Sürek and Özdemir v. Turkey*, judgment of 08.07.1998. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58278 (Accessed on 25.04.2015).
[448] Case of *Goodwin v. the United Kingdom*, judgment of 27.03.1996. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57974 (Accessed on 25.04.2015).

In the case of *Voskuil v. the Netherlands*[449], the applicant journalist lodged an application before the European Court because he had been imposed by national judicial authorities to reveal the source's identity (anonymous policeman) who had supplied information about compromising the investigation against certain persons accused of arms trafficking. In finalizing the conclusion on the respondent State's fulfilling its obligations imposed under Article 10, the European Court stressed that the protection of journalistic sources is one of the basic conditions for press freedom, as is recognised and reflected in various international instruments including the Committee of Ministers Recommendation no. R(2000) 7. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest, and as a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.

Additionally, the Court noted that order of source disclosure can only be justified by an overriding requirement in the public interest. In a democratic state governed by the rule of law the use of improper methods by public authority is precisely the kind of issue about which the public have the right to be informed. The Court noted that such far-reaching measures cannot but discourage persons who have true and accurate information relating to wrongdoing of the kind here at issue from coming forward and sharing their knowledge with the press in future cases. Given the considerations mentioned, the European Judges unanimously found that the official Amsterdam had violated their negative obligation of non-interference with media activities and to refrain from identifying journalistic sources.

In the case of *Roemenie and Schmit v. Luxembourg*[450], the European Court also found a violation of Article 10 because a journalist had been bound to disclose his journalistic sources. In fact, the first applicant published an article accusing a minister of having committed fraud on the VAT regime and who was sanctioned for that deed. The applicant submitted several documents to prove his allegations, including the decision to sanction the impugned minister. Following the minister's criminal complaint, the competent authorities initiated a criminal investigation for breach of professional confidence. In the framework of the investigation, two separate searches were conducted at the first applicant's residence and business address, and in the office of his lawyer (the second applicant). The purpose of the searches was to identify the individuals who had disclosed the information about illegalities committed by the minister, contrary to the civil servant's obligation of professional confidence.

[449]Case of *Voskuil v. the Netherlands*, judgment of 22.11.2007, final on 22.02.2008. HUDOC database. [online]:http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83413 (Accessed on 23.04.2015).
[450] Case of *Roemen and Schmit v. Luxembourg*, judgment of 25.02.2003, final on 25.05.2003. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60958 (Accessed on 23.04.2015).

The European Court pointed out that the searches in that case had been conducted in order to identify the journalistic source, which had been a drastic interference with the right guaranteed by Article 10 of the Convention. It found that the published article had concerned a subject of general interest, and the authorities had conducted two searches to find the source of this article. Moreover, the magistrates noted that the authorities had authorised the searches without previously examining whether the act of disclosure had been covered by the rules of professional confidence. In such circumstances, the Court held unanimously that the respondent State had failed to fulfil its negative obligation of non-intervention with the right of journalists to keep the confidentiality of its information sources.

Negative obligations arising from Article 11 of the ECHR (freedom of assembly and association): from the content of the article in question there are two main negative obligations imposed to the Member States, namely to refrain from prohibiting assemblies, and, respectively, to refrain from impeding the association of persons.

State's refraining from prohibiting peaceful assemblies

In the case of *Patyi and Others v. Hungary*[451], the first applicant, along with other private creditors of an insolvent company, wanted to organize a series of silent demonstrations in front of the Prime Minister's Budapest private residence. After the prior notification concerning the impugned demonstration, as required by domestic law, the police prohibited the conduct thereof. The applicant challenged that decision, but ultimately the court maintained the ban. Meanwhile, the applicant, together with fifteen other demonstrators, appeared before the Prime Minister's house, disguising themselves as tourists, without causing any hindrance or inconvenience to the traffic or other pedestrians. The applicant subsequently notified the police about another demonstration for the same reasons and the same place. It was again prohibited by the police, who noted that the sidewalk was not big enough, and that it would necessitate closing half of the street affected by heavy traffic on a public holiday, which would have considerably interrupted the traffic flow. The applicant's appeal against that decision was rejected again. The applicant subsequently notified the police about four demonstrations which were to be carried on along with other creditors in the same place, but they were also banned for the same reasons.

Before the Strasbourg Court, the applicant complained under Article 11 under the freedom of association claiming the arbitrary hindrance, by the national authorities, of the demonstration the authorization for which they had repeatedly requested.

The European Court noted that the demonstration planned referred to twenty participants, whose only action would have been to stand silently in line on the pavement in front of the Prime

[451] Case of *Patyi and Others v. Hungary*, judgment of 07.10.2008, final on 07.01.2009. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88748 (Accessed on 23.04.2015).

Minister's house. The space on the sidewalk was wide enough – approximately five metres – to allow other pedestrians to walk by during a demonstration. The demonstrators would not have significantly impeded the traffic, especially on that day when the town buses ceased to run soon after 4 p.m. on that street. Moreover, there was no evidence in the case file to suggest that the demonstrations would have been violent or would have represented a danger to public order. Therefore, the Court unanimously decided that the repeated prohibition of the demonstration by the national authorities relying mechanically on the same reasons had been contrary to the standards of Article 11, and deprived the applicants of the substance of their right guaranteed by that Article. The hindrance of the demonstration in those circumstances was contrary to negative obligation imposed to the respondent Government to refrain from banning peaceful assembly.

In another case, *Ollinger v. Austria*[452], the applicant, a Member of Parliament for the Austrian Green Party, complained before the Court claiming violation of his right to freedom of assembly due to the prohibition of a ceremony of remembrance in the Salzburg municipal cemetery on All Saints' Day, 1 November 1998, in the memory of the town Jews killed by the State Nazi troops during the Second World War. Whilst notifying the domestic authorities about the meeting planned at the memorial, the applicant indicated that it would coincide with the gathering of Comradeship IV, organized in the memory of the SS soldiers killed during the war. The national authorities prohibited the applicant's meeting in order to avoid disturbing the commemorative gathering of Comradeship IV, the latter being considered a popular ceremony for which no authorization would have been necessary. They took account particularly of the experience with previous campaigns organized by other people to protest against the meetings of Comradeship IV, which had required police intervention to calm down spirits. The applicant challenged the refusal up to the Supreme Court, but the appeal on points of law was rejected by the Constitutional Court for the reasons below. Although the Constitutional Court upheld that the police assessment had been too limited unable to justify the prohibition of a meeting with the sole purpose of protecting another gathering (Comradeship IV), the ban imposed on the applicant had been justified by the positive obligations incumbent to the State under Article 9 of the Convention to protect individuals exercising their religious conviction against disturbances from others. All Saints' Day is an important religious holiday on which the population traditionally visited cemeteries in order to commemorate the dead, and, given the experience of the previous years, conflicts between demonstrators at such meetings and the members of Comradeship IV might have caused considerable disturbances. However, the Vienna Constitutional Court stated

[452] Case of *Ollinger v. Austria*, judgment of 29.06.2006, final on 29.09.2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-76098 (Accessed on 23.04.2015).

that the applicant's rights under Article 11 had to be counterbalanced by the right of the other association to protection against disruption of its gathering.

In its turn, the European Court did not agreed with the arguments put forward by the Austrian Constitutional Court, noting that as to the applicant's statements, it appeared that the meeting was mainly aimed to remind the public about the crimes committed by the SS forces, and to commemorate the Salzburg Jews killed in the period of the Third Reich. The coincidence in time and venue with the commemoration ceremony of Comradeship IV was an essential part of the message he wanted to convey. The Court also noted that the unconditional prohibition of a counter-demonstration is a very far-reaching measure which would require particular justification, all the more so as the applicant, being a member of parliament, essentially wished to protest against the gathering of Comradeship IV and, thus, to express an opinion on an issue of public interest. In general, the Court found it striking that the domestic authorities had attached no weight to this aspect of the case.

As to the argument relying on the protection of the cemetery-goers' beliefs on the All Saints' Day, the European Court stressed that the assembly organized by the applicant had been in no way directed against them. Moreover, the applicant expected only a small number of participants, who envisaged peaceful and silent means of expressing their opinion. Thus, the intended assembly in itself could not have hurt the feelings of cemetery-goers. Moreover, the Court stated that while the authorities had feared that, as in previous years, heated debates might have arisen, the State would have been able to use other means to prevent this by the police presence at the events, and by keeping the two groups away from each other, which in the instant case had not happened.

Finally, the Court concluded that the authorities had not given any importance to the applicant's interest to protest against the gathering of the Comradeship IV, but they had paid much attention to the cemetery-goers' interest to be protected against possible incidents that could have been in principle minimized or even excluded. In such circumstances, the Court decided that the State had failed to comply with its negative obligation of non-intervention with the individual's right to peaceful assembly.

For comparison, in another case, *Cisse v. France*[453], the Court asserted on the alleged violation of the applicant's right to freedom of assembly by her eviction, along with other illegal immigrants, from an illegally occupied church. In fact, the applicant was part of a group of people not having a French residence permit who decided to engage in collective action aimed at drawing attention to the difficulties faced by them, in order to obtain review of their

[453] Case of *Cisse v. France*, judgment of 09.04.2002, final on 09.07.2002. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60413 (Accessed on 23.04.2015).

administrative situation. This movement culminated in the occupation of a church in Paris by a group of about 200 people without permits to reside in France, mostly of African origin, in which 10 men decided to go on hunger strike. After about two months, the Commissioner of Police of Paris ordered the evacuation of the church, because the occupation of the church was contrary to the exercise of religious rights, and the demonstrators' hygiene conditions were precarious, noting that such a decision would have been necessary to protect order, health, peace and public security. The police evicted the demonstrators from the church, and some of them, including the applicant, were subjected to criminal convictions.

Before the Strasbourg Court the applicant complained about the violation of her rights under Article 11 claiming that the respondent Government had failed to comply with the negative obligation in respect of non-interference with the exercise of the right to peaceful assembly.

The European Court did not agree with the applicant's arguments, stating that the State intervention in the meeting organized by the illegal immigrants had occurred amid the deterioration of public order and health of those in the church for more than two months, and the intervention measures had been due to the worries of the relevant authorities, not without reasonable grounds, being concerned that the situation could have deteriorated rapidly. Moreover, the symbolic value of the presence of the applicant and other immigrants had been tolerated by the authorities for a sufficiently long period of time. In such circumstances, the Court found that the French authorities had not violated the negative obligation of non-interference in the applicant's rights under Article 11, and the police intervention to evict the demonstrators had been legitimate and necessary.

State's refraining from prohibiting collective association

In the case of *Ouranio Toxo and Others v. Greece*[454], the political party representing the interests of the Macedonian minority in Greece, and its members complained to the Strasbourg Judges about the violation of their freedom of association by the Greek authorities' removing of a sign with nationalistic inscriptions in Macedonian, by tolerating and even instigating the attack on the party headquarters and the assault against people who being there. Additionally, they also complained that no criminal investigation had been opened against those involved in the attack, whereas the police called to detain the strikers had refused to intervene. The applicants however were tried for accusations of instigating national hatred.

In its rationale in the present case, the European Court pointed out that the applicant was a lawfully constituted political party, with a legitimate aim, and the use of Macedonian language

[454] Case of *Ouranio Toxo and Others v. Greece*, judgment of 20.10.2005, final on 20.01.2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70720 (Accessed on 23.04.2015).

was normal for the purposes of its foundation. It is true that the use of nationalist inscriptions was able to arouse contradictory feelings among the population of Greek origin, but this alone was insufficient to explain the reaction of the authorities, which on the one hand obviously incited people against the applicant party and, on the other hand, tolerated – by their failure to intervene – the violence on the party headquarters. The Court expressly stated that Article 11 has an aspect of a negative obligation: namely to bind the national authorities to refrain from arbitrary measures capable of interfering with the right to freedom of association. In the light of the essential nature of the freedom of association and its close relationship with the foundations of democracy, there must be compelling reasons and grounds which justify the interference with that freedom.

In the present case, the Court could explain neither the behaviour of the local public administration instigating Greek population against the party members nor the attitude of the police by refusing to intervene in the attack on the headquarters, nor the absence of any criminal investigation into the evident violence and destruction. In such circumstances, the Court unanimously found that the respondent Government failed to fulfil their negative obligations under Article 11.

The Court adopted an interesting position in the case of *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*[455]. The applicant association – an Italian Masonic association with the status of private-law association – invoked before the Italian courts violation of its rights guaranteed by Article 11 as a result of a newly adopted regional law on the appointment of public officials in certain positions, requiring candidates to submit a declaration of non-membership of a Masonic lodge.

The Strasbourg Court held that an order requiring a person to declare non-membership of a Masonic lodge prejudiced the rights of the applicant association, as it could lead to loss of members and might have affected its prestige. Consequently, such an obligation constituted an interference with the applicant's right to free association. In this case, although the number of actual or potential members of the association who might have been confronted with the dilemma of choosing between being Freemasons and competing for the public offices could not be said to be large, the freedom of association was of such importance that it could not be restricted in any way. In fact, this conclusion is valid in the event of one single member of the applicant association would have wished to run for public office. In light of the respective arguments, the European Judges concluded that the restrictions on the members of the applicant Masonic Lodge had not been compatible with their rights guaranteed by Article 11, and that the

[455] Case of *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, judgment of 02.08.2001, final on 12.12.2001. HUDOC database. [online]:http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59623 (Accessed on 23.04.2015).

Italian authorities had failed to comply with their negative obligation not to interfere with these rights.

Negative obligations enshrined in Article 14 (prohibition of discrimination): As mentioned in the chapter on the positive obligations, the given Article suggests – in virtue of its title – ***the negative obligation imposed on the State not to allow any form of unjustified discrimination of persons*** under its jurisdiction. A specific analysis of that obligation is described as follows.

In the case of *Bucheň v. the Czech Republic*[456], the applicant, a career military officer, was appointed to military judge in 1982. Subsequently, the 1993 Constitution liquidated the military courts, and he was dismissed from the military on 31 December 1993, benefitting from a retired military allowance. On 1 January 1994 the applicant started working as a judge in a civil court. Under a law in force at the time, the payment of retired military allowance was suspended during period that the former military judges acted as civil judges, whereas people in the same situation who became civil judges later continued to receive the allowance. Having received numerous complaints, a judicial formation of the Constitutional Court decided that the respective norm, categorize the ones entitled to that allowance, had been unconstitutional; it thus required the Plenum of the Constitutional Court to annul it. Nevertheless, the Plenum of the Constitutional Court refused, and the applicant complained before the European Court of Human Rights about the violation of Article 14 combined with Article 1 of the Additional Protocol to the ECHR.

The European Court found that there were at least two categories of professional military who continued to receive their retired pay: military judges and prosecutors who had become civil magistrate after January 1994. The Court pointed out the existence of an inexplicable difference in treatment. The Czech Government argued that the former military who became civil judges later than others had difficulties in finding a job, whereas those in the applicant's situation benefited from a new job automatically. The Court considered that these criteria were subjective and could not justify a difference in treatment applied, which had to have an objective and reasonable justification.

In such circumstances, the European Court concluded that the difference in treatment applied to the applicant and individuals in his situation in relation to other former military and current judges was not justified on the basis of some acceptable criteria under the ECHR. Therefore, the respondent State failed to fulfil its negative obligation, i.e. not to admit any all

[456] Case of *Bucheň v.the Czech Republic*, judgment of 26.11.2002, final on 26.02.2003. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-65341 (Accessed on 23.04.2015).

form of discrimination, and violated Article 14 in conjunction with Article 1 of the Additional Protocol to the ECHR.

In another case, *Palau-Martinez v. France*[457], having divorced her husband, the applicant, a Jehovah's Witness, asked for, and subsequently obtained before the first instance, custody of her minor children who were to reside with her in Spain. Before the appellate court, the applicant challenged certain issues on the alimony to be collected from her former husband and on the period of time the children were to spend their father. Meanwhile, during the holiday spent with their father living in France, the children were enrolled in school in that locality. The applicant complained before the appellate court of her former husband's abusive behaviour by taking the children in his custody; however, the court did not agree with her claims, and entrusted the children to their father. In deciding so, the appellate court reasoned that the children had to be must be taken out of the system based on the Jehovah's Witnesses education, adhered to by their mother, due to the length of this regime, its intolerance and the proselytizing imposed on the children. The applicant's appeal was rejected by the Court of Cassation of France.

Before the European Court the applicant complained under Article 14 in conjunction with Article 8 of the ECHR due to the national judicial authorities' decision to entrust the children to their father because her being practicing the cult of Jehovah's Witnesses. The Court considered that the domestic courts had subjected the parents of the children to a difference of treatment on the basis of their religion. The appellate court judge asserted only generalities concerning Jehovah's Witnesses, the applicant being a follower thereof, and did not indicate any direct, concrete evidence demonstrating the influence of the applicant's religion on her two children. In addition, the judge rejected the applicant's request for a social inquiry report, a common practice in child custody cases. Finally, the Court concluded that the judge ruled *in abstracto* and on the basis of general considerations, without establishing a link between the children's living conditions with their mother and their real interests. In such circumstances, and given the fact that the difference in the parents' treatment without any objective and reasonable grounds, the European Judges concluded that the respondent State had failed to fulfil its negative obligations to under Article 14, it being violated in conjunction with Article 8.

Negative obligations arising from Article 4 of Protocol No. 4 to the ECHR (prohibition of collective expulsion of aliens): in principle, the respective Article raises one single negative obligation imposed on the Signatory States: namely ***not to admit the collective expulsion of aliens***, the particularities of which will be analysed as follows.

[457] Case of *Palau-Martinez v. France*, judgment of 16.12.2003, final on 16.03.2004. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61548 (Accessed on 23.04.2015).

In the case of *Čonka v. Belgium*[458], the applicants – a Roma family – were constantly threatened by skinheads in the Slovak Republic, and decided to move to Belgium, where they requested political asylum. The Belgian authorities declined their request; as a result, the applicants with other Roma families were detained and later repatriated to Slovakia. Before the European Court applicants alleged *inter alia* the violation of Article 4 of Protocol No. 4 by expelling their entire families to their home country.

In its final rationale, the Court reiterated, as a general principle, that collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group. That does not mean, however, that where the latter condition is satisfied the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4. In those circumstances and in view of the large number of persons of the same origin who suffered the same fate as the applicants, the Court considered that the procedure followed had not enabled it to eliminate all doubt that the expulsion might have been collective. That doubt was reinforced by a series of factors: firstly, prior to the applicants' deportation, the political authorities concerned had had announced that there would be operations of that kind and given instructions to the relevant authority for their implementation; secondly, all the aliens concerned had been required to attend the police station at the same time; thirdly, the orders served on them requiring them to leave the territory and for their arrest had been couched in identical terms; fourthly, it was very difficult for the aliens to contact a lawyer; lastly, the asylum procedure had not been completed. In such circumstances, by a qualified majority of 4 votes to three, the Court found that the Belgian Government had violated Article 4 of Protocol No. 4.

In a more recent case, *Hirsi Jamaa and Others v. Italy*[459], the applicants, eleven Somali nationals and thirteen Eritrean nationals, were part of a group of about two hundred individuals who left Libya aboard three vessels with the aim of reaching the Italian coast. On 6 May 2009, when the vessels were 35 nautical miles south of Lampedusa (Agrigento), that is, within the Maltese Search and Rescue Region of responsibility, they were intercepted by three ships from the Italian Revenue Police (*Guardia di finanza*) and the Coastguard. The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli.

[458] Case of *Conka v. Belgium*, judgment of 05.02.2002, final on 05.05.2002. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60026 (Accessed on 23.04.2015).
[459] 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 25.04.2015)

Before the European Court, the applicants argued that during the journey the Italian authorities had neither informed them about their actual destination nor identified them. After a ten-hour journey, upon arrival in the port of Tripoli, the migrants were handed over to Libyan authorities. As to the applicants, despite having opposed their disembarkation, they were forced to leave the Italian vessels.

In the present case, the Grand Chamber of the Court deemed it necessary to decide whether the applicants' transfer on the Italian ships to Libya had constituted collective expulsion of aliens within the meaning of Article 4 of Protocol No. 4 to the Convention. The Court held that the article in question is applicable to the situation in the present case, although that expulsion occurred extraterritorially beyond the geographical territory of Italy. Furthermore, as regards the exercise by a State of its jurisdiction on the high seas, it reiterated that the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the Signatory States have undertaken to secure to everyone within their jurisdiction.

As to the merits of claims, the European Court could only find that the transfer of the applicants to Libya had been carried out without any form of examination of each applicant's individual situation. It was not disputed that the applicants had not been subjected to any identification procedure by the Italian authorities, which had restricted themselves to embarking all the intercepted migrants onto military ships and disembarking them on Libyan soil. Moreover, the Grand Chamber noted that the personnel aboard the military ships had not been trained to conduct individual interviews and had not been assisted by interpreters or legal advisers. These elements were sufficient for the Court to rule out the existence of sufficient guarantees ensuring that the individual circumstances of each of those concerned were actually the subject of a detailed examination. Finally, the Court concluded that the removal of the applicants had been of a collective nature, in breach of Article 4 of Protocol No. 4 to the Convention.

4.3. Negative obligations and procedural guarantees

The European Convention on Human Rights has imposed on the Signatory States not only negative obligations regarding substantive rights, but also with regard to procedural guarantees, which anyway are more limited both in number and conceptually. In fact, the articles of the Convention enshrining the rights and freedoms of procedural nature, just under Article 5 (right to liberty and security), the European Court has defined in its case-law several negative

obligations, as shown below. Some negative obligations have been also established under Article 7 (no punishment without law), Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens), Article 4 of Protocol No. 7 (right not to be tried or punished twice). As to Article 6 (right to a fair trial) and Article 13 (right to an effective remedy), they imply exclusively positive obligations for States Parties to the Convention.

Negative obligations arising from Article 5 of the Convention (right to liberty and security): In fact, two main negative obligations arise from this that article: namely the State's refraining from illegal deprivation of liberty of individuals, and prohibition of State institutions' arbitrariness.

State's refraining from illegal deprivation of liberty of individuals

The State must not deprive individuals of their liberty without any legal justification. Article 5 lists the situations where the deprivation of liberty of a person is not be contrary to the European Convention, whereas any deviation from this provision constitutes a violation of that article.

The case of *Creangă v. Romania*[460] is interesting from that perspective. In fact, on 15 July 2003 the applicant, police officer, was required to go to the National Anti-Corruption Prosecution Service headquarters (NAP) for questioning. On July 16 2003, towards 12 noon, the prosecutor informed him that a criminal investigation had been opened in the case against him and ten other police officers for accepting bribes, aiding and abetting aggravated theft and criminal conspiracy. Towards 10 p.m., the prosecutor placed the applicant and several police officers in temporary pre-trial detention. Subsequently, the preventive measure was cancelled, but then re-ordered after a cassation appeal lodged by the Prosecutor General had been admitted. By an interlocutory judgment of 29 June 2004, the territorial Military Court ordered that the applicant be released and replaced his pre-trial detention by an order prohibiting him from leaving the country. By a judgment of 22 July 2010 the Bucharest Court of Appeal sentenced the applicant to three years' imprisonment, suspended, for taking bribes and harbouring a criminal.

Relying on Article 5 § 1 of the Convention, the applicant argued that his deprivation of liberty of 16 July 2003 was devoid of legal basis. He complained that no specific reason had been given for the order for his pre-trial detention issued on 16 July 2003, particularly with regard to the threat that his release would have posed to public order. He also considered his pre-trial detention of 25 July 2003 unlawful, after the intervention of the Prosecutor General.

In its final rationale whether the applicant's deprivation of liberty between 12 a.m. and 10 p.m. on 16 July 2003 had been in compliance with the Convention, the Grand Chamber of the

[460] Case of *Creangă v. Romania*, judgment of 23.02.2012. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109226 (Accessed on 20.04.2015)

European Court stated the following. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. Admittedly, in determining whether or not there has been a violation of Convention rights it is often necessary to look beyond the appearances and the language used, and to concentrate on the realities of the situation. Article 5 § 1 applies to deprivations of liberty of a short length. In the instant case, given the applicant's presence at the NAP between the indicated hours, and since the Government did not submit convincing and relevant arguments in support of their version of the facts (that the applicant had voluntarily remained at the NAP), the Court considered that the applicant had been deprived of liberty, at least between 12 a.m. and 10 p.m. The question, however, was whether the applicant had been deprived of his liberty "in accordance with a procedure prescribed by law" within the meaning of Article 5 § 1 of the Convention.

The Court noted that the applicant was summoned to appear at the NAP to make a statement in the context of a criminal investigation, and was not given any additional information as to the purpose of that statement. Domestic law on the subject required the summons to indicate the capacity in which a person was being summoned and the subject matter of the case. The Court noted that the applicant had not been formally classified as a suspect when he had been asked to make his initial statement on a plain sheet of paper on entering the NAP premises. Furthermore, when making his first statement, the applicant was unaware of his legal status and the guarantees arising therefrom. However, according to the Government's version of the facts, at around 12 noon, when all the police officers were completing their statements, the prosecutor came back into the room and informed them that a criminal investigation had been opened in the case in respect of ten of the police officers present, including the applicant, and that they were entitled to choose a lawyer or would otherwise be assigned an officially appointed lawyer. Thus, it was clear that at least from 12 noon, the applicant's criminal status was clarified as a result of the opening of the criminal investigation. From that moment, the applicant was undeniably considered to be a suspect, so that the lawfulness of his deprivation of liberty must be examined, from that point, under Article 5 § 1 (c).

In the same context, the European Court noted that Under Romanian law, there are only two preventive measures entailing a deprivation of liberty: police custody and pre-trial detention. However, at least from 12 noon, the prosecutor had sufficiently strong suspicions to justify the applicant's deprivation of liberty for the purpose of the investigation and he decided only at a very late stage to take the second measure (pre-trial detention), towards 10 p.m. The Court was conscious of the constraints arising in a criminal investigation and did not deny the complexity

of the proceedings instituted in the instant case, requiring a unified strategy to be implemented by a single prosecutor carrying out a series of measures on the same day, in a large-scale case involving a significant number of people. Likewise, it did not dispute the fact that corruption is an endemic scourge which undermines citizens' trust in their institutions, and it understood that the national authorities had to take a firm stance against those responsible. However, with regard to liberty, the fight against that scourge could not justify recourse to arbitrariness.

In such circumstances, the Court considered that the applicant's deprivation of liberty on 16 July 2003, at least from 12 noon to 10 p.m., had had no basis in domestic law and that there had therefore been a violation of Article 5 § 1 of the Convention.

In the case of *Stepuleac v. Moldova*[461], the applicant was arrested in the framework of an investigation as a result of one of his employee's allegations of blackmail and threat. Before the Strasbourg Court he claimed that he had been detained without reasonable suspicion to have committed a crime, and the only basis for initiating criminal proceedings had been G.N.'s complaint, which had not directly indicated the applicant's name. However, as to the applicant, his name had been mentioned in the order to initiate the criminal investigation, for unexplained reasons.

In its turn, having examined whether the applicant's detention had been in compliance with the requirements established by Article 5, and, respectively, whether the respondent State had honoured its negative obligation not to admit illegal deprivation of liberty, the Court noted that none of the courts examining the prosecutor's actions and requests for arrest had dealt with the issue of whether there had been a reasonable suspicion that the applicant had committed a crime, despite the applicant's claim that he had been innocent. The only ground for the applicant's arrest and pre-trial detention was that the victim (the applicant's employee) had directly identified him as the perpetrator of a crime. However, it did not directly indicate the applicant's name in the complaint lodged. It was unclear why his name had been included in that decision at the very start of the investigation and before further evidence could be obtained. He was never accused of condoning illegal activities on the premises of his company, which might have explained his arrest as the director of the company, but of personal participation in blackmail. The Government declared that the victim had identified the applicant some time after lodging his complaint, but they did not submit any documents confirming such further identification, despite the fact that such procedures should be properly documented according to the law. Moreover, the Court noted that the domestic court, when examining the request for a detention order, had established that at least one of the aspects of G.N.'s complaint had been

[461] Case of *Stepuleac v. Moldova*, judgment of 06.11.2007, final on 06.02.2008. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83085 (Accessed on 20.04.2015).

abusive. This should have cast doubt on G.N.'s credibility, and the conflict he had had with the company's administration gave further reasons to doubt his motives. However, rather than verifying this information, the prosecutor arrested the applicant partly on the basis of his alleged kidnapping of G.N. This lent support to the applicant's claim that the investigating authorities had not genuinely verified the facts in order to determine the existence of a reasonable suspicion that he had had committed a crime, but rather pursued his arrest, allegedly for private interests. In the light of the above, in particular the prosecutor's decision to include the applicant's name in the list of suspects without a statement by the victim or any other evidence pointing to him, as well as the prosecutor's failure to make a genuine inquiry into the basic facts, in order to verify whether the complaint was well-founded, the European Court concluded that the information in its possession did not "satisfy an objective observer that the person concerned may have committed the offence", and therefore the respondent Government had not fulfilled the obligations imposed under Article 5.

As to the extension of pre-trial detention, the case of *Al Akidi v. Bulgaria*[462] is notable. The applicant, an Iraqi national, was arrested on 10 September 10 1993 for tax evasion. At the time of his arrest, he had lived in Bulgaria for 12 years and was married to a Bulgarian national. The applicant was held in pre-trial detention between 1993 and 1997, when he was sentenced to 11 years' imprisonment by the first instance court. Before the European Court, the applicant complained that his pre-trial detention had been unjustified and excessively long.

In its reasoning, the Court held that the applicant had been remanded in pre-trial custody until his conviction for 3 years, 4 months and 21 days. According to the Court's constant case-law, the continued detention of a person must be justified by strong evidence of guilt and danger of his absconding. The Court acknowledged that the severity of the charges may justify pre-trial detention of a person, but at some point, maintaining his custody is no longer justified by the mere gravity of the offense the defendant is charged with. In the present case, according to Bulgarian law, the main reason for maintaining the applicant in pre-trial detention was the seriousness of the charges; however, the long period of his pre-trial detention was not justified. The Government's argument that the applicant was an Iraqi citizen, and there was a possibility of his fleeing to his country of origin, was ill-founded in the Court's view, since the national courts had failed to consider the fact that he had lived, and been married, in Bulgaria for more than 12 years. Having regard to the reasons given by the domestic courts to justify the applicant's detention, the Court considered that by failing to address concrete relevant facts and by relying exclusively on a statutory presumption based on the gravity of the charges and which had shifted

[462] Case of *Al Akidi v. Bulgaria*, judgment of 31.07.2003, final on 31.10.2003. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61275 (Accessed on 20.04.2015).

to the accused the burden of proving that there had not been even a hypothetical danger of absconding, re-offending or collusion, the courts had prolonged the applicant's detention on grounds which could not be regarded as sufficient. Therefore, the European Court concluded that the applicant's continued pre-trial detention had been contrary to the requirements prescribed by Article 5 of the ECHR.

Prohibition of State institutions' arbitrariness

The notion of "arbitrariness" within the meaning of Article 5 § 1 has a broader meaning than just mere non-compliance with national law, so that the deprivation of liberty may be lawful in terms of domestic law, but arbitrary within the meaning of the Convention, and thus violating it. The concept of arbitrariness can vary to a certain extent, depending on the type of deprivation in question. The Court has repeatedly stressed that arbitrariness can arise in case of bad faith or fraud on the behalf of the authorities; unless deprivation, and the enforcement thereof, complies with the purposes of the restrictions permitted in Article 5; unless there is a link between the justification of the admissible deprivation of liberty and the facility and conditions of detention; and unless the proportionality between the reasons of deprivation and detention itself was respected.

For example, in the case of *H.L. v. the United Kingdom*[463], the autistic applicant with a history of self-mutilation and the disability to speak coherently, from 1994 on had been repeatedly admitted to various psychiatric institutions without his consent, yet on the initiative of treating doctors considering that he had to be treated in hospital, and qualifying him as "informal patient". The applicant had not opposed since he had been a docile patient. The admission to hospital was justified each time by the doctrine of necessity of the British law, since the applicant had had a tendency to harm himself. At a certain moment, assisted by close relatives, the applicant demanded to be released under the *habeas corpus* procedure whereby the courts could only verify the legality of the measure, but not for the existence of medical needs. At the national level, his application was rejected. At the same time, he attempted several times to independently leave the institutions he had been treated in, but he was not allowed. Before the European Court, the applicant, assisted by his guardians and a counsel, claimed that his internment in specialized psychiatric institutions as an "informal patient" had been an illegal restraint within the meaning of Article 5 § 1.

The Strasbourg Court agreed with the fact that the applicant had been deprived of liberty since his docility could not be equated with consent. Throughout his deprivation of liberty, he had been treated by the doctors of that institution, being the only ones to appreciate the extent to

[463] Case of *HL v. the United Kingdom*, judgment of 05.10.2004, final on 05.01.2005. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-66757(Accessed on 20.04.2015).

which there had been any medical reasons to justify the applicant's continued deprivation of liberty. The Court found that this imprisonment had been imposed by the doctrine of necessity of British law; however, the mere existence of a rule of law to justify detention was not enough. That norm must have fulfilled certain conditions, the most important being the existence of a certain control and some procedures to establish the need for hospital treatment. The Court found that the English law did not provide for any such procedures to cover the situation of docile patients without consent in case of hospitalization. Accordingly, the Court found a violation of Article 5 § 1 due to a lack of legislative guarantees against arbitrary deprivations of liberty, stating that the respondent State had failed to comply with the negative obligation in terms of illegal deprivation of liberty.

In the follow-up case of *Mocarska v. Poland*[464], following a knife attack on her sister, the applicant was arrested on suspicion of theft and domestic violence, and in May 2005 she was admitted to a detention facility. Relying on an expert opinion, in October 2005 the court discontinued the proceedings against the applicant, finding that she could not have been held criminally responsible as she had been suffering from a delusional disorder and ordered that the applicant be placed in a psychiatric hospital, thus prolonging her detention. The designated psychiatric hospital could not immediately hospitalize the patient due to temporary lack of available beds, and the applicant was finally transferred from the detention facility to the psychiatric hospital only in June 2006.

Before the Court, the applicant complained under Article 5 § 1 about her detention in the impugned facility from May 2005 to June 2006. The Court however held that the applicant's detention in the specialized detention centre only starting October 2005, i.e. from the moment when the domestic courts had ordered the applicant's hospitalization in a specialized medical institution, until June 2006, when the transfer actually took place, had fallen under Article 5 § 1.

In its final reasoning, the European Court stated that the applicant's detention after discontinuation of proceedings against her had been based on the domestic law; however, the length of detention pending transfer to a psychiatric hospital was not specified by any statutory or other provision. Nevertheless, it had to be determined whether the continuation of provisional detention for eight months could be regarded as lawful. The Court observed that in the present case the domestic court had asked the Psychiatric Commission to indicate a hospital to which the applicant could be transferred two months after the proceedings had been discontinued. It took the Commission two more months to indicate a hospital for the applicant. Lastly, the applicant had to wait more than three months before her admission to that hospital. During that time she

[464] Case of *Mocarska v. Poland*, judgment of 06.11.2007, final on 06.02.2008. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83076 (Accessed on 22.04.2015).

was detained in a regular detention centre. The Court accepted the Government's arguments that it would have been unrealistic and too rigid an approach to expect the authorities to ensure that a place was immediately available in a selected psychiatric hospital. However, a delay of eight months in the admission of a person to a psychiatric hospital could not be regarded as acceptable. Therefore, the Court concluded that there had not been struck a reasonable balance between the competing interests of the parties, and to hold otherwise would entail a serious weakening of the fundamental right to liberty to the detriment of the person concerned and thus impair the very essence of the right protected by Article 5 of the Convention.

Negative obligations enshrined in Article 7 of the ECHR (no punishment without law): in fact, the legality of any criminal punishment is one of the basic principles of criminal law. It is forbidden to impose a criminal penalty on the offender unless the deed committed is enshrined in criminal law or rules international law. Just one negative obligation imposed on the State arises from the content of the article in question, namely ***not to convict individuals for offenses not provided for by law***.

In the case of *Korbely v. Hungary*[465], the applicant was retired military officer. In 1994 he was accused of participating at the repression of the revolt in the town of Tata during the 1956 revolution, namely because he had been the captain in charge of a squad of fifteen officers in the mission to regain control over the building of the police department occupied by insurgents, and that he had shot, and had ordered his men to shoot, at the civilians. Several people were killed or injured in that incident. Initially the court discontinued the criminal proceedings due to the statutory limitation, motivating that the offenses the applicant had been accused of had constituted rather murder and incitement to murder than crimes against humanity. However, the applicant was finally convicted under common Article 3 of the Geneva Conventions of 1949, namely because killing the insurgents who had already laid down their arms. Thus, the applicant had committed a crime against humanity and was sentenced to five years' imprisonment. He served part of his sentence and then was conditionally released. Before the Court, the applicant alleged that he had been convicted for an action which did not constitute any crime at the time when it had been committed.

The Grand Chamber of the European Court noted, as a general principle, that Article 7 of the Convention is one of the essential elements of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective

[465] Case of *Korbely v. Hungary*, judgment of 19.09.2008. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88429 (Accessed on 23.04.2015)

safeguards against arbitrary prosecution, conviction and punishment. Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable. However, the Grand Chamber noted that Article 7 alluded to the very same concept that law be accessible and foreseeable.

In the present case, the European Judges found that there was insufficient evidence to consider that the insurgents killed and particularly their leader were part of any category of non-combatants under the common Article 3 of the Geneva Conventions of 1949; nor was it established with certainty that they had laid down their arms in that incident. Consequently, the Grand Chamber concluded that the impugned international legal provision could not reasonably serve as the basis of the applicant's conviction for committing a crime against humanity, and the criminal penalty was contrary to Article 7 of the Convention.

In the case of *Puhk v. Estonia*[466], the applicant was convicted of tax fraud, committed from April 1993 until October 1995. Until January 1995, the law criminalizing tax evasion imposed, as one of the conditions, the existence of previous respective misdemeanour. The applicant had never been sanctioned in that respect. In January 1995 a new law entered into force providing that the respective condition had not had to be fulfilled in case of intentional deed. The domestic courts held that the applicant's deed had been intentional, and convicted him for the entire period of time during which he had been defrauding the State's fiscal interests. The applicant had been also convicted for lack of tax records between May and October 1993 under a law that had come into force in July 1993.

Before the Strasbourg Court, the applicant alleged that his conviction under the criminal law in force as of 13 January 1995 for the actions committed before had violated to guarantees of the non-retroactivity of criminal law provided for by Article 7 of the Convention.

In its final rationales, the Court reiterated that the content of Article 7 of the Convention prohibits, in principle, retroactive application of criminal law. In relation to both deeds, the Court held that until the entry into force of the new law, the facts were not of criminal nature under the law in force at that time, and the interpretation thereof in such a way following the adoption of a

[466] Case of *Puhk v. Estonia*, judgment of 10.02.2004, final on 10.05.2004. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61628 (Accessed on 24.04.2015).

new law definitely constituted a violation Article 7. The Court does not deny that the domestic courts were entitled to convict the applicant, but only for the period elapsed after the entry into force of new law. Therefore, the Court unanimously found a violation of Article 7 stating that the respondent State had failed to honour its obligations not to subject a person to criminal liability except for under the law.

Thus, the European Court pays particular attention to the criminalization of unlawful acts at the moment they were committed, this rule being correctly considered a basic principle of a criminal trial and inseparable foundation of a democratic society.

Negative obligations arising from Article 1 of Protocol No. 7 to the ECHR (Procedural safeguards relating to expulsion of aliens): in principle, that Article imposes on the State a fundamental negative obligation, namely ***not to expel a foreign citizen residing lawfully in its territory without legal justification***. The particularities of that obligation will be analysed as follows.

In the case of *Lupsa v. Romania*[467], the applicant, a Yugoslavian citizen, came to, and settled in, Romania in 1989, where he had lived for 14 years and even set up a commercial company whose main activity was roasting and marketing coffee. He also learnt Romanian and cohabited with a Romanian national from 1994. On 6 August 2003 the applicant, who had been abroad, came back to Romania unimpeded by the border police. The next day, however, border police officers came to his home and deported him. The applicant was declared an "undesirable person" and banned from Romania for ten years on the ground that there was "sufficient and serious intelligence that he was engaged in activities capable of endangering national security". The applicant's lawyer lodged an application for judicial review of the deportation order against the applicant, submitting that the applicant had not been served with any document declaring the applicant's presence in Romanian territory to be undesirable. The only hearing before the Bucharest Court of Appeal was held on 18 August 2003, where representative of the Aliens Authority provided the applicant's lawyer with a copy of an order of 28 May 2003 of the public prosecutor's office at the Bucharest Court of Appeal in which, at the request of the Romanian Intelligence Service and in accordance with Government Emergency Ordinance on the rules governing aliens in Romania, the applicant had been declared an "undesirable person" and banned from Romania for ten years. On the same day, the lawyer's appeal was rejected.

Before the European Court, the applicant complained *inter alia* of violation of Article 1 of Protocol No. 7, claiming that his expulsion had been carried out in breach of the procedural safeguards imposed on the official Bucharest.

[467] Case of *Lupsa v. Romania*, judgment of 08.06.2006, final on 08.09.2006. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-75688 (Accessed on 25.04.2015).

The European Court noted the following. Although the applicant was deported in pursuance of a decision reached in accordance with law, there has been a violation of Article 1 of Protocol No. 7 in that the law did not satisfy the requirements of the Convention. Moreover, In any event the Court considers that the domestic authorities also infringed the guarantees to which the applicant should have been entitled under that Article. In that connection, the Court notes that the authorities failed to provide the applicant with the slightest indication of the offence of which he was suspected and that the public prosecutor's office did not send him the order issued against him until the day of the only hearing before the Court of Appeal. Further, the Court observes that the Court of Appeal dismissed all requests for an adjournment, thus preventing the applicant's lawyer from studying the aforementioned order and producing evidence in support of her application for judicial review of it. Reiterating that any provision of the Convention or its Protocols must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory, the Court considers, in the light of the purely formal review by the Court of Appeal in this case, that the applicant was not genuinely able to have his case examined in the light of reasons militating against his deportation.

In another case, *Kaya v. Romania*[468], the applicant, a Turkish citizen, at the material time had been living in Romania for more than 5 years, and was married to a Romanian citizen. In 2005 he was declared an undesirable person and was banned from Romania for 15 years because there was sufficient intelligence that he was engaged in activities capable of endangering national security. The Court reached the same conclusion as in the case above, finding a violation of Article 1 of Protocol No. 7, and stipulated that in the event of expulsion beyond the protection afforded to them especially under Articles 3 and 8, in conjunction with Article 13 of the Convention, aliens benefitted from the specific guarantees provided by Article 1 of Protocol no. 7, they being only applicable to foreigners residing lawfully in a State that had ratified the protocol. The first guarantee afforded to persons covered by this article provides that they shall not be expelled except "in pursuance of a decision reached in accordance with law". Since the word "law" refers to the domestic law, the reference to it, like all the provisions of the Convention, concerns not only the existence of a legal basis in domestic law, but also the quality of the law in question: it must be accessible and foreseeable and also afford a measure of protection against arbitrary interferences by the public authorities with the rights secured in the Convention. In the instant case, the Court reiterates that Emergency Ordinance on the rules governing aliens in Romania, which formed the legal basis for the applicant's deportation, did not afford him the minimum guarantees against arbitrary action by the authorities.

[468] Case of *Kaya v. Romania*, judgment of 12.10.2006, final on 12.01.2007. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77454 (Accessed on 26.04.2015).

In a more recent case, *Nowak v. Ukraine*[469], the applicant, a Polish citizen, in 1998 was charged with assaulting a certain A.B. On an unknown date criminal proceedings against him were instituted. In January 2004 the applicant left Poland for Ukraine. Before leaving, he informed the court that he could be contacted at a correspondence address in Przemyśl. He also telephoned the court several times to ask about progress on his case. He was informed that the proceedings had been stayed. In March 2004 he started working in Lviv, Ukraine. In June 2004 his residence registration was extended until 20 May 2005 and at the same time the applicant was reprimanded by the administrative court for submitting his registration documents late. Meanwhile, on 12 February 2004 Szczecin District Court in Poland remanded the applicant in custody for three months for failure to comply with a summons. On 20 January 2005 the applicant went to a police station in Lviv to report that his friend's car had been stolen. Police checked his passport, verified his personal details and locked him up in a cell. When he asked for the reasons for his arrest he was told that he was an "international thief". He was subsequently questioned by officers and on 24 January 2005 Ukrainian police informed him about the decision to expel the applicant from Ukraine with a three-year ban on re-entry.

Before the Strasbourg Court, the applicant alleged *inter alia* the violation of Article 1 of Protocol No. 7 arguing that the respondent Government had failed to honour its obligation not to expel him without legal justification.

Relying on conclusive evidence in the case, the Court noted that the decision to expel the applicant was apparently served on the applicant at the time of his departure, in a language he did not understand it, and in circumstances preventing him from being represented or able to submit any arguments against his expulsion. Moreover, the Government did not provide explanations or documents to prove that the procedure required by Article 1 of Protocol No. 7 had been provided for by law. In such circumstances, the Court found a violation of Article 1 of Protocol No. 7. It stated that despite the High Contracting Parties' discretionary power to decide whether to expel an alien present on their territory. It must be exercised in such a way as not to infringe the rights under the Convention of the person concerned.

Negative obligations arising from Article 4 Protocol 7 (right not to be tried or punished twice): this Article extends the list of guarantees indispensable for a fair criminal trial, and establishes a person's right not to be tried or punished twice for the same offense, while at the same time prescribing Contracting States the ***negative obligation not to admit holding the offender liable to double prosecution and/or criminal punishment for the same offense***.

[469] Case of *Nowak v. Ukraine*, judgment of 31.03.2011, definitive din 15.09.2011. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104289 (Accessed on 26.04.2015).

For example, in the reference case of *Sergey Zolotukhin v. Russia*[470], the applicant complained before the European Court that had been punished twice in connection with the same offense, his actions being first qualified as an administrative offence of minor disorderly acts, and later as a criminal offence of disorderly acts, including resisting a public officer dealing with a breach of public order. The European Court enunciated as to the first penalty, that the nature of the offense of "minor disorderly acts", together with the severity of the sentence, made the applicant's conviction to be covered by the "criminal proceedings" within the meaning of Article 4 of the Protocol No. 7. As for the principle of *non bis in idem*, the Court relied on the existence of several approaches to the question of whether the offenses for which an applicant had been judged were the same. The first approach focuses on the "same conduct" on the applicant's part, irrespective of the classification in law given to that conduct (*idem factum*). The second approach also proceeds from the premise that the conduct by the defendant which gave rise to prosecution is the same, but posits that the same conduct may constitute several offences (*concours idéal d'infractions*) which may be tried in separate proceedings. A third approach puts the emphasis on the "essential elements" of the two offences. Nevertheless, the Court considers that Article 4 of the Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offense" in so far as it arises from identical facts or facts which are substantially the same.

In that case, the applicant was convicted initially under the Code of Administrative Offences and subsequently under the Criminal Code of the Russian Federation, and two different penalties were established for the same offense, i.e. for disorderly acts, including resisting a public officer dealing with a breach of public order (police officer), whereas the criminal charges referred to exactly the same conduct as the administrative charges, which had comprised essentially the same facts. Given the above, the Court considered that there had been a violation of Article 4 Protocol No. 7 to the ECHR, and the respondent State failed to fulfil its obligations imposed under that article.

In this context, the follow-up case of *Ruotsalainen v. Finland*[471] is notable: the applicant used to drive his pick-up with a more leniently taxed fuel than diesel oil, without having paid due additional tax. Consequently, criminal proceedings were instituted against him, and as a result thereof he was fined some EUR 120 for committing a petty tax fraud. Later, in separate administrative proceedings, the applicant was issued with a fuel fee debit in amount of EUR 15,000, representing the difference between the fuel fees paid and the ones he should have paid

[470] Case of *Sergey Zolotukhin v. Russia*, judgment of 10.02.2009. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91222 (Accessed on 26.04.2015).
[471] Case of *Ruotsalainen v. Finland*, judgment of 16.06.2009, final on 16.09.2009. HUDOC database. [online]:http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92961 (Accessed on 26.04.2015).

according to the law, multiplied by three because of his bad faith. The applicant's complaint against the administrative sanction was rejected by an irrevocable decision.

As to the violation of the principle *non bis in idem*, the Court held that the second set of proceedings against the applicant had had no criminal nature in national law. However, since the fuel fee collected had trebled, it found that it had been imposed by a rule whose purpose was not only compensatory but also deterrent and punitive. The Court considered that this established the criminal nature of the offence. In these circumstances, in order to verify to what extent the provisions of Article 4 of Protocol No. 7 to the Convention were respected, the Court analysed whether the facts of the two proceedings had been identical or not. However, from this perspective, it was established that the criminal sanction was imposed because the applicant had used fuel more leniently taxed than diesel oil to avoid the diesel fee, and the penalty was trebled for the same reason. In those circumstances, the Court concluded that the applicant had been fined twice for the same offense, contrary to Article 4 of Protocol No. 7.

5. CASE STUDIES: FULLFILLING POSITIVE AND NEGATIVE OBLIGATIONS IN CIRCUMSTANCES OF ARMED CONFLICTS

5.1. Support for separatist regimes

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 occur not only from the States, but also from 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[472]. 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 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

[472] Case of *Prosecutor v. Duško Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 02.10.1995. § 70. [online]: http://www.icty.org/x/cases/tadic/acdec/en/51002.htm (accessed on 25.06.2014)

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[473]. We cannot agree with this approach because the instruments of the international human rights law are applicable at any time[474]. 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[475] 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, whereas the notion of jurisdiction is not limited to the European space literally. 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

Case of Cyprus

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

[473] 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]: http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2975009_11122013&language=lang&c=&py=2013 (accessed on 25.01.2015)

[474] 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 25.01.2015)

[475] 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 25.01.2015)

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*)[476], 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[477]. Consequently, the application of Article 1 of the

[476] Case of *Loizidou v. Turkey*, judgment of 18 December 1996. HUDOC database. [Online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58007 (Accessed on 25.01.2015).
[477] 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)

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 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*"[478]. 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 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

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

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 to Professor Cassesse's remark[479], 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 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"[480].

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 Empire's 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

[479] Cassese A., *op. cit.*, p. 658.
[480] Case of *Loizidou…*§ 56.

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*[481], 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 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 case of *Bankovic*,[482] 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.

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[481] 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 25.01.2015)

[482] Case of *Bankovic and Others v. Belgium and Others*, decision of 12 December 2001. HUDOC database. [Online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22099 (Accessed on 25.01.2015).

This principle is reflected in the inability to "divide and adapt" the rights and freedoms enshrined in the Convention.

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, 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 § 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 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*[483], awarding for the first time compensation for pecuniary damage in an inter-

[483] 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 25.01.2015)

State case. In the present case the Court awarded EUR 30 million as compensation for non-pecuniary damage suffered by the families of missing persons and EUR 60 million for non-pecuniary damage suffered by the Greek Cypriots enclaved in the Karpas peninsula. It is curious that the judgment binds the respondent State (Turkey) to pay these amounts to the applicant State (Cyprus), and not to the actual victims of violations found. This is a common technique for the institution of the international responsibility of States, but not for the human rights litigations. 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[484]. 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 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*[485]*; Olymbiou*[486]*; Strati*[487]*; Saveriades*[488]*; Gavriel*[489]*; Solomonides*[490]*; Kyriakou*[491]*; Alexandrou*[492] 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 connection between the actions of Turkish and the TRNC military. Under substantive aspect, especially in respect of Article 1 of Protocol No. 1 to

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[484] Sârcu-Scobioală D., Actul jurisdicțional internațional. Chișinău: Elan Poligraf, 2013, p.78-80.

[485] 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 25.01.2015)

[486] 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 25.01.2015)

[487] 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 25.01.2015)

[488] 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 25.01.2015)

[489] 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 25.01.2015)

[490] 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 25.01.2015)

[491] 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 25.01.2015)

[492] 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 25.01.2015)

the Convention, the Court found the violation of the negative obligation, i.e. not to interfere with the right to property.

The Court also reached a similar conclusion in the case *Varnava* case[493], 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[494]. 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.

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. 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

[493]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 25.01.2015)
[494] *Idem*, § 150.

inaction in respect of the aforementioned obligation amounts to inhuman treatment for the relatives of the disappeared people, whose fate is unknown[495].

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 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[496]. 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"[497]. During the examination of the merits of the case, the issue of jurisdiction did not become the object of dispute, and, therefore, the High Court did not initiate the interpretation of the italicized

[495] *Idem*, § 202.
[496] 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 25.01.2015)
[497] 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 25.01.2015)

phrase of above. The test of effective control *per se* is not applicable in this case for the reasons analysed 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[498], 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*[499], 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 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.

More specific circumstances can be seen in the case of *Andreou v. Turkey*[500]. 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, and the applicant was near the Greek-Cypriot checkpoint, the

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[498] 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 25.01.2015)

[499] 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 25.01.2015)

[500] 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 25.01.2015).

Turkish jurisdiction had to be recognized based on the same overall control criterion. 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*.

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.

The case of the Transdniestrian region

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[501], 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 § 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". 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. Thus, the Court took the approach analogous to that in the case of *Loizidou* and *Cyprus v. Turkey*.

In the *Ivanţoc* case[502], similarly to *Ilaşcu* in substantial terms and in respect of the obligations of the Russian Federation, the Court reached a similar conclusion. 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[503].

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, whereas the burden of proving the contrary lied on the respondent Government. 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,

[501] Case of *Ilaşcu and Others v. Moldova and the Russian Federation*, judgment of 08.07.2004. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61886 (Accessed on 25.01.2015).
[502] Case of *Ivanţoc and Others v. Moldova and the Russian Federation*, judgment of 15.11.2011. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107480 (Accessed on 25.01.2015).
[503] Case of *Catan and Others v. Moldova and the Russian Federation*, judgment of 19.10.2012. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114082 (Accessed on 25.01.2015).

guaranteed by Article 2 of Protocol No. 1, by closing educational institutions using the Latin alphabet in schools.

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 organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention. 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[504]. 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[505]. This fact should not be interpreted as lack of jurisdiction as such. In the Ilaşcu case, the responsibility of the respondent States 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.

[504] Case of *Ivanţoc*…§ 111; Case of *Ilaşcu*…§ 448, 453; Case of *Catan*…§ 148.
[505] Case of *Ivanţoc*…§111; Case of *Catan*…§148.

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)[506]. 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 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 § 1 of the ECHR by Serbia in respect of the actions of the Kosovo court of law[507]. 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

[506] 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)

[507] 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)

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.

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[508].

Abkhazia and South Ossetia

Georgia can be considered the most "active" applicant before international courts in the cases against the Russian Federation. The ICJ has recently adopted the decision to strike off its list of cases the application where Georgia had claimed that Russia had violated the provisions of the Convention on the Elimination of All Forms of Racial Discrimination on the territories of Abkhazia and South Ossetia, 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[509].

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[510]. The second group of applications refers directly to the armed conflict in August 2008, as a result of which there were submitted over 3300

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[508] 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 25.01.2015); 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 25.01.2015)

[509] Case *Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. the Russian Federation)*, judgment of 01.04.2011 on the preliminary objections. [Online]: http://www.icj-cij.org/docket/files/140/16398.pdf (Accessed on 25.01.2015).

[510] 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 25.01.2015)

individual applications against Georgia and the Russian Federation due to the hostilities on both sides[511], and two inter-State applications. The last one, referring to the detention of four underage Georgian national by South Ossetian authorities was struck out due to their release[512].

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[513].

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 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[514].

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,

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[511] 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 25.01.2015)

[512] 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 25.01.2015)

[513] 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 25.01.2015)

[514] 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 25.01.2015). PACE Resolution No. 1647(2009) on the implementation of Resolution 1633 (2008). [online]: http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=17708&lang=en (accessed on 25.01.2015)

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[515] the Grand Chamber had already ruled in the *Al-Skeini* case[516], 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[517]. 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 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

[515] 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 25.01.2015)

[516] Case of *Al-Skeini and Others v. the United Kingdom*, judgment of 07.07.2011. § 137. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606 (accessed on 25.01.2015).

[517] "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 25.01.2015)

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, but rather 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.

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[518] and PACE[519], 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.

Subsequently, on 13 June 2014 Ukraine lodged before the Court the second inter-State application against Russia no. 43800/14[520], alleging violation of Articles 2, 3, 5, 8 and Article 2 of Protocol 4 (freedom of movement) claiming that unknown agents of the secessionist regimes had kidnapped Ukrainian orphans and had later transported them illegally to the Russian Federation. On 9 July 2014, Ukraine lodged a third application against Russia, no. 49537/14, complaining about the detention in Simferopol of Hayser Dzhemilov (the son of a Ukrainian Member of Parliament). Through the separate application no. 49522/14, the official Kiev requested interim measures in that case.[521]

In addition to the mentioned inter-State applications, the Registry of the Court has received more than 160 individual applications (information up to 26 November 2014) lodged

[518] 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 25.01.2015)

[519] 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 25.01.2015)

[520] Press release issued by the Registrar of the Court on 26.11.2014 on the pending cases concerning Crimea and Eastern Ukraine. [Online]: http://hudoc.echr.coe.int/webservices/content/pdf/003-4945099-6056223 (Accessed on 25.01.2015).

[521] Factsheet of the Registry of the Court on armed conflicts, October 2014. [Online]: http://echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf (Accessed on 25.03.2015).

against either Russia or Ukraine or both countries due to alleged violations of human rights in Crimea and eastern Ukraine.

Under substantive aspect, the worst violations of the Convention may involve primarily the collateral damages caused by acts of war[522] (both the lives of civilians and their property) and investigations in that respect, as well as kidnapping and detention of civilians (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; 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[523].

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 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

[522] Report on the human rights situation in Ukraine of 15.06.2014. Office of the United Nations High Commissioner for Human Rights. [online]: http://www.ohchr.org/Documents/Countries/UA/HRMMUReport15June2014.pdf (accessed on 25.01.2015)

[523] Report on the human rights situation in Ukraine of 15.06.2014. Office of the United Nations High Commissioner for Human Rights. [online]: http://www.ohchr.org/Documents/Countries/UA/HRMMUReport15June2014.pdf (accessed on 25.01.2015)

inapplicable in these particular circumstances because of lack of direct military involvement of the Russian Federation through its military contingents.

5.2. Situation in the former Yugoslavia

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*, 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[524]. 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.

[524] Case of *Banković…*§ 54.

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 account any relevant rules of international law when examining questions concerning its jurisdiction in particular[525], 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[526]. 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[527]. 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.

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

[525] *Idem*, § 57.
[526] *Idem*, § 63-65.
[527] *Idem*, § 75.

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 *Ilaşcu* 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[528].

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"[529].

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 that case, however, the Court raised

[528] Case of *Ilaşcu*…§ 448.
[529] Case of *Banković*...§ 80.

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[530]. 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 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[531]. 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

[530] Case of *Loizidou*, judgment on the preliminary objections…§ 93.
[531] 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)

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 § 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 jurisdiction[532], the access to justice only extended to procedural aspect, without covering the substantive one[533].

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 really controversial, whereas 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 the *Markovic* case.

The Grand Chamber developed a different approach in its decision in the cases of *Behrami* and *Saramati*[534]. The applicants invoked the responsibility of the States, whose high-ranking military officers, by their acts, violated the Convention while 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

[532] *Idem*, §55.
[533] *Idem*, §115.
[534] 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)

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"[535]. 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*[536] and *Nada*[537] 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

[535] *Idem*, §138.
[536] 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)
[537] 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)

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 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[538]. 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[539].

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 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".[540]

5.3. Actions of foreign military forces in Iraq

[538] *Idem*, §172.
[539] Case of *Bosphorus*…§165-166.
[540] Article 30 § 3 (c) of the Vienna Convention on the Law of Treaties

The European Court of Human Rights has developed a specific case-law in respect of the extraterritorial applicability of the European Convention on Human Rights in the cases concerning the actions of the coalition forces in Iraq after their 2003 intervention. In particular, the Court's findings and conclusions concerned the activity of the deployed military contingents of the United Kingdom and the Netherlands.

In that context, it is noteworthy that 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[541].

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, 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, 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[542].

Jurisdiction of Great Britain in Iraq

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

[541] See in this respect the case of *Bankovic and Others v. Belgium and Others*, decision of 12.12.2001. HUDOC database. [Online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22099 (Accessed on 20.02.2015).
[542] Case of *Al-Skeini and Others v. the United Kingdom*, judgment of 07.07.2011. § 137. HUDOC database. [online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606 (accessed on 20.02.2015).

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 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*"[543]. 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 analysed 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"), 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 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

[543] *Idem*, § 137.

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[544]. 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[545]. The third applicant – *Shmailawi* – acted on behalf of his wife and son[546]. All three lived in the building of the Institute of 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[547]. The fifth applicant, his father – *Kareem Ali* – was last seen being beaten by British soldiers; he was later found dead in a river [548]. 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[549].

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.

[544] *Idem*, § 34.
[545] *Idem*, § 39.
[546] *Idem*, § 43.
[547] *Idem*, § 47.
[548] *Idem*, § 55.
[549] *Idem*, § 63.

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 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[550]).

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*

[550] Case of *Bankovic and Others v. Belgium and Others*, decision of 12 December 2001. HUDOC database. [Online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22099 (Accessed on 20.02.2015).

regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies"[551].

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.

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 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*[552], similarly to that above, refers to the violation of Article 5 § 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,

[551] Case of *Al-Skeini*…Separate Opinion of Judge Bonello.
[552] 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)

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 § 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 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 § 1 of the Convention.[553] 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 Security Council Resolution 1546, adopted on 8 June 2004[554], 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

[553] 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.
[554] Resolution of the UN Security Council no. 1546 (2004) of 08.06.2004. In: United Nations Official Documents. [online]: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1546(2004) (accessed on 20.02.2015).

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 § 1 of the Convention.

Another case – *Al-Saadoon and Mufdhi*[555] – 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 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[556].

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[557]. 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

[555] 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 20.02.2015)
[556] *Idem*, § 144
[557] 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 20.02.2015)

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.

The Court faced new challenges in the case of *Hassan v. the United Kingdom*[558]. The applicant complained under Articles 2, 3, and 5 of the Convention in respect of his brother, Tarek 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[559]. The situation is more difficult for the second phase, i.e. proving causality between Tarek'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. The absence of evidence equally refers to the causality between the actions of the British soldiers and Tarek's death[560].

As to the jurisdiction, the Court rejected the objections of the British Government and concluded that the applicant's brother had been in the boundaries of the UK's jurisdiction under

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[558] 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 20.02.2015)
[559] *Idem*, § 48.
[560] Case of *Hassan*, § 62-63.

Article 1 of the Convention. It further disregarded the effective control criterion in favour of the *State agent authority* one, by pointing out that Tarek Hassan had been placed under the authority and physical control of the British soldiers. Thus, the Court stated that the United Kingdom had held the authority and control over Tarek from the moment of his capture until his release[561].

Therefore, the jurisdiction of the US over the detention facilities was disregarded, and as a result the principle of monetary gold was ignored, which constituted a specific limitation of the ECHR's extraterritorial application: the Court could not try a respondent State without asserting on the liability of a third party State absent to the proceedings (in the present case the US, exercising effective control over the prison where Tarek had been detained). 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 Tarek's status (of a combatant or civilian) to be determined under the Geneva Convention (III)[562], given the fact that the latter allows temporary detention of individuals to determine their status. Thus, as to respondent State, after Tarek'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 § 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 Tarek'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[563]. Moreover, for such an interpretation of Article 5 no derogation is necessary, in the light of Article 15[564].

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[561] *Idem,* §§ 78, 82.
[562] 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 20.02.2015)
[563] Case of *Hassan*…§§ 97, 105, 106.
[564] *Idem,* § 104.

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 § 1 thereof. Thus, the Court did not merely interpret the 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 § 3 (c) of the Vienna Convention on the Law of Treaties, which allowed the interpretation of Article 5 in the light of the humanitarian law. However, the Court invoked a more important argument following from Article 31 § 3 (b), 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. 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, and it finally decided with a majority of 13 votes to 4 that Article 5 (§§ 1-4) of the ECHR had not been violated, and thus Tarek Hassan's detention by British authorities had not been arbitrary.

In this context, it must be pointed out that in certain circumstances the content of the treaty may be indeed modified by the practices of States; however, the existence of the Contracting Party's intention seems to be dubious. Moreover, whenever States apply the Convention, the Court's case-law is always subject to an eventual adjustment. In any event, the respective judgment will have major repercussions on the application of the ECHR in circumstances of armed conflict.

Dutch jurisdiction within Iraqi territory

In the same context of the foreign military in Iraq, referring to the actions of the Dutch contingent, another recent case, *Jaloud v. the Netherlands*[565], has to be mentioned. The Grand Chamber of the Court ruled on the jurisdiction of the Netherlands for the killing of the Iraqi citizen Azhar Jaloud, the applicant's son, by Dutch soldiers in an incident at the vehicle checkpoint located in the town of Ar Rumaytah, in the province of Al-Muthanna, south-eastern Iraq, region under the control of the occupant military forces.

The applicant complained about the respondent Government' failure to comply with the positive obligations arising from Article 2 of the Convention in its procedural aspect, namely effective investigation into killing the victim, for the following reasons: the incident had been investigated solely by the members of the Royal Military Constabulary unit deployed in Iraq, under the direct control of the Netherlands battalion commander, without the involvement of a public prosecutor; the subsequent decisions of the Dutch prosecutor and of the Military Chamber

[565] Case of *Jaloud v. the Netherlands*, judgment of 20.11.2014. HUDOC database. [Online]: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-148367 (Accessed on 20.02.2015).

of the Arnhem Court of Appeal (Netherlands) not to prosecute the offender Lieutenant A. for his actions, which most likely had caused the death of Jaloud Azhar, had been based entirely on data included in the summary report drafted by the Royal Military Constabulary; no statements had been taken from the Iraqi military personnel who had witnessed the incident, and the statement of the only civilian witness available as recorded by the Royal Military Constabulary investigators had been extremely cursory and inconsistent with the statement which he had made later the same day to an Iraqi official; Lieutenant A. had not been questioned for the first time until seven hours after the incident, and had not been separated from the other witnesses during that period, which enabled him to have ample opportunity to discuss the incident with the other witnesses and to influence them; Lieutenant A. stated that he had been able to obtain from the Iraqi deputy commander a list of the names of the Iraqi personnel who had fired their weapons and the corresponding number of rounds fired towards the victim's car, which had proved the offender's real possibilities to manipulate evidence; the list obtained by Lieutenant A. had not been added to the file of the Royal Military Constabulary unit; the Royal Military Constabulary had held the victim's body for some hours without, yet no autopsy was performed during that period. The body was transferred to an Iraqi civilian hospital, where an autopsy was carried out in the absence of Dutch officials, the autopsy report being short and without details; the victim's family members had been neither involved in the investigation nor informed about its results.[566]

The European Court first examined the question of jurisdiction of the Netherlands in the present case. The respondent Government argued that they had never had the "occupying power" in terms of international humanitarian law. Only the United States and the United Kingdom were "occupying powers", having been so designated by United Nations Security Council. Furthermore, the Netherlands did not assume in Iraq any of the public powers normally in the territory occupied as a result of the intervention led by Washington and London. Also, although the Dutch contingent had had to be involved in law enforcement in Iraq, at the time of the events in question and Jaloud Azhar's death that responsibility had passed into the hands of Iraqi authorities. The victim's death occurred near a checkpoint subordinated to Iraqi authorities not controlled by Dutch soldiers, who despite being close to it, had not exercised any official authority. Netherlands forces had not at any time exercised physical authority or control over the victim, since he had never been in their custody, and they had had no legal powers to do so. The fact of a serviceman firing at a person, even assuming it could be established that the shot was fatal, was not in itself sufficient for jurisdiction in this sense to arise. Finally, even assuming that at the relevant time the Netherlands exercised effective control over the vehicle checkpoint, the

[566] *Idem*, §§ 105-108.

area in question was so limited that there would no longer be any meaningful difference between "effective overall control of an area" and "State agent authority and control".[567]

In this context, the arguments of the intervening British Government as to the jurisdiction of the Netherlands are noteworthy: If the Court were to conclude that the Netherlands had jurisdiction in the present case, there was a "real risk" that Contracting States might in future be "deterred from answering the call of the United Nations Security Council to contribute troops to United Nations mandated forces, to the detriment of the United Nations Security council's mission to secure international peace and security[568].

In any case, the findings of the Court in this respect remain the quintessence of the case. The European Judges stressed that for the purposes of establishing jurisdiction under the Convention, the Court took account of the particular factual context and relevant rules of international law, pointing out that the status of "occupying power" within the meaning of Article 42 of the Hague Regulations, or lack of it, was not *per se* determinative. Furthermore, the fact of executing a decision or an order given by an authority of a foreign State was not in itself sufficient to relieve a Contracting State of the obligations which it had taken upon itself under the Convention. The respondent Party had not been therefore divested of its "jurisdiction", within the meaning of Article 1 of the Convention, solely by dint of having accepted the operational control of the commander of a United Kingdom officer. Additionally, the Court noted that the Netherlands had retained "full command" over its military personnel deployed in Iraq. Although Netherlands troops had been under the command of an officer from the United Kingdom, the Netherlands assumed responsibility for providing security in that area, to the exclusion of other participating States, and retained full command over its contingent there. It was not decisive that the checkpoint had been nominally manned by Iraqi personnel, since under Coalition Provisional Authority Order those soldiers in fact had been supervised by, and subordinate to, officers from the Coalition forces.

Referring to the case and the death of the applicant's son, the Court pointed out that Azhar Jaloud had been killed as he was sitting, as a passenger, in the car which was being shot at during its passage through the vehicle checkpoint controlled by military personnel directly subordinated to the Dutch Army officers; hence, the Kingdom of the Netherlands exercised its jurisdiction in the sense of Article 1.

Therefore, the Court was not explicit enough to reveal the criteria for determining the jurisdiction of the Netherlands in this case (effective control/State agent authority). Given the findings elucidated above, the Court apparently applied the criterion of effective control

[567] Case of *Jaloud*… §§ 112-120.
[568] Idem, §§ 121-126.

exercised by the Dutch soldiers on Iraqi security forces and, implicitly, over the vehicle checkpoint where the victim had been killed. However, bearing in mind the first conclusions of the Court in this respect, namely those relating to the fact that the respondent State has retained authority of command over its military personnel deployed in Iraq, and enjoyed exclusive competence in determining the admissible limits and rules on the use of force, including as to Lieutenant A., whose actions most likely had caused the death of Azhar Jaloud, one can also identify some elements characteristic to the criterion of State agent authority.

It is noteworthy that in this case the Court had to motivate, in a more specific way than in the previous case-law, its conclusions on the jurisdiction of the Netherlands because in the cases analysed above, the respondent State – the United Kingdom – was considered from the outset as an occupying power within the meaning of the rules of warfare, which had exercised effective control over Iraqi territories under its occupation after the intervention in March 2003.

As to the merits of the applicant's claims, i.e. the ineffective investigation into the death of his son, and therefore the violation of Article 2 of the ECHR in its procedural aspect, the European Judges noted that the Dutch authorities had had the obligation to investigate the circumstances of that death anyway, although they could not establish with certainty that the impugned Dutch officer had killed the victim Azhar Jaloud.

Regarding the independence of the investigation, the Court emphasized that in the framework of the investigation into death, the independence and effectiveness of the investigation can be questioned if the investigators and the investigated maintained close relations between them. However, in the present case there were not sufficient grounds for the Court to consider that the independence of the ones investigating the incident had been undermined.

As for the effectiveness of the investigation, the discrepancies between the civil witness's first statement before the Dutch unit and the second statement before the Iraqi official, as invoked by the applicant, might have justified doubts as to the reliability of either statement, as recorded, but the Court could not conclude on that ground alone that the investigation had been inadequate under Article 2 of the ECHR. As to the delay in questioning Lieutenant A., the judges found the mere fact that appropriate steps had not been taken to reduce the risk of such collusion to amount to a shortcoming in the adequacy of the investigation, although there had been no evidence that the officer had tried to tamper with evidence. From the case file it follows that no precautions seemed to have been taken to prevent this from happening. With reference to the argument that Lieutenant A. obtained the list of the names of Iraqi personnel who had fired their weapons at the car with the victim, the Court stated that the fact that he had been able to obtain this list did not in itself raise any issue because at that moment he had been the highest-ranking

Coalition officer on the spot and moreover responsible not only for the Netherlands patrol but also for the Iraqi personnel present. It follows that it was Lieutenant A.'s duty to take measures aimed at facilitating the investigation. However, this list, once it was available, ought to have been added to the file. The information which it contained might have proved useful, especially in comparison with the statements taken from the Iraqi members themselves. The Court found that the investigation had been inadequate on this point. As regards the applicant's argument about the inefficiency of the autopsy, the Court concluded that nothing was known of the qualifications of the Iraqi pathologist who had performed it, whereas the report itself had been extremely brief, it had been lacking in detail and there had not been even any pictures included. Moreover, it did not appear that any alternative arrangement had been considered for the autopsy. For example, it did not appear unlikely that either or both of the Occupying Powers, or perhaps another Coalition power, had had facilities and qualified personnel available. As a result, both the conditions for conducting the autopsy and the final report had revealed deficiencies in respect of the investigation. As to the bullet fragments found in the victim's body, the Court found it unacceptable that they had not been stored and examined in proper conditions in case of a killing, thus sharing the applicant's arguments in this regard. However, ruling on the latter argument – the alleged failure to notify relatives about the development and results of the investigation – the Court found no indication of deficient proceedings because the father had been granted access to the investigation file and the materials appended thereto, since he even had sent copies of the relevant materials to the Court. Thus, from this point of view, the investigation had not been inadequate.

In conclusion, the Court was prepared to make reasonable allowances for the relatively difficult conditions under which the Netherlands military and investigators had had to work. In particular, it had to be recognised that they had been engaged in a foreign country which had yet to be rebuilt in the aftermath of hostilities, whose language and culture had been alien to them, and whose population had witnessed the incident as a result of which the applicant's son had died. Nevertheless, the Court must conclude that the investigation into the circumstances surrounding Azhar Jaloud's death failed, for the following reasons, to meet the standards required by Article 2 of the Convention: firstly, documents containing important information were not made available to the judicial authorities and the applicant; secondly, in that no precautions were taken to prevent Lieutenant A. from colluding, before he was questioned, with other witnesses to the events; thirdly, in that no attempt was made to carry out an appropriate autopsy, and in that the resulting report was inadequate; and fourthly, in that important material

evidence that could enable to elucidate the details of the death – the bullet fragments taken from the body – was mislaid in unknown circumstances.[569]

[569] Case of *Jaloud*… §§ 226-228.

CONCLUSIONS

The present monograph is intended to approach the theoretical and practical foundation of the institution of positive and negative obligations of the Member States to the European Convention on Human Rights. This study led has us to the following ***conclusions***:

1. Although the European Convention on Human Rights neither establishes *in terminis* nor enumerates the obligations imposed on the States parties, the case-law sources, substantiated in the judgments and decisions taken by the Strasbourg Court, represent a direct foundation of specific positive and negative obligations incumbent to the States, and they serve as a practical legal basis for determining the essence, limitations and peculiarities of the obligations. Only by studying the rationales of the European Judges on the alleged violations of rights and freedoms enshrined in the European Convention, the obligations may be clearly defined on the basis of some very generally formulated text of the respective international instrument with regional vocation, and certain aspects thereof can be delimitated.

2. The principle of the human rights universality implying the supremacy of rights to the greatest extend requires the world States to guarantee the effective exercise of human rights and freedoms inherent to human value not just of their own nationals and persons under their territorial jurisdiction, but also of the aliens under their effective control or authority beyond their territorial boundaries, by complying with positive and negative obligations of protection. Exercising extraterritorial jurisdiction inevitably involves certain shortcomings of both legal and practical nature; however, the latest rationales of the magistrates of the main courts in the world show that the elimination of these gaps is an essential task on the Member States since the *territorially or personally limited protection* of certain rights and freedoms does not respond to the progress achieved in the international human rights law and the international humanitarian law, whereas the primary purpose of all State actors is the *indisputable protection* of those rights.

3. Despite not being a novelty of the Strasbourg Court, the extraterritorial obligations of States have acquired a special expression in its case-law, and the regulatory and jurisprudential approaches of the competent bodies, other than the regional European protection systems built under the ECHR, have prepared a favourable ground for the European Court Judges, who have been more and more tempted in the recent years to establish the jurisdiction and liability of a respondent State for the violations of human rights and fundamental freedoms committed beyond the boundaries of the Council of Europe, by applying the European Convention extraterritorially.

4. From the point of view of the European Court, the notion of jurisdiction represents an admissibility criterion. However, it is different from the classical admissibility

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 in respect of the violation invoked; and whether the victim had a right correlative to the respective obligation. Relying on jurisdiction, the Court arrives at the conclusion whether the applicant can claim a violation. In terms of procedure, the question of the respondent State's jurisdiction can be solved at the stage of examining both the admissibility and the merits, depending on the complexity of the circumstances, and the challenges the Court might face.

5. Relying on the Court's case-law on the extraterritorial application of the Convention, the certain absolutely necessary elements may be identified: *the extraterritorial act, the State jurisdiction, and the jurisdictional link between the extraterritorial act and the interference inflicted*. The presence of all the elements is necessary for the engagement of the extraterritorial responsibility of States. 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. 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.

6. In the European Convention on Human Rights, as well as in the Court's case-law, there were developed certain limitations of a general character (derogation clause, jurisdictional immunity) and of a specific nature (legal space, colonial clause) in respect of the extraterritorial application of the ECHR. The monetary gold principle enshrined in the case-law of the International Court of Justice is also added thereto. Whenever the Court discovers at least one of these limitations, 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.

7. The case-law enabled that for a series of special cases of extraterritorial application of the European Convention to be identified, referring to the extraterritorial activities of a State's security services, States' responsibility for acts with extraterritorial effect, the activity of diplomatic missions abroad and diplomatic relations between States, these implying certain peculiarities in engaging States' extraterritorial responsibility.

8. Although the concept of positive obligations has not been expressly stated by the authors of the European Convention in the text thereof, it was formulated by the Strasbourg Court in its case-law on the basis of evolutionary interpretation principle, and is currently viewed as a legal institution inherent in the ECHR law. Paradoxically, case-law of the European Court on this subject is much richer and broader than compared to the case-law established in respect of negative obligations. In fact, the process of the appearance of new positive obligations has not been completed: depending on the circumstances of the cases lodged before the Court, the European Court's Judges can formulate new for obligations which could be later imposed on the Member States.

9. The careful and detailed analysis of the Strasbourg Court's case-law demonstrates that the positive obligations under the *right to life* and *the prohibition of torture* may require the following specific actions from Member States: protection of the right to life of the individual; planning and controlling the operations of the security forces; protection of individuals against threats from third parties; providing medical care; obligation to conduct an effective investigation; ensuring safeguards against ill-treatment and abuse, providing acceptable conditions of detention; providing prisoners with adequate medical treatment; providing physical and moral integrity of the individual in the custody of authorities; investigating the allegations of ill-treatment by state agents.

10. As to the *qualified* rights and freedoms, the ECHR requires the Signatory States to take specific measures referring to: official acknowledgment of the choice of name; acknowledgment of ethnic identity; providing access to official information; establishing paternity/maternity; securing physical, moral, and sexual inviolability of persons; official acknowledgment of transsexuals; formalizing family relationship between parents and children born out of wedlock; separation of spouses; consulting biological parents in case of children being taken in state custody and/or adoption; re-unification of children with their biological parents; providing facilities for handicapped or ill individuals; admission of non-national family members in case of decisions on immigration; protection against pollution; protection of personal data; protection of individual image; protection of telephone communications; protection of health information; protection of written correspondence against censorship; ensuring the State's neutrality and impartiality; formalising a religious cult; protection against incitement to violence and hatred against a religious community; ensuring the freedom to manifest religion at work; promoting alternative service for those whose religious beliefs prohibit military service; ensuring the media pluralism; providing of information by the State; protection of freedom of expression of the individual from other people's threats; protection of

protesters attending a peaceful demonstration; protection of counter-demonstrators; ensuring free activities for political parties; protection of trade unions.

11. The *procedural guarantees* enshrined by the ECHR establish the following positive obligations for the States: adopting effective measures to protect persons from the risk of disappearing while in State custody; the investigation of complaints concerning the disappearance of individuals in State custody; informing promptly the arrested persons about the reasons for their detention; bringing promptly the detainee suspected of committing a crime before the judge; affording the detainees the right to redeem the possibility of bail, unless there are reasons of public interest justifying their detention until the court proceedings; ensuring the access of prisoners to a court to examine the legality of detention; ensuring the right of access to court; ensuring a fair and public trial in civil and criminal cases; examination of civil and criminal cases within a reasonable period of time; ensuring the independence and impartiality of the court; informing promptly the accused in detail and in a language which he understands of the nature and reasons of the accusation against him; affording the defendant the time and facilities necessary for his defence; providing the accused with free assistance of an attorney; providing the accused with the free assistance of an interpreter unless he knows the language of the criminal proceedings; guaranteeing the right of the accused to question witnesses; providing an effective domestic remedy concerning the redress for the violation of the rights and freedoms guaranteed by the European Convention; providing an effective domestic remedy to resolve complaints of unjustified delay of civil and criminal proceedings; providing an effective remedy to solve complaints about inefficient investigation.

12. Conceptually, the negative obligation is the duty of the State (Government officials) to refrain from actions that impede the realization of a right guaranteed by the Convention and its Protocols. This statement must be related to the fact that the Convention contains numerous Articles providing, by setting clear boundaries, the possibility of the restriction of rights, as long as a democratic society benefits from these restrictions. The situations allowing for certain exceptions, interference or limitations in the exercise of a right have to be justified and expressly provided by the European Convention, or explained by the European Court. The negative obligation requires the State to act passively: namely to refrain from violating, or improper interference with, any protected right.

13. As to some conventional clauses prescribing a particular right or a certain freedom, the negative obligations often cannot be categorically separated from the positive obligations, as recognized by the European Court itself. Although seemingly the positive and negative obligations are separated into different categories, the effective interpretation of

international rules enshrining certain rights and freedoms allows determining a number of positive obligations corresponding to the negative obligation provided for expressly by that rule.

14. The analysis of the case-law of the European Court of Human Rights in terms of substantive rights demonstrates that States Parties may be required to comply with the following negative obligations: refraining from causing the death of a person; State agents' refraining from subjecting persons under their authority to inhuman or degrading treatment; no extradition or expulsion if the person concerned risks of being subjected to torture or inhuman treatment in the country of destination; prohibition of subjecting a person to slavery or servitude; no tolerance for forced or compulsory labour; State's non-interference with private and/or family life; the State's non-interference with the exercise of the right to respect for correspondence; State's non-interference with the home of a person; refraining from any undue interference in the religious freedom of the individual; State's non-interference with the freedom of the press; State's refraining from identifying journalistic sources; State's refraining from any form of unjustified discrimination of persons; State's non-interference with the right to property; preventing the collective expulsion of aliens.

15. Furthermore, as a result of the analysis of the case-law on the *procedural rights*, less negative obligations have been identified: State's refraining from illegal deprivation of liberty of individuals; prohibition of State institutions' arbitrariness; non-conviction of individuals for offenses not provided for by criminal law; non-expulsion a foreign citizen residing lawfully in its territory without legal justification; prohibition of double jeopardy.

16. The analysis of the Court's case-law in circumstances of armed conflicts 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 determine jurisdiction, as well as the correlation of the Convention with the rules of the international humanitarian law and the rules of war.

17. According to the Court's case-law on the Transdniestrian conflict, when the State does not exercise effective control over a part 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, which is 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,

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

18. The Court's case-law concerning the Transdniestrian conflict will largely influence the its judgments in the inter-State applications of *Ukraine v. the Russian Federation (*filed in connection with the annexation[570] of the Crimean peninsula by the Russian Federation[571]), and Ukraine's positive obligations towards the population of the territory of the peninsula; as well as the case of *Georgia v. the Russian Federation*[572]*(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.

19. 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, applied to the conflicts in Cyprus, Transdniestria, Abkhazia, South Ossetia, Iraq, and more recently in Crimea and eastern Ukraine, is undoubtedly a progressive approach of its provisions, and certainly contributes to a global affirmation of the rights and freedoms enshrined in it.

[570] 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, §§12-16. [online]: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20873&lang=en (accessed on 30.06.2014)

[571] On 03.03.2014 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 25.01.2015)

[572] 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 25.01.2015)

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