Memorandum on introducing the concept of jurisdiction into Article 1 of Convention 108 (5 September 2012, update)

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Important note

The purpose of the following discussion, whose conciseness necessarily involves some simplifications, is threefold. The first aim is to offer the reader a few points of analysis as to the possible amendment of Article 1 of Council of Europe Convention 108 and the use of the concept of jurisdiction. Secondly, it tries to answer (implicitly) a number of questions raised at the plenary and other meetings of the T-PD. Lastly, it proposes amending the text of the Convention (see section 5 below (B2)). This memorandum does not aim at an exhaustive presentation of the question addressed, or at solutions to the issues raised. Considerable further research and exposition would be required for that purpose.

1 - Relevant legal provisions

Article 1 ECHR: "The High Contracting Parties shall secure to everyone within their jurisdiction ["*relevant de leur juridiction*"] the rights and freedoms defined in Section I of this Convention"

Article 1 Convention 108 – Object and purpose: "The purpose of this convention is to secure in the territory of each Party ["*sur le territoire de chaque Partie*"] for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him ("data protection")."

First proposed amendment (revised in section 5 below (B2)): "The purpose of this convention is to secure **to every individual within ~~the~~ their jurisdiction ~~of the Parties~~**, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him ("data protection")."

2 - Concept of jurisdiction in general[1]

Jurisdiction and competence. In English-language legal writings, the concept of "*jurisdiction*" is generally used for that of State competence[2]. It is the power, assigned by

[1] For example, on the subject of "jurisdiction" and State competence, cf.: in French-speaking doctrine: D. CARREAU, *Droit international*, Paris, Pedone, 2001, pp. 331-388 ; J. COMBACAU and S. SUR, *Droit international public*, Paris, Montchrestien, 2006, pp. ; P. DAILLER, M. FORTEAU AND A. PELLET, with the co-operation of D. MÜLLER, NGUYEN QUOC DINH †, *Droit international public*, Paris, Dalloz, 2009, pp. 514-572 ; P.-M. DUPUIS, *Droit international public*, Paris, Dalloz, 1998, pp. 59-85 ; NGUYEN QUOC DINH, *Droit international public*, Paris, L.G.D.J., 1975, pp. 353-398 ; in English-speaking doctrine: I. BROWNLIE, *Principles of public international law*, Clarendon Press, Oxford University Press, 1990, pp. 286-321 ; R. JENNINGS et A. WATTS, *Oppenheim's International Law,* Vol. 1, Longman, 1993, pp. 456-498 ; F.A.MANN, "The doctrine of international jurisdiction revisited after twenty years", *R.C.A.D.I.*, 1984, 3, pp. 13-115 ; M.N. SHAW, *International Law*, Cambridge University Press, 2008, pp. 645-697.

[2] This is how it is used in Article 2 (1) of the International Covenant on Civil and Political Rights (16 December 1966). The English version of this Article reads as follows: "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,

international law to the State, to regulate and influence the conduct of individuals and to attach consequences to events. State competence springs from State (territorial) sovereignty, which constitutes its foundation.

This general jurisdiction may be divided into two general classes of jurisdiction: "prescriptive jurisdiction" (or "*compétences normatives*") and "enforcement jurisdiction" (or "*compétences d'exécution*"). For example, law, regulations adopted by governments (royal orders in Belgium, decrees in France, etc), judgments, etc, come under the State's prescriptive jurisdiction, while all procedures of enforcement, seizure, expulsion, arrest, finding of evidence, etc, are the upshot of the State's enforcement jurisdiction. It will be noted, however, that legal opinion in the matter makes distinctions and qualifications of other kinds which we shall not examine in detail for present purposes.

Where State jurisdiction is founded in international law, it rests on several titles. At present, legal opinion unanimously accepts the titles of jurisdiction constituted by national territory (territorial jurisdiction) and nationality (personal jurisdiction). As to a State's territorial sovereignty, this has two features: completeness and exclusiveness. Briefly, the State may issue prescriptions on all subjects in respect of its territory, and is alone in holding that power in that place. In principle, State jurisdiction is territorial in its scope. Only exceptionally can it be recognised as having extraterritorial scope. We can be infer from the well-known *Lotus* case, settled by the former Permanent Court of International Justice[3], that the State's prescriptive jurisdiction is not limited in territorial scope by public international law – which is disputed in legal theory – but its enforcement jurisdiction is strictly limited to its own territory – which is indisputable. In other words, a State would not infringe public international law if it enacted laws with an extraterritorial effect, but would infringe it by setting out to implement these enactments in foreign territory, through the exercise of its enforcement jurisdiction.

In short, there is room for extraterritorial regulations, even if the State's jurisdiction is essentially territorial by definition. State practice bears clear witness to this reality. Suffice it to mention American and European law of competition – American especially. The latter, whose "*jurisdiction*" is founded, where appropriate, on the theory of effects, unarguably has extraterritorial effects, in exactly the same way as its European counterpart, whose applicability is of course founded on a different theory but likewise with extraterritorial effect[4].

It should be further noted that the two aforementioned titles of jurisdiction – territoriality and nationality – are construed extensively to allow national regulations to have extraterritorial effects[5]. In the sphere of data protection for example, Council of Europe Convention 108 and European

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national or social origin, property, birth or other status" (our italics). French version: "Les Etats parties au présent Pacte s'engagent à respecter et à garantir à tous les individus se trouvant sur leur territoire *et relevant de leur compétence* les droits reconnus dans le présent Pacte, sans distinction aucune, notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique ou de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation" (our italics).

[3] PCIJ, Lotus case of 7 September 1927, judgment of 6 April 1955, *ICJ Reports*, series A, No. 10.

[4] Cf. B. STERN, « L'extraterritorialité « revisité » : où il est question des affaires Alvarez-Machain, Pâte de Bois et de quelques autres… », *A.F.D.I.*, 1992, 38, pp. 289-294.

[5] Without going into detail, various titles to jurisdiction – principles – can be invoked, without regard to their possible overlap or to the legal disputes occasioned by them: subjective territorial principle, objective territorial principle, active or passive personal jurisdiction, universal jurisdiction or theory of effects. State jurisdiction is usually founded on elements of territorial and/or national attachment. These may be sidelined when universal jurisdiction or the principle of protection are relevant, or else the legal subject-matter at issue (piracy, war crimes, currency counterfeiting, etc) serves as the basis of jurisdiction.

Directive 95/46 ordain a legal control over transborder data flows which displays an extraterritorial effect[6]. Where piracy, war crimes, crimes against humanity and genocide, etc, are concerned, there is even question of universal jurisdiction.

Conflicts of jurisdiction. State jurisdictions, depending on their underlying title, are liable to come into conflict. These conflicts of jurisdiction are settled by legal co-operation in civil cases (or criminal, considering that the data protection rules potentially carry criminal sanctions) and consequently by the rules of private international law (or again criminal law). It is therefore of interest to give a succinct illustration of the eventuality, where data protection is concerned, of such conflicts of jurisdiction (in terms of public international law).

A first example relates to a data controller who, being established in the territory of a State A, uses means of processing (data centres for instance) in the territory of a State B – it is of little consequence whether or not these States are both parties to Convention 108. In such a situation, both States may at the very least invoke their prescriptive jurisdiction (*compétence normative*) founded, in public international law, on a territorial title (location of the data controller or of the means of processing). State B, however, will not be able to exercise its enforcement jurisdiction (*compétence d'exécution*) in the territory of State A without the latter's consent. Where relevant it might be possible in theory to contemplate exercising this enforcement jurisdiction in respect of property owned by the data controller in the territory of State B.

The second example concerns a rather more complex situation of transborder data flows towards third countries. A subsidiary Y of an enterprise X established in a State A – not one of the parties to Convention 108 – under the law of that State, pursues its data processing activity in a State B – also not one of the parties to Convention 108. The personal data which it processes are transmitted to it from a State C, which is party to Convention 108. The police of State A serve enterprise X with a demand, founded in the law of State A, to obtain the data processed by subsidiary Y which, as a subsidiary, does not possess its own legal personality distinct from that of enterprise X. The example is not unrealistic[7]. In the present instance, State C can avail itself of its territorial jurisdiction (prescriptive and enforcing) to forbid anyone present in its territory to transmit personal data to third States. This jurisdiction more specifically concerns any person (legal or natural) with the intention of transmitting data to subsidiary Y. State B can exercise its territorial jurisdiction (prescriptive and enforcing) over the processing activities of subsidiary Y. State A too exercises its jurisdiction (prescriptive and enforcing) over enterprise X on two accounts: territory,

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[6] The extraterritorial effect is as follows. If a third State wants the data controllers established its territory to be able to receive data from the Council of Europe States without the need to invoke the rules of exemption in respect of data flows, it is bound to adopt regulations which are at the very least adequate. An example is the establishment, in the United States, of the Safe Harbour Principles. If an American enterprise wishes to receive, for purposes of processing, data from the European Union, it must accept the Safe Harbour Principles. In such cases, European regulations have effects in the territory of third States: either enterprises choose of their own volition to abide by certain data protection requirements, or a State ensures, also voluntarily, that its regulations are adequate by comparison with the European standard of protection.

[7] State A could be the United States. For example, under USC Title 50 – War and national defence, Chapter 36 – Foreign intelligence surveillance, Subchapter IV – Access to certain business records for foreign intelligence purposes, Sec. 1861 : "*(a) Application for order; conduct of investigation generally (1) Subject to paragraph (3), the Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution".*

since it is established – incorporated – there, and also its nationality. Moreover, it is principally this claim of nationality which would enable it, perhaps not without contention, to get at subsidiary Y. If subsidiary Y was in fact a subsidiary of enterprise X, hence endowed with legal personality, the control exercised by enterprise X over its daughter company could also be invoked by State A in order to exercise its jurisdiction. However, this title of jurisdiction would be all the more arguable. Finally, the State of which the person concerned is a national could invoke a passive personal jurisdiction should the case arise.

3 – The concept of jurisdiction and the ECHR

Origins. The European Court of Human Rights has several times examined the applicability of Article 1 of the ECHR (cited above) with reference to the concept of jurisdiction. In its well-known *Bankovic* decision[8], it looks back on the emergence of this concept in the ECHR:

> "3. The drafting history of Article 1 of the Convention
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> 19. The text prepared by the Committee of the Consultative Assembly of the Council of Europe on legal and administrative questions provided, in what became Article 1 of the Convention, that the "member States shall undertake to ensure to all persons residing within their territories the rights...". The Expert Intergovernmental Committee, which considered the Consultative Assembly's draft, decided to replace the reference to "all persons residing within their territories" with a reference to persons "within their jurisdiction". The reasons were noted in the following extract from the Collected Edition of the *Travaux Préparatoires* of the European Convention on Human Rights (Vol. III, p. 260):
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> > "The Assembly draft had extended the benefits of the Convention to 'all persons residing within the territories of the signatory States'. It seemed to the Committee that the term 'residing' might be considered too restrictive. It was felt that there were good grounds for extending the benefits of the Convention to all persons in the territories of the signatory States, even those who could not be considered as residing there in the legal sense of the word. The Committee therefore replaced the term 'residing' by the words 'within their jurisdiction' which are also contained in Article 2 of the Draft Covenant of the United Nations Commission."
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> 20. The next relevant comment prior to the adoption of Article 1 of the Convention, made by the Belgian representative on 25 August 1950 during the plenary sitting of the Consultative Assembly, was to the effect that "henceforth the right of protection by our States, by virtue of a formal clause of the Convention, may be exercised with full force, and without any differentiation or distinction, in favour of individuals of whatever nationality, who on the territory of any one of our States, may have had reason to complain that [their] rights have been violated".
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> 21. The *travaux préparatoires* go on to note that the wording of Article 1 including "within their jurisdiction", did not give rise to any further discussion and the text as it was (and is now) was adopted by the Consultative Assembly on 25 August 1950 without further amendment (the above-cited Collected Edition (Vol. VI, p. 132)."

Without going into the details of this analysis, it should be stressed that the use in the Court's case-law of the jurisdiction concept is not easy to understand or systematise. For instance, it has recently contended that *"the notion of jurisdiction in human rights treaties relates essentially to a question of fact, of actual authority and control that a State has over a given territory or person"*.[9]

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[8] Eur. Court H.R., dec. Bankovic and others v. Belgium and others, 12 December 2001, Application No. 52207/99 (Grand Chamber).

[9] M. MILANOVIC, "From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties", *Human Rights Law Review*, 2008, n° 8, pp. 411-448. The author criticises the aforementioned *Bankovic* decision to the extent that it treats the concept jurisdiction used in the EHCR as equivalent to its ordinary meaning in international law. He agrees here with Judge Loucaides, to whom he refers back. Cf. L.G. Loucaides, "Determining the

Territoriality and extraterritoriality. We shall limit ourselves here to some observations on the above-mentioned territoriality element. The latter obviously does not compel States Parties to obstruct any extraterritorial effect of the ECHR. They are free to extend the geographical scope of their rules for the implementation of the Convention, in accordance with public international law, if that is their intention. On the contrary, the States might even be required to recognise the ECHR as having some degree of extraterritoriality. In that connection, the writer would be inclined to consider that the States Parties to the ECHR should apply it – and enforce it – to the extent allowed by the jurisdiction which they are entitled to exercise regarding a given situation. In other words, it would be a matter of their having to apply the ECHR in the exercise of all their powers – prescriptive and executive – that is, in the exercise of their territorial or extraterritorial *jurisdiction*. This would beg the difficult question of assessing the State's *positive obligations vis-à-vis* an international situation (ie a situation comprising a variable number of external elements) which is submitted to it, or which it examines *proprio motu,* in the exercise of any of its competences[10].

However, the proposal here may be slightly simplistic, and this view would be sometimes corroborated and sometimes refuted by the Court's case-law. It is impossible to enlarge on or defend these considerations here. The case-law of the Court and the former Commission are hard to systematise in that regard, and so a few decisions are cited to illustrate the possible applications of Article 1 ECHR, and a degree of extraterritoriality which the ECHR *must* have pursuant to this case-law. Thus, schematically and *non-exhaustively*[11]:

- a State Party to the ECHR is bound to apply the Convention when a suspect is handed over to its agents abroad[12], when it exercises effective overall and military control (occupation) over part of a third State's territory [13] and when its diplomatic and consular agents discharge their functions abroad[14];
- with regard to extradition, a State Party to the ECHR cannot extradite an individual if he or she incurs genuine risks of receiving, in the requesting State, treatment contrary to Article 3

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extra-territorial effect of the European Convention: facts, jurisprudence and the Bankovic case", *European Human Rights Law Review,* 2006, no. 4, p. 394, where the author writes: "*The 'ordinary meaning' of the word 'jurisdiction' is 'power or authority in general'. That meaning in the context of human rights treaty is not incompatible with public international law or the object and purposes of the Convention"* (references omitted). The judge continues, on p. 399, "*What is decisive in finding whether a High Contracting Party has violated the Convention in respect of any particular person or persons is the question whether such Party has exercised* de facto *or* de jure *actual authority, i.e. the power to impose its will, over the alleged victim"*.

[10] For an analysis of this issue, see J.-P. MOINY, « *Cloud Computing:* validité du recours à l'arbitrage? Droits de l'Homme et clauses abusives (partie II) », *Revue Lamy Droit de l'Immatériel,* n° 78, 2012, pp. 108-110. Where prescriptive competence is concerned, there is also the question to which kinds of international situations involving individuals a State is required to apply the ECHR.

[11] For a non-exhaustive overview of the case-law of the Eur. Court HR in the field of States' extraterritorial jurisdiction, see the recent factsheet published by the ECHR Press Unit, "Extra-territorial jurisdiction of ECHR Member States", available on http://www.echr.coe.int/NR/rdonlyres/D34FA717-6018-44F6-BC26-1274E401982E/0/FICHES_Juridiction_extraterritoriale_EN.pdf

[12] Eur. Comm. HR, dec. Freda v. Italy, 7 October 1980, Application No. 8916/80; Eur. Comm. HR, dec. Reinette v. France, 2 October 1989, Application No. 14009/88; Eur. Comm. HR, dec. Illich Sanchez Ramirez v. France, 24 June 1996, Application No. 28780/95.

[13] Eur. Comm. HR, dec. Cyprus v. Turkey, 11 October 1973, Applications Nos. 6780/74 and 6950/75 (plenary); Eur. Comm. H.R., dec. Cyprus v. Turkey, 10 July 1978, Application No. 8007/77 (plenary); Eur. Court H.R.., judgment Loizidou v. Turkey (preliminary objections), 23 March 1995, Application No. 15318/89 (Grand Chamber); Eur. Court H.R.., judgment Issa and others v. Turkey, 16 November 2004, Application No. 31821/96 (second section).

[14] Eur. Comm. HR, dec. F.J.R. v. S. v. Federal Republic of Germany, 25 September 1965, Application No. 1611/62; Eur. Comm. H.R., dec. M. v. Denmark, 14 October 1992, Application No. 17392/90.

ECHR or is liable to undergo blatant denial of justice there (violation of Article 6 ECHR)[15]; **this precedent will surely be approximated to the provisions governing transborder data flows**;

- with regard to judicial co-operation in the civil and criminal spheres, the Court has also acknowledged that the States Parties to the ECHR owed certain obligations of a kind that would give the Convention an extraterritorial effect [16].

4 - Amendment of Convention 108

Reasons. There seem to be two main reasons for amending Article 1 of Convention 108 as originally suggested. Firstly, it would be a matter of aligning the geographical scope of Convention 108 to that of the ECHR and more specifically of Article 8 ECHR which constitutes one of its essential foundations, although Convention 108 does not have the sole object of protecting privacy. From the perspective of using Convention No. 108 as an international instrument beyond the Council of Europe member States, it should be stressed that if third States may not necessarily be conversant with the case-law of the Eur. Court HR, the ECHR is not the only human rights treaty which uses the jurisdiction concept[17].

Moreover, the amendment referring to the concept of jurisdiction, rather than territory, seems likelier to stand the test of time and continual technological developments. The new wording would seem more amenable to legal interpretation and more adaptable.

It should be added here that recourse to the territory concept might cause problems in the event of the accession of an international organisation to Convention No. 108 – if this possibility is conceivable and is envisaged. In such a hypothesis, the organisation must first of all process data in accordance with the Convention (e.g. processing information communicated by the States, processing by the organisation's departments such as data transmission to a member State or a third party, or personal data processing – Interpol?). The next step is, where the organisation is empowered to adopt texts binding on its member States and therefore on the latter's territories, to ensure that such texts comply with the Convention (this applies to an organisation which is made up of States and is empowered to adopt binding rules). The last important point is that the international organisation must undertake to apply the Convention in the exercise of all its responsibilities. Would a reference to the territory allow this for all types of international organisation?

Conflicts of law (applicable law); lack of implications. The change of text as originally suggested is not without implications. Today of course, the effect of an amendment along the suggested lines would be limited (cf. the Republic of Cyprus, below), perhaps even non-existent in terms of *national law* on data protection the conditions for whose geographical applicability (private international law) have already been defined. In principle, provisions such as Article 1 of the ECHR and of Convention 108 do not result in any fundamental contestation of the private international law of the States parties, which at all events is destined to be applied. Even, for example, a provision like Article 22 of the Council of Europe Convention on Cybercrime, which goes further into the

[15] See case of *Soering*, Eur. Court H.R.., Soering v. United Kingdom judgment, 7 July 1989, Application No. 14038/88 (plenary), and the subsequent case-law founded on it.

[16] Eur. Court HR, judgment in the case of Drozd and Janousek v. France and Spain, 26 June 1992, Application No. 12747/87 (plenary); Eur. Court HR., judgment in the case of Pellegrini v. Italy, 20 July 2001, Application No. 30882/96 (second section).

[17] See footnote no. 2 above.

intricacies of international criminal law[18] – that is the rules which, in domestic law, define the State's jurisdiction in criminal matters – does not upset domestic law regarding jurisdiction. Moreover, it is rather that the Convention on Cybercrime encapsulates the principles of application in a large number of States. However, the provision does explicitly *require* the State to exercise its (prescriptive and enforcement) jurisdiction in these cases.

It can be borne in mind that, where data protection is concerned and in the context of the ECHR, questions of conflicts of jurisdiction (see above) (and the underlying questions of private international law or international criminal law) remain primarily the preserve of the State. As regards applicable law, it is clear that Convention No. 108 does not strictly speaking enshrine any rule on conflicts of laws. The current Article 1 does not settle the question of such conflicts or, in other words, the problem of the applicability of national texts adopted to implement the Convention. However, it could have some limited influence on these conflicts. On the one hand, by laying down an obligation of non-discrimination, it prohibits a State Party from having regard to the nationality or place of residence of data subjects in cases of "guaranteeing" them, "in the territory" of the State in question, respect for their rights and fundamental freedoms, particularly their right to private life, with respect to data processing[19]. We have mentioned the origins of the use of the jurisdiction concept under the ECHR in order to show that this restriction imposed on the State would not be forfeited by using the jurisdiction concept. On the other hand, to the extent that the rules on transborder data flow, in principle, make the possibility of data flows to a third State subject to the latter guaranteeing an appropriate standard of data protection, these rules can also have some impact in terms of settling conflicts of laws.

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[18] Section 3 – Jurisdiction – Article 22 – Jurisdiction: "1. Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with Articles 2 through 11 of this Convention, when the offence is committed:

a in its territory; or

b on board a ship flying the flag of that Party; or

c on board an aircraft registered under the laws of that Party; or

d by one of its nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State.

2 Each Party may reserve the right not to apply or to apply only in specific cases or conditions the jurisdiction rules laid down in paragraphs 1.b through 1.d of this article or any part thereof.

3 Each Party shall adopt such measures as may be necessary to establish jurisdiction over the offences referred to in Article 24, paragraph 1, of this Convention, in cases where an alleged offender is present in its territory and it does not extradite him or her to another Party, solely on the basis of his or her nationality, after a request for extradition.

4 This Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with its domestic law.

5 When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution"

[19] Para. 26 of the explanatory report is clear on this subject: "The guarantees set out in the convention are extended to every individual regardless of nationality or residence. This provision is in accordance with the general principle of the Council of Europe and its member States with regard to the protection of individual rights. *Clauses restricting data protection to a State's own nationals or legally resident aliens would be incompatible with the convention*" (our italics).

We should now briefly comment on the certainty of the law which might seem to stem from using the word "territory" in the current Article 1 of Convention No. 108. First of all, this provision should not be seen as necessarily limiting the extent of a State's exercise of its jurisdiction. For instance, the Convention does not, *a priori,* prevent a State from subordinating to its law any data processing concerning a natural person habitually resident in its territory, no matter where the data controller is located, where the processing is being carried out or where the data subject is at the time of data collection, etc). So we should not see it as in any way restricting the State's *power* to extend the geographical scope of its data protection regulations as far as it wishes.

Moreover, seen from a different angle, the provision might be interpreted restrictively in terms of the States' *duties*, not only in the information society we know today but also in more "traditional" situations. We might then interpret the provision as meaning that only the processing operation covered by the guarantees set out in the Convention is the operation all of whose (material and human) components are located in the State's territory. This would mean that any processing conducted outside this territory (in an embassy or consulate, or in a location where public authorities are at work, e.g. in the event of a military occupation or data collection during investigations abroad[20]) could be considered as not having to be included in national regulations, by virtue of the Convention.

Again, we might wonder if Article 1 of Convention No. 108 does not require the State to apply its national regulations to a service operator located abroad who aims his service (operated from a foreign country and accessible via Internet) at nationals of the said State whose data, as collected in the context of the service provision, he wishes to process. It is indeed in and from the territory of this State, in which data protection must be guaranteed, that this service is being provided and used.

Extension of the application of the Convention to "controlled" territories: example of the Republic of Cyprus. In the case *Loizidou v. Turkey (preliminary objections)*[21], the responsibility of Turkey in Northern Cyprus was adduced by a Cypriot national. This is one case raising the question of the scope of State jurisdiction, which is possibly to be introduced into Article 1 of Convention No. 108. At the preliminary objection stage, the Court decided that "(b)earing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration"[22] (our emphasis). Continuing with the question of substantive responsibility, the Court held, in *Loizidou v. Turkey (merits)*[23], that "the responsibility of Contracting States can be involved by acts and missions of their authorities which produce effects outside their own territory"[24]. Such responsibility may be the consequence of a military action and the resultant overall control over the territory in question[25].

[20] The use of the "jurisdiction" concept would require the application of the Convention guarantees in such cases.

[21] Eur. Court HR, judgment Loizidou v. Turkey (preliminary objections), 23 March 1995, Application no. 15318/89 (Grand Chamber).

[22] Ibid., para 62, indent 2.

[23] Eur. Court HR, judgment Loizidou v. Turkey (merits), 18 December 1996, application no. 15318/89 (Grand Chamber).

[24] Ibid., para.49.

[25] Ibid., para. 56.

Still on the subject of ECHR violations in Northern Cyprus, the judgment *Cyprus v. Turkey*[26] specifies that the *Loizidou* case "is framed in terms of a broad statement of principle as regards *Turkey's general responsibility under the Convention* for the policies and actions of the "TRNC" authorities"[27] (our italics). The Court has on several occasions made abundantly clear that it was in no way challenging the viewpoint of the international community on the creation of the TRNC or the fact that the Government of the Republic of Cyprus is the only legitimate government of Cyprus[28]. The Court had in fact to assess the responsibility of a State for breaches of human rights. And that is what was also at issue in the new wording of Article 1 of Convention No. 108: establishing the responsibility of the State in the exercise of its (in this case extraterritorial) jurisdiction. The use of the concepts of jurisdiction and territory certainly does not imply recognising the legitimacy of any kind of occupation; that is not the aim of Article 1 of the Convention. If Turkey were to accede to Convention No. 108, its Article 1 having been amended by the insertion of the word "jurisdiction" (although Turkey has not ratified the Convention), it would become responsible for implementing the guarantees set out in Convention No. 108 in the TRNC, as the Republic of Cyprus is prevented from exercising its jurisdiction there. This would certainly expand the scope of the Convention somewhat[29].

Consequences and transborder flows. It is important, finally, to note that the introduction of the concept of jurisdiction into Article 1 of Convention 108 would not make it ineffectual or immaterial to employ the concept of territory in laying down rules on transborder flows of data between parties to the Convention[30]. Here, it is a matter of determining the data's place of destination. This is the place where the level of protection with which data must circulate freely needs to be known – in this instance the level of a State Party.

In relation to a movement of data, the criterion of territory, also used implicitly by European Directive 95/46 ("to a third country"), has a certain simplicity; the recipient of the data need merely be located in order to ascertain whether movement is permitted. The applicable rules constitute a safety-net whose purpose is to prevent data, once transferred abroad, from being processed regardless of data protection requirements.

The Additional Protocol to Convention 108, on the other hand, uses the concept of jurisdiction in respect of transborder data flows towards a third State[31]. That would therefore be a further reason to support the wording which was originally proposed for Article 1 of Convention

[26] Eur. Court HR, judgment Cyprus v. Turkey, 10 May 2001, application no. 25781/94 (Grand Chamber).

[27] Eur. Court HR, judgment Cyprus v. Turkey, op. cit., para. 77.

[28] Cf. Eur. Court HR, judgment Cyprus v. Turkey, *op. cit.*, paras. 61 and 90, Eur. Court HR, judgment Loizidou v. Turkey (preliminary objections), *op. cit.*, para. 40; Eur. Court HR, judgment Loizidou v. Turkey (merits), *op. cit.*, para. 44.

[29] However, it remains to be seen whether the current text does not allow this interpretation, which would clearly be a broad one. It is a case of considering that under Article 1 the territory of a Party is its official territory (defined by the country's borders), and any other territory generally controlled by the said Party.

[30] Article 12 – Transborder flows of personal data and domestic law: "1. The following provisions shall apply to the transfer across national borders, by whatever medium, of personal data undergoing automatic processing or collected with a view to their being automatically processed.
2. A Party shall not, for the sole purpose of the protection of privacy, prohibit or subject to special authorisation transborder flows of personal data *going to the territory of another Party*." (underlining these terms).

[31] Article 2 – Transborder flows of personal data to a recipient which is not subject to the jurisdiction of a Party to the Convention "1. Each Party shall provide for the transfer of personal data to a recipient that is *subject to the jurisdiction of a State or organisation that is not Party* to the Convention only if that State or organisation ensures an adequate level of protection for the intended data transfer" (underlining these terms).

108[32]. For the sake of coherence and uniformity, one could then think about removing the reference to territory from Article 12 of the Convention and specify instead the recipient "subject to the jurisdiction of a State Party". However, the opposite would also be conceivable.

5 – Proposed amendments to Articles 1 and 3

NB: account is only taken of amendments relating to the issue of scope (i.e. not concerning relations between data protection and human rights, etc.).

During the discussions various proposals were put forward, and so it might now be useful to recapitulate the various possibilities and propose what might seem to be the best one. Since Convention No. 108 is not destined for universal applicability (unlike the ECHR), its first Article establishes a limit on its scope.

(A) The first proposed amendment is geared to including the word "jurisdiction" in the provision:

> (Article 1 **amended**) "The purpose of this convention is to secure in the territory of each Party **for every individual subject to its jurisdiction**, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him ("data protection")."

More relevantly, apparently, the jurisdiction concept might be targeted at data processing. We might, however, wonder whether the concept as it emerges from the wording used in the ECHR could concern a processing operation rather than an individual or a place. We consider that the main thing is to ensure that the explanatory report clarifies this issue. The proposed article would thus be worded as follows:

> (Article 1 **amended**) "The purpose of this convention is to secure for every individual, whatever his nationality or residence, protection of his personal data, promoting respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of his personal data **subject to the jurisdiction** of the Parties."

Article 3 as suggested in the proposed amendments dated 15 June 2012 also uses the word "jurisdiction", prescribing the applicability of the Convention to processing carried out by any "data controller subject to its jurisdiction". The provision as such does, however, raise problems *vis-à-vis* its interpretation in conjunction with Article 1. The two provisions might appear contradictory, or at least impose concurrent restrictions on the scope of the text, and their application might cause confusion. Moreover, Article 3 would be more relevant if it concentrated on the actual processing (and therefore all its human and material components), rather than on the person responsible for it (the controller) (whereby the above comments on this concept in connection with the processing process rather than an individual or a place remain relevant). In any case, public sector processing would remain within the scope of the Convention. In the event of the adoption of an amendment to Article 1 as suggested in § (**A**) above, or in the event of a *status quo*, the current text of Article 3 (1) of the Convention might be retained:

> (Article 3 retained) "The Parties undertake to apply this convention to automated personal data files and automatic processing of personal data in the public and private sectors."

[32] The wording used by the Additional Protocol nevertheless most certainly designates the recipient subject to the *territorial* jurisdiction of a State which is not party, or even more precisely, to location on the territory of a State which is not party. Indeed, *transborder* flows are concerned.

(B) Another approach might be envisaged, leading to the amendment of Articles 1 and 3 of the Convention. It would involve focusing the scope of the Convention on processing (embracing its personal and material components) in Article 3. The texts would be worded as follows **(B1)**:

> (Article 1 **amended**): "The purpose of this convention is to secure, **within the limits of Article 3**, for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him ("data protection")."
>
> (Article 3 **amended**) "**Each Party** undertakes to apply this convention to […] processing […] of data […] **subject to its jurisdiction**."

The explanatory report could then specify the types of processing which are at least considered as subject to the jurisdiction of a State (e.g. processing, all of whose components are located in its territory, and processing which is conducted by the national authorities), and must therefore be subject to the regulations set out in the Convention.

We consider the last possibility (**B2**) clearer and more precise and therefore safer. In our view it would better specify the scope of the States' obligations. This time we could move away from the word "jurisdiction", which has prompted reservations and queries. The aim would be to word the provision on transborder flows similarly to that on flows among States Parties to the Convention, in other words abandoning the use of the jurisdiction concept in the current additional protocol. The text might read as follows:

> (Article 1 **amended**): "The purpose of this convention is to secure, **within the limits of Article 3, for every individual,** whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him ("data protection").
>
> (Article 3 **amended**): "**Each Party** undertakes to apply this convention to […] processing […] of data […] **for which at least[33] one internal public authority is responsible, and to any other data processing with a sufficient link to its territory.**"

As just mentioned, this wording has the advantage of clarity. It highlights, in the human rights field, the "negative" and "positive" obligations of the State, which can only emerge implicitly by means of a wording which exclusively uses the jurisdiction concept (see **(A)** above). On the one hand, it must refrain from infringing data protection – and the fundamental rights and freedoms – when processing data. In this connection, as a data controller, it is subject to the obligations set out in the Convention. On the other hand, the State must introduce legal arsenal to prevent data controllers from violating the right to data protection, etc., pertaining to other individuals. This is a question, in the ECHR context, of "horizontalising" Article 8 in connection with data processing. The provision more clearly imposes a duty in exercising State jurisdiction, to some extent in keeping with Article 22 of the aforementioned Budapest Convention[34].

Nevertheless, the proposal presents two difficulties, although they are curable. Firstly, in connection with international organisations, the expression "sufficient link to its territory" may not be relevant. For instance, if an organisation such as Interpol becomes a Party, the important thing is

[33] The expression "at least" is used because there may be person jointly responsible for processing. The expression "at least" might be replaced by "for which, alone or jointly with a third party" (whereby such third party may be a foreign public authority or a private individual).

[34] See footnote no. 18. above.

for it to implement the guarantees enshrined in the Convention in exercising its competences (i.e. when it is sharing information). Any mention of its "territory" is meaningless. Therefore, as regards the accession of an international organisation, it would be appropriate to specify how the provision should be interpreted in the act of accession, or even to specify in the Convention how the provision should be interpreted in the case of a Party which is an international organisation.

Secondly, in connection with data processing carried out in the private sector, the case-law of the Eur. Court HR in the field of occupation and interpretation of the "jurisdiction" concept is liable to be non-transposable (cf. the above-mentioned Cypriot case). What would be required in such cases would be to extend the provision beyond the Party's own territory to the territories over which it exercises control – "global and effective control", in the words of the Eur. Court HR. At all events, this is how the territory concept should be understood in such a case.

Lastly, in connection with the "sufficient link", this might be explained in the explanatory report, or even in an additional paragraph. For instance, it might be specified that there is a sufficient link between a Party and a data processing operation where the data controller can be considered, at least in respect of this operation, as being established in the territory of the Party in question (a company operating in this territory, a person habitually resident there, etc.). The impact of this provision on conflicts of laws may be greater in this field. However, we should stress that the Parties are responsible for the applicability of the guarantees laid down in the Convention, without specifying the *national* law originating them. Thus, if we consider that a data processing operation demonstrates a sufficient link with State Party A when the sub-contractor is established in its territory, State Party A would continue to comply with Article 3 of the Convention if it applied, rather than its own national law, the law of another State Party B (provided State B has correctly implemented the Convention), on whose territory the data controller is established.

- <u>For the aforementioned reasons, we would propose adopting amendment (B2) (or at least a similar version).</u>