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STEERING COMMITTEE FOR HUMAN RIGHTS /

COMITÉ DIRECTEUR POUR LES DROITS DE L'HOM

(CDDH)

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COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS /

COMITÉ D'EXPERTS SUR LE SYSTÈME DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME

(DH-SYSC)

_____

DRAFTING GROUP ON THE PLACE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE EUROPEAN AND INTERNATIONAL LEGAL ORDER /

GROUPE DE RÉDACTION SUR LA PLACE DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME DANS L'ORDRE JURIDIQ INTERNATIONAL

(DH-SYSC-II)

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Contribution of the Registry of the European Court of Human Rights

concerning, in particular, Theme 1, subtheme ii) on State responsibility and extraterritorial application of the European Convention on Human Rights

Contribution du Greffe de la Cour européenn

concernant notamment le Thème 1, sous-thème ii) traitant de la responsabilité des États et extraterritorialité de la Convention eur

(*available in English only / disponible en anglais uniquement*)

DIVISION DE LA RECHERCHE
RESEARCH DIVISION

Articles 1 and 5
Extra-territorial jurisdiction, jurisdiction of territorial State prevented from exercising its authority in part of its territory, and validity of detention and criminal proceedings in de facto entities

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STUDY OF THE CEDH CASE-LAW
ARTICLES 1 AND 5

SUMMARY

Part I: When one State attacks the territorial and political integrity of another State, both States can be held liable under the Convention directed "active" Contracting Party, outside its exer territory. In the second case the "passive" Contracting Party which suffers from foreign occupation, rebellion or installation of a regional separatist regime. "Jurisdiction" of the "active" State, "State perpetrator", then it obligations can be twofold: it is chiefly the negative duty to abstain from wrongful conduct, but also a positive obligation to secure, in such an area, the rights and freedoms set out in the Convention. As far as the "passive", or "suffering" Contracting Party is is no need to answer "jurisdiction" question, concerning effective control of one part of its territory does not deprive this Contracting Party from its "*jurisdiction*" within the meaning of the Convention. The respondent Government bears only a positive obligation to do its best in order to ensure respect for rights and freedoms of the persons concerned.

On the basis of the existing case-law, one can identify five basic positive obligations of the "*suffering*" State: (1) to refrain from supporting the separatist regime; (2) to act in order to re-establish control over the disputed territory; (3) to try to solve the appli and diplomatic means; (4) to take appropriate practical and technical steps; (5) to take appropriate judicial measures to safeguard positive obligations depends on the particular circumstances of each case. However, the measures taken by the respondent Government must be constant and permanent, showing a true intent to solve the problem.

Part II: This part will address the validity of decisions given by courts or other authorities of *de facto* entities, in particular in the context of detention and criminal proceedings, from the point of view of the Court's case-law and international law.

Although the Court has refrained from elaborating a general theory concerning the lawfulness of legislative and administrative acts of *de facto* entities, it has clearly accepted that civil, administrative or criminal measures adopted by the *de facto* authorities should in principle be regarded as "*lawful*" for the purposes of the Convent application or enforcement of these measures by the agents of the *de facto* entity, including detention measures under Article 5 of the Convention in accordance with the laws in force in that entity. The Court has also established that the domestic courts of a *de facto* entity can be considered "*established by law*" within the meaning of the Convention, Artic long as they form part of "*constitutional and legal basis*" system. While initially the Court applied this principle only to civil courts, for the benefit of the local population and the protection of their rights, it has expanded it to criminal courts, whose decisions are in principle detrimental to the individual concerned. However, the Court may still refuse to accept a criminal court of a *de facto* entity as a "*court*" if it belongs to which does not have a "*constitutional and legal basis*" reflecting a judi compatible with the Convention. This gives the Court some discretion to examine on a case-by-case the quality of the judicial system in question, for instance whether the proceedings were patently arbitrary or politically motivated. In any event, the Court has always held that the recognition of legal effects for Convention purposes of acts or decisions of *de facto* entities does not amount to a legitimisation of those entities under international law.

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- PART I -
EXTRATERRITORIAL JURISDICTION AND THE PRESUMPTION OF JURISDICTION WHEN A STATE HAS LOST CONTROL OVER PART OF ITS TERRITORY

INTRODUCTION

1. The purpose of this section is to give an overview of judgments and decisions on State jurisdiction in an extraterritorial context, namely when a State has lost control over part of its internationally recognised territory, adopted after the delivery of the Grand Chamber judgment in the case of *Ilaşcu and Others v. Moldova and Russia* ([GC], no. 48787/99, ECHR 2004-VII).

2. Generally speaking, State jurisdiction and State responsibility issues may occur before the Court from two different angles. When one State attacks the territorial and political integrity of another State, both States can be held liable under the Convention:

(a) In the **first** case the applicant's complaint is directed against a Contracting Party, which exercises its authority outside its territory, namely in case of: (i) a complete or partial military occupation of another State; (ii) supporting a rebellion or acts of civil war in another State, or (iii) supporting the installation of a separatist State (regime) within the territory of another State; ***active*** Contracting

(b) In the **second** case the complaint is directed against a Contracting Party, which suffers from such a foreign occupation, rebellion or installation of a regional separatist regime. ***passive*** Contracting Party

3. The *Ilaşcu* case contained *both* types of complaints described above, that is:

(a) first-type complaints against Russia, which was found to have offered political and military support to the *Moldavian Republic of Transdniestria* ("the MRT"); therefore the applicants fell within the Russian jurisdiction for the purposes of Article 1 of the Convention (*ibid.*, §§ 377-394);

(b) second-type complaints against Moldova which had actually suffered from the *de facto* secession of the "MRT".

I. LIABILITY OF THE "ACTIVE", OR "PERPETRATOR" STATE

4. Concerning the first type of liability, the best summary of the basic principles governing it is found in the case of *Al-Skeini and Others v. the United Kingdom* ([GC], no. 55721/07, 7 July 2011):

> "130. As provided by ... Article [1], the engagement undertaken by a Contracting State is confined to "securing" ("*reconnaître*" in the French text) the listed rights ... its own "jurisdiction" (see *Soering v. the United Kingdom*, 7 July 1989, § 86, Series A no. 161; *Banković and Others v. Belgium and Others* [GC] (dec.), no. 52207/99, § 66, ECHR 2001-XII). "Jurisdictio[n]" ... Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004-VII).
>
> (α) <u>The territorial principle</u>
>
> 131. A State's jurisdictional competence ... Article ... (*Soering*, cited above, § 86; *Banković*, cited above, §§ 61 and 67; *Ilaşcu*, cited above, § 312). Jurisdiction is presumed to be exercised normally throughout the State's territory (*Ilaşcu*, cited above, § 312; *Assanidze v. Georgia* [GC], no. 71503/01, § 139, ECHR 2004-II). Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases (*Banković*, cited above, § 67).
>
> 132. To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extra-territorially must be determined with reference to the particular facts.
>
> (β) <u>State agent authority and control</u>
>
> 133. The Court has recognised in its case-law that, as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 ma[y] ... outside its own territory (see *Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A no. 240, § 91; *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 62, Series A no. 310; *Loizidou v. Turkey* (merits), 18 December 1996, § 52, *Reports of Judgments and Decisions* 1996-VI; and *Banković*, cited above, 69). The statement of principle, as it appears in *Drozd and Janousek* and the other cases just cited, is very broad: the Court states ... involved ... circumstances. It is necessary to examine the Court's case-law to identify the defining principles.
>
> 134. First, it is clear that the <u>acts of diplomatic and consular agents</u>, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others (*Banković*, cited above, § 73; see also *X v. Federal Republic of Germany*, no. 1611/62, Commission decision of 25 September 1965, Yearbook of the European Convention on Human Rights, vol. 8, pp. 158 and 169; *X v. the United Kingdom*, no. 7547/76, Commission decision of 15 December 1977; *WM v. Denmark*, no. 17392/90, Commission decision of 14 October 1993).
>
> 135. Secondly, the Court has recognised the exercise of extra-territorial jurisdiction by a Contracting State when, <u>through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government</u> (*Banković*, cited above, § 71). Thus where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State (see *Drozd and Janousek*, cited above; *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99 and 48209/99, judgment of 14 May 2002; and also *X and Y v. Switzerland*, nos. 7289/75 and 7349/76, Commission's ... admis... July 1977, DR 9, p. 57).
>
> 136. In addition, the Court's case-law demonstrates that, in certain circumstances, the <u>use of force by a State's agents operating outside its territory</u> may bring the individual thereby brought under the control of the State's authorities into the State's Article

individual is taken into the custody of State agents abroad. For example, in *Öcalan v. Turkey* [GC], no. 46221/99, § 91, ECHR 2005-IV, the Court held that "directly aft officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within ther i'sjdui c t i o n' o f t h a t S t a t e f o r t h e p u r p o s e s o f Ar Turkey exercised its au*tIsha oandi Others v.Turkey*, no.31821/96, 16 territ November 2004, the Court indicated that, had it been established that Turkish soldiers had taken the applicants' relatives into custody in Northern Ira deceased would have been within Turkish j ovuerisdicti them. In *Al-Saadoon and Mufdhi v. the United Kingdom* (dec.), no. 61498/08, §§ 86-89, 30 June 2009, the Court held that two Iraqi nationals detained in British-controlled military prisons in Iraq fell within the jurisdiction of the United Kingdom, since the United Kingdom exercised total and exclusive control over the prisons and the individuals detained in them. Finally, in *Medvedyev and Others v. France* [GC], no. 3394/03, § 67, ECHR 2010-..., the Court held that the applicants were within French jurisdiction by virtue of the exercise by French agents of full and exclusive control over a ship and its crew from the time of its interception in international waters. The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.

137. 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 ca*Bna nbkeo v"i*dći, v id cited above, § 75).

(γ Effective control over an area

138. Another exception to the principle that jurisdiction under Article 1 is limited to a S territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that 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 the Con subordinate ilocnal State' administration (*Loizidou* (preliminary objections), cited above, § 62; *Cyprus v. Turkey* [GC], no. 25781/94, § 76, ECHR 2001-IV, *B a n k o* cited above, § 70; *I l a*, cited above, §§ 314-316; *Loizidou* (merits), cited above, § 52). Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other sup port en actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights (*Cyprus v. Turkey*, cited above, §§ 76-77).

139. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State (see *Loizidou* (merits), cited above, §§ 16 and 56; in the *I l a*, cited above, § 387). Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region (see *I l a*, cited above, §§ 388-394).

140. The "effective control" principle the system of declarations under Article 56 of the Convention (formerly Article 63) which the States decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible. Article 56 § 1 provides a mechanism whereby any State may decide to extend the application of the Convention, "with due regard . . . to local r international relations it is responsible. The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term "jurisdilc t iTohne" siint uArtiocnlse covered by the "eff separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible (see *Loizidou* (preliminary objections), cited above, §§ 86-89 and *Quark Fishing Ltd v. the United Kingdom* (dec.), no. 15305/06, ECHR 2006-...).

(δ) The Convention legal space (“*espace juridique*”)

141. The Convention is a constitutional instrument of European public order (see *Loizidou v. Turkey* (preliminary objections), cited above, § 75). It does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States (see *Soering*, cited above, § 86).

142. The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and of protection within the “Convention legal space” (*Loizidou* (merits), cited above, § 78; *Banković*, cited above, § 80). However, the importance of establishi not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States. The Court has not in its case-law applied any such restriction (see amongst other examples *Öcalan, Issa, Al-Saadoon and Mufdhi, Medvedyev,* all cited above).”

5. The Court concluded in *Al-Skeini* by affirming the existence of a jurisdictional link for the purposes of Article 1 of the Convention between the United Kingdom and the deaths at issue in the case:

“149. It can be seen, therefore, that following the removal from power of the Ba’ath regime and until the accession of the interim Iraqi government, the United Kingdom (together with the United States of America) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in south-east Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.”

6. On the same day as *Al-Skeini* the Grand Chamber rendered a second judgment concerning the applicant’s internment in a occupation of Iraq by the Coalition forces. In *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, ECHR 2011, the Court agreed with the majority of the House of Lords that the internment of the applicant was attributable to the United Kingdom and that during his internment the applicant fell within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention. The internment took place within a detention facility controlled exclusively by British forces, and the applicant was therefore within the authority and control of the United Kingdom. Although the decision to continue holding the applicant in internment was, at various points, reviewed by committees including Iraqi officials and non-United Kingdom representatives from the Multinational Force, the Court did not consider that the existence of these reviews operated to prevent the detention from being attributable to the United Kingdom.

7. Most recently in *Hassan v. the United Kingdom* the general principles summarised in *Al-Skeini* were recalled and applied without any further development of the case-law (*Hassan v. the United Kingdom* [GC], no. 29750/09, § 74-80, ECHR 2014). As in *Al-Skeini* and *Al-Jedda*, the Court did not find it necessary to decide whether the United Kingdom was in effective control of the area during the relevant period of the Iraqi occupation by the Coalition forces, but found that it had exe another ground. Following his capture by British troops and his placement in the British-run detention centre the applicant’s brother came within United Kingdom and therefore fell within the United Kingdom jurisdiction under the principles outlined in paragraph 136 of *Al-Skeini*.

8. In the very recent case of *Jaloud v. the Netherlands* [GC], no. 47708/08, 20 November 2014, in pointing to "occupying power" as the most apt criterion of the question of jurisdiction under Article 1 of the Convention, the Court can be seen to use a wider concept of extra-territorial jurisdiction compared to *Al-Skeini* and *Al-Jedda*. The case concerned the investigation by the Netherlands authorities into the circumstances surrounding the death of the applicant's son who was shot dead in Iraq in April 2004 by Iraqi while passing through a checkpoint manned by personnel under the command and direct supervision of a Netherlands Royal Army officer. The Netherlands troops were part of a multinational division under the command of an officer of the armed forces of the United Kingdom. In the Court's opinion, "jurisdiction" by the Netherl within the meaning of Article 1 of the Convention, solely by dint of having accepted the operational control of a United Kingdom officer "in full command". Moreover, as the personnel stationed in that area. The Court was satisfied that the Netherlands had exercised "jurisdiction" within the limits of its mission for the purpose of asserting authority and control over persons passing through the checkpoint. It therefore found that the death of the applic the Netherlands.

9. It is worth mentioning that several cases on extraterritorial jurisdiction of member States, most notably the inter-state application *Georgia v. Russia (II)*[1], no. 38263/08, decision on admissibility of 13 December 2011, are currently pending before the Court.[2]

1. The Chamber relinquished jurisdiction in favour of the Grand Chamber on 3 April 2012.

2. See, e.g, cases concerning the region of Nagorno-Karabakh disputed between Armenia and Azerbaijan: *Chiragov and Others v. Armenia* (no. 13216/05) [GC], decision on admissibility of 14 December 2011 as well as the communicated cases *Arayij Zalyan and Others v. Armenia*, nos. 36894/04 and 3521/07 as well as *Samvel Arakelyan v. Azerbaijan*, no. 13465/07.

II. LIABILITY OF THE PASSIVE, "SUFFERING" STATE

A. General principles

10. The issue of passive or suffering State has been dealt with by the Commission in the cases concerning Cyprus and Turkey. See, for example, *An and Others v. Cyprus*, no. 18270/91, Commission decision of 8 October 1991):

> "The Commission has previously observed that the Human Rights Convention continues to apply to the whole of the territory of the Republic of Cyprus" and that the recognition by Turkey of the Turkish Cypriot administration in the north of Cyprus as "Turkish Federated State of Cyprus" does not affect "the continuing existence of the Republic of Cyprus as a single State and High Contracting Party to the Convention" (No. 8007/77, Cyprus v. Turkey, Dec. 10.7.78, D.R. 13, p. 85 at pp. 149-150).
>
> At the same time, however, the Commission has also found that the Government of the Republic of Cyprus "have since 1974 been prevented from exercising their jurisdiction in the north of the island. This restriction on the actual exercise of jurisdiction ... is due to the presence of Turkish armed forces" (ibid.).
>
> The Commission now finds that the authority of the respondent Government is in fact still limited to the southern part of Cyprus. It follows that the Republic of Cyprus cannot be held responsible under Article 1 (Art. 1) of the Convention for the acts of Turkish Cypriot authorities in the north of Cyprus of which the present applicants complain.
>
> The Commission concludes that the application is i

11. The Court, for its part, decided in the *Assanidze* case, cited above:

> "139. The Ajarian Autonomous Republic is indisputably an integral part of the territory of Georgia and subject to its competence and control. In other words, there is a presumption of competence. The Court must now determine whether there is valid evidence to rebut that presumption.
>
> 140. In that connection, the Court notes, firstly, that Georgia has ratified the Convention for the whole of its territory. Furthermore, it is common ground that the Ajarian Autonomous Republic has no separatist aspirations and that no other State exercises effective overall control there (see, by converse implication, *Ilaşcu and Others v. Moldova and Russia* (dec.) [GC], no. 48787/99, 4 July 2001, and *Loizidou*, cited above). On ratifying the Convention, Georgia did not make any specific reservation under Article 57 of the Convention with regard to the Ajarian Autonomous Republic or to difficulties in exercising its jurisdiction over that territory. Such a reservation would in any event have been ineffective, as the case-law precludes territorial exclusions (see *Matthews v. the United Kingdom* [GC], no. 24833/94, § 29, ECHR 1999-I) other than in the instance referred to in Article 56 § 1 of the Convention (dependent territories).
>
> 141. Unlike the American Convention on Human Rights of 22 November 1969 (Article 28), the European Convention does not contain a "federal cl events occurring on the territory of the states forming part of the federation. Moreover, since Georgia is not a federal State, the Ajarian Autonomous Republic is not part of a federation. It forms an entity which, like others (the Autonomous Republic of Abkhazia and, before 1991, the Autonomous District of South Ossetia), must have an autonomous status..., which is a different matter. Besides, even if an implied federal clause similar in content to that of Article 28 of the American Convention were found to exist in the European Convention (which is impossible in practice), it could not be construed as releasing the federal State from all responsibility, since it requires t accordance with its constitution ..., to the end that the [states forming part of the federation] may adopt appropr iate provisions for the fulfillment of [the] Co
>
> 142. Thus, the presumption referred to in paragraph 139 above is seen to be correct. Indeed, for reasons of legal policy – the need to maintain equality between the States Parties and to ensure the effectiveness of the Convention – it could not be otherwise. But for the presumption, the applicability of the Convention could be selectively restricted to only parts of the territory of certain States Parties, thus rendering the notion of effective human rights protection underpinning the entire Convention meaningless while, at the same time, allowing discrimination between the States Parties, that is to say beween those which accepted the application of the Convention over the whole of their territory and those which did not.
>
> 143. The Court therefore finds that the actual facts out of which the allegations of violations arose were within the "jurisdict ion" of the Georgian authorities within the meaning of Article 1 (Art. 1) of the Convention."

Bertrand Russell Peace Foundation Ltd. v. the United State (s

Kingdom, no. 7597/76, Commission decision of 2 May 1978, Decisions and Reports (DR) 14, pp. 117 and 124) within the meaning of Article 1 of the Convent

12. The basic principles applicable to the second type of liability – that *passive* "or *suffering*" – have been summarised in *Ilaşcu and Others*

"311. It follows from Article 1 that member States must answer for any infringement of the rights and freedoms protected by the Convention committed against individuals placed under their "jurisdiction"

The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.

312. The Court refers to its case-law to the effect that the concept of Article 1 of the Convention must be considered to (see *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99 and 48209/99, § 20, judgment of 14 May 2002; *Banković and Others* (dec.) [GC], no. 52207/99, §§ 59-61, ECHR 2001-XII; and *Assanidze v. Georgia* [GC], no. 71503/01, § 137, ECHR 2004-II).

From the standpoint of public international law, the word Convention must be understood to mean that a State's *Banković*, cited above, § 59), but also that jurisdiction is presumed to be exercised normally throughout the State's territory.

This presumption may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory. That may be as a result of military occupation by the armed forces of another State which effectively controls the territory concerned (see *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, and *Cyprus v. Turkey*, §§ 76-80, cited above, and also cited in the above-mentioned *Banković* decision, §§ 70-71), acts of war or rebellion, or the acts of a foreign State supporting the installation of a separatist State within the territory of the State concerned.

313. In order to be able to conclude that such an exceptional situation exists, the Court must examine on the one hand all the objective facts capable of li territory, and on the The undertakings given by a Contracting State under conduc Article 1 of the Convention include, in addition to the duty to refrain from interfering with the enjoyment of the rights and freedoms guaranteed, positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory (see, among other authorities, *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V).

Those obligations remain even where to its territory, exercise o so that it has a duty to take all the appropriate measures which it is still within its power to take.

...

318. In addition, the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under (*Cyprus v. Turkey*, cited above, § 81). That is Conven particularly true in the case of recognition by the State in question of the acts of self-proclaimed authorities which are not recognised by the international community.

319. A State may also be held responsible even where its agents are acting *ultra vires* or contrary to instructions. Under the Conve its are strictly liable for the conduct of their or subordinates; they are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 64, § 159; see also Article 7 of the International Law Commission's States for internationally wrongful *Cdiro* case heard by the wor General Claims Commission, (1929) Reports of International Arbitral

13. On the basis of the abovementioned principles the Court considered it necessary to "*ascertain whether Moldova's responsibility to refrain from wrongful conduct or its positive obligations under the Convention*" (§ 328). It came to the following conclusion:

> "330. On the basis of all the material in its possession, the Court considers that the Moldovan Government, the only legitimate government of the Republic of Moldova under international law, does not exercise authority over part of its territory, namely that part which is under the effective control of the "MRT" . . .
>
> 331. However, even in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention." [emphasis added]

14. There is a difference between the two types of liability of both States. Concerning the **"*active*"** State, *State perpetrator*", "the Court first has to establish whether it has *jurisdiction*" within the meaning of Article 1 of the Convention. If there is "*jurisdiction*", *then* the respondent State's obligations are not only negative duty to abstain from wrongful conduct (which generates State responsibility for wrongful acts under international law: see *ibid.*, §§ 320-321), but also a positive obligation "*to secure, in such an area, the rights and freedoms set out in the Convention*" – at least according to the general case-law of the Court on this matter.

15. As far as the **"*passive*"**, or the **"*suffering*"** Contracting Party is concerned (the one which suffers from a foreign occupation, rebellion or installation of a regional separatist regime), there is no need to establish whether the respondent State exercises its *jurisdiction*: loss of effective control of one part of its territory does not deprive this Contracting Party from *jurisdiction*" "within the meaning of Article 1 of the Convention. In such cases there still is *jurisdiction*" "of the respondent State, reduces the scope of that jurisdiction. Therefore the respondent Government bears only a **positive obligation** to do its best in order to ensure (or, rather, to try to ensure) respect for the rights and freedoms of the persons concerned. This is perfectly logical because, being deprived of the effective control over a part of its territory, the State cannot be held accountable for any "*wrongful act within the meaning of international law*".

16. In *Ilaşcu and Others* the Court defined the respondent State's obligations in the following way:

> "333. The Court considers that where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation, such as obtains when a separatist regime is set up, whether or not this is accompanied by military occupation by another State, it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State.
>
> Nevertheless, such a factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the positive obligations towards persons within its territory. The State in question must endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention.
>
> 334. Although it is not for the Court to indicate which measures the authorities should take in order to comply with their obligations most effectively, it must verify that the measures actually taken were appropriate and sufficient in the present case. When faced with a partial or total failure to act, the Court's task is to determine to what extent a minimum effort was nevertheless possible and whether it should have been made. Determining that question is especially necessary in cases concerning an alleged infringement of absolute rights such as those guaranteed by Articles 2 and 3 of the Convention.

335. Consequently, the Court concludes that the applicants are within the jurisdiction of the Republic of Moldova for the purposes of Article 1 of the Convention, but that its responsibility for the acts complained of, committed in the territory of the so-called "MRT", over assessed in the light of its positive obligations under the Convention.

336. The Court must determine whether the Moldovan authorities discharged their positive obligations to secure the rights guaranteed by the Convention, or whether, as the applicants and the Romanian Government submitted, the Moldovan Government did n

17. Likewise, in *Catan and Others v. the Republic of Moldova and Russia* ([GC], nos. 43370/04, 8252/05 and 18454/06), where the applicants complained of the closure of Moldovan-language schools and their harassment by the separatist authorities, the Court declared:

"109. The Court must first determine whether the case falls within the jurisdiction of the Republic of Moldova. In this connection, it notes that all three schools have at all times been situated within Moldovan territory. It is true, as all the parties accept, that Moldova has no authority over the part of its territory to the east of the River Dniester, which [in the *Ilaşcu* judgment, controlle cited above, the Court held that individuals detai because Moldova was the territorial State, even though it did not have effective control over the Transdniestrian region. Moldova's obligation under within their jurisdiction the [Convention circumstances rights a to a positive obligation to take the diplomatic, economic, judicial or other measures that were both in its power to take and in accordance with international law (see *Ilaşcu*, cited above, § 331). The Court reached a similar conclusion in *Ivanţoc and Others v. Moldova and Russia*, no. 23687/05, §§ 105-111, 15 November 2011.

110. The Court sees no ground on which to distinguish the present case. Although Moldova has no effective control over the acts that the region is recognised under "MRT" in Tr public international law as part of Moldova's terr Convention, to use all legal and diplomatic means available to it to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention to those living there (see *Ilaşcu*, cited above, § 333). The Court will consider below whether Moldova has s

B. Application of these principles in particular cases

18. There have been only **five** cases before the Court where the "suffering" or "passive" State under the Convention had been al

(a) *Assanidze v. Georgia* [GC] (no. 71503/01, § 137, ECHR 2004-II), which was delivered several months before *Ilaşcu and Others v. Moldova and Russia*. In this case the applicant had been convicted by the Ajarian courts, but then received a presidential pardon and was acquitted by the Supreme Court of Georgia; nevertheless, he remained in prison. In this case, strictly speaking, there was no foreign occupation or a formally separatist entity; there were just some difficulties encountered by the central State authorities in exercising their jurisdiction in the Ajarian Autonomous Republic;

(b) *Ilaşcu and Others v. Moldova and Russia*, cited above, where the applicants complained of being illegally tried, convicted, detained and ill-treated by the authorities of the so-called Moldovan Republic of Transdniestria ("MRT") supported by the Russian troops stationed in Moldova;

(c) *Ivanţoc and Others v. Moldova and Russia*, no. 23687/05, 15 November 2011, where two out of the four applicants in the *Ilaşcu* case, as well as their family members,

complained about their continuing detention *after* the delivery of the *Ilaşcu* judgment, and until their final release in 2007;

(d) *Catan and Others v. the Republic of Moldova and Russia* [GC], cited above, where the applicants, Moldovans who lived in Transdniestria and who were at the time of lodging the application pupils at three Moldovan-language schools and their parents, complained about the closure of their schools and their harassment by the separatist Transdniestrian authorities.

(e) *Azemi v. Serbia*, no. 11209/09, decision of 5 November 2013, denying Serbia's responsibility under Article 1 of the Convention for non-enforcement of a Kosovar Municipal Court's decision from 2002. Ins to be attributed to the international civil administration acting under the UN which took control over Kosovo's judiciary or regulations following the withdrawal of the Federal Republic of Yugoslavia troops from Kosovo in 1999.

19. What is clear is that the question whether the State suffering from the loss of control of a part of its territory has complied with its positive obligations has to be assessed by the Court on a **case-by-case** basis. It is nevertheless possible to identify some important obligations formulated by the Court in *Ilaşcu*. There are currently **five** obligations, of which two concern the general situation of the territory "suffering" separatism, and three the individual situation of the applicant.

(1) General measures to re-establish control over the territory

(a) REFRAINING FROM SUPPORTING THE SEPARATIST REGIME

20. The respondent State must not recognise the legality of the *status quo*, because this would mean an acquiescence of the illegal acts committed by the occupying State or the separatist regime. In *Ilaşcu and Others* the Court found:

"333. Moldova's positive obligations to re-establish its control over the Transdniestrian territory, as an expression of its jurisdiction, and to measures to ensure respect for the applicants' rights, including attempts to secure th

340. The obligation to re-establish control over Transdniestria required Moldova, firstly, to refrain from supporting the separatist regime of the "MRT", and other measures at its disposal to re-establish its control over that territory.

It is not for the Court to indicate the most appropriate measures Moldova should have taken or should take to that end, or whether such measures were sufficient. through specific acts or measures, to re-establish its control over the territory of the "MRT".

341. In the present case, from the onset of hostilities in 1991-92, the Moldovan authorities never ceased complaining of the aggression they considered they independence. ...

...

343. Moldova's re-establish its authority over the Transdniestrian region continued after 1994, its authorities having continued to assert their s internally and internationally....

On 12 September 1997 it ratified the Convention and confirmed in its reservations to the Convention its intention to re-establish control over the region of Transdni

21. In *Ivanţoc and Others*, concerning the period of time between ... Russia ... 2004 and 2007 ... *note[d] that even after 8 July 2004, Moldova never ceased to protest about the Russian Federation's acti*... *"MRT", and, while rejecting* ... *independence, continued to deploy* ... *its efforts with the aim of recovering its control over the Transdniestrian territory.* (*ibid.*, § 108).

22. The "*suffering*" State must thus refrain from su... However, neither cooperation with the separatist authorities with a view to easing and improving the living conditions of the local population nor a recognition of the legal effects of some acts carried out by the unrecognised authorities can, as such, be construed as "*support*" (see, e.g., *Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa): Notwithstanding Security Council Resolution 276 (1970)* – Advisory Opinion, *ICJ Reports* 1971). In the *Ilaşcu* case the Court found:

> "345. In parallel with that change of strategy, relations were established between the Moldovan authorities and the Transdniestrian separatists. Economic cooperation agreements were concluded, relations were established between the Moldovan parliament and the "parliament of the M... years there has been cooperation in police and security matters and there are forms of cooperation in other fields such as air traffic control, telephone links and sport. ...
>
> The Moldovan Government explained that these cooperation measures had been taken by the Moldovan authorities out of a concern to improve the everyday lives of the people of Transdniestria and allow them to lead as nearly normal lives as possible. The Court, like the Moldovan Government, takes the view that, given their nature and limited character, these acts cannot be regarded as support for the Transdniestrian regime. On the contrary, they represent affirmation by Moldova of its desire to re-establish control over the region of Transdniestria."

23. By extension, the "*suffering*" State – in the same manner as the "*perpetrator*" State – must also abstain from supporting any acts of private individuals and entities that violate Convention rights. Thus, for example, in *Solomou and Others v. Turkey*, no. 36832/97, 24 June 2008 the Court recalled:

> "46. In addition, the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's responsibility under the Conve... with the obligation contained in Article 1 of the Convention (see *Cyprus v. Turkey* [GC], no. 25781/94, § 81, ECHR 2001-IV). This is particularly true in the case of recognition by the State in question of the acts of self-proclaimed authorities which are not recognised by the international community (see *Ilaşcu and Others*, cited above, § 318)."

(b) ACTING IN ORDER TO RE-ESTABLISH CONTROL OVER THE DISPUTED TERRITORY

24. The "*suffering*" State must take all the steps it ... to re-establish its control over the territory in question. A mere change in strategy and tactics does not amount to a renunciation of efforts to regain control. In the *Ilaşcu and Others* case the Court found:

> "341. ... In the Court's opinion, when confronted wi... economically by a power such as the Russian Federation ..., there was little Moldova could do to re-establish its authority over Transdniestrian territory. That was evidenced by the outcome of the military conflict, which showed that the Moldovan authorities did not have the means to gain the upper hand in Transdniestrian territory against the rebel forces supported by 14th Army personnel.
>
> 342. The Moldovan authorities continued after the end of the hostilities in July 1992 to take steps to re-establish control over Transdniestria. From 1993 onwards, for example, they began to bring criminal

proceedings against certain Transdniestrian officials accused of usurping titles corresponding to State offices...

343. Moldova's efforts to establish its authority over the Transdniestrian region continued after 1994, its authorities having continued to assert their sovereignty over the territory controlled by the "MRT" internally and internationally ... In 1994 it adopted a new Constitution which provided, *inter alia*, for the possibility of granting a certain amount of autonomy to Transdniestria. In the same year, it signed with the Russian Federation an agreement for the withdrawal of Russian troops from Transdniestria within three years.

On 12 September 1997 it ratified the Convention and confirmed in its reservations to the Convention its intention to re-establish control over the region of Transdniestria.

344. These efforts continued after 1997, despite a reduction in the number of judicial measures intended to assert Moldovan authority in Transdniestria. The prosecutions of Transdniestrian officials were not followed up and were even discontinued in 2000, and a former dignitary of the Transdniestrian regime was permitted, after his return to Moldova, to hold high State office...

On the other hand, the efforts of the Moldovan authorities were directed more towards diplomatic activity. In March 1998 Moldova, the Russian Federation, Ukraine and the region of Transdniestria signed a number of instruments with a view to settling the Transdniestrian conflict. Meetings and negotiations took place between representatives of Moldova and the Transdniestrian regime. Lastly, from 2002 to the present, a number of proposals for the settlement of the conflict have been put forward and discussed by the President of Moldova, the OSCE and the Russian Federation ...

The Court does not see in the reduction of the number of measures taken as part of attempts to exercise its jurisdiction in the region, regard being had to the fact that several of the measures previously tried by the Moldovan authorities (see paragraphs 181-84 above).

The Court further notes that the Moldovan Government argued that their change of negotiating strategy towards diplomatic approaches aimed at preparing Transdniestria had been a response to demands expressed by the separatists during discussions on the settlement of the situation in Transdniestria and the applicants' rel had previously adopted, particularly in the legal sphere. The Court notes the witness evidence to that effect given by Mr Sturza. . . ."

25. Likewise, in *Ivanţoc and Others* the Court held (*Moldova and Ru*

"106. As to the general measures intended to re-establish control over the Transdniestrian territory, the Court recalls that in its *Ilaşcu, Ivanţoc-Popa* judgment it stated that it was not its task to indicate the most appropriate measures Moldova should have taken to that end, or whether such measures were sufficient. The Court must only verify Moldo measures, to re-establish its control over the territory of

The Court stressed in paragraph 341 *in fine* of its judgment, when confronted with a regime sustained militarily, politically and economically by a power such as the Russian Federation, there was little that Moldova could do to re-establish its authority over Transdniestrian territory.

The Court notes that even after 8 July 2004, Moldova never ceased to protest about the Russian Federation's active support for the separatist re declaration of independence, continued to deploy its efforts with the aim of recovering its control over the Transdniestrian territory. . ."

(2) Measures to ensure respect for the app

(a) TRYING TO SOLVE THE APPLICANTS' FATE BY POLITICAL AND DIPLOMATIC MEANS

26. The *suffering*" State must use all the political disposal in order to prevent or put an end *Ilaşcu and Others* case the Court found:

"34. As regards the applicants' situation, the Court
1997 the Moldovan authorities took a number of judicial, political and administrative measures. These included:

...

– the sending of doctors from Moldova to examine the applicants detained in Transdniestria...; and

– the financial assistance given to the applicants
visits to the applicants...

During that period, as appears from the witness evidence, in discussions with the Transdniestrian leaders the Moldovan authorities also systematically raise
their Convention rights ... In particular, the Court notes the efforts made by the judicial authorities; for example, the Minister of Justice, Mr Sturza, made numerous visits to Transdniestria to negotiate with the Transdniestrian authorities for the applicants' rel

347. Even after 1997, measures were taken or sought by Moldova
sent to Transdniestria to examine them (the last ex
their families continued to receive financial assistance from the authorities and Mr Sturza, the former Minister of Justice and Chairman of the Committee for Negotiations with Transdniestria, continued to raise the question of the applicants' release with the T
notes that, according to the evidence of certain witnesses, Mr Ilaşcu's release was the result of lengthy negotiations with the "MRT" authorities. Moreover,
went to Transdniestria in April 2001 to bring the f

...

Lastly, the Moldovan authorities have applied not only to the "MRT" re
international organisations for their assistance in

27. Likewise, in *Ivanţoc and Others v. Moldova and Russia* the Court declared:

"104. As regards the applicants' situation, the Cou
Transdniestrian leaders, the Moldovan authorities
release and respect for their Convention rights. Contrary to their pos
after 8 July 2004 the Moldovan authorities consta
bilateral relations with the Russian Federation. Furthermore, they continually sought the assistance of other States and international organisations in obtaining

(b) TRYING TO SOLVE THE APPLICANTS' FATE BY PRACTICAL AND TECHNICAL MEANS

28. In certain particularly serious situations of "*suffering*" States may be required to take three q
practical steps to help applicants who are *de facto* outside their control. In *Catan and Others* the Court first reiterated its general conclusions made in *Ilaşcu and Others* and *Ivanţoc and Others*, and then declared:

"141. In the *Ilaşcu* judgment the Court found that Moldova had failed fully to comply with its positive obligation to the extent that it had failed to take all the measures available to it in the course of negotiations with the "MRT" and Russian authorities to obtain the release of the applicants (cited above, §§ 348-352). In the present case, in contrast, the Court considers that the Moldovan Government have made considerable efforts to support the applicants. In particular, following the requisitioning of the schools' former buildings by the "M
rent and refurbishment of new premises and have also paid for all equipment, staff salaries and transport costs, thereby enabling the schools to continue operating and the children to continue learning in Moldovan, albeit in far from ideal conditions..."

(c) TAKING APPROPRIATE JUDICIAL MEASURES TO SAFEGUARD THE APPLICANTS' RIGHTS

29. Finally, depending on the circumstances of the case, the "*suffering*" State might be required to take appropriate judicial measures, for example, by expressly declaring the

applicants' convictions" or to obtain the release of detainees; "or investigation against the respective officials of the unrecognised entity. However, the practical effectiveness of such measures may sometimes be too limited. In the *Ilaşcu and Others* case the Court found:

> "343. As regards the applicants' situation within the Convention the Court ... 1997 the Moldovan authorities took a number of judicial, political and administrative measures. These included:
>
> – the Supreme Court's judgment of 3 February 1994 q 1993 and setting aside the warrant for their detention...;
>
> – the criminal proceedings brought on 28 December 1 Transdniestria"...;
>
> – the amnesty declared by the President of Moldova request of 3 October 1995...;
>
> ...
>
> 347. ... It is true that the Moldovan authorities did not pursue certain measures taken previously, particularly investigations in respect of persons However, the Court considers that in the absence of control over Transdniestrian territory by the Moldovan authorities any judicial investigation in respect of persons living in Transdniestria or linked to offences committed in Transdniestria would be ineffectual. This is confirmed by the witness evidence on that point ..."

30. In *Ivanţoc* the Court further relativised this obligation:

> "111. As to other possible measures, such as judicial measures, the Court refers to its conclusion in paragraph 347 of the *Ilaşcu, Ivanţoc and Popa* case, where it had found ineffectual any judicial investigation in respect of persons living in Transdniestria. In the present case the Court finds that no new fact or argument has been put forward capabl

(3) The efforts by the respondent State must be constant

31. What is most important is that both the general and the special measures taken by the "*suffering*" State must be constant *Ilaşcu and Others* judgment:

> "348. The Court does not have any evidence that since 2001 effective measures have been taken by the authorities to put an end to the continuing infringements of their Convention rights complained of by the other three the effect that the question of the applicants' situation continues to authorities in their dealings with the "MRT" regi justifying the conclusion that the Moldovan Government have been diligent with regard to the applicants.
>
> In their negotiations with the separatists, the Moldovan authorities have restricted themselves to raising the question of the applicants' situation orally, for their Convention rights ...
>
> Similarly, although the applicants have been deprived of their liberty for nearly twelve years, no overall plan for the settlement of the Transdniestrian con situation, and the Moldovan Government did not claim that such a document existed or that negotiations on the subject were in progress.
>
> 349. Nor have the Moldovan authorities been any more relations with the Russian Federation.
>
> In the Court's opinion, the fact that at the hear from arguing that the Russian Federation was responsible for the alleged violations on account of the presence of its army in Transdniestria, so as not to hinder the process "aimed the ... applicants" (see paragraph 360 below), amo

Russian authorities might have over the Transdniestrian regime if they were to urge it to release the applicants. Contrary to the position prior to May 2001, when the Moldovan authorities raised the question of the applicants' release with the Russian author after that date.

In any event, the Court has not been informed of any approach by the Moldovan authorities to the Russian authorities after May 2001 aimed at obtaini

350. In short, the Court notes that the negotiations for a settlement of the situation in Transdniestria, in which the Russian Federation is acting as a guarantor State, have been ongoing since 2001 without any mention of the applicants and without any measure being taken or considered by the Moldovan authorities to secure to the applicants their Convention rights.

351. Having regard to all the material in its posses release in May 2001, it was within the power of the Moldovan Government to take measures to secure to the applicants their rights under the Convention.

352. The Court accordingly concludes that Moldova's Convention on account of its failure to discharge its positive obligations with regard to the acts complained of which occurred after May 2001.

In order to determine whether Moldova's responsib Court will therefore need to examine each of the co

32. Conversely, in *Ivanţoc and Others* the Court found that the efforts made by the Moldovan Government between 2004 and 2007 were sufficient; therefore Moldova could no longer be deemed responsible for the alleged violations perpetrated by the authorities of the "MRT":

"107. The Court must therefore ascertain whether betw and the applicants' release in June 2007 Moldova applicants their rights guaranteed by the Convention.

108. As to the general measures intended to re-establish control over the Transdniestrian territory, the Court recalls that in its *Ilaşcu, Ivanţoc and Others* judgment it stated that it was not its task to indicate the most appropriate measures Moldova should have taken to that end, or whether such measures were sufficient. The Court must only verify Moldo measures, to re-establish its control over the Transdniestrian territory, were sufficient (see *Ilaşcu and Others* cited above, § 340 *in fine*).

The Court stressed in paragraph 341 *in fine* of its judgment, when confronted with a regime sustained militarily, politically and economically by a power such as the Russian Federation, there was little that Moldova could do to re-establish its authority over Transdniestrian territory.

The Court notes that even after 8 July 2004, Moldova never ceased to protest about the Russian Federation's active support for the Transdniestrian regime, which declaration of independence, continued to deploy its efforts with the aim of recovering its control over the Transdniestrian territory (see above paragraphs 16, 19, 22, 26, 28 to 34 and the case of *Catan and Others* cited above, § 38).

109. As regards the applicants' situation, the Court Transdniestrian leaders, the Moldovan authorities release and respect for their Convention rights. Contrary to their position prior to the after 8 July 2004 the Moldovan authorities constan bilateral relations with the Russian Federation. Furthermore, they continually sought the assistance of other States and international organisations in obtaining

110. As to other possible measures, such as judicial measures, the Court refers to its conclusion in paragraph 347 of the *Ilaşcu, Ivanţoc and Others* case, where it had found ineffectual any judicial investigation in respect of persons living in Transdniestria. In the present case the Court finds that no new fact or argument has been put forward capable of persuading it to reach a different conclusion.

> 111. Having regard to the above considerations and to all the material in its possession, the Court considers that Moldova discharged its positive obligations to secure to the applicants their rights guaranteed by the Convention, with regard to the acts complained of, that is, after July 2004.
>
> On that account, there has been no failure on the part of Moldova to secure the rights guaranteed by the Articles of the Convention invoked by the applicants and accordingly no breaches of any of these Articles.
> The Moldovan Government's objection regarding thei
> consequential extent of their responsibility under

33. Likewise, in *Catan and Others*, the Court found that "*the Republic of Moldova ha[d] fulfilled its positive obligations in respect of [the] applicants*" and concluded tha been no violation of Article 2 of Protocol No. 1 by the Republic of Moldova (*ibid.*, § 148).

CONCLUSION

34. When one State interferes with the territorial and political integrity of another State, both States can be held liable under the Convention. However, there is a difference between the two types of liability of both States. Concerning the **"*active*"** State, or *State* the "*perpetrator*", the Court first has *jurisdiction*" to establish whether meaning of Article 1 of the Convention. *If* there *jurisdiction*", *then* the respondent obligations can be twofold: it is chiefly the negative duty to abstain from wrongful conduct, but also a positive obligation to secure, in such an area, the rights and freedoms set out in the Convention. As for a ***passive*** State, that is, the State ***suffering*** the Contracting Party is is no need to answer the question of *jurisdiction* in the sense, "since the l control of one part of its territory does not deprive this Contracting Party from its "*jurisdiction*" within the meaning of the Convention. The respondent Government bears only a positive obligation to do its best in order to ensure the respect for rights and freedoms of the persons concerned.

35. On the basis of the existing (and scarce) case-law, one can identify **five** basic positive obligations of the *suffering* State: "(1) to refrain from supp act in order to re-establish control over the disputed territory; (3) to try to solve the applicants' fate by po(4) to take appropriate practical and diplomati technical steps; (5) to take appropriate judicial measure The exact extent of the positive obligations depends on the particular circumstances of each case. However, the measures taken by the respondent Government must be constant and permanent, showing a true intent to solve the problem.

- PART II -
DETENTION ORDERED IN CRIMINAL PROCEEDINGS BY A COURT OPERATING IN A *DE FACTO* ENTITY

I. THE COURT'S CASE-LAW

A. *General considerations on the validity [illegible] courts of de facto entities*[3]

36. The issue of [illegible] “*lawfulness*” [illegible] *de facto* entities was [illegible] examined by the Court in the inter-State case *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV. When considering the general requirement to exhaust domestic remedies of the “TRNC” (Turkish Republic of Northern Cypru[illegible] *Advisory Opinion* of the International Court of Justice on Namibia (see Part II, section II, p. 26) and held that:

> “... the obligat[illegible] *de facto* entities is far from absolute. Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the de facto authorities, **including their courts**; and in the very interest of the inhabitants, the acts of these authorities related thereto cannot simply be ignored by third States or by international institutions, especially courts, including this [illegible] (*ibid.*, § 96)”.

37. The Grand Chamber further observed that:

> “98. For the Court, the conclusion [illegible] drawn is [illegible] **judicial organs** set up by the “TRNC” in so far as the relationships at [illegible] interest of the inhabitants of the “TRNC”, includi[illegible] such organs; and [illegible] authorities had not established them, this could rightly be considered to run counter to the Convention. Accordingly, the inhabitants of the territory may be required to exhaust these remedies, unless their inexistence or ineffectiveness can be proved – a point to be examined on a case-by-case basis”.

38. In the Court's view, recognising the eff[illegible] for the limited purpose of protecting the ri[illegible] in any way the “TRNC” (§ 92). Nor did it [illegible] international community regarding the establishment of this *de facto* entity or the fact that the government of the Republic of Cyprus remained the sole legitimate government of Cyprus (§ 90).

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[3]. The issue of the validi[illegible] *de facto* entities for the purposes of the Convention will [illegible] not be addressed in the present report. See, in this regard, the *Djavit An v. Turkey* judgment (no. 20652/92, 20 February 2003) in which the finding of a violat[illegible] Convention was based on the absence of any laws or [illegible] permits to Turkish Cypriots living in northern Cyprus to cross the green-line into southern Cyprus (see also, *Adali v. Turkey*, no. 38187/97, §§ 273-274, 31 March 2005). See however *Loizidou v. Turkey* (merits), 18 December 1996, §§ 44-47, *Reports of Judgments and Decisions* 1996-VI, where the Court did not attribute legal validity for the purposes of the Convention t[illegible] which Turkey claimed that property located in northern Cyprus had been expropriated).

39. As regards the alleged violation of Article 6 rights in respect of Greek Cypriots living in northern Cyprus and the Cypriot Government, the Chamber observed that there was a functioning court system in the "TRNC" for the settlement of disputes between Greek Cypriots, which was a court system established by law[4]. It therefore concluded that "TRNC" courts could be considered as having a constitutional and legal basis on which they operated[5]. In the Court's opinion, as in the context of exhaustion of domestic remedies, any other conclusion would be to the detriment of the Greek-Cypriot community and would result in a denial of opportunity to individuals from that community to have an adjudication on a cause of action against a private or public body (§ 238). It added that this conclusion in no way amounted to a recognition, implied or otherwise, of the "TRNC".

40. As to the alleged violation of Article 6 in respect of Turkish Cypriots living in northern Cyprus, the Cypriot Government reiterated their arguments as to the illegality of the "TRNC" courts. The Court found a violation of Article 6 § 1 on account of the practice of authorising the trial of civilians by military courts, not on the grounds that those courts were intrinsically *illegal* as being *de facto* entities[6].

41. The principles set out in *Cyprus v. Turkey* were recalled and applied in *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, ECHR 2010, where the Grand Chamber was called upon to examine the effectiveness of a new compensatory remedy available to Greek-Cypriot owners of immovable property located in northern Cyprus. The Grand Chamber accepted that the new mechanism before the Immovable Property Commission (a domestic remedy) had a "*national*" character vis-à-vis Turkey for the purposes of the exhaustion rule (§ 89). For the Court, this did not mean that Turkey wielded internationally recognised sovereignty over northern Cyprus.

42. As to the argument that requiring exhaustion of the new remedy lent legitimacy to the illegal occupation of northern Cyprus, the Court reiterated the principles established in *Cyprus v. Turkey* and maintained its opinion that "*allowing the respondent State to correct wrongs imputable to it does not amount to an indirect legitimisation of a regime unlawful under international law*" (§ 96). It is interesting to note that although the new remedy (before a commission) was not of a judicial nature, claimants could still lodge an appeal to the "TRNC" High Administrative Court in order to challenge procedural irregularities before the Immovable Property Commission. Since none of the applicants had used the new mechanism, the Grand Chamber declared their cases inadmissible for non-exhaustion of domestic remedies.

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4. As the Commission observed, the court system in its functioning and procedures reflected the judicial and common-law tradition of Cyprus.

5. This led the Court to conclude that there had been no violation of Article 6 § 1 in respect of Greek Cypriots living in northern Cyprus. On similar grounds, the Court found no violation of Article 13 in respect of interferences by private persons with the rights of Greek Cypriots living in northern Cyprus under Article 8 of the Convention and Article 1 of Protocol No. 1, having regard to the evidence that aggrieved Greek Cypriots had access to local courts in order to assert civil claims (§ 324).

6. See however the partly dissenting opinion of Judge Marcus-Helmons, who considered that the courts established in northern Cyprus were illegal and could not be regarded as "*tribunal established by law*".

B. Criminal proceedings and detention orders in de facto entities

43. It appears that the first cases in which the arrest/detention by agents of *de facto* entities was raised before the Convention organs were those concerning the conflict in Cyprus: *Chrysostomos and Papachrysostomou v. Turkey*, no. 15299/89, and *Loizidou v. Turkey*, no. 15318/89, reports of the Commission adopted on 8 July 1993. The Turkish-Cypriot police had arrested the applicants, who had participated in an anti-Turkish demonstration in Nicosia, for having crossed the UN buffer zone and allegedly entering the area under Turkish-Cypriot control. In both cases, the Commission considered that their arrest by Turkish-Cypriot police officers acting under the Criminal Procedure Law[7] took pla c e *in accordance with a procedure prescribed by law*" a n d *lawful*" s w "i t h i n t h meaning of Article 5 § 1 of the Convention[8]. As to the subsequent detention and criminal proceedings in northern Cyprus against the applicants in the *Chrysostomos* case, the Commission found that the Turkish authorities had not been directly involved in these acts, which therefore could not be imputed to Turkey. The Court did not therefore examine the merits of this complaint.

44. The Court took a different approach when it had to examine, under Article 5 § 1(a) of t h e C o n v e n t i o n , t h e l a w f u l n e s Moldavian Republic of tentio T r a n s d n i e s t r i a n In *Ilaşcu and Others v. Moldova and Russia*, cited above (2004), the a p p l i c a n t s c o m p l a i n e d t h a t t h e i r d e t e n t 1(a) in that they had been convicted by a non-competent or unlawfully constituted court, the "Mo l d a v i a n R e p u b l i c o f T r a n s d n i e s t r i a n Supre circumstances, a court belonging to the judicial system of a *de facto* entity could be regarded a s a t *established by law*" " p r o v i d e d t h a t i t f o r m e d p a r t o n *constitutional and legal basis*" r e f l e c t i n g a j u d i c i a l t r a d i t i o n c o m p a t i b l e w i t h the Convention (referring to *Cyprus v. Turkey*, §§ 231 and 236-237). After referring to its r e a s o n i n g u n d e r A r t i c l e 3 r e g a r d i n g *Supreme Court of the MRT*" (§ 4 3 6) , t h e a t n o n e o f t h e a p p l i c a n t s i n t h e p r e s e n t c a s e h a d b e e n c o n v i c t e d *court*" e d b y a t " a s e n t e n c e o f i m p r i s o body at the close of proceedings like those conducted in the case could not be regarded as "*lawful detention*" o r d i n *accordance with a procedure prescribed by law*" (§ 4 6 2) . It is interesting to note that under Article 3, the Court explicitly said that the sentence passed on Mr. I l a ş c u h a d n o l e g a l b a s i s o r l e g i t i m a c y

> "4 3 6 . T h e s u f f e r i n g t h e f e l t w e r e a g g r a v a t e d by the fact that the sentence had no legal basis o r l e g i t i m a c y f o r C o n v e n t i o n p u r p o s e s . T h e " S u p r e m I l a ş c u w a s s e t u p b y a n e n t i t y h a s n o t b e e n r e c o g n i s e d b y t h e l e g a l u n i n t e r n a t i o n a l c o m m u n i t y . T h a t " c o u r t " b e l o n g s t o a constitutional and legal basis reflecting a judicial tradition compatible with the Convention. That is evidenced by the patently arbitrary nature of the circumstances in which the applicants were tried and c o n v i c t e d , a s t h e y d e s c r i b e d t h e m i n a n a c c o u n t w h i

7. L e g i s l a t i o n e n a c t e d i n C y p r u s u n d e r B r i t i s h of the events.

8. See however the separate opinion of C.L. Rozakis in *Chrysostomos*. He considered that the arrest had taken place in an area (the buffer zone) where Turkish law was not applicable, and therefore, was illegal.

9. This conclusion was reiterated in *Ivantoc and Others,* cited above, concerning the continuous violation of Article 5 in respect of Mr Ivantoc and Mr Popa, based on the same conviction and sentence of imprisonment (§ 133).

45. It seems that the Court, in concluding that the sentence passed had no legal basis for Convention purposes, took into account both the arbitrary nature of the proceedings and the fact that the "Supreme Court" of the *de facto* entity whose system of justice ("TRNC") could hardly be qualified as operating on a *constitutional and legal basis reflecting a judicial tradition compatible with the Convention*". However, the Court did not distinguish this system from the "TRNC" court system, contrary to the approach taken in *Cyprus v. Turkey*.

46. In *Foka v. Turkey*, no. 28940/95, §§ 81-84, 24 June 2008, the Court examined whether the detention of an applicant "enclaved" Greek Cypriot suspect by police officers of the "TRNC" could be regarded as "lawful" within the meaning of Article 5 § 1 of the Convention. The Court noted that it had previously recalled that all those affected by the policies or actions of the authorities of the "TRNC" fell within the "*jurisdiction*" of Turkey for the purposes of Article 1 of the Convention, in view of the overall control exercised by Turkey over the territory of northern Cyprus. It held that it would be inconsistent with this responsibility under the Convention if the adoption by the authorities of the "TRNC" of *criminal law* measures, or their application or enforcement within that territory, were to be denied any validity or regarded as having no "*lawful*" basis in terms of the Convention. Therefore, in so far as the actions of the "TRNC" authorities was in compliance with the laws and procedures in force in northern Cyprus, those acts should in principle be regarded as having a legal basis in domestic law for the purposes of the Convention. This led the Court to find that the arrest of the applicant by a "TRNC" police officer had a basis in law for the purposes of Article 5 § 1(b) of the Convention.

47. In order to establish the "*lawfulness*" of the detention by the "TRNC", the Court relied on the doctrine of the validity of acts of *de facto* entities referred to in *Cyprus v. Turkey* (§ 96), as well as on previous cases where it had found that there was no legal or regulatory framework for interferences with other Convention rights (see, in this regard, the *Djavit An v. Turkey* judgment, no. 20652/92, 20 February 2003, in which the finding of a violation of the applicant's rights under Article 8 was based on the absence of any laws or measures in the "TRNC" to prevent Greek Cypriots living in northern Cyprus to cross the green-line into southern Cyprus; see also, *Adalı v.* no. 38187/97, §§ 273-274, 31 March 2005). The Court, as in *Cyprus v. Turkey*, recalled that "lawfulness" for the purposes of Article 5 § 1 was to be established whatsoever the position of the international community vis-à-vis the "TRNC".

48. In *Protopapa v. Turkey*, no. 16084/90, § 87, 24 February 2009, the Court had to examine a case in which a Greek Cypriot had been convicted by "TRNC" courts. The Turkish demonstration had joined the Nicosia in which the applicants in the *Chrysostomos and Papachrysostomou v. Turkey* and *Loizidou v Turkey* cases (see above) also took part. He was convicted for having illegally entered the "TRNC" territory. Following the same account the more recent case-law developed by the Court (*Cyprus v. Turkey* and *Foka*), the Court considered that the deprivation of liberty was "lawful" within the meaning of Articles 5 § 1(c) (arrest and detention on remand for committing offences under "TRNC"[10]) and 5 § 1(a) (detention after conviction) of the Convention. As regards the Article 6 complaint, the Court held that the criminal trial before the "TRNC" court had been unfair, there being no ground for finding that the court was not independent and/or impartial or that the proceedings against the applicant had been politically

10. Unlawful assembly and illegal entry into « TRNC » territory.

motivated (§ 87)[11]. The Court reached the same conclusions in a group of follow-up cases concerning the same factual background[12].

CONCLUSION

49. Although the Court has refrained from elaborating a general theory concerning the lawfulness of legislative and administrative acts of *de facto* entities[13], it has clearly accepted that civil, administrative or criminal measures adopted by *de facto* authorities should in principle be regarded as "lawful" for the purposes of the Convention (*Foka*). This obviously covers the application or enforcement of these measures by the agents of the *de facto* entity, including detention measures under Article 5 of the Convention in accordance with the laws in force in that entity. The Court has also established that the domestic courts of a *de facto* entity can be established by law within the meaning of the Convention, as long as they form part of a judicial system that constitutionally and in operation has a sufficient "legal basis" (*Cyprus v. Turkey*). While initially the Court applied this principle only to civil courts, for the benefit of the local population and the protection of their rights (*Cyprus v. Turkey*), it has expanded it to criminal courts, whose decisions are in principle detrimental to the individual concerned (*Protopapa*). However, the Court may still refuse to accept a criminal court of a *de facto* entity as a court if it belongs to a system which does not operate constitutionally and has no "legal basis" reflecting a judicial tradition compatible with the Convention (*Ilascu*). This leaves the Court some discretion to examine on a case-by-case basis the quality of the judicial system in question, for instance whether the proceedings were patently arbitrary or politically motivated.

50. In any event, the Court has always held that the recognition of legal effects for Convention purposes of acts or decisions of *de facto* entities does not amount to a legitimisation of those entities under international law.

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11. The Court also considered that the conviction and punishment had been foreseeable and therefore compatible with Article 7 of the Convention (see §§ 90-98).

12. *Asproftas v. Turkey*, no. 16079/90, 27 May 2010; *Petrakidou v. Turkey*, no. 16081/90, 27 May 2010; *Olymbiou v. Turkey*, no. 16091/90, 27 October 2009; *Strati v. Turkey*, no. 16082/90, 22 September 2009. See, for similar events in 2010, *Union européenne des droits de l'homme* (dec.), no. 7116/10, 2 April 2013.

13. *Loizidou v. Turkey* (merits), 18 December 1996, § 45, *Reports of Judgments and Decisions* 1996-VI.

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