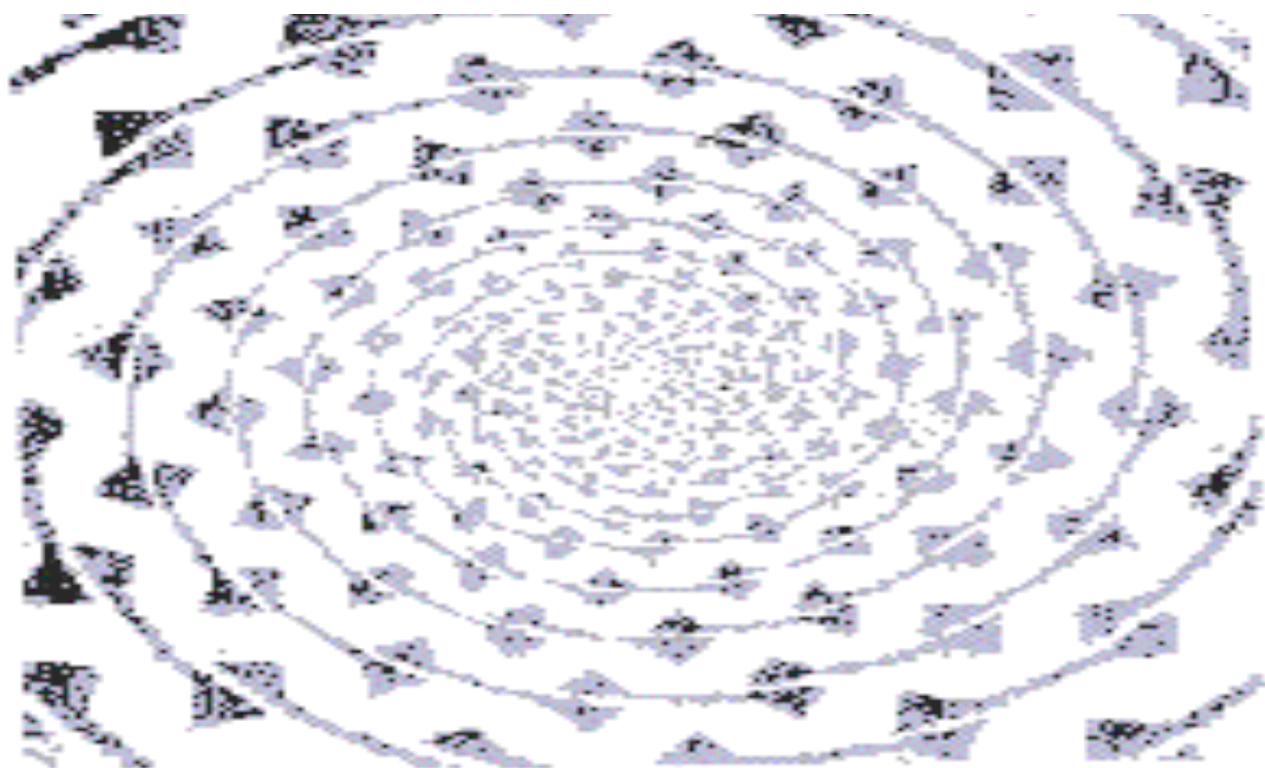


## Cellule de Recherche Interdisciplinaire en Droits de l'Homme



### **Globalization and Jurisdiction : Lessons from the European Convention on Human Rights**

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# Globalization and Jurisdiction : Lessons from the European Convention on Human Rights

by Olivier De Schutter\*

## Abstract

*This paper studies the question of the extra-territorial effect of human rights treaties, using the European Convention on Human Rights as an example of the broader questions the growing interdependency of States raises for the understanding of the notion of States' "jurisdiction". The case-law of the European Court of Human Rights is exemplary in that, despite the professed willingness of the Court to examine the issues it is presented with within the framework of general public international law, it cannot fully escape the tension between that framework and the specificity of human rights treaties. Second, nowhere to a larger extent than on the European continent has inter-State co-operation been developed, and has State sovereignty been restricted, especially – for the Member States of the European Union – due to the supranational character of the Union. This requires not only that we address the question of the "jurisdiction" which States may be said to exercise over situations which are affected, not by measures they have adopted (or could have adopted) unilaterally, but by the combined acts of a number of States, whether or not in the framework of an international organisation. It also requires that we ask whether any positive obligation may be imposed on States to develop further these modes of inter-State cooperation, where this is required for the effective protection of the rights of the individual, and whether this may be reconciled with the principle of specialty of international organisations. These features justify calling the European Convention on Human Rights a laboratory for the understanding of the evolving notion of "jurisdiction" in the era of globalization.*

## 1. Introduction

Our era has witnessed a spectacular redeployment of the functions of the State and a concomitant redefinition of the relationship of the State to its national territory as one of its constituent elements.<sup>1</sup> There are different facets to this redeployment. On the one hand, States have extended the assertion of their power beyond the national territory, as illustrated both by the “global war on terrorism” and by the development of extra-territorial jurisdiction. On the other hand, the sovereignty of the State is questioned by the emergence of powerful transnational actors, both private and intergovernmental, affecting in many instances the ability of the State to assert its authority even on its national territory and leading to calls for a global administrative law better capable of controlling these actors which, although they are seen as competing with the State, are not subjected to the same legitimacy tests.<sup>2</sup> Whether it is interpreted as an expansion of the influence the State exercises in the era of globalization or as a sign of its decline, if not marginalization, the interdependency of States is more important than

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<sup>1</sup> See, among many others, G. Kreijen et al. (eds), *State, Sovereignty, and International Governance*, Oxford Univ. Press, 2002 ; H. Ruiz Fabri, “Immatériel, territorialité, Etat”, *Archives de philosophie du droit*, 1999, 187-212; A. Tita, “Globalization: A New Political and Economic Space requiring Supranational Governance”, 3 *Journal of World Trade* 47 (1998).

<sup>2</sup> This is the main intuition behind the Global Administrative Law project launched by the Institute for International Law and Justice at New York University School of Law : see [www.iilj.org](http://www.iilj.org) and, for a presentation of the main themes, B. Kingsbury, N. Krisch and R. Stewart, “The Emergence of Global Administrative Law”, *IILJ Working Paper* 2004/1.

ever, explaining for instance the popularity of the concept of global public goods<sup>3</sup> and the calls for the affirmation of an extra-territorial responsibility of States, towards populations other than their own.<sup>4</sup>

The most important questions facing the international law of human rights today relate to this renegotiation of the position of the State and to the renewed understanding of its links to the events it may or may not influence.<sup>5</sup> Are States obligated under the human rights treaties they have ratified when they act beyond their national territory, or when they fail to act beyond their national territory although they could influence events abroad, for instance by better controlling their nationals operating on foreign territory<sup>6</sup>? Conversely, may States escape their responsibility where events take place on their territory which however they are unable to influence ? May States be imputed the acts of intergovernmental organisations they have set up and delegated powers to ? May they be held responsible for the acts of other States with whom they cooperate ? And if we agree they might incur responsibility for the acts of such organisations or for those of such other States, may States be held responsible for *not* using their powers, affirmatively, in order to influence the behavior of those other entities ? At a fundamental level, the question is whether the responsibility of States towards the human rights they are internationally committed to uphold should be aligned with this contemporary redefinition of the State and of its relationship to national territory, or whether the understanding of this responsibility should instead be based on the reaffirmation of the classical functions of the State and of its role as the territorial sovereign. In the era of globalization, the tension is heightened between law and fact,<sup>7</sup> between the temptation to hold on to a classical definition of the State as the territorial sovereign and the contemporary realities of its redeployment : the slogan of “effectiveness” of human rights might mean, either that the State must reaffirm its control on the events which it should be held accountable for, whether or not it is in a position to effectively exercise that control ; or

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<sup>3</sup> See in particular W. D. Nordhaus, *Managing the Global Commons*, Cambridge, MA, MIT Press, 1994, and the contributions emanating from the United Nations Development Programme, in particular I. Kaul, I. Grundberg and M. A. Stern, *Global Public Goods: International Cooperation in the 21st Century*, New York, Oxford Univ. Press, 1999; Office of Development Studies, *Global Public Goods : Taking the Concept Forward*, Discussion Paper 17, UNDP, New York, 2001; and I. Kaul, P. Conceicão, K. Le Goulven and R. U. Mendoza (eds), *Providing Global Public Goods : Managing Globalization*, Oxford Univ. Press, New York and Oxford, 2003.

<sup>4</sup> See, for instance, U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2000/4 (2000), para. 39 (“States parties have to respect the enjoyment of the right to health in other countries, and prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law”); U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2002/11 (26 November 2002), para. 31 (“To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party’s jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction”); *The right to food*, Report submitted by the Special Rapporteur on the right to food, Jean Ziegler, in accordance with Commission on Human Rights resolution 2002/25, U.N. Doc. E/CN.4/2003/54 (10 January 2003), para. 29.

<sup>5</sup> See, among many others, the essays collected in F. Coomans and M. Kamminga (eds), *Extraterritoriality of Human Rights Treaties*, Intersentia, Antwerp-Oxford, 2004; and Michael J. Dennis, “Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation”, 99 *American Journal of International Law* 119 (2005); Theodor Meron, “Extraterritoriality of Human Rights Treaties”, 89 *American Journal of International Law* 78 (1995).

<sup>6</sup> See, e.g., *The Realization of Economic, Social and Cultural Rights, Final report on the question of the impunity of perpetrators of human rights violations (economic, social and cultural rights)*, prepared by Mr. El Hadji Guissé, Special Rapporteur, pursuant to Sub-Commission resolution 1996/24, U.N. Doc. E/CN.4/Sub.2/1997/8, 27 June 1997, at para. 131 (“The violations committed by the transnational corporations in their mainly transboundary activities do not come within the competence of a single State and, to prevent contradictions and inadequacies in the remedies and sanctions decided upon by States individually or as a group, these violations should form the subject of special attention. The States and the international community should combine their efforts so as to contain such activities by the establishment of legal standards capable of achieving that objective”); M. Sornarajah, *The International Law on Foreign Investment*, 2nd ed., Cambridge Univ. Press 2004, chap. 4 (arguing at p. 169 that “developed States owe a duty of control to the international community and do in fact have the means of legal control over the conduct abroad of multinational corporations”).

<sup>7</sup> It is by this “tension” that Charles de Visscher defined its notion of “effectiveness in action”. See Ch. de Visscher, *Les effectivités du droit international public*, Paris, Pedone, 1967, p. 15 (defining “l’effectivité en action” as a situation where “le rapport du fait avec le droit prend le caractère d’une tension”).

that the determination of the international responsibility of States should be made more realistic, indexed on the evolution of the influence it may (or may not) exercise in fact.<sup>8</sup>

The recent case-law of the European Court of Human Rights constitutes an excellent laboratory to test the relationship between the facts of globalization and interdependency and the evolution of international law away from its classical adherence to a territorial concept of the State. Article 1 of the European Convention on Human Rights provides that the Contracting Parties “shall secure to everyone *within their jurisdiction*” the rights and freedoms of the Convention, a condition which also concerns the Additional Protocols to the Convention. Whether or not the alleged victim of the violation was under the jurisdiction of the defending State when the violation was committed thus precedes the two questions which Article 2 of the International Law Commission’s Draft Articles on State Responsibility defines as the two constituent elements of an internationally wrongful act of a State,<sup>9</sup> i.e., 1° whether the measure complained of (an act or an omission) may be attributed to that State and 2° whether that measure constitutes a breach of an international obligation of that State. In this sense, the requirement of “jurisdiction” stipulated in Article 1 ECHR is preliminary to the question of State responsibility for a breach of the Convention. In principle, the imputability of a situation to a State is therefore not a substitute for this situation falling under its jurisdiction. Rather, the question of imputability only is raised at a second stage, after it has been determined that the event occurred under that State’s “jurisdiction”.

However, the fact that States may affect situations beyond their national borders, by adopting acts which are clearly attributable to them in the meaning of Chapter II of the ILC’s Draft Articles on State responsibility, raises the question of the relationship between this notion of “jurisdiction” and the

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<sup>8</sup> See, e.g., J. Lenoble, “Responsabilité internationale des Etats et contrôle territorial”, *Revue belge de droit international*, 1981-1982, p. 95, at 109 (explaining, about the principle of effectiveness, that the rule “traduit une transparence du fait et du droit qui fait que la règle contient en elle-même les éléments qui assurent son évolution”).

<sup>9</sup> As adopted by the ILC on 9 August 2001; the UN General Assembly has taken note of the Draft Articles in Res. 56/83 adopted on 12 December 2001, “Responsibility of States for internationally wrongful acts”. Of course, the presentation of the question of “jurisdiction” as logically preceding the questions of attribution and compliance *vel non* with the international obligations of the State is contestable. Some authors would be tempted to equate the question of whether an individual is under the jurisdiction of the State with the question of attribution (under the theory that an individual may be said to be under the jurisdiction of the State to the extent that this individual has been directly affected by the act or the omission of the State); others would see the question of “jurisdiction” as defining the scope of the State’s obligations, and thus as having to be analyzed, once the question of attribution has been answered in the affirmative, as part of the question whether the State has breached its international obligation. But treating the question of “jurisdiction” as a threshold question describes better the approach followed by the European Court of Human Rights : see M. O’Boyle, “The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on ‘Life After Bankovic’”, in F. Coomans and M. Kammenga (eds), *Extraterritorial of Human Rights Treaties*, Intersentia, Antwerp-Oxford, 2004, pp. 125-139, at p. 131 (“In the Convention system the concepts of jurisdiction and state responsibility are not interchangeable. They are separate concepts though the former is necessarily the pathway to establishing the latter”) (responding to the critique of the methodology followed by the Court in the inadmissibility decision it adopted in the case of *Bankovic*, see infra text corresponding to nn. 9-11, by R. Lawson, “Life After Bankovic: on the Extraterritorial Application of the European Convention on Human Rights”, in the same volume, pp. 83-123). In judgments it delivered respectively on 8 July 2004 in the case of *Ilascu and Others v. Moldova and Russia* and on 16 November 2004 in the case of *Issa and Others v. Turkey*, the Court notes : “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” (Eur. Ct. HR (GC), *Ilascu and Others v. Moldova and Russia* (Appl. N° 48787/99), judgment of 8 July 2004, § 311; Eur. Ct. HR (2nd sect.), *Issa and Others v. Turkey* (Appl. N° 31821/96), Judgment of 16 November 2004 (final on 30 March 2005), § 66). It is however to identify instances where the questions of ‘jurisdiction’ in the meaning of Article 1 ECHR and of imputability to the State of the acts complained of were treated as identical, to the extent that ‘jurisdiction’ was described as being either ‘territorial’ or, alternatively, ‘personal’ : see, e.g., Eur. Ct HR, *Drozd and Janousek v. France and Spain* judgment of 26 June 1992, § 91 (where, confronted with the allegation that France and Spain were responsible for the alleged violation of the ECHR committed by courts of Andorra where French and Spanish judges were sitting, the Court remarks that ‘The term ‘jurisdiction’ is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory. The question to be decided is whether the acts complained of by Mr Drozd and Mr Janousek can be attributed to France or Spain or both, even though they were not performed on the territory of those States’); Eur. Ct. HR (GC), *Al-Adsani v. the United Kingdom* (Appl. N° 35763/97), ECHR 2001-XI, § 40 (where, in a case where an applicant with joint British and Kuwaiti nationality complained about having been abducted and tortured in Kuwait, the Court notes that “The applicant does not contend that the alleged torture took place within the jurisdiction of the United Kingdom or that the United Kingdom authorities had any causal connection with its occurrence”). These cases are discussed hereafter.

notion of national territory. It is this question which this paper explores, in three different directions which the following sections address in turn. A number of States parties to the European Convention on Human Rights have been allegedly committing violations of this instrument by deploying activities beyond their national territory, raising the question whether the Convention does apply to such “extra-territorial” situations (2. The extra-territorial applicability of the European Convention on Human Rights). The European Court of Human Rights has also been confronted with situations where events occurred on portions of the territory which were *de facto* escaping control by the organs of the defending State (3. The “jurisdiction” of the State on its national territory). Perhaps even more significantly, the Court is faced on the European continent with an extraordinary proliferation of cooperations between States, of which the expansion of the European Union and the progress of its integration constitutes perhaps the most spectacular, but by no means unique, manifestation. It therefore is confronted with the discrepancy between the individual character of the responsibility of States under the Convention and the reality of inter-State cooperation, resulting in situations where the alleged violation of the rights of the individual has its source, in fact, not in the acts of any single State party to the Convention, but in the combination of acts of two or more States (4. State jurisdiction and intergovernmental cooperation).

In the context of the European Convention on Human Rights, these questions are made significantly more complex by the recognition that the Contracting States may be imposed certain positive obligations, i.e., obligations to adopt measures which ensure a protection of the rights of individuals, and that they are not simply bound to respect those rights by abstaining from the adoption of measures which could infringe those rights in violation of the Convention. Indeed, the identification of positive obligations in the Convention implies that, where a situation falls under the “jurisdiction” of a State party, that State must act through its organs, and may not remain passive even in the face of events for which it bears no direct responsibility. But the ability for the State to fulfil those positive obligations is severely curtailed where the situation calling for State action either occurs on foreign territory, or is a situation which is affected by the combined action of a number of States, parties or not to the Convention, and therefore does not depend on the adoption of a measure by the defending State alone. Where the exercise of the sovereign powers of this State clashes with competing sovereignties, or with the powers attributed by treaty to an international organisation of which it is a member, how can it be required from the State to fulfil its positive obligations ? Which limits to the identification of such obligations does the existence of competing sovereignties impose ? If we consider that the requirement according to which the situation where a violation of the Convention is alleged to have occurred must be under the “jurisdiction” of the State concerned does not in principle constitute an obstacle to imposing on the States parties to the Convention “extra-territorial” obligations extending beyond their national territory, is the implication that they must seek to influence the situation of human rights in territories other than their own ?

The case-law of the European Court of Human Rights is exemplary in a number of ways. First, despite the professed willingness of the Court to examine the issues it is presented with within the framework of general public international law – a position it has emphasized in particular in cases where the limits imposed by the requirement of “jurisdiction” have been tested<sup>10</sup> –, it cannot fully escape the tension between that framework and the specificity of human rights treaties – a specificity which, indeed, also has been emphasized during the early stages of the development of the case-law of the European Convention on Human Rights’ supervisory bodies –.<sup>11</sup> Second, nowhere to a larger extent

<sup>10</sup> See, e.g., Eur. Ct. HR (GC), *Al-Adsani v. the United Kingdom* (Appl. N° 35763/97), ECHR 2001-XI, §§ 52-56. For a discussion of *Al-Adsani* in the light of public international law, see L. M. Caplan, “State Immunity, Human Rights, and *Jus Cogens* : A Critique of the Normative Hierarchy Theory”, 97 *American Journal of International Law* 741 (2003); see also M. Emberland, “Case Report : McElhinney v. Ireland, Al-Adsani v. United Kingdom, Fogarty v. United Kingdom”, 96 *American Journal of International Law* 699 (2002).

<sup>11</sup> The European Commission of Human Rights emphasized as early as in 1961 that “the purpose of the High Contracting Parties in concluding the convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests, but to realize the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe (...). [The] obligations undertaken by the High Contracting Parties in the European Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create

than on the European continent has inter-State co-operation been developed, and has State sovereignty been restricted, especially – for the Member States of the European Union – due to the supranational character of the Union. This requires not only that we address the question of the “jurisdiction” which States may be said to exercise over situations which are affected, not by measures they have adopted (or could have adopted) unilaterally, but by the combined acts of a number of States, whether or not in the framework of an international organisation. It also requires that we ask whether any positive obligation may be imposed on States to develop further these modes of inter-State cooperation, where this is required for the effective protection of the rights of the individual, and whether this may be reconciled with the principle of specialty of international organisations. These features justify calling the European Convention on Human Rights a laboratory for the understanding of the evolving notion of “jurisdiction” in the era of globalization.

## 2. The extra-territorial applicability of the European Convention on Human Rights

### a) The territorial understanding of the notion of “jurisdiction”

In the case of *Bankovic and Others v. Belgium and Others*,<sup>12</sup> the Grand Chamber of the European Court of Human Rights was confronted with the question whether the States parties to the European Convention on Human Rights could be held responsible under that treaty for the bombing of the building of the Serbian Radio and Television on 23 April 1999 by NATO forces. In the view of the applicants, who were injured or whose relatives had been killed in the event, this had led to a number of the provisions of the Convention being violated, including the right to life protected under Article 2. They contended that the aerial strike brought them under the jurisdiction of the defending States. Their contention was, specifically, that “the extent of the positive obligation under Article 1 of the Convention to secure Convention rights would be proportionate to the level of control in fact exercised”.<sup>13</sup> They relied in particular on the decisions of the European Court of Human Rights in *Loizidou v. Turkey*. There, finding that the applicant should be considered as falling under the jurisdiction of Turkey although the acts complained of occurred not on Turkish territory but on the territory of the “Turkish Republic of Northern Cyprus”, which Turkey (and Turkey alone in the international community) had recognized as an independent State, the Court had concluded that “the responsibility of a Contracting Party may [...] arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. *The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control* whether it be exercised directly, through its armed forces, or through a subordinate local administration”.<sup>14</sup> The *Bankovic* Court was not persuaded. It considered instead that there existed no “jurisdictional link between the persons who were victims of [the aerial bombing] and the respondent States”, and that accordingly, it was “not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question”.<sup>15</sup>

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subjective and reciprocal rights for the High Contracting Parties themselves” (Eur. Comm. HR, *Austria v. Italy* (“Pfundner” case), Appl. N° 788/60, *Yearbook of the ECHR*, vol. 4, 1961, p. 116). On the specificities of human rights treaties, see B. Simma, “International Human Rights and General International Law: A Comparative Analysis”, 4 *Collected Courses of the Academy of European Law* (1995) 153; M. Craven, “Legal Differentiation and the Concept of the Human Rights Treaty in International Law”, *E.J.I.L.* (2000), vol. 11, No. 3, 489-519. For a broader analysis of the coexistence of specific, treaty-based regimes, and general public international law, see of course P.-M. Dupuy, “L’unité de l’ordre juridique international. Cours général de droit international public”, *R.C.A.D.I.*, 2002, vol. 297, esp. at 428-478.

<sup>12</sup> For a critical commentary, see K. Altiparmak, “Bankovic : An Obstacle to the Application of the European Convention on Human Rights in Irak?”, *Journal of Conflict and Security Law* (2004), vol. 9 No. 2, 213-251.

<sup>13</sup> Eur. Ct. HR (GC), *Bankovic and Others v. Belgium and Others* (Appl. N° 52207/99), decision (inadmissibility) of 12 December 2001, ECHR 2001-XII, § 42 (hereafter referred to as “Bankovic”).

<sup>14</sup> Eur. Ct. HR (GC), *Loizidou v. Turkey* (Appl. N° 15318/89), Judgment (preliminary objections) of 23 March 1995, Series A n°310, § 62 (my emphasis). See also Eur. Ct. HR (GC), *Loizidou v. Turkey* (Appl. N° 15318/89), Judgment (merits) of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2234, § 52.

<sup>15</sup> *Bankovic*, § 82.

This reading of Article 1 of the Convention, restricting in principle the applicability of the Convention to the national territory of the States parties, was based primarily on two considerations. First, seeking reliance on the preparatory works of the Convention,<sup>16</sup> the Court considered that the Contracting Parties never intended the Convention to apply beyond the national territories of these States. The Convention, the Court emphasized, has an essentially regional vocation, and was not meant to apply beyond the Council of Europe Member States : “The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States”.<sup>17</sup> We shall return to this argument later.<sup>18</sup> Second, and more decisively, the Court referred to a number of writings from which it concluded that, “from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State’s exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States”.<sup>19</sup>

This second argument is unconvincing. It confuses two entirely different understandings of the concept of jurisdiction. Indeed, it is one thing to say that a State may, under public international law, exercise its “jurisdiction” vis-à-vis certain situations not confined to its national territory, for example under the principles of nationality, passive personality or universality for certain internationally recognized crimes, or even, as some would argue, in the absence of a specific prohibition imposed by international law to States adopting legislation with extra-territorial reach.<sup>20</sup> It is quite another to say that

<sup>16</sup> The Court recalls in §§ 19 and 63 of its decision that the Expert Intergovernmental Committee which drafted the Convention replaced the words “all persons residing within their territories” originally proposed with a reference to all persons “within the jurisdiction” of the States parties with a view to expanding the Convention’s application to those who are not legally residing, but who are, nevertheless, present on the territory of the Contracting States. The preparatory works are in fact not conclusive on the issue and commentators have understandably disagreed on their interpretation.

<sup>17</sup> *Bankovic*, § 80.

<sup>18</sup> See hereafter, text corresponding to fn. 45-66.

<sup>19</sup> *Bankovic*, § 59.

<sup>20</sup> Although the answer to the question of which acts with an extra-territorial scope (affecting situations beyond the national territory) a State *may* adopt obviously may have repercussions on the question of which obligations may be *imposed* on a State to adopt such acts (and thus influence situations outside its national territory), I am not entering here into the controversy about which limits general public international law imposes on the adoption by States of acts which will affect events situated outside its territory. It is clear that the exercise of *executive* (or *enforcement*) extra-territorial jurisdiction is limited by the sovereign rights of the territorial States and, conversely, that the exercise of *adjudicative* extra-territorial jurisdiction, whereby a State confers upon its jurisdictions a competence to decide cases originating in events located outside its national territory while applying the *lex loci*, is in principle unlimited. More controversial are the limits to *prescriptive* extra-territorial jurisdiction, i.e., to the adoption by a State of legislative norms which seek to influence behavior outside its national territory. In the *Lotus Case (France v. Turkey)* (Series A n°10, pp. 18-19), the Permanent Court of International Justice remarked that “Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable”. This *obiter dictum* of its judgment of 27 June 1927 has sometimes been interpreted as affirming a freedom of States to act in this regard – although of course, “the permissive rule [enunciated in *Lotus*] only applies to prescriptive jurisdiction, not to enforcement jurisdiction: failing a prohibition, State A *may*, on its own territory, prosecute offences committed in State B (*permissive rule*); failing a permission, State A *may not* act on the territory of State B” (dissenting opinion of *ad hoc* judge Van den Wyngaert to the judgment of the International Court of Justice delivered on 14 February 2002 in the case relating to the *Arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, at para. 49). However, both the interpretation of this decision and its contemporary relevance are debated. On the distinction between these three manifestations of extra-territorial jurisdiction, see C. Scott, “Translating Torture into Transnational Tort : Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms”, in C. Scott (ed), *Torture as Tort. Comparative Perspectives on the Development of Transnational Human Rights Litigation*, Hart Publ., Oxford, 2001, 45-63, at 54; and see also Jennings and Watts (ed.), *Oppenheim’s International Law*, 9th ed., 1992, vol. I, par. 137; R. Higgins, “The Legal Basis of Jurisdiction”, in C.J. Olmstead, *Extra-territorial Application of Laws and Responses Thereto*, Oxford, I.L.A. & E.S.C. Publ. Ltd., 1984, p. 4. On the controversies about prescriptive extra-territorial jurisdiction in the face of current developments, see O. De Schutter, “L’incrimination universelle de la violation des droits sociaux fondamentaux”, in *La compétence universelle*, Revue de droit de l’ULB-Annales de Droit de Louvain, Bruxelles, Bruylant, 2004, 209-245, at 218-223. F. A. Mann and B. Stern have significantly contributed to the doctrinal progress in this field : see F. A. Mann, “The Doctrine of Jurisdiction in International Law”, *R.C.A.D.I.*, 1964-I, vol. 82, at 9-162; F.A. Mann, “The Doctrine of International Jurisdiction Revisited after Twenty Years”, *R.C.A.D.I.*, 1984-III, at 9-115; B. Stern, “Quelques observations sur les règles internationales relatives à l’application extra-territoriale du droit”, *A.F.D.I.*, 1992, at 239-313; B. Stern, “Une tentative d’élucidation du concept d’application

a State may or may not be imputed certain acts or failures to act, such as, for instance, the violations of the right to life resulting from aerial strikes on civilian targets. Conflating the two amounts to the paradoxical result that a State acting beyond its “jurisdiction” in the former sense, i.e., beyond its powers as recognized under international law, could not be held responsible for the consequences resulting from these acts under the treaties it has agreed to. This would be unacceptable in both political and legal terms. It is inconsistent with the position of the International Court of Justice that “[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States”,<sup>21</sup> which the European Court of Human Rights relied on in *Loizidou* in order to consider that Turkey should be considered internationally liable for the acts the authorities of the “Turkish Republic of Northern Cyprus”: if the illegality under international law of the invasion by Turkish forces of the Northern part of the Island of Cyprus in 1974 may not be invoked to restrict the responsibility of Turkey for the events occurring on the territories it occupied after that invasion, why then should the responsibility of the States parties to the Convention be limited, in other situations, with regard to events where they might be acting beyond the scope of their “jurisdiction” as recognized under international law?

The argument that State responsibility under international law should be limited to the acts by which it is acting within its “jurisdiction” under international law is untenable.<sup>22</sup> Indeed, it is amply refuted by the international courts or human rights bodies which have decided similar issues in recent years. Under Article 2(1) of the International Covenant on Civil and Political Rights, a State party to this treaty undertakes “to respect and to ensure to all individuals within its territory and subject to its jurisdiction” the rights it recognizes. In the famed case of *Lopez Burgos* where it was confronted with the forcible abduction in Argentina by the Uruguayan security forces of a trade-unionist and political opponent, from where he was clandestinely transported to Uruguay, the Human Rights Committee considered that neither Article 2(1) ICCPR, nor Article 1 of the Optional Protocol which provides that the Committee may receive communications from individuals “subject to [the] jurisdiction” of the State concerned, may be read to imply that this State “cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it”; indeed, said the Committee, “it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory”.<sup>23</sup> The term “jurisdiction”, in the view of the Committee, refers “not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred”.<sup>24</sup> Since the Committee initially adopted this position, it has been amply confirmed:<sup>25</sup> the States parties to the Covenant must respect and ensure the rights laid down in this instrument to “anyone within the power or effective control of that State party, even if not situated

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extraterritoriale”, *R.Q.D.I.*, 1986, at 49-78; B. Stern, “L’extraterritorialité revisitée”, *A.F.D.I.*, 1992, at 239-313.

<sup>21</sup> International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Rep. 1971, p. 16, at p. 54, para. 118.

<sup>22</sup> Unfortunately, the European Court of Human Rights appears to hold to this confusion between the notion of “jurisdiction” as a source of potential State responsibility under Article 1 ECHR and the notion of (prescriptive) “jurisdiction” as the scope of the powers to legislate which public international law recognizes to a State, despite the absence of any logical connection between these two concepts : see Eur. Ct. HR (GC), *Assanidze v. Georgia* (Appl. N° 71503/01) judgment of 8 April 2004, at par. 137.

<sup>23</sup> Human Rights Committee, *Lopez Burgos v. Uruguay* (communication n° 52/1979 (final views 29 July 1981 (thirteenth session)) (UN doc. CCPR/C/13/D/52/1979), at para. 12.3. See also, for an identical statement in a twin case, Human Rights Committee, *Celeberti de Casariego v. Uruguay* (communication n° 56/1979 (final views of 29 July 1981 (thirteenth session)), at para. 10.3.

<sup>24</sup> Ibid., para. 12.2.

<sup>25</sup> See in particular the Concluding Observations/Comments on Israel, (1999) (UN doc. CCPR/C/79/Add. 93), § 10; Concluding Observations/Comments on Israel (2003) (UN doc. CCPR/CO/78/ISR), § 11 (“...the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party’s authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law”).

within the territory of the State party".<sup>26</sup> The same position has been adopted by the Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, Social, and Cultural Rights.<sup>27</sup> These views have been spectacularly endorsed by the International Court of Justice in the Advisory Opinion it delivered on 9 July 2004 regarding the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.<sup>28</sup>

*b) The exception to the territorial understanding of the notion of "jurisdiction"*

A later case, *Issa and Others v. Turkey*, implicitly overrules *Bankovic* insofar as this latter decision seemed to imply that a State party to the Convention could not be held responsible for the consequences of acts going beyond the jurisdiction it might legitimately exercise under public international law, unless it occupied foreign territory where it exercises *de facto* governmental powers.<sup>29</sup> Six Iraqi nationals, acting on their own behalf and on behalf of deceased relatives, alleged the unlawful arrest, detention, ill-treatment and subsequent killing of their relatives in the course of a military operation conducted by the Turkish army in northern Iraq in April 1995. In its judgment of 16 November 2004, the Court stated that, under the principles established in its case-law, "a State may (...) be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State (...). Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory".<sup>30</sup> The Court considered however that the conditions for the applicants' relatives to be under the "jurisdiction" of Turkey in this sense were not satisfied. It distinguished the situation in *Issa* from that in *Loizidou* in the following terms :

notwithstanding the large number of troops involved in the aforementioned military operations, it does not appear that Turkey exercised effective overall control of the entire area of northern Iraq. This situation is therefore in contrast to the one which obtained in northern Cyprus in the *Loizidou v. Turkey* and *Cyprus v. Turkey* cases (...). In the latter cases, the Court found that the respondent Government's armed forces totalled more than 30,000 personnel (which is, admittedly, no less than the number alleged by the applicants in the instant case ...) but with the difference that the troops in northern Cyprus were present over a very much longer period of time) and were stationed throughout the whole of the territory of northern Cyprus. Moreover,

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<sup>26</sup> Human Rights Committee, *General comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted on 29 March 2004 at 2187th meeting of the Committee (eightieth session), in : *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, 12 May 2004 (HRI/GEN/1/Rev.7), at § 10.

<sup>27</sup> Committee on Economic, Social, and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights : Israel*, 23 May 2003 (E/C.12/1/Add.90), at § 31 (reaffirming the view "that the State party's obligations under the Covenant apply to all territories and populations under its effective control").

<sup>28</sup> International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, at para. 102-113.

<sup>29</sup> The *Bankovic* court mentions in this regard (now operating a confusion between *prescriptive* extra-territorial jurisdiction which was at the basis of its reasoning and *enforcement* extra-territorial jurisdiction) that in addition to the case where "the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government", "other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State" (Eur. Ct. HR (GC), *Bankovic and Others v. Belgium and Others* (Appl. N° 52207/99), decision (inadmissibility) of 12 December 2001, ECHR 2001-XII, §§ 71 and 73). A situation such as that presented by *Issa and Others* – where a State conducts military operations on the territory of a foreign State without the latter's consent, but without this turning into *de facto* control over an occupied portion of the territory equivalent to the exercise of governmental powers – does not fall under these categories, thus excluding, in the approach adopted in *Bankovic*, the applicability of the European Convention on Human Rights, as the individuals affected would not be under the "jurisdiction" of the State concerned.

<sup>30</sup> Eur. Ct. HR (2nd sect.), *Issa and Others v. Turkey* (Appl. N° 31821/96), Judgment of 16 November 2004 (final on 30 March 2005), § 71.

that area was constantly patrolled and had check points on all main lines of communication between the northern and southern parts of the island.<sup>31</sup>

This, however, did not necessarily exclude the imputability to Turkey of the acts complained of in *Issa and Others*. Indeed, the Court proceeds to examine whether the allegation that the Turkish troops could be held responsible for the abductions and killings of the Iraqi shepherds whose relatives had brought the application before the Court could be proven. The Turkish troops not exercising a *de facto* control over the Northern part of Iraq comparable to that exercised by Turkey on the Northern part of the Island of Cyprus, such an imputability could not be presumed. It had to be verified whether at the relevant time Turkish troops conducted operations in the area where the killings took place, or whether other elements could be seen as evidence that those killings could be attributed to them. The Court arrived at the conclusion that “it has not been established to the required standard of proof that the Turkish armed forces conducted operations in the area in question, and, more precisely, (...) where, according to the applicants’ statements, the victims were at that time”<sup>32</sup>; therefore “the Court is not satisfied that the applicants’ relatives were within the ‘jurisdiction’ of the respondent State for the purposes of Article 1 of the Convention”.<sup>33</sup>

In sum, this line of the case-law of the European Court of Human Rights, concerning the extra-territorial applicability of the Convention, leads it to distinguish between two situations. Where the alleged violation has occurred either on the territory of the defending State party to the Convention, or on a territory on which that State exercises a *de facto* control equivalent to that it exercises on its national territory – equivalent, that is, insofar as it has at its disposal a governmental apparatus making it possible to secure the rights of the Convention for the benefit of the persons on that territory –, it is under an obligation both to respect and to protect the rights and freedoms guaranteed in the Convention to all persons present within those territories. It is in this sense that, in the case of *Cyprus v. Turkey*, the Court made it clear that, Turkey having effective overall control over northern Cyprus, “its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey’s ‘jurisdiction’ must be considered to extend to securing the *entire range of substantive rights* set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey”.<sup>34</sup>

The applicability of the European Convention on Human Rights is not limited, however, to those situations of territorial control. As *Issa* shows, the extra-territorial acts of the States parties to the Convention – i.e., the acts of those States which allegedly lead to violations of the rights afforded under the Convention in situations not located on its territory or on a territory on which it exercises *de facto* control – may also engage their responsibility provided those acts may be directly attributed to the State organs. This has been the position traditionally adopted by the monitoring bodies of the European Convention on Human Rights. In the first case presented to the European Commission of Human Rights about the situation created by the invasion of Northern Cyprus by the Turkish forces in 1974, the Commission noted that “nationals of a State, including registered ships and aircrafts, are partly within its jurisdiction wherever they may be, and that authorised agents of a State, including diplomatic and consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property ‘within the jurisdiction’ of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged”.<sup>35</sup> It took this view also in *Ilse Hess v. the United Kingdom*, where the Commission noted that the United Kingdom could in principle be held responsible for the situation of the Spandau prison, located in the British sector of West Berlin,

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<sup>31</sup> Ibid., at § 75.

<sup>32</sup> Ibid., at § 81.

<sup>33</sup> Ibid., at § 82.

<sup>34</sup> Eur. Ct. HR (GC), *Cyprus v. Turkey* (Appl. N° 25781/94), judgment of 10 May 2001, § 77.

<sup>35</sup> Eur. Comm. HR, *Cyprus v. Turkey* (Appl. N° 6780/74 and N° 6950/75), decision of 26 May 1975, 2 DR 136.

and which the four allied powers controlled jointly : the Commission saw “no reason why the acts of British authorities in Berlin should not entail the liability of the United Kingdom under the Convention”, as “a State is under certain circumstances responsible under the Convention for the actions of its authorities outside its territory”; it dismissed the application as inadmissible *ratione personae*, however, as the United Kingdom alone could not, without the consent of the other three allied powers, modify the regime applied in the prison.<sup>36</sup> These statements have never been overruled.<sup>37</sup> Indeed, also *post Bankovic*, the Court in *Öcalan* – where the applicant, the leader in exile of the Workers’ Party of Kurdistan (PKK), had been brought by the Kenyan authorities to an aircraft in the international transit area of Nairobi Airport, in which Turkish officials were waiting for him, and from where he was brought to Turkey in order to face trial – confirmed that, in such a situation, a person brought under the effective authority of officials of a State party to the Convention is “within the ‘jurisdiction’” of that State for the purposes of Article 1 of the Convention. The Court distinguished *Bankovic* by emphasizing that, in *Öcalan*, “the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey”.<sup>38</sup>

In other terms, where the State party to the Convention does not occupy a territory, exercising powers equivalent to those of a local government, it may still be bound to respect the Convention when acting beyond its national territory, but its obligations are limited : the State is under an obligation to respect the rights of the individuals who are under the effective control of its organs ; it is not bound under the Convention to protect the rights of the population of the territories where its organs occasionally deploy their activities. One obvious consequence is that the State is not under an obligation to control the activities of its nationals operating in foreign territories, even where the activities of those nationals would lead to violations of the rights of others : although, under the active personality principle, the State could impose a liability, in particular a criminal liability, on its nationals wherever they conduct their activities,<sup>39</sup> a failure by a State party to the Convention to exercise this power would not engage its responsibility under the Convention, even though certain individuals’ human rights could be affected by this failure to act.<sup>40</sup> Another consequence is that individuals affected by the conduct of the organs of a State party to the Convention which it has put at the disposal of another State may not be considered as placed under the “jurisdiction” of the former State, which excludes the imposition of any obligation on that State to control the way such organs will behave.<sup>41</sup> The judgment delivered by the Court in 1992 in the case of *Drozd and Janousek v. France and Spain* exemplifies

<sup>36</sup> Eur. Comm. HR, *Ilse Hess v. the United Kingdom* (Appl. N° 6231/73), 2 DR 73; 18 *Yearbook of the ECHR* 174 (1975).

<sup>37</sup> For instance, in *Ramirez Sanchez v. France*, the European Commission of Human Rights considered that the applicant, the terrorist ‘Carlos’ abducted from Sudan and surrendered to the French authorities, was ‘under the authority, and therefore the jurisdiction’, of France upon the moment of his surrender, for the purposes of the applicability of Article 5 ECHR which guarantees the right to liberty and security, even though this authority was exercised in a foreign country (Eur. Comm. HR, *Illrich Sanchez Ramirez v. France* (Appl. N° 28780/95), decision (inadmissibility) of 24 June 1996).

<sup>38</sup> Eur. Ct. HR (1st sect.), *Öcalan v. Turkey* (Appl. N° 46221/99), Judgment of 12 March 2003, § 93. This position was confirmed upon referral by the Grand Chamber of the Court : Eur. Ct. HR (GC), *Öcalan v. Turkey* (Appl. N° 46221/99), Judgment of 12 May 2005, § 91.

<sup>39</sup> This constitutes an exercise of the prescriptive (or normative) jurisdiction of the State; it is of course without prejudice of the limits which the exercise of its executive (or ‘enforcement’, sometimes also referred to as ‘prerogative’) jurisdiction encounters, due to the need to respect the sovereign rights of the territorial State. See above, fn. 20.

<sup>40</sup> Indeed, the very broad language used by the European Commission of Human Rights in the first *Cyprus v. Turkey* case (see above, text corresponding to fn. 35), where it refers to the fact that “...nationals of a State (...) are partly within its jurisdiction wherever they may be”, would seem to imply such a possibility.

<sup>41</sup> The question whether, in any case, such conduct of the organs of a State party to the Convention which are put at the disposal of another State may be attributed to the former State, is a distinct question from that of whether or not the individuals affected by that conduct are ‘under the jurisdiction’ of this State : see supra, text corresponding to fn. 4. The ILC’s Draft Articles on State Responsibility answer negatively to the question whether a State which has put its organs at the disposal of another State may be imputed to the former State, “where the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed” (Art. 6). This however does not preclude that the European Convention on Human Rights could in the future impose on the State which places its organs at the disposal of another State an obligation not to contribute to a violation of the rights and freedoms guaranteed by the ECHR. This would not lead to attributing directly to the State the conduct of those organs affecting individuals in foreign territories when put at the disposal of another State ; the conduct which could lead to international responsibility would be that of the national legislator, for having failed to impose such an obligation on the organs put at the disposal of another State.

this well.<sup>42</sup> The applicants, a Spanish and a Czechoslovak national, had been convicted by a court of the Principality of Andorra (at a time when Andorra was not a party to the Convention), in conditions which, they alleged, were in violation of the fair trial requirements of Article 6 of the Convention. The *Tribunal de Corts* before which the trial had taken place had been presided over by a French magistrate, another French magistrate was sitting in the three-members court, and the third member was designated by the Bishop of Urgel. The Court nevertheless considered that the responsibility of France nor that of Spain could be engaged for the administration of justice in Andorra :

Whilst it is true that judges from France and Spain sit as members of Andorran courts, they do not do so in their capacity as French or Spanish judges. Those courts, in particular the Tribunal de Corts, exercise their functions in an autonomous manner; their judgments are not subject to supervision by the authorities of France or Spain.<sup>43</sup>

In this two-tiered approach to the question of the so-called “extra-territorial” applicability of the Convention, the notion of territorial control therefore has a crucial regulating function to fulfil. Whenever an event, allegedly constituting a violation of the Convention, occurs on the territory of a State party to the Convention, the responsibility of that State is potentially engaged, either because the violation has been committed directly by one of its organs, or because the State has failed to prevent the violation from occurring by adopting the reasonable measures which could have been expected and by providing adequate remedies for the reparation of the victim if and when those preventive measures fail. The situation where an event occurs not on the national territory of the State but on a portion of foreign territory where it *de facto* exercises elements of sovereignty is assimilated to this first hypothesis, because it would be unacceptable for States to be allowed to escape their liability by refusing to consider as part of their national territory certain zones on which, in effect, they detain the governmental powers.<sup>44</sup> The regime applicable to the second hypothesis is the result of two, partly conflicting, concerns. It is necessary, of course, to constrain the exercise by the State of its powers even when they are exercised outside the national territory : again, a State should not be allowed to evade its responsibility simply because, for instance, it persecutes political opponents living abroad rather than within its national territory. On the other hand however, because the degree of control of any State on events occurring on foreign territory is much more limited – restrained as it is, indeed, by the need to respect the sovereign rights of the territorial State –, it would be unrealistic to impose on a State with respect to events occurring on foreign territory obligations similar to those imposed with respect to events occurring on its national territory. In this hypothesis, the “presumption of control” is lacking, on which the regime of human rights obligations of States with respect to events occurring on their national territory or on territories on which they exercise governmental powers is based.

Thus, two principles emerge : (i) on the national territory of a State party to the Convention or on territory where it has assumed governmental powers, that State must ensure that the full range of the rights recognized under the Convention are ensured, and must comply with the corresponding obligations, both to respect and to protect those rights, which the Convention imposes : (ii) where the organs of the State act beyond the national territory or territory assimilated to national territory, they remain bound to respect the rights set forth in the Convention, to the extent that they exercise effective control over certain persons or property.

### c) The “espace juridique” of the Convention

<sup>42</sup> Indeed, the rapporteur of the International Law Commission J. Crawford cites the case of *Drozd and Janousek* in order to illustrate the rule of Article 6 of the ILC’s Articles on State Responsibility (*The International Law Commission’s Articles on State Responsibility. Introduction, Text and Commentaries*, Cambridge Univ. Press, 2002, at 15 (n. 141); and the comparison *a contrario* with Eur. Comm. HR, *X and Y v. Switzerland* (joined appl. N°7289/75 and n°7349/76), 9 D.R. 57 (exercise by the Swiss police, in Liechtenstein who was not at the time party to the ECHR, of “delegated powers”, however customs and immigration jurisdiction was exercised in Liechtenstein by Swiss police officers governed exclusively by Swiss law and exercising the public authority of Switzerland, leading J. Crawford to conclude that they were not organs of the Swiss State “placed at the disposal” of Liechtenstein)).

<sup>43</sup> Eur. Ct. HR (plenary Court), *Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A n°240, § 96.

<sup>44</sup> See, *mutatis mutandis*, Eur. Ct. HR, *Amuur v. France* judgment of 25 June 1996, § 42 (so-called ‘international zone’ of the international airport of Paris-Orly falls under the jurisdiction of France notwithstanding its status under national law).

The reader will have noted that, in the definition of the two above principles, no distinction is made between the potential liability of a State party to the Convention in extra-territorial situations where that State occupies a territory in which the Convention was previously in force or where its agents perform acts on such territory, and situations which occur outside the territory of States parties to the Council of Europe. As we have seen however,<sup>45</sup> this distinction did seem to play an important role in the inadmissibility decision adopted unanimously by the Grand Chamber in *Bankovic*. The applicants had argued before the Court that “any failure to accept that they fell within the jurisdiction of the respondent States would defeat the *ordre public* mission of the Convention and leave a regrettable vacuum in the Convention system of human rights’ protection”.<sup>46</sup> The answer of the Court to this contention was that :

the Convention is a multi-lateral treaty operating (...) in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights’ protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.<sup>47</sup>

There are powerful arguments in favor of this distinction, and thus, for limiting any extra-territorial applicability of the Convention to territories situated within the ‘*espace juridique*’ – in the geographical sense of the expression – of the Council of Europe Member States. First, in the decision of 26 May 1975 it adopted in the first *Cyprus v. Turkey* case – a decision which led the way which would lead, twenty years later, to *Loizidou* –, the European Commission of Human Rights appears to have been guided by its concern that, if it did not find Turkey to have jurisdiction on the occupied party of Northern Cyprus, it would have allowed the Convention to have become ineffective in that part of the island : the military occupation would have deprived the inhabitants of the Northern part of Cyprus from a protection under the Convention which they otherwise would have enjoyed.<sup>48</sup> This argument, according to which allowing Turkey to occupy Northern Cyprus without assuming an obligation to fully respect the rights set forth in the Convention in the zone it occupies would result in allowing for a “vacuum” to be created in the protection that instrument affords, surfaces again in the judgment of the Court delivered on 10 May 2001 in the case of *Cyprus v. Turkey*. The Court notes that if it were to consider that the “jurisdiction” of Turkey does not extend to this territory, this would result in “a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention’s fundamental safeguards and their right to call a High Contracting Party to account for violations of their rights in proceedings before the Court...”.<sup>49</sup> Second – and this again is an argument the *Bankovic* Court puts forward<sup>50</sup> –, the inclusion in the Convention of a clause<sup>51</sup> enabling a Contracting State to declare that the Convention shall extend to all or any of the territories for whose international relations that State is responsible demonstrates that, at least in the view of the drafters, the applicability of the Convention beyond the national territories of the States parties was not presumed, even where they might be effectively in control on certain (non-European) territories.

<sup>45</sup> See above, text corresponding to fn. 17-18.

<sup>46</sup> *Bankovic*, § 79.

<sup>47</sup> *Bankovic*, § 80.

<sup>48</sup> See above, text corresponding to fn. 35. The European Commission on Human Rights notes specifically : “The operation of the Convention in the occupied part of Cyprus would become ineffective if one accepted [Turkey’s] submission that alleged violations of the Convention in that area could not be examined by the Commission. It followed from Art. 17 that the Convention did not allow such a vacuum in the protection of its rights and freedoms”. Article 17 ECHR states in particular that nothing in the Convention “may be interpreted as implying for any State (...) any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth [in the Convention] or at their limitation to a greater extent than is provided for in the Convention”.

<sup>49</sup> Eur. Ct. HR (GC), *Cyprus v. Turkey* (Appl. N° 25781/94), judgment of 10 May 2001, ECHR 2001-IV, at § 78.

<sup>50</sup> *Bankovic*, § 80.

<sup>51</sup> Article 56 § 1 ECHR (previously Article 63 § 1).

However, on this point also, it would appear that the case-law of the Court may be seen as having overruled *Bankovic*. As to the argument that the Northern Cyprus cases led to an extensive understanding of the notion of “jurisdiction” in order to ensure that there would be no “vacuum” created in the system of protection of the Convention in territories where it would otherwise be applicable, it cannot but be remarked that this argument was not made, explicitly at least, in the judgment of 8 July 2004 delivered by the Grand Chamber in the case of *Ilascu and Others v. Moldova and Russia*. This is remarkable, insofar as the circumstances of that case, which are examined in more detail below, would seem to call for a similar reasoning : the individuals situated on the territory of the separatist “Moldavian Republic of Transdniestria”, whose authorities had proclaimed their independency from Moldova and were not under the effective control of the Moldovan central authorities, would be in effect deprived of the protection of the Convention if they were not allowed to impose on the Federation of Russia – whose “jurisdiction” was seen to extend to that territory because of the decisive influence it exercises on the authorities on the separatist regime –, that it assumes its obligations under the Convention also with respect to that zone. The omission of this argument in the context of *Ilascu* by the fact that, as we shall see, Moldova was considered by the Court to still have “jurisdiction”, albeit limited in fact, on the zone of the separatist republic – a zone on which, indeed, it continued to claim sovereignty and the control of which it sought to retain. Thus, the “vacuum” in the system of protection of the Convention would not be complete, as the population of the “Moldavian Republic of Transdniestria” still, in principle, may call upon Moldova to ensure that the Convention is complied with within that territory. The “vacuum” argument nevertheless could have been made, insofar as any protection the Modovan authorities could have provided in the zone on which the “Moldavian Republic of Transdniestria” was self-proclaimed would have been essentially theoretical.<sup>52</sup>

More fundamentally, the judgement of the Court adopted a few months later in *Issa and Others* seems to confirm that the notion of a geographically limited “*espace juridique*” in which the Convention is to apply has lost any support it may have had in the past. Where it summarizes the principles guiding its case-law, the Court in *Issa* simply restates that “the concept of “jurisdiction” within the meaning of Article 1 of the Convention is not necessarily restricted to the national territory of the High Contracting Parties (...). In exceptional circumstances the acts of Contracting States performed outside their territory or which produce effects there (“extra-territorial act”) may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention”<sup>53</sup>; there is no allusion to the fact that such exceptional circumstances should only play a role on a territory where the Convention would otherwise have been applicable. Indeed, later in the judgment, applying the general principles to the case in dispute, the Court explicitly addresses the question of the applicability of the Convention beyond the ‘*espace juridique*’ of the Council of Europe, and offers a quite different understanding of this notion. It says :<sup>54</sup>

The Court does not exclude the possibility that, as a consequence of this military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey (and not that of Iraq, which is not a Contracting State and clearly does not fall within the legal space (*espace juridique*) of the Contracting States (see the above-cited *Bankovic* decision, § 80).

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<sup>52</sup> Thus, the English High Court of Justice (Divisional Court), in a widely publicized judgment of 14 December 2004, considered – rightly, in my view – that “the northern Cyprus and Moldova cases are correctly to be understood as ultimately turning on the exclusive and inclusive aspects of the rationalisation of the Convention as operating essentially only within its own regional sphere but also as permitting no vacuum to appear within that space” (*The Queen, on the application of Mazin Jumaa Gatteh Al Skeini and Others v. The Secretary Of State For Defence*, [2004] EWHC 2911 (Admin), at § 274). This case is examined in more detail further.

<sup>53</sup> Eur. Ct. HR (2nd sect.), *Issa and Others v. Turkey* (Appl. N° 31821/96), Judgment of 16 November 2004 (final on 30 March 2005), § 68.

<sup>54</sup> Eur. Ct. HR (2nd sect.), *Issa and Others v. Turkey*, at § 74.

Although *Issa* was adopted by a Chamber of the Court constituted within the second section, and thus in principle is less authoritative than the *Bankovic* decision – adopted unanimously by a Grand Chamber –, it should not be too easily dismissed. Three of the judges sitting in *Issa*, which was adopted unanimously, also were sitting in the Grand Chamber which decided *Bankovic*<sup>55</sup>: far from this latter decision having been overlooked, the reading which they offered of it was deliberate, and we should seek, rather than to ignore *Issa* because it is inconsistent with *Bankovic*, to read *Bankovic* in the light of the later case-law of the Court.

The relationship between *Bankovic* and *Issa* formed one central aspect of the very richly reasoned judgment delivered on 14 December 2004 by the English High Court of Justice (Divisional Court), when it examined the claims of relatives of Iraqi citizens who had died in Iraq at a time and within geographical areas where the United Kingdom was recognized as an occupying power.<sup>56</sup> Five claimants were killed in incidents with British troops. A sixth applicant died while under custody of British troops in a military prison. The claimants alleged violations of Article 2 of the Convention, which guarantees the right to life, and – in the case of the sixth applicant – of Article 3, which prohibits torture and inhuman or degrading treatments, as they considered that the deaths had not led to effective enquiries. Both these provisions were made applicable before British courts by virtue of the Human Rights Act 1998.

The High Court concludes that the “jurisdiction” of the United Kingdom does not extend to the total territory occupied by the British armed forces in Iraq, even though that territory may be said to be under its effective control. Basing itself mainly on *Bankovic*, which it considers the leading authority on the interpretation of Article 1 ECHR after an extensive review of the case-law of the European Court of Human Rights,<sup>57</sup> the High Court takes the view that “article 1 jurisdiction does not extend to a broad, world-wide extra-territorial personal jurisdiction arising from the exercise of authority by party states' agents anywhere in the world, but only to an extra-territorial jurisdiction which is exceptional and limited and to be found in specific cases recognised in international law. Such instances (...) instances are ones where, albeit the alleged violation of Convention standards takes place outside the home territory of the respondent state, it occurs by reason of the exercise of state authority in or from a location which has a form of discrete quasi-territorial quality, or where the state agent's presence in a foreign state is consented to by that state and protected by international law: such as diplomatic or consular premises, or vessels or aircraft registered in the respondent state”.<sup>58</sup> The claims of the first five claimants fail on that basis. However, the Court does recognize that the situation of the sixth claimant, Mr Mousa, warrants a different conclusion : “It seems to us that it is not at all straining the examples of extra-territorial jurisdiction discussed in the jurisprudence considered above to hold that a British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities, and containing arrested suspects, falls within even a narrowly limited exception exemplified by embassies, consulates, vessels and aircraft, and in the case of *Hess v. United Kingdom*, a prison”.<sup>59</sup> The judgment then goes on to decide that the inadequacies in the enquiries which took place following the death of Mr Mousa justify a finding of a violation of the procedural requirements of Articles 2 and 3 of the Convention.<sup>60</sup>

<sup>55</sup> These are judges Costa, Thomassen and Baka.

<sup>56</sup> *The Queen, on the application of Mazin Jumaa Gatteh Al Skeini and Others v. The Secretary Of State For Defence*, [2004] EWHC 2911 (Admin).

<sup>57</sup> *The Queen, on the application of Mazin Jumaa Gatteh Al Skeini and Others v. The Secretary Of State For Defence*, at § 245 (“*Bankovic* is the leading authority in support of both the basic proposition [that the essential and primary nature of Article 1 jurisdiction is territorial] and the reasons for it. As such it must throw its light and its learning over all the authorities which precede and follow it”); see also at § 268 (“*Bankovic* is a watershed authority in the light of which the Strasbourg jurisprudence as a whole has to be re-evaluated”).

<sup>58</sup> *The Queen, on the application of Mazin Jumaa Gatteh Al Skeini and Others v. The Secretary Of State For Defence*, at §§ 269-270.

<sup>59</sup> *The Queen, on the application of Mazin Jumaa Gatteh Al Skeini and Others v. The Secretary Of State For Defence*, at § 287.

<sup>60</sup> I am not aware of an appeal having been lodged in the case against the judgment of the High Court of Justice. But the Public Interest Lawyers, the group which litigated the case on behalf of the six claimants, does announce on its website that

In order to dismiss the claims for judicial review of the five first claimants, the High Court of Justice thus bases itself on the notion of an “espace juridique” of the Convention expressed in § 80 of the *Bankovic* decision. It reads this notion as implying that a State party to the Convention is not bound to ensure the rights and freedoms set forth in that instrument on foreign territories effectively under its control, unless this would result in a “vacuum” of the system of protection of the Convention within the territories of the Council of Europe to which that instrument was intended to apply. This reading not only treats as binding authority what was merely *obiter* in *Bankovic* – where all parties agreed that the NATO forces did not exercise effective control over Serbia –; it also does not take into consideration the almost explicit reconsideration of that passage in the later case of *Issa*. The High Court of Justice does recognize this tension.<sup>61</sup> But it adheres to a “pick-and-choose” jurisprudence which is manifest in the justification it offers for following *Bankovic* instead of the more recent case-law of the European Court of Human Rights:

in our judgment the dicta in *Issa* do not, for the reasons which we have sought to express, follow any "clear and constant jurisprudence of the Strasbourg court". On the contrary, we think that they are inconsistent with *Bankovic* and the development of the Strasbourg jurisprudence in the years immediately before *Bankovic*. In a sense *Issa* seems to us to look back to an earlier period of the jurisprudence, which has subsequently made way for a more limited interpretation of article 1 jurisdiction. It may well be that there is more than one school of thought at Strasbourg; and that there is an understandable concern that modern events in Iraq should not be put entirely beyond the scope of the Convention: but at present we would see the dominant school as that reflected in the judgment in *Bankovic* and it is to that school that we think we owe a duty under section 2(1) [of the Human Rights Act 1998].<sup>62</sup>

Borrowing from Justice Scalia’s flavorful qualifications,<sup>63</sup> we may consider that this is simply an answer to the “never-say-never” jurisprudence of the European Court of Human Rights. And, indeed, the Strasbourg Court may have failed to provide the national courts with all the guidance they may require on this question. It has preferred to decide the questions it has been confronted with, which often are especially sensitive in situations which contain an extra-territorial element, on a case-to-case basis, wishing neither to definitively close any doors, nor to open the floodgates for fanciful and politically motivated applications.<sup>64</sup> Nevertheless, when confronted with two successive decisions of the European Court of Human Rights which contain apparently conflicting dicta, the role of the national courts is to seek either to reconcile these decisions by identifying some overarching principle which could explain both, or to recognize the primacy of the most recent decision, which is presumed to represent the current position of the international judge. To affirm the primacy of the older decision

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they “shall be appealing to the Court of Appeal on the issue of effective control” ([http://www.publicinterestlawyers.co.uk/iraq\\_litigation.htm](http://www.publicinterestlawyers.co.uk/iraq_litigation.htm), last visited on 25 August 2005).

<sup>61</sup> *The Queen*, on the application of *Mazin Jumaa Gatteh Al Skeini and Others v. The Secretary Of State For Defence*, at § 263. See also § 277 of the judgment, where the Court candidly notes : “In *Issa* at para 74 the Court recognises the espace juridique doctrine but, in our respectful opinion, does not succeed in avoiding it implying that non-Convention territory automatically becomes Convention territory if there is effective control of an area by a state party”.

<sup>62</sup> *The Queen*, on the application of *Mazin Jumaa Gatteh Al Skeini and Others v. The Secretary Of State For Defence*, at § 265.

<sup>63</sup> See the opinion of Justice Scalia, joined by the Chief Justice and Justice Thomas, concurring in part and concurring in the judgment, in *Sosa v. Alvarez-Machain et al.*, 542 U.S. \_\_ (2004) (judgment of 29 June 2004), slip op., p. 13 of the separate opinion.

<sup>64</sup> For one example, see Eur. Ct. HR (2nd sect.), *Aziz v. Cyprus, Greece, Turkey and the United Kingdom* (Appl. N° 69949/01), decision (partial decision of inadmissibility) of 23 April 2002 : the applicant, a member of the Turkish Cypriot community who could not be registered in the Greek Cypriot electoral role, considered that not only the Cypriot government was responsible for this situation, but also Greece, which “caused the military coup in 1974 against the Cyprus Government”, Turkey, which “illegally invaded and still occupies nearly 40% of Cypriot territory and supports the illegal ‘Turkish Republic of Northern Cyprus’”, and the United Kingdom, which “gave support to the revolutionary Cyprus government to propose constitutional changes in 1963 and has done nothing ever since to uphold the Constitution”. The Court answers that “the applicant’s complaints, to the extent that are directed against Greece, Turkey and the United Kingdom, are of a political nature and have no bearing on the situation complained of by the applicant, namely the refusal of the Cypriot authorities to register him in the electoral lists”.

under the pretext that the more recent one are not adequately supported by the authorities it relies on<sup>65</sup> hardly seems to conform with the kind of cooperation between the English courts and the European Court of Human Rights which the Human Rights Act 1998 seems to call for.<sup>66</sup>

#### *d) The positive obligation to influence extra-territorial situations*

The two principles identified above require that a distinction be made between (i) the national territory of a State party to the Convention or the territory where it has assumed governmental powers, and (ii) situations where the organs of the State act beyond the national territory or territory assimilated to national territory. The determination of the scope of the State's obligations should be made to depend on this distinction. The judgment of the Court in *Ilascu and Others v. Moldova and Russia*<sup>67</sup> concerns an intermediate situation, in which the *de facto* influence exercised by the Russian authorities on the authorities of the self-proclaimed "Moldavian Republic of Transdniestria" was in effect considered by the Court to be such as to compensate for the absence of a territorial control of Russia equivalent to that exercised by Turkey on the Northern part of Cyprus. The "Moldavian Republic of Transdniestria" is a region of Moldova which proclaimed its independence in 1991 but is not recognised by the international community. It has been consistently supported, first by the USSR when the Republic of Moldova proclaimed its independence in August 1991, and later by the Federation of Russia; indeed, the Fourteenth Army of the USSR, previously deployed in Moldova with its headquarters in Chisinau, had retreated from most of Moldova but remained present in Transdniestria, and actively cooperated with the separatists since. After the end of the conflict between Moldova and the separatist republic in 1991-1992, senior officers of the former Fourteenth Army participated in public life in Transdniestria, and soldiers of the former Fourteenth Army took part in the elections in Transdniestria, military parades of the Transdniestrian forces and other public events. Strong links, both economic and legal – for instance in the field of judicial cooperation – were established between the Moldavian Republic of Transdniestria and the Federation of Russia, the successor State to the USSR. The four applicants, Moldovan nationals who were arrested in June 1992 and had been condemned by a Transdniestrian court to imprisonment terms or, in the case of Mr Ilascu, to death, alleged in particular that the court which had convicted them was not competent for the purposes of Article 6 of the Convention, that they had not had a fair trial, that their detention in Transdniestria was not lawful, in breach of Article 5, and that their conditions of detention contravened Articles 3 and 8 of the Convention. The applicants argued that the Moldovan authorities were responsible under the Convention for the alleged violations, since they had not taken any appropriate steps to put an end to them. They further asserted that the Russian Federation shared responsibility since the territory of Transdniestria was and is under *de facto* Russian control on account of the Russian troops and military equipment stationed there and the support allegedly given to the separatist regime by the Russian Federation. With respect to this latter question, the Court recalled that, under *Loizidou*, "a State's responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – it in practice exercises effective control of an area situated outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration".<sup>68</sup> This quote is one we are already familiar with. However the Court then added<sup>69</sup>:

<sup>65</sup> *The Queen, on the application of Mazin Jumaa Gatteh Al Skeini and Others v. The Secretary Of State For Defence*, at § 263 : "...in the light of our analysis of Issa (...) we do not consider that its broad dicta are consistent with Bankovic. Moreover, the authorities relied on by the Court for those broad dicta do not adequately support them..."

<sup>66</sup> As explained by Lord Bingham in the case of *Ullah* : "This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law" (*Regina (Ullah) v. Special Adjudicator* [2004] UKHL 26, [2004] 3 WLR 23, at para. 20).

<sup>67</sup> Eur. Ct. HR (GC), *Ilascu and Others v. Moldova and Russia* (Appl. N° 48787/99), judgment of 8 July 2004.

<sup>68</sup> Eur. Ct. HR (GC), *Ilascu and Others v. Moldova and Russia*, at § 314 (citing *Loizidou v. Turkey (Merits)*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, pp. 2234-2235, § 52).

<sup>69</sup> Eur. Ct. HR (GC), *Ilascu and Others v. Moldova and Russia*, at §§ 315-318.

It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned (...).

Where a Contracting State exercises overall control over an area outside its national territory its responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration which survives there by virtue of its military and other support (...).

*A State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction.* Thus, with reference to extradition to a non-Contracting State, the Court has held that a Contracting State would be acting in a manner incompatible with the underlying values of the Convention, [...] if it were knowingly to hand over a fugitive to another State where there are substantial grounds for believing that the person concerned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, p. 35, §§ 88-91).

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 (...). 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.

Applying those principles to the facts of the case, the Court arrived at the conclusion that the Moldavian Republic of Transdniestria, "set up in 1991-1992 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, *or at the very least under the decisive influence*, of the Russian Federation, and in any event that *it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation*", and that therefore the applicants must be considered to come within the "jurisdiction" of the Russian Federation for the purposes of Article 1 of the Convention.<sup>70</sup> This finding extends the notion of (extra-territorial) jurisdiction under this provision beyond what resulted from the Cypriot cases, insofar as exercising a decisive influence on a rebel regime and even an overall control on the territory cannot be assimilated to a situation of full military occupation, as the position of Turkey in the Northern part of Cyprus may be described.<sup>71</sup>

Nevertheless, this was the less controversial part of the judgment of the Court.<sup>72</sup> And, indeed, once it is recognized that the *de facto* influence exercised by the Federation of Russia on Transdniestria is comparable in effect to that exercised by Turkey in Northern Cyprus, even though the means may not be as direct, and that the Region of Transdniestria therefore is under the "jurisdiction" of Russia in the meaning of Article 1 ECHR, the ensuing reasoning – holding Russia responsible for the acts of the authorities of the self-proclaimed Moldavian Republic of Transdniestria – it is not particularly remarkable. Although we may be trained, as international lawyers, to think that the international responsibility of a State may not be engaged by the conduct of actors not belonging to the State apparatus unless they are in fact acting under the instructions of, or under the direction or control of,

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<sup>70</sup> Eur. Ct. HR (GC), *Ilascu and Others v. Moldova and Russia*, at §§ 391-394 (my emphasis). It will be noted that, although the Court announced in the passage quoted above that "A State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction" (§ 317; my emphasis), thus presenting "jurisdiction" and "imputability" as alternative grounds for a finding of liability, here the fact that a situation is imputable to the Russian authorities (due to the influence they may exercise on the Transdniestrian separatists) leads to a finding that the "jurisdiction" of the Federation of Russia extends to such situations. These conceptual hesitations and even inconsistencies are a sign of the uncertainties within the Court as to how to treat such situations.

<sup>71</sup> See the dissenting opinion of judge Ress, at § 3.

<sup>72</sup> Although the judgment elicited no less than four partly dissenting and one dissenting opinions from altogether 13 judges of the 17-members Grand Chamber, only one member of the Court disagreed with the finding concerning the extent of the jurisdiction of Russia. This was judge Kovler, elected on behalf of Russia.

that State in carrying out the conduct,<sup>73</sup> the private-public distinction on which this rule of attribution is based is mooted (though not contradicted) by the imposition of positive obligations on the States parties to the ECHR : once a situation is found to fall under the “jurisdiction” of a State party to the Convention, the State must accept responsibility not only for the acts its organs have adopted, but also for the omissions of these organs, where such omissions result in an insufficient protection of private persons whose rights or freedoms are violated by the acts of other non-State actors.

What is noteworthy in the *Ilascu* case, however, is that the applicants were directing their application not only against Russia, the “sponsor” State of the Moldavian Republic of Transdniestria, but also against Moldova, which sought since 1991 – but failed – to assert its sovereignty on the Region of Transdniestria. They thus confronted the Court with the question whether, when a portion of the national territory escapes the effective control of the central authorities, that segment of the territory should nevertheless be considered to be under the “jurisdiction” of the State concerned, with the obligations this entails. It is to this problem that I now turn.

### **3. The “jurisdiction” of the State on its national territory**

#### *a) The “jurisdiction” of the State on national territory under its effective control*

The preceding section recalled that, where a State exercised on a foreign territory a form of control comparable to that of a territorial sovereign, assuming the governmental powers generally associated therewith, the situations occurring on that territory should be considered to fall under its “jurisdiction” in the meaning of Article 1 ECHR. It would seem to fit within that same logic to consider that, conversely, “the presumption that persons within the territory of a State are within its ‘jurisdiction’ for Convention purposes is a rebuttable one and, exceptionally, the responsibility of a State will not be engaged in respect of acts in breach of the Convention which occur within its territory”.<sup>74</sup> In both situations, “jurisdiction” thus would derive from control,<sup>75</sup> and far from being determinative, the fact that a particular event occurs on the national territory only would serve to establish a *presumption of control* : thus, whilst “jurisdiction” should extend to the situations effectively under the control of the State which may ensure the protection of the full range of the rights protected under the Convention, it should be limited, conversely, where a State is *de facto* unable to exercise its governmental powers on some portions of the national territory. Indeed, this was the position adopted by the Court in *Cyprus v. Turkey*, where the Court justified reiterating its conclusion that Northern Cyprus was under the “jurisdiction” of Turkey

... having regard to the (...) continuing inability [of the government of Cyprus] to exercise their Convention obligations in northern Cyprus, [so that] any other finding would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention’s fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court.<sup>76</sup>

That statement seemed to imply, first, that the “jurisdiction” of a State party to the Convention could not be considered to extend to all its national territory if, on certain portions of that territory, the State is unable in fact to exercise its control in order to effectively guarantee the rights and freedoms set forth in the Convention ; second, that the notion of “jurisdiction” is an all-or-nothing concept, in the sense that any single event falls under the jurisdiction either of State A or of State B, depending on

<sup>73</sup> To paraphrase Art. 4 of the ILC’s Draft Articles on State Responsibility, which itself is of course directly inspired by the requiring adopted by the International Court of Justice in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (merits)*, ICJ Rep. 1986, p. 14.

<sup>74</sup> See the partly diss. opinion of Judge Sir Nicolas Bratza, joined by judges Rozakis, Hedigan, Thomassen and Pantîru appended to the judgment of the Court in *Ilascu and Others v. Moldova and Russia*.

<sup>75</sup> For an exposition of why responsibility derives from control, see C. Eagleton, “International Organisation and the Law of Responsibility”, R.C.A.D.I., vol. 76, 1950, at 385.

<sup>76</sup> Eur. Ct. HR (GC), *Cyprus v. Turkey* (Appl. N° 25781/94), judgment of 10 May 2001, § 78, ECHR 2001-IV.

which State effectively could have controlled the event and, therefore, may be held internationally responsible for not having guaranteed the rights and freedoms recognized under the Convention.

This however is not to say that the responsibility of the State under whose jurisdiction a particular event occurs is necessarily engaged simply because the event which it should have prevented occurred. Rather, in the logic espoused by the Court in *Cyprus v. Turkey*, where an event occurs under the jurisdiction of a State party to the Convention three situations are to be carefully distinguished. No particular difficulty is raised in the first situation, where the violation has its source directly in the acts of the organs of the State – for instance, a judicial decision has been adopted in violation of the requirements of a fair trial or a law has been passed which creates an unjustifiable interference with the right to respect for private life. But it may be that the event allegedly resulting in a violation of Convention rights may not be directly attributed to the organs of the State, in that it has its source in the acts of private individuals. In this second situation, the international responsibility of the State will only be engaged where it appears that the State has not adopted the measures which could have reasonably prevented the event from occurring, but this infringement cannot be presumed from the simple fact that those measures have failed in a particular instance to prevent the rights of an individual from being violated : the obligation here is one of means, not of result.<sup>77</sup> The requirement of a prior exhaustion of the local remedies available before the European Court of Human Rights may consider an application ensures that, where the violation complained of has its source in the acts of private individuals, the international responsibility of the State will only exist where, not only it has failed to prevent the event from occurring, but where it also has failed to replace the individuals who are victims of the event in the situation in which they would have been in the absence of that event,<sup>78</sup> and to identify and punish those responsible for the violation.<sup>79</sup> In other terms, despite all the conceptual confusion which still continues to pervade this part of the jurisprudence of the Court, the acts of private individuals are not *as such* imputable to the State, although if they are left unpunished or unremedied, their occurrence and repetition may serve to shed light on the failure of the organs of

<sup>77</sup> Eur. Ct. HR, *Plattform "Ärzte für das Leben" v. Austria*, judgment of 21 June 1988, Series A n°139, § 34.

<sup>78</sup> Since the early 1980s, the case-law of the Court requires not only that the State authorities ensure a reparation to the victim, but also that they adopt the measures acknowledging that the Convention has been violated (see, e.g., Eur. Ct. HR, *Amuur v. France* judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 846, § 36 : “a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a ‘victim’ unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention”). This ensures that States will not be tempted to simply ‘buy off’ individual victims by compensating them on a case-by-case basis but without removing the deficiencies in the national legal system or the practices which led to the violation in the first place.

<sup>79</sup> It is clear that, in this situation where the alleged violations have their source directly in the acts of private individuals, the local remedies rule constitutes a rule of substance (defining whether the State has violated an international obligation) rather than a rule of procedure (governing only the admissibility before the international jurisdiction of the claim of the individual aggrieved). Although, as is well known, the first qualification was favored first by E. Borchard and, later, by R. Ago as well as, generally, by the Italian doctrine, Ch. de Visscher and C. F. Amerasinghe in particular were in favor of the second qualification. See, among many other references, E. Borchard, “The Local Remedies Rule”, *American Journal of International Law*, 1934, p. 729; R. Ago, “Le délit international”, *R.C.A.D.I.*, vol. 68, 1939-II, pp. 26-554, at p. 516; G. Barile, *I diritti assoluti nell’ordinamento internazionale*, Milano, Giuffrè, 1951, at 327; F. Durante, *Ricorsi individuali a organi internazionali*, Milano, Giuffrè, 1958, at 137; G. Gaja, *L’esaurimento dei ricorsi interni nel diritto internazionale*, Milano, Giuffrè, 1967, at 140 (for a presentation of the local remedies rules as a rule of substance), and contrast with Ch. de Visscher, “Notes sur la responsabilité internationale des Etats et la protection diplomatique d’après quelques documents récents”, *Rev. dr. int. et de légis. comparée*, 1927, 245, at 252; Ch. de Visscher, “Le déni de justice en droit international”, *R.C.A.D.I.*, vol. 52, 1935-II, 368-442, esp. chap. III (“Les rapports du déni de justice avec la responsabilité internationale et avec la règle de l’épuisement préalable des voies de recours internes”), at pp. 421-432; and C. F. Amerasinghe, “The formal character of the rule of local remedies”, *ZaöRV*, vol. 25, 1965, p. 445. On the controversy as to the qualification of the rule, see J. Fawcett, “The exhaustion of local remedies : substance or procedure?”, *B.Y.I.L.*, 1954, p. 452. For more contemporary perspectives, see especially A.A. Cancado Trindade, *The application of the rule of exhaustion of local remedies in International law. Its rationale in the international protection of individual rights*, Cambridge Univ. Press, 1983; D. Sullinger, *L’épuisement des voies de recours internes en droit international général et dans la Convention européenne des droits de l’homme*, Lausanne, Imprimerie des Arts et Métiers, 1979. I have argued elsewhere that, while the local remedies rules may be seen as a rule of procedure where the violation has its direct source in the acts of a State organ, it should be treated as rule of substance where the responsibility of the State is alleged to arise from a failure to control the acts of private parties : see O. De Schutter, *Fonction de juger et droits fondamentaux*, Bruxelles, Bruylant, 1999, at 269-279; and O. De Schutter, “La subsidiarité dans la Convention européenne des droits de l’homme : la dimension procédurale”, in : M. Verdussen et al. (ed), *L’Europe de la subsidiarité*, Bruxelles, Bruylant, 2000, at 63-130.

the State to comply with its obligation to protect the rights of individuals under its jurisdiction.<sup>80</sup> The responsibility of the State is only engaged in such instances because its organs have failed to fulfil their duties to protect the human rights of individuals under the jurisdiction of the State<sup>81</sup> : the legislature, for instance, has failed to adopt legislation which sufficiently discourages violations from being committed ; the executive has failed to enforce the applicable legislation ; or the judiciary has failed to adequately protect the rights of the victims, even though these rights may be not only recognized under international law, but also protected under internal legislation. Unless such failures may be identified in the behavior of the State organs, the State will not be held responsible for an event which, although it might be described as a violation of the rights of the individual, will not be treated as a violation of the obligations imposed on the State by the European Convention on Human Rights to which it is a party.<sup>82</sup> A third and again very different situation is where the State is not unwilling, nor insufficiently attentive to the need to prevent violations from occurring, but *unable* to effectively control actors operating on its national territory. It is this situation which the following section examines.

*b) The “jurisdiction” of the State on national territory escaping its effective control*

In the logic of *Cyprus v. Turkey*, the question where a State cannot effectively exercise control over a situation occurring on its national territory should not be whether the State has deployed all the efforts which could have been reasonably expected in order to prevent violations from occurring. Rather, the preliminary question to be answered is whether the presumption that the State is in control of the events occurring on that territory may be maintained, or whether it should be replaced by a more realistic view about its capacity to influence those events. Indeed, the understanding of the 2001 *Cyprus v. Turkey* judgment quoted above is that where a State is unable to control a part of its national territory, it has no “jurisdiction” on the events occurring there, and either another State party to the Convention may be identified as the State effectively exercising jurisdiction (such as Turkey with respect to Northern Cyprus) or, however regrettable that may be, there is a vacuum in the system of protection of the Convention.

This latter solution, however, is precisely the one which the *Ilascu and Others v. Moldova and Russia* judgment challenges. Although the Court finds 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 [Moldavian Republic of Transdnistria]”, the Court does not conclude therefrom that – it being impossible for Moldova to exercise its jurisdiction on the said territory – this State may not be held responsible for what occurs in the region concerned. Instead, the Court considers that “*even in the absence of effective control over the Transdnestrian 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

<sup>80</sup> See, e.g., Eur. Ct. HR, *X and Y v. the Netherlands* judgment of 26 March 1985, Series A no. 91, pp. 11–13, §§ 21–27 (abuse committed against a mentally disabled minor of more than 16 years of age, revealing a lacuna in the Dutch criminal legislation which offered in such circumstances an insufficient protection to the victims of sexual abuse); Eur. Ct. HR, *Stubblings and Others v. the United Kingdom* judgment of 22 October 1996, Reports 1996-IV, p. 1505, §§ 62–64 (while noting that “Children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives”, the Court finds that “In the instant case (...), such protection was afforded” despite the fact that the applicants had been sexually abused when they were children and were barred from seeking a remedy against their alleged abusers); Eur. Ct. HR, *A. v. the United Kingdom* judgment of 23 September 1998, § 22 (child beaten repeatedly by his stepfather : the Court concludes that the law in the United Kingdom does not provide adequate protection to children against treatment or punishment contrary to Article 3 ECHR).

<sup>81</sup> L. Condorelli, “L’imputation à l’Etat d’un fait internationalement illicite : solutions classiques et nouvelles tendances”, *R.C.A.D.I.*, vol. 189, 1984-IV, 9-222, at 153 (“...ce qui est imputé à l’Etat n’est pas le fait de particuliers mais le comportement des organes de l’Etat ; ce dernier comportement, que la conduite de l’individu se limite à mettre en évidence, peut naturellement avoir un caractère omissif ou commissif et enclenche la responsabilité internationale de l’Etat lorsqu’il représente l’infraction à une obligation de prévention et/ou de répression”).

<sup>82</sup> See O. De Schutter, “ L’intervention des autorités publiques dans les relations familiales et l’obligation de prévenir les mauvais traitements : vie familiale et droit à la protection de l’enfant dans la jurisprudence de la Cour européenne des droits de l’homme ”, *Revue trimestrielle de droit familial*, 3/1999, 427-455.

Convention".<sup>83</sup> In the approach the Court took to the Cypriot cases, jurisdiction was an all-or-nothing concept, which therefore could constitute a threshold question to be answered before examining whether the alleged violation may be attributed to the State and whether the State has violated its obligations under the Convention. Jurisdiction now becomes a relative concept, a matter of degree determining the scope of the obligations of the State concerned. The Court considers that:<sup>84</sup>

... 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 guaranteed by the Convention.

This statement is methodologically disputable. The notion of "positive obligations", in fact, had until presently been used in an entirely different context where, precisely because a State exercised (complete) jurisdiction over a course of events (was in "full and effective control"), it could be required from that State to protect the rights and freedoms guaranteed to the individuals under the Convention, by adopting the necessary measures therefor. It appears here to fulfil a different function, as if in order to compensate for extending the "jurisdiction" of the State in the meaning of Article 1 ECHR – and thus, the scope of the obligations of the State under the Convention – beyond what would be justified by a realistic appreciation of its effective ability to influence a situation. Moldova should be considered to have jurisdiction on the region where the self-proclaimed Moldavian Republic of Transnistria is established, but we are not to worry : its obligations with respect to the continued arbitrary detention of the applicants in the hands of the authorities of that separatist republic are strictly tailored to what may be required from the Moldovan authorities in such a situation : the "positive obligations" imposed on them relate only to "the measures needed to re-establish [the control of Moldova] over Transnistrian territory, as an expression of its jurisdiction" (although as the Court acknowledges, "there was little Moldova could do" in this respect),<sup>85</sup> and to "measures to ensure respect for the applicants' rights, including attempts to secure their release".<sup>86</sup> Therefore, although, as stated by judge Sir Nicolas Bratza, the reliance on the concept of "positive obligations" may be a source of confusion ("both misleading and unhelpful in the present context", are his words), the idea behind the use of that concept is nevertheless clear : a State may not seek refuge behind its inability to control portions of its national territory in order to escape its obligation to do everything which it legally and practically can do in order to secure the rights of the Convention on all its territory.

It will be useful to contrast the *Ilascu and Others* judgment with the attitude of the Court in its *Assanidze v. Georgia* judgment, delivered by the Grand Chamber only three months earlier. The applicant in this case had been held in custody in the 'Ajarian Autonomous Republic' in Georgia since 1993, after having been arrested and convicted for allegedly illegal financial dealings. Although the Georgian president had granted him a pardon in 1999 suspending the remaining two years of his sentence, he had remained in detention. Indeed, soon after the presidential decree granting the pardon had been adopted, the Ajarian High Court had declared the pardon null and void, and the judgments of the Georgian Supreme Court quashing that latter judgment had been ignored by the local authorities in the Ajarian Autonomous Republic. After the applicant was again convicted on another ground in 2000 by the Ajarian High Court, the Supreme Court of Georgia acquitted him. That acquittal judgment also

<sup>83</sup> Eur. Ct. HR (GC), *Ilascu and Others v. Moldova and Russia*, at §§ 330-331 (my emphasis in both quotes).

<sup>84</sup> Eur. Ct. HR (GC), *Ilascu and Others v. Moldova and Russia*, at § 333.

<sup>85</sup> Eur. Ct. HR (GC), *Ilascu and Others v. Moldova and Russia*, at § 341.

<sup>86</sup> Eur. Ct. HR (GC), *Ilascu and Others v. Moldova and Russia*, at § 339.

was never executed, however. Despite all the best efforts of the General Prosecutor's Office of Georgia, the Public Defender, the Georgian Ministry of Justice and the Legal Affairs Committee of the Georgian Parliament, and even the President of the Republic of Georgia, seeking the immediate release of Mr Assanidzé, the local authorities concerned in the Ajarian Autonomous Republic refused to comply, apparently believing that he has been conspiring against the President of the autonomous Republic.

When the question whether Mr Assanidzé was being subjected to arbitrary detention in violation of Article 5(1) ECHR was presented to the European Court of Human Rights, the Georgian government 'accepted that the Ajarian Autonomous Republic was an integral part of Georgia and that the matters complained of were within the jurisdiction of the Georgian Republic', and it moreover insisted that 'Georgian law was duly applied in the [Ajarian Autonomous Republic] and that, apart from the present case, with its strong political overtones, there was no problem of judicial cooperation between the central authorities and the local Ajarian authorities'.<sup>87</sup> The Court took the view that the events complained of by the applicant fell under the 'jurisdiction' of the Georgian State:<sup>88</sup>

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.

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, *Ilascu, Lesco, Ivantoc and Petrov-Popa v. Moldova and the Russian Federation* [GC], no. 48787/99, decision of 4 July 2001; and *Loizidou v. Turkey* (preliminary objections) cited above). (...)

Thus, the presumption referred to (...) above is seen to be correct. Indeed, for reasons of legal policy – the need to maintain equality between the State 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 parts only of the territory of certain State Parties, thus rendering the notion of effective human-rights protection underpinning the entire Convention meaningless while, at the same time, allowing discrimination between the State 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.

It is clear from this passage that the Court considers that the 'presumption' that the jurisdiction of a State extends to all its national territory is an absolute one where no other State *de facto* occupies a portion of the territory : even where the central authorities fail to impose their will on autonomous entities within the State, the State remains fully responsible under international law, and it may not shelter beyond the inability of the central authorities to impose on the subordinate levels that they comply with the rights and freedoms of the Convention.<sup>89</sup> Thus, although the Court does not deny in

<sup>87</sup> Eur. Ct. HR (GC), *Assanidze v. Georgia* (Appl. N° 71503/01) judgment of 8 April 2004, at §§ 133-134.

<sup>88</sup> Eur. Ct. HR (GC), *Assanidze v. Georgia* (Appl. N° 71503/01) judgment of 8 April 2004, at §§ 139-143.

<sup>89</sup> On the obligation to control the lower levels of the administration, see among many others Eur. Ct. HR, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 90-91, § 239. As recalled by the European Court of Human Rights in *Assanidze* (at § 141 of the judgment), the European Convention on Human Rights contains no "federal clause", comparable to Article 28 in the American Convention on Human Rights. This provision, which was inserted in the American Convention on Human Rights at the request of the United States, introduces a differentiation between the obligations concerning subject matters which fall under the "legislative and judicial jurisdiction" of the national (i.e., federal) government, which the central authorities must implement (Art. 28(1) ACHR), and those concerning subject matters on which the constituent units of the federal state have jurisdiction, with regard to which the obligation of the central authorities is to "immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of the Convention" (Art. 28(2) ACHR). On the interpretation of Art. 28 ACHR by the Inter-American Court of Human Rights, see in particular the *Garrido and Baigorria Case, Reparations (Art. 63(I) American Convention on Human Rights)*, judgment of August 27, 1998, Series C, No. 39, at para. 38-46, and especially the reminder that under general public international law, a State cannot in principle "plead its federal structure to avoid complying with an international obligation". In this respect, the confirmation in Article 50 of the International Covenant on Civil and Political Rights that the provisions of the Covenant "shall extend to all parts of

*Assanidze* that ‘the central authorities have taken all the procedural steps possible under domestic law to secure compliance with the judgment acquitting the applicant, have sought to resolve the dispute by various political means and have repeatedly urged the Ajarian authorities to release him’ – but have failed –, and that therefore ‘under the domestic system, the matters complained of by the applicant were directly imputable to the local Ajarian authorities’,<sup>90</sup> it concludes nevertheless that this should not affect the scope of the ‘jurisdiction’ of the State of Georgia under Article 1 ECHR : ‘It is only the responsibility of the Georgian State itself – not that of a domestic authority or organ – that is in issue before the Court’.<sup>91</sup> This conclusion was adopted unanimously by the Grand Chamber.

c) *The positive obligation to exercise effective control on all the national territory*

On their surface, *Assanidze* and *Ilascu* look alike : in both cases, the ‘jurisdiction’ of the State is presumed to extend to its entire national territory, whatever the difficulties the central authorities may be experiencing in imposing their will to other parts of the administration. In reality, not only are the factual settings of both cases very dissimilar, but moreover *Ilascu* in two important respects contradicts the reasoning of the Court in *Assanidze*. *Assanidze* was justified by the idea that no other State exercises overall control on the territory of the Ajarian Autonomous Republic ; in *Ilascu* on the contrary, it is despite the fact that the Federation of Russia exercises an overall control on Transdniestria that the ‘jurisdiction’ of Moldova is considered to extend to that territory. ‘Jurisdiction’ in *Assanidze* was considered an all-or-nothing concept, designating in fact the sovereign power on the portion of territory where the events complained of had occurred, in order to identify a potential responsibility of that power in those events ; in *Ilascu*, ‘jurisdiction’ is seen instead as a relative concept, not only in the sense that what happens in Transdniestria is considered to be influenced both by Moldova and Russia who therefore are jointly responsible for the situation denounced before the Court, but also in the sense that, the ‘jurisdiction’ of Moldova on the Moldavian Republic of Transdniestria not being complete (its ‘scope’ is ‘reduced’, says the Court), the obligations of the Moldovan authorities are tailored to the extent of the jurisdiction effectively exercised as if the European Convention on Human Rights contained a “federal clause” similar to Article 28 of the American Convention on Human Rights.<sup>92</sup> The Court arrives at the conclusion that the obligations of Moldova are limited to taking all the legal and practical steps they may in order to secure the release of the applicants arbitrarily detained in Transdniestria. It thus reasons as if the authorities of the Moldavian Republic of Transdniestria were private actors not part of the State apparatus, which is entirely justifiable ; what is more remarkable, and which the separate opinions appended to the *Ilascu* judgment rightly emphasize, is that this is accompanied by a move towards a concept of ‘jurisdiction’ which has become relative, tailored to the degree of control effectively exercised.

What significance should be attached to this shift? In his partly dissenting opinion to *Ilascu and Others*, judge Loucaides suggests that the position of the Court, insofar as it imposes on Moldova positive obligations to secure the rights of the Convention even with respect to situations on which it cannot exercise its effective control, would lead to absurd results as it “would lead, for instance, (...) to the illogical conclusion that all High Contracting Parties to the Convention, would have jurisdiction and responsibility for violations of the human rights of persons in any territory of a High Contracting Party, including their own but outside their actual authority (either *de facto* or *de jure* or both depending on the territory), merely by virtue of not pressing to secure the Convention rights in that territory through action against the State which does in reality exercise such authority over these persons”. This is disingenuous ; and it misrepresents the position of the majority which the partly dissenting opinion criticizes. In fact, the imposition of positive obligations on Moldova cannot be dissociated from the fact that the situation complained of – the continued arbitrary detention of the applicants, essentially – occurred on the national territory of Moldova, and should therefore be

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federal States without any limitations or exceptions” is unwelcome precisely because it is redundant and simply restates the general rule (see on the circumstances of the introduction of this rule M. Sorensen, “Federal States and the International Protection of Human Rights”, 46 *American Journal of International Law* 195-218, at 207).

<sup>90</sup> Eur. Ct. HR (GC), *Assanidze v. Georgia* (Appl. N° 71503/01) judgment of 8 April 2004, at par. 145.

<sup>91</sup> Eur. Ct. HR (GC), *Assanidze v. Georgia* (Appl. N° 71503/01) judgment of 8 April 2004, at par. 149.

<sup>92</sup> See above, fn. 61.

presumed to be under the jurisdiction of that State : it is *to the extent the situation occurred on its national territory*, that Moldova was under an obligation to take all the necessary steps to ensure that the rights and freedoms of the Convention are secured to all, and that it could not simply seek shelter behind an alleged incapacity to influence the situation leading to a violation of the Convention.<sup>93</sup>

Although the *Ilascu* judgment therefore does not represent a radical departure from a territory-based understanding of the concept of ‘jurisdiction’ as a condition for State responsibility under the European Convention on Human Rights, it nevertheless does mark an evolution in the case-law, insofar as the Court recognizes that ‘jurisdiction’, rather than being necessarily exclusive may be *shared* between two or more States parties to the Convention. This may be the case either where more than one State could exercise a decisive influence on the situation denouced as constituting a breach of the Convention, even by unilateral action ; or where two or more States could, by their *combined* action, decisively exercise such an influence. We see, then, how the debate on the relationship between the concept of ‘jurisdiction’ in the meaning of Article 1 ECHR and the national territory stands in close relationship to the debate on the ability for the European Convention on Human Rights to adequately address situations where, by concluding treaties among themselves, the States parties to the Convention in fact reallocate among themselves the responsibility of ensuring compliance with the Convention. We thus arrive at the third and most difficult question addressed in this paper.

#### **4. State jurisdiction and intergovernmental cooperation**

##### *a) “Jurisdiction” and the scope of State obligations in the framework of inter-State cooperation*

When it is confronted with situations where the *combined* actions of two or more States parties to the Convention have created a situation allegedly in violation of the obligations of each State under this instrument, the European Court of Human Rights has consistently adhered to three principles. First, States may not, by the conclusion of international agreements following the accession to the Convention, escape their obligations under this instrument. *Pacta sunt servanda* : unless all the States parties to the Convention agree to revising the content of the mutual obligations they have towards one another, no State individually may bind itself by international treaties which will make it impossible for that State to continue to comply with its Convention obligations, without engaging its responsibility under this instrument.<sup>94</sup> Where certain States parties to the European Convention on Human Rights have agreed to create between themselves an international organisation in particular, the Court has emphasized that the Convention ‘does not exclude the transfer of competences to international organisations provided that Convention rights continue to be “secured”. Member States’ responsibility therefore continues even after such a transfer’.<sup>95</sup>

However, in order not to discourage the development in the future of intergovernmental cooperation, and seeking to offer a reading of the Convention, to the fullest extent possible, in the light of any

<sup>93</sup> Judge Loucaides describes the position of the Court as one according to which “a High Contracting Party to the Convention has ‘jurisdiction’ over any person outside its authority simply because it does not take the political or other measures mentioned in general terms by the majority”. In fact, the positive obligations identified by the Court do not extend to “any person outside the authority of the State”, but only to those on its territory, who therefore would be under its jurisdiction had the State the possibility to assert effectively its authority on those persons.

<sup>94</sup> This is of course in conformity with the rule expressed in Article 30 of the Vienna Convention on the Law of Treaties of 23 May 1969, entitled ‘Application of successive treaties relating to the same subject-matter’ (see, specifically, Article 30 § 4, b)). As explained by Special Rapporteur Fitzmaurice : “Since anything that some of the parties to a treaty do *inter se* under another treaty is clearly *res inter alios acta*, it cannot in law result in any formal diminution of the obligation of these parties under the earlier treaty, or affect juridically the rights or position of the other parties, which remain legally intact and subsisting” (G. Fitzmaurice, ‘Third Report’, *ILC Yearbook* (1958), vol. II, p. 43). For further discussions of the rule, see in particular Ch. Rousseau, “De la compatibilité des normes juridiques contradictoires dans l’ordre international”, *39 Revue générale de droit international public* (1932) 133-192; E.W. Vierdag, “The Time of the Conclusion of a Multilateral Treaty : Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions”, *59 British Yearbook of International Law* (1988) 92-111; W. Czaplinski and G.M. Danilenko, “Conflict of Norms in International Law”, *21 Netherlands International Law Review* (1990) 12-28; J. B. Mus, “Conflicts Between Treaties in International Law”, *29 Netherlands International Law Review* (1998) 208-232.

<sup>95</sup> Eur. Ct. HR (GC), *Matthews v. the United Kingdom* (Appl. N° 24833/94) judgment of 18 February 1999, § 32.

relevant rules and principles of international law applicable in relations between the Contracting Parties,<sup>96</sup> the European Court of Human Rights has recently concluded that it would presume the compatibility with the European Convention on Human Rights of acts adopted by States in fulfilment of the obligations imposed upon them as members of an international organisation, to the extent that these acts may be adequately reviewed for their compatibility with fundamental rights in the system set up within that organisation itself. This is the second principle to which it adheres. It stated in the “*Bosphorus Airways*” case<sup>97</sup> that “State action taken in compliance with such legal obligations [deriving from commitments of a State party to the Convention under a treaty concluded subsequently to their accession to the Convention] is justified as long as the relevant organisation [set up by such subsequent treaty] is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (...). By “equivalent” the Court means “comparable”: any requirement that the organisation’s protection be “identical” could run counter to the interest of international co-operation pursued”.<sup>98</sup> Such State action implementing obligations imposed under treaties entered into by States parties to the Convention after their accession to this latter instrument will be presumed compatible with the Convention : “If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation”<sup>99</sup> – that is, when the State is deprived of any margin of appreciation in the implementation of those obligations. Such a presumption may not be absolute, however. The Court reiterates its view according to which “absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards”. It follows not only (according to the first principle mentioned above) that the State “is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention”,<sup>100</sup> but also that the presumption of compatibility with the Convention of acts adopted by States parties by which they implement obligations resulting from their membership of international organisations where fundamental rights are recognized a protection equivalent to that provided under the European Convention on Human Rights “can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation

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<sup>96</sup> In conformity with Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969 and as according to the well-established case-law of the Court : see Eur. Ct. HR (GC), *Al-Adsani v. the United Kingdom* (Appl. N° 35763/97), § 55, ECHR 2001-XI.

<sup>97</sup> Eur. Ct. HR (GC), *Bosphorus Hava Yollari Turizm ve Ticaret Anonim \_irketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005. The case concerned the impounding on an aircraft, which was the property of the Yugoslav Airlines (“JAT”), the national airline of the former Yugoslavia, and had been leased by the applicant Turkish company. The impounding was decided in implementation of UN Security Council Resolution 820 (1993) of 17 April 1993, which provided that States should impound, *inter alia*, all aircraft in their territories “in which a majority or controlling interest is held by a person or undertaking in or operating” from the FRY. That Resolution had been implemented by EC Regulation 990/93 which entered into force on 28 April 1993 (O.J.L. 102/14 (1993)), and implemented in turn in Ireland by the European Communities (Prohibition of Trade with the Federal Republic of Yugoslavia (Serbia and Montenegro)) Regulations 1993 (SI 144 of 1993). In a judgment of 30 July 1996 delivered in answer to a referral from the Irish Supreme Court, the European Court of Justice had confirmed that Article 8 of EC Regulation 990/93 applied to the aircraft concerned and that the impounding did not violate the fundamental rights of the applicant company : the restriction to the right to property of the company, in particular, was proportionate to the fulfilment of “an objective of general interest (...) fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina”.

<sup>98</sup> Eur. Ct. HR (GC), *Bosphorus Hava Yollari Turizm ve Ticaret Anonim \_irketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, § 155.

<sup>99</sup> Eur. Ct. HR (GC), *Bosphorus Hava Yollari Turizm ve Ticaret Anonim \_irketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, § 156.

<sup>100</sup> Eur. Ct. HR (GC), *Bosphorus Hava Yollari Turizm ve Ticaret Anonim \_irketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, § 154.

would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights".<sup>101</sup>

This position of the Court is clearly inspired by the attitude of the German Federal Constitutional Court (*Bundesverfassungsgericht*) towards European Community law. Indeed, the German Federal Constitutional Court has agreed to recognize the supremacy of European Community law, without a scrutiny of its compatibility with the fundamental rights protected under the German Basic Law (*Grundgesetz*), only after it surmounted its initial hesitations and was convinced that fundamental rights are adequately protected in the legal order of the Community.<sup>102</sup> It is already that attitude of the German courts which had led the European Commission of Human Rights, in 1990, to develop the doctrine of an "equivalent protection", according to which the monitoring bodies set up by the European Convention on Human Rights should not control acts adopted by States parties as Member States of the European Community in fulfillment of their Community obligations insofar as the legal order of the Community provided for its own system of protection of fundamental rights which could be considered to be generally satisfactory.<sup>103</sup> That doctrine has been relied upon in later cases by the European Court of Human Rights, even before its spectacular reaffirmation in *Bosphorus Airways*. Most notably, it appears at least implicitly in two judgments the Court delivered on 18 February 1999 where it considered that the application by the German courts of the rule on immunity of jurisdiction of the European Space Agency does not constitute a violation of Article 6 § 1 of the Convention, which guarantees in principle a right of access to court. Indeed, the Court considered there that, insofar as it corresponds to a long-standing practice established in the interest of the good working of international organisations and fits within a "trend towards extending and strengthening international cooperation in all domains of modern society",<sup>104</sup> applying a rule on immunity of jurisdiction of international organisations is permissible under the Convention, insofar as "the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention".<sup>105</sup> It thus recognized that the setting up of remedies within the internal structures of the European Space Agency could ensure compatibility with the requirements of Article 6 § 1 of the Convention, although the immunity of jurisdiction of the ESA implied that it could not be sued before the domestic courts of Germany. Although the applicants in these cases were clearly under the "jurisdiction" of Germany – the issue was not even raised before the Court –, Germany could justify denying access to its courts by pointing at the alternatives open to the applicants under the rules of the European Space Agency.

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<sup>101</sup> Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim \_irketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, § 156.

<sup>102</sup> This case-law has been developing in different phases, to which judgments adopted respectively in 1974 ("Solange I") (BverfGE 37, 271 (280)), 1987 ("Solange II") (BverfGE 73, 339 (379)), 1993 (the "Maastricht" decision) (BverfGE 89, 155 (174)) and 2000 (the "Bananas" decision) (2 BvL 1/97, EuGRZ 2000, p. 328 (333)) correspond. The development of this case-law has been abundantly comment upon; I will therefore be excused for not describing it in detail. The main lesson is that, having been reassured by the development of a system ensuring that fundamental rights will be protected within the legal order of the European Community at a level substantially equivalent to that provided by the German Basic Law – the doubts raised by certain national constitutional courts about the compatibility of the doctrine of supremacy of EC Law with the protection of fundamental rights under national constitutions having led the European Court of Justice to develop its protection of fundamental rights as part of the general principles of European Community law –, the *Bundesverfassungsgericht* now applies a presumption of compatibility with the requirements of fundamental rights of EC Law. It will therefore agree to review the compatibility of EC law with those requirements only in situations where the applicant brings forward elements tending to demonstrate that the level of protection of fundamental rights has not been maintained at the level at which it was found by the *Bundesverfassungsgericht* to be satisfactory in its "Solange II" decision of 22 April 1987. See on these developments, inter alia, J. Limbach, "La coopération des juridictions dans la future architecture européenne des droits fondamentaux. Contribution à la redéfinition des rapports entre la Cour constitutionnelle fédérale allemande, la Cour de justice des Communautés européennes et la Cour européenne des droits de l'homme", *Revue universelle des droits de l'homme*, 2000, vol. 12 n° 10-12, at 369-372.

<sup>103</sup> Eur. Comm. HR, *M. & Co v. Germany*, (Appl. N° 13258/87), decision of 9 February 1990, Decisions and Reports (DR) 64, p. 138 ; Eur. Comm. HR, *Heinz v. the Contracting Parties also parties to the European Patent Convention* (Appl. N° 21090/92), decision of 10 January 1994, DR 76-A, p. 125.

<sup>104</sup> Eur. Ct. HR (GC), *Beer and Regan v. Germany* (Appl. N° 28934/95) judgment of 18 February 1999, § 53; Eur. Ct. HR (GC), *Waite and Kennedy v. Germany* (Appl. N° 26083/94) judgment of 18 February 1999, § 63. Both judgment were decided by a unanimous Court.

<sup>105</sup> Eur. Ct. HR (GC), *Beer and Regan v. Germany* (Appl. N° 28934/95) judgment of 18 February 1999, § 58; Eur. Ct. HR (GC), *Waite and Kennedy v. Germany* (Appl. N° 26083/94) judgment of 18 February 1999, § 73.

Although it establishes a presumption of compatibility with the European Convention on Human Rights of State action implementing rules of an international organisation within which fundamental rights are protected at an equivalent level, the position of the European Court of Human Rights as expressed in *Bosphorus Airways* does not question that a State party to the Convention still exercises its “jurisdiction” when it implements its obligations under such rules, even where, as in the circumstances of that case, its national authorities are left no discretion whatsoever as to the means by which to comply with those obligations.<sup>106</sup> Through this case-law, the Court seeks to ensure in particular that the Convention will not constitute an obstacle to further European integration by the creation among the Member States of the Union of a supranational organisation – a development which, as the representatives of the European Commission argued in their submissions to the Court, would be seriously impeded if the Member States were to verify the compatibility with the European Convention on Human Rights of the acts of Union law before agreeing to apply them, even in situations where they have no margin of appreciation to exercise –. But the Court stops short of stating that, as the Member States have transferred certain powers to a supranational organisation, the European Community, the situations resulting directly from the application of European Community acts would escape their “jurisdiction” in the meaning of Article 1 of the Convention. Instead, while the Convention remains applicable to such situations, and while the States parties remain fully answerable to the supervisory bodies it sets up, it is only the level of scrutiny exercised by the European Court of Human Rights which is influenced by the circumstance that the alleged violation has its source in the application of an act adopted within the European Community : the Court considers that, insofar as the legal order of the European Union ensures an adequate level of protection of fundamental rights, and unless it is confronted with a “dysfunction of the mechanisms of control of the observance of Convention rights” or with a “manifest deficiency”,<sup>107</sup> it may presume that, by complying with the legal obligations under this legal order, the EU Member States are not in violation of their obligations under the ECHR.

The *Waite and Kennedy*, *Beer and Regan*, and *Bosphorus Airways* cases, all concern situations where an international organisation was considered to have internal mechanisms offering a protection of fundamental rights equivalent to that which would have been afforded under the European Convention on Human Rights. The question whether this doctrine of “equivalent protection” should play a similar role in the context of inter-State cooperation remains debated. The Court distinguishes the *Bosphorus Airways* situation from *Pellegrini v. Italy* – where Italy was found to have violated the right to a fair trial guaranteed in Article 6 § 1 of the Convention for having enforced a judgment delivered by the Vatican courts in violation of the rights of defence of the applicant<sup>108</sup> – on the basis that “enforcement of a judgment not of a Contracting Party to the Convention [<sup>109</sup>] (...) is not comparable to compliance with a legal obligation emanating from an international organisation to which Contracting Parties have transferred part of their sovereignty”.<sup>110</sup> The implied suggestion is that, where States parties to the Convention co-operate with one another, they may subject the acts of the other States to only minimal review ; instead, where they cooperate with States not parties to the European Convention on Human Rights (or when the implement secondary legislation adopted within international organisations not offering a protection of human rights at a level similar to that guaranteed by the European Convention on Human Rights), there could be no presumption that the measures adopted in the framework of such co-operation comply with the requirements of the Convention, and a strict scrutiny of such compliance therefore would be required.

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<sup>106</sup> See § 137 of the judgment : “In the present case it is not disputed that the act about which the applicant complained, the detention of the aircraft leased by it for a period of time, was implemented by the authorities of the respondent State on its territory following a decision to impound of the Irish Minister for Transport. In such circumstances the applicant company, as the addressee of the impugned act, fell within the “jurisdiction” of the Irish State, with the consequence that its complaint about that act is compatible *ratione loci, personae* and *materiae* with the provisions of the Convention.”.

<sup>107</sup> Eur. Ct. HR (GC), *Bosphorus Hava Yollari Turizm ve Ticaret Anonim \_irketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, § 166.

<sup>108</sup> Eur. Ct. HR (4th sect.), *Pellegrini v. Italy* (Appl. N° 30882/96) judgment of 20 July 2001, § 40.

<sup>109</sup> The Holy See is not a Contracting Party to the European Convention on Human Rights.

<sup>110</sup> Eur. Ct. HR (GC), *Bosphorus Hava Yollari Turizm ve Ticaret Anonim \_irketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, § 157.

Although, when faced with situations where States cooperated with one another, the Court occasionally did seem to treat Contracting Parties to the Convention the same way it treats third States, it does allow to some extent for a presumption that the behavior of the States Parties will be in conformity with the requirements of the Convention.<sup>111</sup> In the case of *T.I. v. the United Kingdom* for instance, the applicant was facing the risk of being returned by the United Kingdom to Germany from where he feared he might be expelled to Sri Lanka where he believed his security would be threatened. In the inadmissibility decision of 7 March 2000 reached by the European Court of Human Rights, the Court considered that “The indirect removal [...] to an intermediate country, which is also a contracting state, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention”.<sup>112</sup> However, the fact that Germany is bound by the European Convention on Human Rights does lead the Court to presume that the fears expressed by the applicant are ill-founded : indeed, although it considers that it should not establish a blind – or absolute – presumption that the removal of the applicant to Germany will not expose him to a risk of violation of his Convention rights, the Court says that “There is (...) no basis on which [it] could assume in this case that Germany would fail to fulfil its obligations under Article 3 of the convention to provide the applicant with protection against removal to Sri Lanka if he put forward substantial grounds that he faces a risk of torture and ill-treatment in that country”; therefore the Court allows at least for a relative presumption of compatibility with the Convention of forms of inter-State cooperation between two States parties to the Convention, although that presumption may be rebutted in the face of certain specific circumstances.<sup>113</sup>

On the other hand however, both because it is reluctant to be seen to impose on third States that they comply with the rules of the Convention,<sup>114</sup> and because it seeks to remain “pragmatic”<sup>115</sup> when

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<sup>111</sup> See generally on this question O. De Schutter, “L'espace de liberté, de sécurité et de justice et la responsabilité individuelle des Etats au regard de la Convention européenne des droits de l'homme”, in G. de Kerchove et A. Weyembergh (eds.), *L'espace pénal européen : enjeux et perspectives*, Bruxelles, éd. de l'ULB, 2002, 222-247.

<sup>112</sup> Eur. Ct. HR, *T.I. v. the United Kingdom* (Appl. No. 43844/98) decision (inadmissibility) of 7 March 2000.

<sup>113</sup> See also, for cases where persons suspected of links with the basque terrorist organisation ETA were surrendered by the French authorities to the Spanish police : Eur. Commiss. HR, dec. of 12 January 1998, *L. Iruretagoyena v. France*, Appl. No. 32829/96; and Eur. Commiss. HR, dec. of 5 December 1996, *J. A. Urrutikoetxea v. France*, Appl. No. 31113/96. These decisions illustrate that the fact the Spain is bound by the European Convention on Human Rights, while not conclusive, does lead to a presumption that the treatment which the applicants can expect in the hands of the Spanish authorities will be in conformity with the Convention. In the latter decision, the absence of any ill-treatment of the applicant although he had been transferred to Spain justified this conclusion *post hoc*.

<sup>114</sup> Of course, technically, only the States parties to the Convention against which an application is filed before the European Court of Human Rights will be responsible for breaches of the Convention, even where such breaches originate in the fact that they have cooperated with another State having adopted a certain behavior which, if that same behavior had been adopted by the State party to the Convention, would have constituted a violation of that treaty. Where State A party to the ECHR extradites an individual to State B which is not a party thereto, State A may be in violation of its obligations under the ECHR if a treatment risks being inflicted upon the individual concerned which would not be allowable under Article 3 ECHR, even if that treatment would violate no international obligation of the receiving State. As the European Court of Human Rights has remarked, “there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment” (Eur. Ct. HR, *Soering v. the United Kingdom* judgment of 8 July 1989, Series A n°161, at § 91). Nevertheless, as the Court recognizes in the same paragraph, “The establishment of such responsibility [of the extraditing State] inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention”.

<sup>115</sup> In a decision of 22 June 2004, where it considers inadmissible an application by a gay man fearing persecution on grounds of his sexual orientation if returned to Iran, a Chamber constituted within the 4th section of the European Court of Human Rights explains that “On a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention”. The Court suggests in this case that, insofar as the persecutions feared would not lead to violations of rights protected under Articles 2 (right to life) or 3 (torture or inhuman or degrading treatment), the existence of certain risks for the person returned should not constitute an obstacle to his or her removal from the territory (Eur. Ct. HR (4th sect.), *Fashkami v. the United Kingdom*, Appl. No. 17341/03).

imposing certain restrictions on inter-State cooperation,<sup>116</sup> the Court has sometimes considered that States parties to the Convention wishing to cooperate with those States were only prohibited from doing so in situations of gross injustice committed in those States. In the *Drozd and Janousek* judgment of 16 June 1992, when examining whether the French authorities should have verified whether the procedures followed by the Andorran courts complied with Article 6 of the Convention when asked to execute the resulting criminal conviction (at a time, as has already been recalled, when Andorra was not a party to the Convention), the Court said :<sup>117</sup>

As the Convention does not require the Contracting Parties to impose its standards on third States or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Article 6 of the Convention. To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned. The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a *flagrant denial of justice* (see, mutatis mutandis, the *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no. 161, p. 45, para. 113).

Thus, a third principle appears : where the alleged violation has its source in a State measure which does not directly commit the violation, but is adopted in the framework of a form of inter-State cooperation where the violation is directly attributable to the other State, the State party to the Convention giving effect to that violation or facilitating it only is bound to respect a “core content” of the Convention, roughly corresponding to its “international public policy” component if we rely on an analogy with private international law.

The three principles thus summarized may be contested, and the scope of their applicability in the case-law of the Court remains subject to debate. That they are currently guiding the development of this jurisprudence, however, is hardly controversial : although a State party to the Convention may not, by the conclusion of a treaty with other parties than with all the parties to the Convention – whether this treaty sets up an international organisation or whether its subject-matter is less ambitious –, derogate from its prior obligations under the Convention (first principle); nevertheless we may presume that, where precaution has been taken to ensure that human rights remain protected at an equivalent level in the framework of the inter-State cooperation under this treaty, a State party to the Convention does not violate its obligations under this instrument when it simply complies with the resulting obligations it has agreed to in the later treaty (second principle); finally, in the acts which take place in the framework of inter-State cooperation are examined under a specific level of scrutiny, which corresponds to our intuition that State A may not be held to account for acts committed by State B, even if State A in some way participated in the adoption of those acts or gave them effect (third principle). The conclusion of a later treaty or the entering into forms of inter-State cooperation does not affect the “jurisdiction” of the State party to the Convention, which remains bound by the Convention even in situations where it has assumed obligations under another treaty and simply

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<sup>116</sup> This concern of the Court is already expressed in the 1989 judgment of *Soering v. the United Kingdom*, where the Court noted that “the Convention 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. Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of Article 3 in particular” (at § 86). The Court further developed this point : “As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases” (§ 89).

<sup>117</sup> Eur. Ct. HR, *Drozd and Janousek v. France and Spain*, judgment of 16 June 1992, cited above, at § 110.

implements those obligations in the adoption of the measure allegedly leading to a violation of the Convention, without exercising any margin of appreciation. It is not the existence of “jurisdiction” on a particular situation, but only the scope of the State’s obligations under the Convention which will be affected by the conclusion of this later treaty, as these obligations will be examined taking into account any other (possibly competing) international agreements entered into by the State.<sup>118</sup>

### *b) Positive obligations in the framework of inter-State cooperation*

In contrast with these three previous principles, a fourth principle is hardly ever made explicit, because it is assumed to have an obvious character and not to require any justification. We may call this the principle of individual State responsibility. According to this principle, each State individually, and not States jointly, may be found in violation of the Convention : where a situation allegedly in breach of the Convention has resulted from the combination of the action of two or more States parties to the Convention, the international responsibility of each State is to be examined separately. As a result, each State may escape responsibility under the Convention if – although the alleged violation has occurred in the context of inter-State cooperation – the violation is entirely imputable to another State and could not have been avoided by the defending State before the Court. Where, for instance, delays in judicial proceedings are attributable to the slowness of a court belonging to another legal system or to that of foreign authorities, these delays may not be imputed to the defending State, whose responsibility must be examined only with respect to the acts or omissions of its organs.<sup>119</sup> Where the violation of the right to have witnesses cross-examined<sup>120</sup> is alleged in a situation where the judicial authorities failed to secure the presence at the hearing of a witness because of the lack of cooperation of another State, this failure cannot be imputed to the defending State, whose courts may not be held responsible for that failure, where they have deployed their best efforts to ensure that presence.<sup>121</sup> Where an individual fails to have a judgment executed because of the immunity invoked by the foreign State against which the judgment has been delivered, the State under whose jurisdiction the

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<sup>118</sup> Indeed, the existence of other international obligations may justify that certain restrictions be brought to the rights guaranteed under the Convention. Thus, the Court has accepted that compliance with EC law by a Contracting Party constitutes a legitimate general interest objective within the meaning of Article 1 of Protocol No. 1 (Eur. Ct. HR (GC), *Bosphorus Hava Yollari Turizm ve Ticaret Anonim İrketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, § 151, and *mutatis mutandis*, Eur. Ct. HR (2nd sect.), *S.A. Dangeville v. France* (Appl. N° 36677/97), judgment of 16 April 2002, at §§ 47 and 55); it has recognized that restrictions to the right of access to a court could be justified by the existence of treaties recognizing certain immunities (see above, fn. 10, and hereunder, fn. 122).

<sup>119</sup> See, e.g., Eur. Ct. HR, *Pafitis and Others v. Greece* judgment of 26 February 1998, § 95 (“As regards the proceedings before the Court of Justice of the European Communities [as one of the additional factors which contributed to the prolongation of the proceedings concerned], the Court notes that the Athens District Court decided on 3 August 1993 to refer a question to the Court of Justice, which gave judgment on 12 March 1996. During the intervening period the proceedings in the actions concerned were stayed, which prolonged them by two years, seven months and nine days. The Court cannot, however, take this period into consideration in its assessment of the length of each particular set of proceedings: even though it may at first sight appear relatively long, to take it into account would adversely affect the system instituted by Article 177 of the EEC Treaty [now Article 234 EC] and work against the aim pursued in substance in that Article”). See also Eur. Ct. HR, *Karalyos and Huber v. Hungary and Greece* (Appl. n° 75116/01) judgment of 6 April 2004.

<sup>120</sup> Article 6 § 3, d) of the Convention provides that “Everyone charged with a criminal offence has the following minimum rights: (...) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.

<sup>121</sup> See, e.g., Eur. Ct. HR (1st sect.), *G. Calabro v. Italy and Germany* (dec.) (Appl. n° 59895/00), 21 March 2002. In this case where the applicant had been convicted for cocaine trafficking on the basis, *inter alia*, of statements made by an undercover agent of the German federal police (“Jürgen”) who had taken part in a joint operation of the German and Italian police, this undercover agent did not testify before the Italian courts, as the German authorities declared that he could not be found. The European Court of Human Rights took the view that “the Italian authorities made considerable efforts to obtain oral testimony from Jürgen, having made several orders requiring him to attend court to give evidence, and issued a request for evidence on commission. However, despite those efforts, they were unable to secure his presence at the hearing as, according to the information received from Germany, he could not be found”. The Court considered that “it was not for the Italian authorities to make enquiries to establish the whereabouts of a person residing on the territory of a foreign State. By making an order for Jürgen’s attendance and issuing an international request for evidence on commission, the Criminal Court and the Court of Appeal used the means at their disposal under domestic law to secure the presence of the witness concerned. Moreover, they had no alternative but to rely on the information received from qualified sources based in Germany (...). Under these circumstances, the Italian authorities cannot be accused of a lack of diligence engaging their responsibility before the Convention institutions”. See for another example, in similar circumstances, Eur. Ct. HR (2nd sect.), *Kostu v. Italy* (dec.) (Appl. N° 33399/96), 9 March 1999 (inadmissibility).

individual is situated and whose courts have delivered the judgment which he seeks to enforce may not be found in violation of the right of access to a court guaranteed under Article 6 § 1 ECHR, as such a restriction may be seen as justified by the legitimate aim of respecting the immunity of execution of foreign States<sup>122</sup>; neither may the individual challenge the choice of a State before foreign courts to raise the defence of sovereign immunity, as an individual is not “under the jurisdiction” of that State when that State is simply a defendant to an action brought before such foreign courts and may thus be likened to a private individual against whom proceedings are instituted.<sup>123</sup>

Although it does set limits to the scope of the “jurisdiction” of the State party to the Convention in situations of inter-State cooperation, this fourth principle is not logically contradicting the previous three. It may, however, result in neutralizing them in fact. For instance, although (under the constant case-law of the European Court of Human Rights) the EU Member States, as States parties to the European Convention on Human Rights, should ensure that the European Court of Justice will comply with Article 6 § 1 ECHR, which includes a requirement that delays of judicial proceedings will not be unreasonable, a State may justify the length of the proceedings before the national courts, which otherwise would appear unreasonable in the light of the complexity of the case and the behavior of the parties, by the time it took for the European Court of Justice to answer a question of interpretation of EC law referred to this Court.<sup>124</sup> Or to consider another example : although a State might be found in violation of the Convention for executing a judgment adopted in violation of the requirements of a fair trial, for example because a criminal conviction was based on testimony which could not be contradicted by the accused and which was not corroborated by other elements, it is uncertain whether that State would be found in violation of the Convention for having convicted a person on the basis of such testimony where the impossibility to cross-examine the witness has its source in the refusal of another State to cooperate.<sup>125</sup> In sum, the fact that the responsibility of each State is considered separately from the responsibility of the other States or international organisations with which it cooperates may lead to certain restrictions to fundamental rights being justified, although the same restrictions would not be allowable if the responsibility was examined for all the States involved jointly.<sup>126</sup> And, more importantly, the Court has never imposed on the States parties to the Convention a positive obligation either to enter into international agreements or even to fully develop the potential of existing agreements where this would ensure an improved protection of the human rights guaranteed under the Convention.

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<sup>122</sup> See Eur. Ct. HR (1<sup>st</sup> sect.), *Kalageropoulou and Others v. Greece and Germany* decision (inadmissibility) (Appl. N° 59021/00) of 12 December 2002 : “...measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot generally be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI, §§ 52-56). In the light of the foregoing considerations, the Court considers that although the Greek courts ordered the German State to pay damages to the applicants, this did not necessarily oblige the Greek State to ensure that the applicants could recover their debt through enforcement proceedings in Greece”.

<sup>123</sup> The Court considers that “the participation of a State in the defence of proceedings against it in another State does not, without more, amount to an exercise of extraterritorial jurisdiction”: Eur. Ct. HR (GC), *McElhinney v. Ireland and the United Kingdom* (Appl. N° 31253/96) decision of 9 February 2000.

<sup>124</sup> See Eur. Ct. HR, *Pafitis and Others v. Greece* judgment of 26 February 1998, cited above, fn. 119.

<sup>125</sup> Comp. with Eur. Ct. HR (1<sup>st</sup> sect.), *G. Calabro v. Italy and Germany* (dec.) (Appl. n° 59895/00), 21 March 2002, cited above, fn. 121. It should be added however that, in this case, the conviction of the applicant by the Italian courts was not based exclusively on the declarations of the witness which the German authorities asserted could not be found in order to testify in the Italian criminal procedure.

<sup>126</sup> The famous *dictum* of the *Matthews* case where the Court says that the United Kingdom, “together with all the other parties to the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol No. 1, for the consequences of [the Treaty on the European Union, signed in Maastricht in 1992]” (Eur. Ct. HR (GC), *Matthews v. the United Kingdom*, cited above, at § 33 (my emphasis)), does not contradict this. On the contrary, the responsibility of the United Kingdom – like that of each other EU Member State having concluded the Maastricht Treaty without having ensured that the residents of Gibraltar would be authorized to vote at elections to the European Parliament – results from the fact that that State, considered individually, had the choice whether or not to ratify the Treaty, and that this was a choice for each State to make, rather than for the organisation as whole or for the States acting collectively.

The very silence of the Court concerning the principle according to which, under the Convention, State responsibility is to be examined for each State individually, may thus be seen as revealing : it illustrates that, while the progress of international cooperation is seen in principle favourably by the European Court of Human Rights, which seeks to read the Convention in accordance with its requirements, and progressively to develop a regime under which the obligations of the Contracting Parties under the Convention will be seen as compatible with the transferral of powers to international or supranational organisations, the Court still has not conceived a requirement of deeper international cooperation to be imposed under the Convention, even where it would benefit an effective protection of the rights on individuals under the jurisdiction of the States parties.<sup>127</sup> Although a State may not unilaterally manipulate the scope of its “jurisdiction” by entering into inter-State cooperations in order to diminish its international responsibility, the Court does not impose that it takes responsibility for situations which call for solutions based on an expansion of inter-State cooperation.

## 5. Conclusion

The requirement that the situation complained of by the victim of a violation alleged before the European Court of Human Rights was under the “jurisdiction” of the defending State constitutes a preliminary condition for a finding of State responsibility under the Convention. However, although the function this notion fulfils may be clear, its precise status between norm and fact is still subject to controversy. The notion of national territory serves to justify a differentiated approach to the notion. Where a particular situation occurs on the national territory of the State party to the Convention, “jurisdiction” of the territorial State is presumed, in the sense that the State may in principle be imputed any violation resulting from that situation, if this situation reveals a failure by that State to comply with its obligations under the Convention.<sup>128</sup> Although such a presumption is absolute – a State may not invoke that a particular portion of the territory escaping its effective control is not within its “jurisdiction” to escape its obligations under the Convention –, where it is unable in fact to exercise control, the obligation of the State is limited to an obligation to do all which is practically and legally possible in order to ensure that the rights of the Convention are fully respected<sup>129</sup>. Here, the notion of “jurisdiction” thus functions as a *norm* : it serves to justify imposing certain obligations on the State, in the name of the effective control it is *under an obligation to exercise* – and indeed, is presumed to exercise – on its national territory. Instead, where a situation occurs outside the national territory, “jurisdiction” becomes a question of *fact*, hardly distinguishable from imputability : it serves to designate a fact, that of effective control over a situation, which implies that the State exercising such control should comply with its obligations under the Convention to an extent commensurate with this control exercised in fact.<sup>130</sup> This fact of effective control produces certain normative consequences, as an identification of the obligations imposed on the State will follow from identifying that it exercises a control in fact over certain events. But the determination whether “jurisdiction” exists in the first place will require an examination in fact, rather than depend on the determination of the legal status of a territory or on the identification of the territorial sovereign.

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<sup>127</sup> The Court does refer to the international agreements concluded by the States parties to the ECHR as a means to evaluate the scope of their positive obligations in certain cases. This is an *estoppel*-like argument under which a State may not argue that a particular measure it is expected to adopt in order to comply with the Convention is disproportionate, when that State has already accepted to be bound by a similar obligation under another international instrument. See, e.g., Eur. Ct. HR (1st sect.), *Ignaccolo-Zenide v. Romania* (Appl. N° 31679/96) judgment of 25 January 2000, at § 113 (where the Court considers that “the positive obligations that Article 8 of the Convention lays on the Contracting States in the matter of reuniting a parent with his or her children must be interpreted in the light of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. This is all the more so in the instant case as the respondent State is also a party to that instrument, Article 7 of which contains a list of measures to be taken by States to secure the prompt return of children”, and remarks that “the authorities did not take the measures to secure the return of the children to the applicant that are set out in Article 7 of the Hague Convention”, in order to conclude that the national authorities have not put sufficient efforts into ensuring compliance with judgments imposing that the children be returned to their mother, when the father was abroad with the children); and Eur. Ct. HR (4th sect.), *Iglesias Gil and A.U.I. v. Spain* (Appl. N° 56673/00) judgment of 29 April 2005, § 51.

<sup>128</sup> See section 3 above.

<sup>129</sup> See above, text corresponding to nn. 67-73.

<sup>130</sup> See section 2 above.

This distinction between situations located on the national territory of a State party and extra-territorial situations also may be related to the distinction between negative and positive obligations : in principle, where a situation occurs on the national territory of the State or on a territory where it exercises *de facto* governmental powers, the State should guarantee the full range of the Convention rights, and it is bound by the corresponding obligations, including the obligation to protect the rights of the Convention from violations committed by third parties ; instead, where a situation occurs outside the national territory, the State will only be imposed a negative obligation not to violate the rights of the Convention when acting through its organs. Under this framework, the potential importance of *Ilascu and Others v. Moldova and Russia* resides in the circumstance that, for the first time, the Court – and not only certain individual members of the Court<sup>131</sup> – recognizes that a State may be imposed certain positive extra-territorial obligations, by stating that a State’s responsibility “may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction”.<sup>132</sup> The highly specific character of the case however, and in particular the closeness of the links between the Federation of Russia and the separatist regime set up in the self-proclaimed “Moldavian Republic of Transnistria”, makes it difficult to generalize from this isolated holding.

Although, for obvious reasons, the limits of the “national territory” will not play the same regulating function where the notion of “jurisdiction” is examined in the context of inter-State cooperation – in particular by the setting up of international organisations to which States may choose to attribute certain powers –, here also a clear distinction, albeit still implicit, is made between negative and positive obligations. The supervisory organs of the European Convention on Human Rights have consistently held that the rights and freedoms listed in the Convention should continue to be secured after the conclusion of such treaties or the setting up of such organisations : the conclusion of later treaties, in other terms, should not result in diminishing the level of protection of fundamental rights, or this would allow the States parties to the Convention to limit the scope of their obligations under the Convention by concluding treaties with other parties. It is therefore understandable that the Court has considered that the Convention “does not exclude the transfer of competences to international organisations *provided that Convention rights continue to be ‘secured’*”.<sup>133</sup> However, although they remain bound by the Convention when they decide to conclude later international agreements, the States parties to the Convention are not under a positive obligation either to enter into international agreements which might improve the protection of the human rights they have agreed to ensure respect of under the Convention, or, where such international agreements do exist – as those leading to the creation of the European Union and the European Communities –, to ensure that the potential of those agreements is fully realized – that, for instance, the international organisations they have set up exercise all the powers they have been attributed in order to effectively protect the fundamental rights for the benefit of the persons situated under the jurisdiction of the Member States –. The requirements of the European Convention on Human Rights impose limits to what international agreements may be concluded and to what powers may be transferred to international organisations, and they impose that certain safeguards be built into such agreements and transerrals of powers ; but they do not influence which international agreements should be concluded or which powers should be exercised in coordinated fashion at the international level. Although few would dispute that there may be cases where the protection of fundamental rights in a harmonized or coordinated fashion at the international level may improve the quality of this protection – in which sense human rights may be conceptualized as global public goods calling for further intergovernmental coordination –, the consequences thereof for the definition of State obligations in the European Convention on Human Rights have not been drawn yet.

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<sup>131</sup> Referring to the obligation of France and Spain to impose on the courts of the Principality of Andorra that they respect the rights of Article 6 ECHR, judges Pettiti, Valticos and Lopes Rocha, remarked in their joint dissenting opinion to the 1992 judgment of the Court in *Drozd and Janousek v. France and Spain*, approved by judge Walsh and Spielmann, that “the Co-Princes should even now use their authority and influence in order to give effect in Andorra to the fundamental principles of the European Convention on Human Rights, which has the force of law or even overrides national law in their own countries, and more generally is a basic element of the rule of law in Europe”.

<sup>132</sup> See above, text corresponding to nn. 67-73.

<sup>133</sup> See above, text corresponding to nn. 94-95.

The interdependency of States characteristic of the era of globalization, and further reinforced by the phenomena of regional integration as most clearly exemplified on the European continent, addresses new challenges to the international law of human rights. We have up to now witnessed a defensive reaction, which consists in refusing a dilution of State responsibility resulting from the deployment of extra-territorial activities by the State not accompanied by the imposition of human rights obligations commensurate to the effective control exercised by a State outside its national territory, and in imposing certain limits to the development of forms of intergovernmental cooperation which may result in human rights violations for which no individual State may be found directly responsible. This defensive reaction is important and, indeed, crucial to the continued relevance of the European Convention of Human Rights. The time may have come however, to ask whether a more offensive attitude should not be adopted, based on the notion that ‘positive obligations’ could serve to determine not only the scope of the obligations of States with regard to situations falling under their jurisdiction, but also the scope of the jurisdiction itself they ought to exercise. With regard to situations occurring on its national territory, a State party to the Convention must not only respect the rights and freedoms that instrument guarantees, but also protect those rights from the acts of others. It should now be asked which obligations the State party to the Convention owes to persons whose situation it may decisively influence, even though they might be situated outside its national territory. And it should be asked which forms of international cooperation a State may be under an obligation to develop, where this appears necessary for the effective protection of human rights in a world – and on a continent – where the interdependency of States has never been stronger, and where the situation of human rights in any particular location thus is made to depend, more frequently than before, not only on the measures adopted by the territorially sovereign State, but also on measures adopted by other States sharing with a former State a single area.