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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. In the first case the applicant's complaint is directed against the "active" Contracting Party, which exercises its authority outside its territory. In the second case the complaint is directed against the "passive" Contracting Party, which suffers from foreign occupation, rebellion or installation of a regional separatist regime. If there is "jurisdiction" of the "active" State, or the "State perpetrator", then its 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 the "suffering" Contracting Party is concerned, there is no need to answer the question concerning the "jurisdiction" issue, since the loss of effective control of one part of its territory does not deprive this Contracting Party from its "jurisdiction" within the meaning of Article 1 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 applicant's fate by political and diplomatic means; (4) to take appropriate practical and technical steps; (5) to take appropriate judicial measures to safeguard the applicant's rights. 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: 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 Convention. 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 considered to be "established by law" within the meaning of Article 6 of the Convention, as long as they form part of a judicial system operating on a "constitutional and legal basis". 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 a system which does not operate on a "constitutional and legal basis" reflecting a judicial tradition 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.

TABLE OF CONTENTS

- PART I -

EXTRATERRITORIAL JURISDICTION AND THE PRESUMPTION OF JURISDICTION WHEN A STATE HAS LOST CONTROL OVER PART OF ITS TERRITORY	5
INTRODUCTION.....	5
I. Liability of the “active”, or “perpetrator” state.....	6
II. Liability of the “passive”, or “suffering” state.....	11
A. <i>General principles</i>	11
B. <i>Application of these principles in particular cases</i>	16
(1) General measures to re-establish control over the territory	17
(a) REFRAINING FROM SUPPORTING THE SEPARATIST REGIME	17
(b) ACTING IN ORDER TO RE-ESTABLISH CONTROL OVER THE DISPUTED TERRITORY	18
(2) Measures to ensure respect for the applicants’ rights	20
(a) TRYING TO SOLVE THE APPLICANTS’ FATE BY POLITICAL AND DIPLOMATIC MEANS	20
(b) TRYING TO SOLVE THE APPLICANTS’ FATE BY PRACTICAL AND TECHNICAL MEANS	21
(c) TAKING APPROPRIATE JUDICIAL MEASURES TO SAFEGUARD THE APPLICANTS’ RIGHTS	21
(3) The efforts by the respondent State must be constant	22
CONCLUSION.....	24

- PART II -

DETENTION ORDERED IN CRIMINAL PROCEEDINGS BY A COURT OPERATING IN A <i>DE FACTO</i> ENTITY	26
I. The Court’s Case-law	26
A. <i>General considerations on the validity or “lawfulness” of domestic courts of de facto entities</i>	26
B. <i>Criminal proceedings and detention orders in de facto entities</i>	28
CONCLUSION.....	31
Selective bibliography	33

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

3. The *Ilaşcu and Others* 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 separatist "*Moldavian Republic of Transdniestria*" ("MRT"); therefore the applicants came within the "*jurisdiction*" of the Russian Federation 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".

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

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 and freedoms to persons within 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). “Jurisdiction” under 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) The territorial principle

131. A State’s jurisdictional competence under Article 1 is primarily territorial (see *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) State agent authority and control

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 may extend to acts of its authorities which produce effects 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 merely that the Contracting Party’s responsibility “can be involved” in these circumstances. It is necessary to examine the Court’s case-law to identify the defining principles.

134. First, it is clear that the acts of diplomatic and consular agents, 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,

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

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, 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 (*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 admissibility decision of 14 July 1977, DR 9, p. 57).

136. In addition, the Court's case-law demonstrates that, in certain circumstances, the use of force by State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an 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 after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the 'jurisdiction' of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory". In *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004, the Court indicated that, had it been established that Turkish soldiers had taken the applicants' relatives into custody in Northern Iraq, taken them to a nearby cave and executed them, the deceased would have been within Turkish jurisdiction by virtue of the soldiers' authority and control over 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 can be "divided and tailored" (compare *Banković*, cited above, § 75).

(γ) Effective control over an area

138. Another exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national

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

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 Contracting State's own armed forces, or through a subordinate local administration (*Loizidou* (preliminary objections), cited above, § 62; *Cyprus v. Turkey* [GC], no. 25781/94, § 76, ECHR 2001-IV, *Banković*, cited above, § 70; *Ilaşcu*, 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 support entails that State's responsibility for its policies and 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's military presence in the area (see *Loizidou* (merits), cited above, §§ 16 and 56; *Ilaşcu*, 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 *Ilaşcu*, cited above, §§ 388-394).

140. The "effective control" principle of jurisdiction set out above does not replace 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 requirements," to all or any of the territories for whose 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 "jurisdiction" in Article 1. The situations covered by the "effective control" principle are clearly 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 freedoms hitherto enjoyed and would result in a "vacuum" of protection within the "Convention legal space" (see *Loizidou* (merits), cited above, § 78; *Banković*, cited above, § 80). However, the importance of

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

establishing the occupying State's jurisdiction in such cases does 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 detention centre run by British forces during the 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 exercised jurisdiction over the applicant's brother on another ground. Following his

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

capture by British troops and his placement in the British-run detention centre the applicant's brother came within the physical power and control of the 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 out that the status of "occupying power" was not per se determinative for 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, an Iraqi civilian who was shot dead in Iraq in April 2004 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, the Netherlands could not be divested of its "jurisdiction", within the meaning of Article 1 of the Convention, solely by dint of having accepted the operational control of a United Kingdom officer. It retained "full command" over its military personnel stationed in that area. The Court was satisfied that the Netherlands had exercised "jurisdiction" within the limits of its mission in the context of the multinational force and for the purpose of asserting authority and control over persons passing through the checkpoint. It therefore found that the death of the applicant's son had occurred within the "jurisdiction" of 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”, OR “SUFFERING” STATE

A. General principles

10. The issue of liability of the “passive” or “suffering” state was dealt already 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 European Convention on Human Rights 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 incompatible with the provisions of the Convention.”

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 clause” limiting the

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

obligations of the federal State for 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 the federal State to “immediately take suitable measures, in accordance with its constitution ..., to the end that the [states forming part of the federation] may adopt appropriate provisions for the fulfillment of [the] Convention”.

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 between 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 “jurisdiction” of the Georgian State (see *Bertrand Russell Peace Foundation Ltd v. the United 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 Convention.”

12. The basic principles applicable to the second type of liability – that of the “passive”, or “suffering” State - 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 “jurisdiction” for the purposes of Article 1 of the Convention must be considered to reflect the term’s meaning in public international law (see *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99 and 48209/99, § 20, judgment of 14 May 2002; *Banković and Others v. Belgium 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 words “within their jurisdiction” in Article 1 of the Convention must be understood to mean that a State’s jurisdictional competence is primarily territorial (see *Banković and Others*, cited above, § 59), but also that jurisdiction is presumed to be exercised normally throughout the State’s territory.

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

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 and Others* 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 limiting the effective exercise of a State's authority over its territory, and on the other the State's own conduct. The undertakings given by a Contracting State under 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 the exercise of the State's authority is limited in part of its territory, 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 the Convention (see *Cyprus v. Turkey*, cited above, § 81). That 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.

319. A State may also be held responsible even where its agents are acting *ultra vires* or contrary to instructions. Under the Convention, a State's authorities are strictly liable for the conduct of their 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 draft articles on the responsibility of States for internationally wrongful acts ("the work of the ILC"), p. 104, and the *Cairo* case heard by the General Claims Commission, (1929) Reports of International Arbitral Awards 5 (RIAA), p. 516)."

13. On the basis of the abovementioned principles the Court considered it necessary to "*ascertain whether Moldova's responsibility is engaged on account of either its duty to refrain from wrongful conduct or its positive obligations under the Convention*" (§ 322). 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" ...

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

331. However, even in the absence of effective control over the Transdnistrian 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.”

14. There is a difference between the two types of liability of both States. Concerning the “*active*” State, or the “*State perpetrator*”, the Court first has to establish whether it indeed has “*jurisdiction*” within the meaning of Article 1 of the Convention. *If there is “jurisdiction”, then the respondent State’s obligations can be twofold: it is chiefly the 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 answer the question concerning the “*jurisdiction*” issue, since the loss of effective control of one part of its territory does not deprive this Contracting Party from its “*jurisdiction*” within the meaning of Article 1 of the Convention. In such cases there still is “*jurisdiction*” of the respondent State, but the factual situation at stake simply 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 obligation 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 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 defined in the Convention.

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

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 "MRT", over which it exercises no effective authority, is to be 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 not take enough measures to secure those rights."

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 is controlled by the "MRT". Nonetheless, in the *Ilaşcu* judgment, cited above, the Court held that individuals detained in Transdnistria fell within Moldova's jurisdiction because Moldova was the territorial State, even though it did not have effective control over the Transdnistrian region. Moldova's obligation under Article 1 of the Convention, to "secure to everyone within their jurisdiction the [Convention] rights and freedoms", was, however, limited in the circumstances 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 *Ivanțoc 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 of the "MRT" in Transdnistria, the fact that the region is recognised under public international law as part of Moldova's territory gives rise to an obligation, under Article 1 of the 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 satisfied this positive obligation."

B. Application of these principles in particular cases

18. There have been only **five** cases before the Court where the liability of the “*suffering*”, or “*passive*” State under the Convention had been alleged by the applicants:

- (a) *Assanidze v. Georgia* [GC] (no. 71503/01, § 137, ECHR 2004-II), which was delivered several months before *Ilaşcu and Others*. 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 unrecognised “*Moldovan Republic of Transnistria*” (“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 Transnistria 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 Transnistrian 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. Instead, the impugned non-enforcement was to be attributed to the international civil administration acting under the UN which took control over Kosovo’s judiciary or other institutions by virtue of UNMIK 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

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

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 policies of the “*suffering*” State, and the remaining 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:

“339. Moldova’s positive obligations relate both to the measures needed to re-establish its control over Transdniestrian territory, as an expression of its jurisdiction, and to measures to ensure respect for the applicants’ rights, including attempts to secure their release.

340. The obligation to re-establish control over Transdniestria required Moldova, firstly, to refrain from supporting the separatist regime of the “MRT”, and secondly to act by taking all the political, judicial 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. It must only verify Moldova’s will, expressed 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 had suffered and rejected the “MRT”’s declaration of independence. ...

...

343. Moldova’s efforts to re-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”, both 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 Transdniestria....”

21. In *Ivanțoc and Others v. Moldova and Russia*, concerning the period of time between 2004 and 2007 the Court “*note[d] that even after 8 July 2004, Moldova never ceased to protest about the Russian Federation’s active support for the separatist regime of the “MRT”, and, while rejecting the “MRT” declaration of independence, continued to deploy its efforts with the aim of recovering its control over the Transdniestrian territory...*” (*ibid.*, § 108).

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

22. The “*suffering*” State must thus refrain from supporting the separatist regime. 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 MRT”, for several 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 Convention. Any different conclusion would be at variance 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 objectively can in order 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 with a regime sustained militarily, politically and economically by a power such as the Russian Federation ..., there was

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

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 re-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", both 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 a renunciation on Moldova's 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 had been blocked by "MRT" reprisals (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's return within the Moldovan legal order had been a response to demands expressed by the separatists during discussions on the settlement of the situation in Transdniestria and the applicants' release. They had accordingly abandoned the measures they had previously adopted, particularly in the legal sphere. The Court notes the witness evidence to that effect given by Mr Sturza. ..."

25. Likewise, in *Ivanțoc and Others v. Moldova and Russia* the Court held:

"108. As to the general measures intended to re-establish control over the Transdniestrian territory, the Court recalls that in its *Ilașcu, Ivanțoc, Leșco and*

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

Petrov-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 Moldova's resolve, expressed through specific acts or measures, to re-establish its control over the territory of the "MRT"...

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 Transnistrian 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 regime of the "MRT", and, while rejecting the "MRT" declaration of independence, continued to deploy its efforts with the aim of recovering its control over the Transnistrian territory..."

(2) Measures to ensure respect for the applicants' rights

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

26. The "*suffering*" State must use all the political and diplomatic means it has at its disposal in order to prevent or put an end to the violation of the applicants' rights. In the *Ilaşcu and Others* case the Court found:

"346. As regards the applicants' situation, the Court notes that before ratification of the Convention in 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 Transnistria...; and

– the financial assistance given to the applicants' families and the help they were given in arranging visits to the applicants...

During that period, as appears from the witness evidence, in discussions with the Transnistrian leaders the Moldovan authorities also systematically raised the question of the applicants' release and respect for 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 Transnistria to negotiate with the Transnistrian authorities for the applicants' release.

347. Even after 1997, measures were taken by Moldova to secure the applicants' rights: doctors were sent to Transnistria to examine them (the last examination by doctors from Chişinău took place in 1999), 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 Transnistria, continued to raise the question of the applicants' release with the Transnistrian authorities. In that connection, the Court notes that, according to the evidence of certain witnesses, Mr Ilaşcu's release was the result of lengthy negotiations with the "MRT" authorities. Moreover, it was following those negotiations that Mr Sturza went to Transnistria in April 2001 to bring the four applicants back to Chişinău ...

...

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

Lastly, the Moldovan authorities have applied not only to the “MRT” regime but also to other States and international organisations for their assistance in obtaining the applicants’ release...”

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

“109. As regards the applicants’ situation, the Court notes that, in their discussions with the Transnistrian leaders, the Moldovan authorities systematically raised the question of the applicants’ release and respect for their Convention rights. Contrary to their position prior to the Court’s judgment, after 8 July 2004 the Moldovan authorities constantly raised the issue of the applicants’ fate in their bilateral relations with the Russian Federation. Furthermore, they continually sought the assistance of other States and international organisations in obtaining the applicants’ release...”

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

28. In certain particular circumstances the “*suffering*” State might be required to take 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 *Ilașcu and Others* and *Ivanțoc and Others*, and then declared:

“147. In the *Ilașcu* 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 bring about the end of the violation of the applicants’ rights (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 “MRT”, the Moldovan Government have paid for the 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 also be required to take appropriate judicial measures, for example, by expressly declaring the applicants’ conviction by the separatist “*courts*” to be null and void; or opening a criminal investigation against the respective officials of the unrecognised entity. However, the practical effectiveness of such measures may sometimes be too limited. In the *Ilașcu and Others* case the Court found:

“346. As regards the applicants’ situation, the Court notes that before ratification of the Convention in 1997 the Moldovan authorities took a number of judicial, political and administrative measures. These included:

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

- the Supreme Court’s judgment of 3 February 1994 quashing the applicants’ conviction of 9 December 1993 and setting aside the warrant for their detention...;
- the criminal proceedings brought on 28 December 1993 against the “judges” of the “Supreme Court of Transdnistria”...;
- the amnesty declared by the President of Moldova on 4 August 1995 ... and the Moldovan parliament’s 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 involved in the applicants’ conviction and detention. However, the Court considers that in the absence of control over Transdnistrian territory by the Moldovan authorities any judicial investigation in respect of persons living in Transdnistria or linked to offences committed in Transdnistria would be ineffectual. This is confirmed by the witness evidence on that point ...”

30. In *Ivanțoc and Others* the Court further relativised this obligation:

“110. As to other possible measures, such as judicial measures, the Court refers to its conclusion in paragraph 347 of the *Ilașcu, Ivanțoc, Leșco and Petrov-Popa* case, where it had found ineffectual any judicial investigation in respect of persons living in Transdnistria. 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.”

(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 and permanent. According to the *Ilașcu and Others* judgment:

“348. The Court does not have any evidence that since Mr Ilașcu’s release in May 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 applicants. At least, apart from Mr Sturza’s evidence to the effect that the question of the applicants’ situation continues to be raised regularly by the Moldovan authorities in their dealings with the “MRT” regime, the Court has no other information capable of 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, without trying to reach an agreement guaranteeing respect 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 Transdnistrian conflict brought to the Court’s attention deals with their 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 attentive to the applicants’ fate in their bilateral relations with the Russian Federation.

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

In the Court's opinion, the fact that at the hearing on 6 July 2001 the Moldovan Government refrained from arguing that the Russian Federation was responsible for the alleged violations on account of the presence of its army in Transdnistria, so as not to hinder the process "aimed at ending ... the detention of the ... applicants" (see paragraph 360 below), amounted to an admission on their part of the influence the Russian authorities might have over the Transdnistrian 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 authorities, interventions to that end also seem to have ceased 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 obtaining the remaining applicants' release.

350. In short, the Court notes that the negotiations for a settlement of the situation in Transdnistria, 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 possession, the Court considers that, even after Mr Ilașcu's 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 responsibility could be 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.

In order to determine whether Moldova's responsibility is indeed engaged under the Convention, the Court will therefore need to examine each of the complaints raised by the applicants."

32. Conversely, in *Ivanțoc 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 between the date of the Court's judgment in July 2004 and the applicants' release in June 2007 Moldova discharged its positive obligations to secure to the applicants their rights guaranteed by the Convention.

108. As to the general measures intended to re-establish control over the Transdnistrian territory, the Court recalls that in its *Ilașcu, Ivanțoc, Leșco and Petrov-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 Moldova's resolve, expressed through specific acts or measures, to re-establish its control over the territory of the "MRT" (see *Ilașcu, Ivanțoc, Leșco and Petrov-Popa* 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 Transdnistrian territory.

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

The Court notes that even after 8 July 2004, Moldova never ceased to protest about the Russian Federation's active support for the separatist regime of the "MRT", and, while rejecting the "MRT" 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 notes that, in their discussions with the Transdniestrian leaders, the Moldovan authorities systematically raised the question of the applicants' release and respect for their Convention rights. Contrary to their position prior to the Court's judgment, after 8 July 2004 the Moldovan authorities constantly raised the issue of the applicants' fate in their bilateral relations with the Russian Federation. Furthermore, they continually sought the assistance of other States and international organisations in obtaining the applicants' release (see paragraph 24 above).

110. As to other possible measures, such as judicial measures, the Court refers to its conclusion in paragraph 347 of the *Ilaşcu, Ivanţoc, Leşco and Petrov-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 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 their lack of effective control in Transdniestria and the consequential extent of their responsibility under the Convention for the acts complained of is upheld."

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 that there had 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 the "*State perpetrator*", the Court first has to establish whether it indeed has "*jurisdiction*" within the meaning of Article 1 of the Convention. *If there is "jurisdiction", then the respondent State's obligations can be twofold: it is chiefly the negative duty to abstain*

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

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 the “*suffering*” Contracting Party is concerned, there is no need to answer the question on the “*jurisdiction*” issue, since the loss of effective control of one part of its territory does not deprive this Contracting Party from its “*jurisdiction*” within the meaning of Article 1 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 supporting the separatist regime; (2) to act in order to re-establish control over the disputed territory; (3) to try to solve the applicants’ fate by political and diplomatic means; (4) to take appropriate practical and technical steps; (5) to take appropriate judicial measures to safeguard the applicants’ rights. 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 or “lawfulness”
of domestic courts of de facto entities***³

36. The issue of the validity or “lawfulness” of domestic courts of *de facto* entities was 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 Cyprus), the Grand Chamber referred to the *Advisory Opinion* of the International Court of Justice on Namibia (see Part II, section II, p. 32) and held that:

“...the obligation to disregard acts of *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 one.” (*ibid.*, § 96”).

37. The Grand Chamber further observed that:

“98. For the Court, the conclusion to be drawn is that it cannot simply disregard the **judicial organs** set up by the “TRNC” in so far as the relationships at issue in the present case are concerned. It is in the very interest of the inhabitants of the “TRNC”, including Greek Cypriots, to be able to seek the protection of such organs; and if the

³. The issue of the validity of “domestic legislation” of *de facto* entities for the purposes of the Convention will 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 violation of the applicant’s rights under Article 11 of the Convention was based on the absence of any laws or measures in the “TRNC” regulating the issuance of permits to Turkish Cypriots living in northern Cyprus to cross the green-line into southern Cyprus (see also, *Adalı 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 to Article 159 of the “TRNC” Constitution (by virtue of which Turkey claimed that property located in northern Cyprus had been expropriated).

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

“TRNC” 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 effectiveness of judicial bodies of the “TRNC” for the limited purpose of protecting the rights of the territory’s inhabitants did not legitimate in any way the “TRNC” (§ 92). Nor did it call into question the view adopted by the 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).

39. As regards the alleged violation of Article 6 rights in respect of Greek Cypriots living in northern Cyprus and the Cypriot Government’s challenge to the very legality of the “TRNC” court system, the Grand Chamber observed that there was a functioning court system in the “TRNC” for the settlement of disputes relating to civil rights and obligations defined in “*domestic law*” and which was available to the Greek-Cypriot population⁴. It therefore concluded that “TRNC” courts could be considered to be “*established by law*” with reference to the “*constitutional and legal basis*” on which they operated (§ 237)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”’s claim to statehood (§ 239).

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 legislative practice of authorising the trial of civilians by military courts, not on the grounds that those courts were intrinsically “*illegal*” as being part of a *de facto* entity⁶.

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 a “*tribunal established by law*”.

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

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 introduced by the “TRNC”, available to Greek-Cypriot owners of immovable property located in northern Cyprus. The Grand Chamber accepted that the new mechanism made available by the “TRNC” (a remedy before the Immovable Property Commission) had to be regarded as a “*domestic remedy*” or “*national*” remedy 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 if they considered that there had been unfairness or 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.

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 Law⁷ took place “*in accordance with a procedure prescribed by law*” and was “*lawful*” within the meaning of

⁷. Legislation enacted in Cyprus under British rule, applicable in the “TRNC” at the time of the events.

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

Article 5 § 1 of the Convention⁸. 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 the Convention, the lawfulness of a detention after conviction by the “Moldavian Republic of Transdniestria” Supreme Court. In *Ilaşcu and Others v. Moldova and Russia*, cited above (2004), the applicants complained that their detention had not been “lawful” under Article 5 § 1(a) in that they had been convicted by a non-competent or unlawfully constituted court, the “Moldavian Republic of Transdniestria” Supreme Court. The Court recalled that in certain circumstances, a court belonging to the judicial system of a *de facto* entity could be regarded as a tribunal “*established by law*” provided that it formed part of a judicial system operating on a “*constitutional and legal basis*” reflecting a judicial tradition compatible with the Convention (referring to *Cyprus v. Turkey*, §§ 231 and 236-237). After referring to its reasoning under Article 3 regarding the nature of the proceedings before the “*Supreme Court of the MRT*” (§ 436), the Court concluded that none of the applicants in the present case had been convicted by a “*court*” and that a sentence of imprisonment passed by such a judicial body at the close of proceedings like those conducted in the case could not be regarded as “*lawful detention*” ordered “*in accordance with a procedure prescribed by law*” (§ 462)⁹. It is interesting to note that under Article 3, the Court explicitly said that the sentence passed on Mr. Ilaşcu had no legal basis or legitimacy for Convention purposes:

“436. The anguish and suffering he felt were aggravated by the fact that the sentence had no legal basis or legitimacy for Convention purposes. The “Supreme Court of the MRT” which passed sentence on Mr Ilaşcu was set up by an entity which is illegal under international law and has not been recognised by the international community. That “court” belongs to a system which can hardly be said to function on 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 convicted, as they described them in an account which has not been disputed by the other parties (...).”

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).

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

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 MRT” was created by a *de facto* entity whose system 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, considered valid for the purposes of Article 6 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 “*enclaved*” Greek Cypriot ordered by agents of the “TRNC” could be regarded as “lawful” within the meaning of Article 5 § 1 of the Convention. The Court recalled that all those affected by the policies and actions of the “TRNC” came within the “*jurisdiction*” of Turkey for the purposes of Article 1 of the Convention, having regard to 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 civil, administrative or *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, the Court considered that when an act of the “TRNC” authorities was in compliance with laws in force within the territory of 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 been “lawful” within the meaning of Article 5 § 1(b) of the Convention.

47. In order to accept the “*lawfulness*” of the detention by the “TRNC” officers, 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 criticised the absence in the “TRNC” of a 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 11 of the Convention was based on the absence of any laws or measures in the “TRNC” regulating the issuance of 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). The Court, as in *Cyprus v. Turkey*, recalled that “*lawfulness*” for the purposes of the Convention did not put in doubt 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 arrested by “TRNC” agents, then tried and convicted by “TRNC” courts. The applicant

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

had joined an anti-Turkish demonstration in 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 logic as the Commission, but taking into account the more recent case-law developed by the Court (*Cyprus v. Turkey* and *Foka*), the Court considered that the deprivation of liberty of the applicant had been “lawful” within the meaning of Articles 5 § 1(c) (arrest and detention on remand for committing offences under “TRNC” law¹⁰) and (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 not been unfair, there being no ground for finding that the “TRNC” courts as a whole were not independent and/or impartial or that the proceedings against the applicant had been politically motivated (§ 87)¹¹. The Court reached the same conclusions in a group of follow-up cases concerning the same factual background¹².

CONCLUSION

49. Although the Court has refrained from elaborating a general theory concerning the lawfulness of legislative and administrative acts of *de facto* entities¹³, 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 considered to be “established by law” within the meaning of Article 6 of the Convention, as long as they form part of a judicial system operating on a “constitutional and 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

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

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 and Josephides v. Turkey* (dec.), no. 7116/10, 2 April 2013.

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

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

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 on a “*constitutional and 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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