Presidência Portuguesa do Comité de Ministros do Conselho da Europa
Portuguese Chairmanship of the Committee of Ministers of the Council of Europe
Présidence Portugaise du Comité des Ministres du Conseil de l'Europe

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 30 September 2005

Restricted
CDL-UD(2005)022rep
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

in the framework of
THE ACTIVITIES OF THE PORTUGUESE CHAIRMANSHIP
OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE
in co-operation with
THE UNIVERSITY OF COIMBRA
IUS GENTIUM CONIMBRIGAE CENTRE,
THE FACULTY OF LAW
&
THE INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL LAW - IACL

UNIDEM Seminar

"THE STATUS
OF INTERNATIONAL TREATIES
ON HUMAN RIGHTS"

Coimbra (Portugal), 7-8 October 2005

REPORT
"THE TERRITORIAL SCOPE OF HUMAN RIGHTS OBLIGATIONS : THE CASE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS"

by
Mr Christos L. ROZAKIS
Professor of International Law, University of Athens, Greece
Vice-President, European Court of Human Rights, Strasbourg

1. Introductory remarks

There is now more than half a century that the protection of human rights has transcended the boundaries of States, of their domestic constitutions and other internal legal regimes, and has acquired a solid international dimension. Numerous multilateral treaties are currently constituting a powerful panoply of protection of a multitude of human rights at a universal or regional level ; and there is little doubt that a number of fundamental rights have even escaped the constraints of conventional arrangements and have reached the status of general customary rules. Some of them (such as the prohibition of torture) are even considered to be peremptory rules of international law (*jus cogens*), not allowing any derogations from their normative contents.

It should still be underlined that in our current international landscape human rights are mainly protected through conventional rules creating rights for the individuals – or sometimes for collectivities – and consequently obligations for the States-parties to the corresponding agreements. These agreements may be either of a general character, namely designed to apply at the level of the international community as a whole, or they may have a regional nature, i.e. they apply *inter partes* among a number of States which belong to a specific geographical area of the world or partake to the same geopolitical culture, without necessarily strictly belonging to the same geographical area. It goes without saying that this *ratione loci* element does not determine automatically the subject-matter of the protected rights : both general and regional human rights arrangements may cover different categories of rights, starting from the so-called first generation rights (civil and political rights), and extending to newer generations of rights (e.g. environmental protection), or rights of specifically protected persons (minorities, women, children, etc.). In the category of general arrangements, there is an admirable production of international conventions coming from the initiative of the United Nations, while three geographical or geopolitical regions of the world have produced today – with a varying degree of frequency and success – regional agreements of human rights protection : Europe, the Americas and Africa.

The scope of applicability of these multilateral treaties is basically determined by their very nature as international agreements. Taking aside the interaction between treaty-law and customary-law, which may lead in certain circumstances, and under certain conditions, to the emergence of customary rules of law transforming conventional rules to general rules binding on all states independently of their initial conventional source, rules of protection of human rights, stemming from general or particular agreements, follow the usual pattern of international law, namely that they are binding only to their parties, inter se. By its nature a general treaty, enjoying universal participation, has a wider field of applicability than a particular-regional one, in the sense that it covers more parts of the world than a regional convention does ; but still the obligations that the former creates, and which may be invocable by other States-parties or other subjects of international law (e.g. individuals), are limited to those States which have consented to its contents, in exactly the same way as it happens in the case of particular-regional treaties. There is no indication in State practice that human rights treaties, qua treaties, may be opposed to a non-party and have a wider applicability scope than the one that its membership determines. The situation is radically different in the case of customary rules of human rights. These rules are generally invocable vis-à-vis any and every State from the moment that they acquire their customary status.

A State is, consequently, linked with a human rights obligation either through a general customary rule or through a treaty rule to which it has consented. Yet, it is one thing the applicability of a human rights rule vis-à-vis a State, it is another thing its responsibility regarding its respect in specific circumstances. The binding character of a rule upon a State is a precondition for its applicability in these circumstances, but it does not suffice. The State must be also responsible for an alleged transgression of a rule ; and to be found responsible it must have acted within its jurisdiction, namely within the confines of its power.

The question which therefore arises is when or where a State has jurisdiction? It is a common place that the State's jurisdiction is primarily territorial. International law accepts that they exist other bases of jurisdiction, such as nationality of individuals, flag, diplomatic and consular relations, passive personality and universality, but these grounds are limited and are circumscribed by the sovereign rights of the other States whose jurisdiction may be encroached with the jurisdiction of a State attempting to exercise it on an extra-territorial basis. Examples of such possible encroachment are abundant in international law : it is widely accepted, for instance, that a State's exercise of jurisdiction over its own nationals abroad is subordinate to the territorial jurisdiction of the State in whose territory these nationals reside ; or that a State cannot exercise jurisdiction on the territory of another State, without the latter's consent, etc.

The primacy of territoriality for a valid exercise of jurisdiction is also reflected in Article 2, paragraph 1 of the 1966 Covenant on Civil and Political Rights, which provides that

> "[e]ach State Party to the present Convention undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Convention…"

It should, yet, be underlined that the existence of the words "and subject to its jurisdiction" has allowed the Human Rights Committee, in applying the article in the circumstances of particular cases, to give flesh to an extra-territorial application of the obligations contained in the Covenant. As early as 1981, in the case of *Lopez Burgos v. Uruguay*, the Committee noted that the notion of jurisdiction also covers acts of States agents which had taken place outside the territory of the State.

The territorial nature of jurisdiction is left open in the case of the 1978 American Convention on Human Rights, since its Article 1 simply refers to the obligation of States Parties to it "to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights, without any discrimination". In a relatively recent case, *Coard et al v. the United States*, the Inter-American Commission of Human Rights found that it is

> "pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extra-territorial locus will not only be consistent with, but required by, the norms which pertain…
>
> [E]ach American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a State's territory, it may, under given circumstances, refer to a conduct with an extra-territorial locus where the person concerned is present in the territory of one State, but subject to the control of another State – usually the acts of the latter's agents abroad…"

The most extensive case-law on this matter, namely the territorial or extra-territorial nature of jurisdiction can be found in the decisions of the organs of the European Convention on Human Rights, to which will now turn.

2. The case-law of the European Convention on Human Rights

The concept of jurisdiction, like all other concepts appearing in the provisions of the European Convention on Human Rights (hereafter "the Convention") (torture, private and family life, etc), was not elaborated and defined by the Convention's drafters. The task of determining its actual purview was left to the supervisory bodies – the European Commission of Human Rights, now defunct, and the Court – which, through their case-law have undertaken the labour not only of giving flesh to general, undefined terms, but also of adapting them to the realities of an ever changing European society. The Convention was designed, by its drafters, to work within the European legal space for a considerable span of time, and the indeterminacy of its concepts – coupled, of course, with the existence of the supervisory bodies – was a wise decision, allowing the Convention, as "a living instrument" to survive social and other mutations during the lengthy voyage across the uncharted map of a constantly changing humanity.

2.1. The rule : the territorial character of jurisdiction

Before embarking on an examination of the case-law of the Strasbourg institutions, I propose a fleeting look at the choices made by the drafters of the Convention with regard to the notion of jurisdiction, as they appear in the preparatory work, but also in the very text of the Convention, read as a whole.

Insofar as the preparatory work is concerned, the text prepared by the Committee of the Consultative Assembly of the Council of Europe on Legal and Administrative Questions proposed a clearly territorial delimitation of a State's responsibility vis-à-vis the Convention : the wording of what eventually became Article 1 provided that "member States shall undertake to ensure to all persons residing within their territories the rights…" The Expert Intergovernmental Committee, which reconsidered the draft, decided to widen the jurisdictional limits of the Convention, by replacing the reference to "all persons residing within their territories" with a reference to "persons within their jurisdiction". Yet, as clearly transpires from the explanatory text which accompanied the proposal, the reason for this replacement was not the reference to "territory", but the requirement of residence as a condition of applicability of the Convention in individual circumstances.

The territorial nature of jurisdiction may also be detected in the very text of the Convention read as a whole. The Preamble, as such, does not contain conclusive elements as to the jurisdictional boundaries of the Convention, although it may be safely assumed that its "membership" was purported to be limited to the geographical, or, one may say, geopolitical confines of the European continent, or, better, to those European States which were "like-minded and have a common heritage of political ideals, freedom and the rule of law". After all, its main goal was to achieve "greater unity between [the members of the Council of Europe]". It should not be forgotten that the Convention was adopted at a historical juncture, where a number of western European States were seeking to identify themselves through their distinctive characteristics as democratic States respecting the rule of law in their internal orders – in contrast with socialist European States falling under the auspices of the then USSR

– and to create, in an incremental manner the necessary conditions for furthering their European political integration. In these circumstances, the Convention was not solely designed to afford individual relief to those suffering violations of their human rights, but also to be used, within the regional context, as an instrument for the integration of Western Europe's States. The aim was therefore "greater unity" within this regional context; and this regional context had an intrinsic element of territoriality.

What also seems to unequivocally reflect the will of the drafters regarding the limits of jurisdiction of the States Parties to the Convention is the text of the present Article 56 of the Convention, which deals with its territorial application. There it is provided that any State "may at the time of its ratification or at any time thereafter declare … that the … Convention shall … extend to all or any of the territories for whose international relations it is responsible" (paragraph 1). Paragraph 4 of the same Article provides that any State which has made such a declaration "may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals…" It is clear that the fact that States felt the need to provide for a specific rule concerning the applicability of the Convention to territories outside the metropolitan area of a State Party, but under its political control, indicates the initial intention of the drafters to limit the purview of the Convention territorially ; otherwise other forms of jurisdiction recognised by general international law could have been easily envisaged as covering areas lying outside the territory of the States Parties, without the need for a specific reference to the territories "for whose international relations [a State Party] is responsible". It is also of particular significance that the drafters felt the need to provide for a specific rule (in paragraph 4) to deal with the issue of the competence of the Court for such categories of territories.

2.2 The "traditional" case-law

The Strasbourg institutions, during their fifty years of operation, have rarely been faced with the dilemma whether in the circumstances of a case there has been a question of territorial jurisdiction affecting their competence to rule on the merits. In the great majority of cases the applicants have complained of acts or omissions of States Parties in their territory and, hence, no issue of incompatibility of the Convention ratione loci has usually arisen. Only in very few instances have applicants, in inter-State or individual petitions, indicated that wrongdoings of a State, in breach of the Convention, have occurred outside its territory, through acts or omissions of its agents. Early instances of the examination of the question of extraterritoriality may be traced as far back as 1974, when Strasbourg – more particularly the European Commission of Human Rights – dealt with the extraterritorial jurisdiction of a State Party and the consequent extraterritorial limits of the Convention's applicability : in the inter-State case of Cyprus v. Turkey, the European Commission of Human Rights stressed that the term "jurisdiction" "is not limited to the national territory of the High Contracting Party concerned. It is clear from the language, in particular of the French text, and the object of this Article, and the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their territory or abroad".

The position of the Commission, which seems to depart considerably from the position of the drafters of the Convention, relied mainly on the Convention's purpose as a human rights treaty, and produced a test of extraterritorial jurisdiction, which has had lasting effects on the Strasbourg case-law; that of "actual control" (actual authority). This approach was later adopted and further developed by the Court in the case of Loizidou v. Turkey. In Loizidou the main issue was whether the facts alleged by the applicant – her inability to have access to

her possessions in the northern part of Cyprus – were capable of falling within the jurisdiction of Turkey, although they had occurred outside the latter's national territory. The Court, both in its examination of the preliminary objections and in its examination of the merits answered the question in the affirmative. It held :

> "Bearing 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".

In the judgment on the merits of the case the Court dealt further with the issue of imputability, and explained what it meant with regard to the exercise of effective control to which it had referred in the decision on the preliminary objections :

"It is not necessary to determine whether … Turkey exercises detailed control over the policies and actions of the 'TRNC' ['"Turkish Republic of Northern Cyprus'"]. It is obvious from the large number of troups engaged in active duties in northern Cyprus… that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case entails her responsibility for the policies and actions of the 'TRNC'. Those affected by such policies or actions therefore come within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention. Her obligations to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus".

The Loizidou case endorses the position of the European Commission of Human Rights and introduces, in the context of extraterritoriality, the notion of "effective control" (instead of "actual" control as proposed by the Commission). The Court did not elaborate on this notion, but one may assume that by effective control it meant the capacity of a State to exercise power through its agents in an unhindered manner in a specific area outside its territory and, furthermore, for a period of time allowing for the "effective" deployment of this power.

2.3. The departure from the tradition

It appears from the position taken by the Strasbourg institutions that, from an early stage in the evolution of their case-law, a broad interpretation was given to the notion of jurisdiction under Article 1, allowing a review of the conduct of States Parties well beyond their national territory, subject to their exercising effective control over areas and people lying outside their borders. In these circumstances there was a presumption that the nature of the Convention as a human rights treaty, and the obligations on the States Parties to always act in conformity with the rules of the Convention, irrespective of territorial constraints, extended beyond the confines of the European continent and offered anyone under the authority of the States Parties the requisite protection ; or, to put it in its proper context, the European "public order" in the domain of human rights constrained the States Parties to the Convention to behave in a uniform manner in protecting these rights irrespective of national frontiers and regional considerations.

The test of extraterritoriality anchored in the concept of "effective control", has been coloured in a different way recently through the position taken by the Court in two rulings, which may be construed as departing from the traditional approach developed mainly in the Turkish extraterritorial cases : the admissibility decision in *Banković and Others v. Belgium and Others* and the judgment in *Ilaşcu and Others v. Moldova and Russia*.

The Banković case concerns the air-strike by NATO on the main television and radio facilities in Belgrade during the Kosovo conflict, which killed sixteen people and seriously injured another sixteen. The applicants were all victims of the air bombing or close relatives of those who died, and the respondents were all member States of NATO, the organisation commanding the attack over Belgrade, while at the same time, being States Parties to the Convention. The applicants alleged that the NATO bombing constituted a violation of Articles 2 (right to life) and 10 (freedom of expression), and that there was no effective remedy in the domestic order of the respondent States to protect them against these alleged violations, as required by Article 13 of the Convention.

What became the main issue before the Court and the centre of its interest in the circumstances of the case was whether the air-strike by NATO implied that the States Parties involved in the incident had had effective control over the territory and the people in it, and whether the alleged violations occurred within or outside the field of the States' competence under the Convention.

The Court declared the case inadmissible as being incompatible with the provisions of the Convention. In doing so it relied on the following main arguments.

a. By applying the tests of the "ordinary meaning" and "any subsequent practice", as provided for by the Vienna Convention on the Law of Treaties, to the relevant term "jurisdiction" under Article 1, the Court was satisfied that, from the standpoint of international law, the jurisdiction of a State was primarily territorial. Therefore, Article 1 must be considered to reflect this ordinary territorial notion of jurisdiction, other bases being exceptional and requiring special justification in the particular circumstances of each case.

b. The case-law of the Court demonstrates that its recognition of the exercise of extraterritorial jurisdiction by a Contracting State is exceptional : it has accepted it in circumstances when a respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent or acquiescence of the Government of that territory, exercises all or some of the public powers normally exercised by that Government.

c. The Court argued that the applicants' submissions were tantamount to considering that anyone adversely affected by an act imputable to a State Party, wherever in the world that act may have been committed or its consequences felt, was thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention. The applicants' approach did not explain the application of the words "within their jurisdiction", and it even went so far as to render those words superfluous and devoid of any purpose. Had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text identical or similar to the contemporaneous Article 1 of the Geneva Convention of 1949.

d. In answering the applicants' argument that failure to accept the jurisdiction of the respondent States would amount to a defeat of the ordre public mission of the Convention, the Court's position was the following :

> "The Court's obligation … is to have regard to the special character of the Convention as a constitutional instrument of European public order for the protection of individual human beings, and its role, as set out in Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties. It is therefore difficult to contend that a failure to accept the extraterritorial jurisdiction of the respondent States would fall foul of the Convention's ordre public objective, which itself underlines the essentially regional vocation of the Convention system, or of Article 19 of the Convention which does not shed any particular light on the territorial ambit of that system.

In short, the Court concluded, the Convention is a multilateral treaty operating in an essentially regional context, and notably in the legal space of the States Parties. The Federal Republic of Yugoslavia clearly did not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of the States Parties to it. Accordingly, the desirability of avoiding a gap in human rights protection has so far been relied on by the Court in favour of establishing jurisdiction only when a territory would normally be covered by the Convention.

A number of conclusions may be drawn by analysing Banković, which may, at the same time, answer the question whether or not this decision on (in)admissibility departs from the case-law generated mainly by the Turkish cases involving the northern part of Cyprus.

The first conclusion is that through the Banković decision the Court has come closer to the wish of the Convention's drafters to produce an instrument of a predominantly regional nature, based on territorial jurisdiction of States Parties. The key sentences to be noted from the decision in this respect is the one referring to the Convention as an instrument of European ordre public, which is not designed to apply everywhere in the world. A new element which has also been introduced by Banković concerns the purview of the concept of regionality. Indeed, the clear reference made by the Court to the regional character of the Convention is to be read in conjunction with the distinction it made between Loizidou and Banković insofar as competence *ratione loci* is concerned. The Court found that the extraterritoriality in Loizidou was justified by the fact that the northern part of Cyprus and its inhabitants were part of the territories and people who had been covered by the Convention, before the occupation by the Turkish forces ; while, presumably *a contrario*, the territory of former Yugoslavia had never been protected by it. Hence, it seems that the notion of regionality, as expounded by Banković, is not predominantly determined by geographical considerations (no one appears to dispute that former Yugoslavia was geographically part of Europe) but by geopolitical considerations, in the sense that "Europe" and "European" were defined on the ground of their participation in or belonging to the political family of the Council of Europe (and the legal order of the Convention). A second conclusion that can be drawn concerns the concept of "effective control". In Banković the Court implied that there was a distinction between the extraterritorial control exercised by Turkey in northern Cyprus and the presence of NATO aircraft in Yugoslav airspace during the bombing of the radio and television station. Without entering into the crucial issue of the individual responsibility of the NATO members when they collectively decided to bomb the station, the Court merely stated that in Loizidou effective control of the territory was found to exist because of (a) the occupation of the territory and (b) the large number of Turkish forces engaged in active duty in Cyprus. *A contrario*, then, the instantaneous act of bombing and flying over Belgrade did

not meet the requirements of effective control. In other words, it seems that effective control means, according to *Banković*, the exercise of authority in a territory, taking place over a certain duration and having overall repercussions on matters of governance at local level.

A third conclusion that can be drawn is that the Court in Banković, although it reiterated its primary devotion to the territorial nature of jurisdiction, and the exceptional character of extraterritoriality in a regional context, did not hermetically shut the door to extraterritoriality, even in relation to a State Party's conduct outside the regional- and geopolitical area of the Convention. In paragraph 73 of the decision it noted : "other recognised instances of extraterritorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board crafts and vessels registered in or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extraterritorial exercise of jurisdiction by the relevant State". This *obiter dictum*, which follows on from the Court's statement that it relies on public international law rules dealing with matters of jurisdiction – which, according to it, is primarily territorial – may bind it in future cases where a complaint comes before it concerning an alleged violation of the Convention outside the regional field of its applicability but involving State's agents in a foreign country – the "long arm of the State" – or incidents inside a craft or a vessel. One may find here, in this *obiter dictum*, the seeds of a possible future threat to the test of regionality, which may materialise through an "expansive" interpretation of this type of "jurisdiction".

Yet this last conclusion is mere speculation. For the time being, it seems indisputable that the Court has followed international law only with regard to the general rule of territoriality of jurisdiction, but not with regard to its exceptions. Its attachment to the predominantly territorial element of jurisdiction reflects international law ; but when it comes to extraterritorial jurisdiction – which goes hand in hand with international responsibility – the Court, by developing the notion of regionality and effective control, has formulated its own concept of extraterritorial jurisdiction, to apply solely for the purposes of the Convention.

A fourth and final conclusion that can be drawn is that the Court was careful not to overturn past case-law, but rather to qualify it by elaborating on the concepts of regionality and effective control. Its restrictive interpretation vis-à-vis its findings in the Turkish cases does not create problems of applicability of the Convention in its regional context, but clearly creates a *vacuum* outside these limits. In the circumstances of today's international relations, where the involvement of major powers – including medium-range European powers – in international or internal conflicts is a widespread phenomenon (either through United Nations decisions, or through autonomous and sometimes, from the standpoint of legality, disputable actions), the question of the limits of applicability of the Convention acquires particular significance. Reliance upon the regional character of the Convention seems to impose certain constraints on its application in areas outside the Council of Europe's domain, even, I would say, where effective control of a territory may be found to exist. This leaves the world with a considerable *vacuum*, which must be filled by other international instruments (other regional instruments being, by definition, excluded, the remaining weaponry encompasses other universal instruments, such as the Covenant on Civil and Political Rights, or agreements dealing specifically with international humanitarian law and the laws of war, such as the Geneva Convention or the new Rome Statute of the International Criminal Court) to the extent that they coincide *ratione materiae* with the protection offered by the

Convention. Yet the different character of such instruments providing for a more limited possibility of individual petition or applying primarily at inter-State level may leave a lot to be desired for those who consider themselves victims of a violation by a State Party to the Convention but who are left, jurisdiction-wise, outside the scope of its protection.

At the other end of the jurisdictional spectrum lies the case of *Ilaşcu and Others v. Moldova and Russia*. While in the case of Banković the Court opted for a restrictive interpretation of Article 1 of the Convention, in Ilaşcu the Court applied a wide, extensive interpretation of the concept of jurisdiction.

The facts of the case which are pertinent to our discussion are the following : the case originated in an application by four Moldovan nationals who were convicted by the courts of the "Moldavian Republic of Transdniestria" (the "MRT"), a separatist region of Moldova which proclaimed its independence in 1991 but is not recognised by the international community. They submitted that their conviction and imprisonment had violated the Convention and that the Moldovan authorities were responsible under the Convention for the alleged infringements, since they had not taken any appropriate steps to put an end to them. They further asserted that the Russian Federation shared responsibility since the territory of Transdniestria was and is under *de facto* Russian control on account of the Russian troops and military equipment stationed there and the support given to the separatist regime by the Russian Federation.

The main issue before the Court was the question of jurisdiction, in a situation where Moldova did not control the Transdniestrian authorities with regard to the acts committed by them against the applicants, but where the territory governed by the separatist regime was still formally part of the State of Moldova – a party to the Convention –; and where the Russian Federation, firstly, had been involved in the arrest and detention of the applicants in 1992 and had handed over them to the Transdniestrian police, and, secondly, had continued to give its support to the Transdniestrian separatist regime throughout the period during which the latter acted in violation of the Convention.

The Court, in its judgment, first dealt with the general principles applying in questions concerning jurisdiction under Article 1 of the Convention. It started by reaffirming its position that the words "within their jurisdiction" must be understood to mean that a State's jurisdictional competence is primarily territorial, 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 due to military occupation by the armed forces of another State which effectively controls the territory concerned… to acts of war or rebellion, or to the acts of a foreign State supporting the installation of a separatist State within the territory of the State concerned".

In applying the general principles in respect of Moldova and the Russian Federation, the Court began by acknowledging that, despite the fact that after 21 July 1992 Moldova "tended to adopt an acquiescent attitude, maintaining over the region of Transdniestria a control limited to such matters as the issue of identity cards and customs stamps", the Moldovan Government, "the only legitimate government of the Republic of Moldova under international law, does not exercise effective authority over part of its territory, namely that part which is under the effective control of the 'MRT'.

Yet this crucial conclusion did not prevent the Court from observing :

> "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 powers to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention".

To continue :

> "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 a 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 Contracting State's 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 guaranteed by the Convention.
>
> … Consequently, the Court concludes that the applicants are within the jurisdiction of the Republic of Moldova for the purposes of Article 1 … but that its responsibility for the acts complained of, committed in the territory of the 'MRT', over which it exercises no effective authority, is to be assessed in the light of its positive obligations under the Convention".

On the basis of the concept of positive obligations which persist as obligations even in the absence of effective control over part of the territory, the Court proceeded to examine the position taken by the Government of Moldova to effect and to secure the release of the applicants through the means (diplomatic, political) still available to it. Having found that Moldova had ceased to exert any pressure on those responsible for the applicants' continuing detention in breach of Article 5 of the Convention, in any event after May 2001 (during the negotiations for a settlement of the situation in Transdniestria, in which the Moldovan authorities had participated, without any mention of the applicants' fate being made and "without any measure being taken or considered by the Moldovan authorities to secure to the applicants their Convention rights"), the Court concluded that Moldova's responsibility was "capable of being engaged under the Convention on account of its failure to discharge its positive obligations with regard to the acts complained of which occurred after May 2001". Further, in examining the merits of the case it attributed a number of violations of the Convention to Moldova.

The situation regarding the Russian Federation, on the other hand, seems to conform more to the traditional approach of the Court on matters of extraterritorial jurisdiction. The Court considered that on the facts of the case, the "Moldavian Republic of Transdniestria", set up in 1991-1992 with the support of the Russian Federation, "vested with organs of power and its own administration, remains under the effective authority, or at the very least under the

decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation". In these circumstances, the Court considered that "there is a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate, as … the Russian Federation made no attempt to put an end to the applicants' situation brought about by its agents, and did not act to prevent the violations allegedly committed after 5 May 1998". As a result, the applicants "come within the 'jurisdiction' of the Russian Federation and its responsibility is engaged with regard to the acts complained of". On the basis of this attribution of responsibility, the Court entered into the examination of the merits and found a number of violations of the Convention by the Russian Federation also.

From the above analysis of the main points of the Ilaşcu judgment, it clearly transpires that we are faced with a novel approach by the Court to the notion of jurisdiction under Article 1 of the Convention. With regard to the jurisdiction of the Russian Federation there is already a departure from the traditional approach as established through the Turkish cases. The Court in Ilaşcu complements the "effective control" test by adding two new elements : the "decisive influence" test, and the "survival through support" test. It must be underlined that the Court in Ilaşcu does not refer, when dealing with the jurisdiction of the Russian Federation, to the notion of "effective control", but replaces it with the notion of "effective authority". The term "effective authority" may denote a more lenient approach, compared to the strict requirements of the previous case-law, and appears to be a test more suitable to the circumstances of the case. The more lenient approach is further reinforced by the (alternative ?) test of "decisive influence", which seems to represent the minimum test acceptable to the Court in attributing jurisdiction to a State, and by the explanatory sentence of "survival through support", which may be also seen as a distinct alternative test to establish jurisdiction ("in any event"). As was insinuated some lines above, when faced with a situation where it was difficult to establish a clear-cut parallel between Russia's responsibility and that of Turkey in the Cypriot cases, the Court preferred to depart from the traditional references and to adapt its approach to the realities of the situation. It should not be forgotten, moreover, that the Court was also influenced in its decision by the fact that, on the facts of the case, the Russian Federation was clearly responsible for the misfortunes of the applicants, their arrest, detention and surrender at the hands of the separatist regime at the beginning of this dramatic saga.

The situation is different with regard to Moldova's jurisdiction. The Court had to deal with a situation where it was clear from the facts of the case that the Moldovan authorities did not have any control whatsoever over the separatist region and its *de facto* regime. It is the Court itself which admits, as we have already noted, that "[o]n the basis of all the information in [the Court's] possession … 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'. The Court therefore accepted (a) that the separatist regime had effective control over the territory, and (b) that the Russian Federation also had effective control over the territory or its authorities, or at least exerted a decisive influence upon them. In these circumstances, one might expect that the Court, by following its previous case-law, would be led to the finding that Moldova did not have jurisdiction in the circumstances of the case ; since the test of effective control, particularly as expounded in the Banković decision, is rather rigid and requires control of the area concerned and its authorities and the duration of such control for a considerable period of time. If these tests are applied, Moldova clearly did not have effective control, the real

effective control being in the hands of the illegal local administration and its supporters (particularly insofar as the alleged violations of the Convention were concerned). It should not be forgotten that in the most recent inter-State case of *Cyprus v. Turkey* the Court found that Turkey was responsible because of its exercise of effective control in the northern part of Cyprus, while the Republic of Cyprus, being deprived of such control, did not have any responsibility for the wrongdoings affecting the rights of individuals in that region.

Even if we apply the more lenient test, as applied by the Court in the case of the Russian Federation in Ilaşcu, namely that of "decisive influence" and the survival of the separatist regime by virtue of the military, economic, financial and political support given to it by the Russian Federation, it is still difficult to contend that the facts of the case show that the Moldovan authorities had at any stage of their relations with the separatist regime a "decisive influence" on it, or that they gave it support of the kind given by the Russian Federation. It is also clear that the test applied in the case of *Assanidze v. Georgia*, where the Court found that the Georgian authorities encountered difficulties in securing compliance with the rights guaranteed by the Convention in some part of the territory, was not applicable in the circumstances of Ilaşcu. There is a clear distinction to be made between the factual situation in Georgia – where the authorities did not deny responsibility, after all, for the whole of the territory, and the central government had temporary difficulties in imposing its order – and the factual situation in Transdniestria, where the separatist regime was firmly established in the territory and exercised full control over it.

Yet the Court circumvented the hurdles of effective control and went a step forward vis-à-vis the usual test applicable in the circumstances of this category of cases : even in the absence of effective control, the Court found that a State remained under a positive obligation to do its utmost to secure within the part of its territory no longer under its effective control the safeguards provided for in the Convention. This additional requirement is a totally novel one : nowhere in its previous case-law had the Court claimed that a State that had temporarily lost effective control over part of its territory, still had jurisdiction over it, on account of its positive obligations to continue to seek to ensure compliance with the Convention safeguards. In the analogous situation of the Republic of Cyprus, the Strasbourg institutions never raised the issue of the official State's compliance with these positive obligations. On the contrary, Strasbourg was firm in accepting that the loss of effective control by the State was tantamount to its being exonerated from any jurisdictional obligations.

The introduction of the "positive obligation" requirement, acting as a constituent element of the notion of "jurisdiction" within the meaning of Article 1 of the Convention, seems to raise a number of problems. No one can deny, of course, that Article 1, by referring to the obligations of States to secure the rights and freedoms provided for by the Convention, does not necessarily refer solely to a State's duty to abstain from interfering with these rights and freedoms, but also, in certain circumstances, to its duty to act positively in order to protect these rights. The question still remains whether in the event that a State does not effectively control part of its territory, and, indeed, that part of the territory is under the effective control of another entity, the State still has jurisdiction, more limited but still existing, "positively" obliging it to continue to ensure compliance with the Convention. And a further question also arises : even if we assume that there is jurisdiction of a limited purview, how can the boundaries of this jurisdiction be determined ?

In answering the first question, the immediate response that comes to the mind of a student of the Convention is that the application of the case-law of the Convention, through the "effective control" test, would lead to the following result : if a State does not have effective control of its territory and, conversely, another State or entity does, the first State has no

jurisdiction. The extent of its obligations under the Convention depend upon the prior finding as to jurisdiction and, consequently, the question whether or not it has positive obligations to secure rights and freedoms is subordinate to the issue of jurisdiction : no jurisdiction means no obligations, passive or active.

The Court in the case of Ilaşcu took a different approach by incorporating the issue of positive obligations within the very notion of jurisdiction and by disregarding the test of effective control as a pre-condition for the establishment of jurisdiction. This is a clear departure from the case-law, as developed mainly through the Turkish cases, with a disputable logic and wisdom behind it.

But even if we accept that the notion of positive obligations may become a constituent part of the notion of "jurisdiction", still this does not answer the question of the extent of the jurisdiction that remains in the hands of a State that does not have effective control over part of its territory. It clearly transpires from the Ilaşcu judgment that the Court has developed a rather subjective – and one may say politicised – test in determining whether Moldova faced up to its positive obligations, by calling into question its political tactics in effectively protecting the human rights of the individual applicants. Indeed, what happened in Ilaşcu was that the Court was not satisfied by the change in the policy of the Moldovan Government, who at a certain stage ceased to refer to the fate of the applicants and applied a different political strategy vis-à-vis the Russian Federation and the separatist regime. Yet one wonders whether a change of political strategy or tactics may automatically denote a loss of interest on the part of a government with regard to its obligations vis-à-vis victims of human rights violations, or whether it may also be construed as a manoeuvre intended to produce results – which had not been produced through its previous policy –, potentially benefiting, inter alia the victims of violations of the Convention through other means. In other words, one wonders whether a change of policy from one of confrontation and direct reference to the fate of the victims to more subtle forms of negotiations for the return of the lost territory suffices for one to say that the State no longer pursues a course of action compatible with its positive obligations to protect human rights under the Convention.

2.4. Concluding remarks

Our analysis of the Strasbourg case-law on Article 1 of the Convention may give rise to a number of conclusions, which recapitulate the analysis carried out on the preceding pages.

First of all, we may safely assume that a general statement can be drawn from the analysis and this is that there is settled, uninterrupted case-law in support of the territorial nature of jurisdiction under Article 1. Indeed, it has never been in doubt, at any stage of the Convention's existence that the jurisdiction of States under Article 1 is primarily territorial, all other forms of jurisdiction being exceptional. In this respect Strasbourg follows the general tendencies of public international law.

What is less absolute and safe to accept unconditionally is the extent of the territorial jurisdiction of a State within its internationally recognised boundaries - in other words, how the case-law of Strasbourg treats cases where, for a number of reasons, the formal government of a State does not control the whole of the territory, although from an international law point of view the uncontrollable area is still part of the State's territory. Previous case-law has suggested an answer to this problem by proposing a test of effective control : a State was and remained responsible for the whole of its territory as long as it retained effective control of the territory ; in a situation where another State or entity acquired such effective control, the State hitherto responsible ceased to have jurisdiction in the part of the territory which was in the

hands of that other State or entity. These are the lessons which may be drawn by the Turkish cases in which there was a clear understanding that from the moment that Turkey acquired effective control of the territory of northern Cyprus, the Republic of Cyprus, although it remained the only legal entity recognised by international law as representing the whole of the territory of the State, was no longer responsible for violations occurring in its northern part, which was under Turkish occupation. It seems that Strasbourg agreed that there was no possibility of parallel effective control, the imposition of such control by one State or entity in part of the territory of a State excluding any control by another.

Yet, this clear-cut position appears to be called into question by recent case-law, and nuanced by the introduction of additional tests for the determination of jurisdiction. The Assanidze judgment did not depart from the traditional approach, because the Court found there that the Georgian Government were responsible for the whole of Georgia's territory, including the Ajarian Autonomous Republic, on the basis of the argument *inter alia* that the latter had no separatist aspirations and that no other State exercised effective overall control of the region.

In the case of Ilaşcu things have, however, evolved. As we have already said, in the case of Moldova the Court incorporated the concept of "positive obligations" into the notion of jurisdiction and disregarded the constitutive element of effective territorial control as a pre-condition for the establishment of jurisdiction. This departure from the traditional case-law, coupled with a rather problematic finding on the extent of jurisdictional limits (the subjective test applied by the Court in the circumstances of the change in Moldova's policy), might be considered as a jurisprudential novelty, which, to my mind, requires further elaboration, probably in future relevant cases.

Finally, when we come to extraterritorial jurisdiction, we are confronted with two decisions which deal with the test of "effective control" from a totally different angle. In Banković, the Court – further to its reference to the predominantly regional, geopolitical application of the Convention – applies the test of effective control in its strongest form, by making it clear that the two preconditions for its existence are a time element (duration) and the actual involvement of a State in the exercise of power outside its own territory. While in Ilaşcu, it takes a more flexible and diversified approach to the notion of "effective control", based on the "decisive influence" and "survival through support" tests, which, of course, were not envisaged, not even as remote possibilities, in the relevant Turkish cases. It seems then that we are witnessing an evolution of the concept of "effective control", which may incrementally bring about, through future cases, new conceptual approaches to the question of jurisdiction under Article 1 of the Convention.