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THE INTERPRETATION AND APPLICATION OF THE CONCEPT "THE JURISDICTION OF THE STATE" UNDER ARTICLE 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ASPECTS GENERATING THE IMPUTABILITY TO THE STATES PARTIES

Master thesis

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LIST OF ABBREVIATIONS

BIOT – British Indian Ocean Territory

CPA – Coalition Provisional Authority

DDR – East German police

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

ICJ – International Court of Justice

ILC – International Law Commission

MF – Multinational Force

MRT – Moldavian Republic of Transdniestria

PCIJ – Permanent Court of International Justice

RTS – *Radio Televizije Srbije*

The Commission – European Commission of Human Rights

The Court – European Court of Human Rights

The Secretary-General – Secretary-General of the Council of Europe

UN – The United Nations

UNAMI – United Nations Assistance Mission for Iraq

UNSC - The United Nations Security Council

VCLT – Vienna Convention on the Law of Treaties

INTRODUCTION

The relevance of the topic. The European Convention for the Protection of Human Rights and Fundamental Freedoms[1] (hereinafter – the Convention or ECHR), signed on 4 November 1950, is the first legal document that makes legally certain binding rights enshrined in the Universal Declaration of Human Rights[2]. Furthermore, the Convention is one of the main international legal instruments in Europe, enabling legal persons, particularly individuals, to litigate against States Parties to defend rights and freedoms guaranteed to them by the Convention. Like other international legal instruments, the Convention, which is a classic international treaty that imposes obligations on States Parties, has its own application characteristics and rationale[3].

How the notion of "individuals" can be understood under the case-law of the ECtHR, which legal persons can be defined as the owners of the rights guaranteed by the Convention, what substantive and procedural rights are guaranteed by the Convention in terms of which concepts of territory and state jurisdiction can be attributed, and to what extent the Convention applies to those individuals– are the main questions to be answered to determine the scope of the interpretation and application of the rights and fundamental freedoms enshrined in the Convention and its Protocols, and also, to determine the content of the State's obligations under the Convention. Obligation to respect Human Rights enshrined in Article 1 of the Convention is therefore of particular importance for the practical and effective application of the Convention, which reads as follows: "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*"[4].

Hence, under Article 1 of the Convention, a State which is a party to an international agreement adopted within the framework of a regional international organisation – the Council of Europe - must ensure the enjoyment of the rights and fundamental freedoms set out in Section I of the Convention to all persons under its jurisdiction. This means that Article 1 of the Convention applies to all persons who are at that time under the effective jurisdiction of a particular state (that is to say, not necessarily only in respect of nationals of that State or aliens resident there), which means that concerning state and must guarantee to such a person the human rights and fundamental

[1] See Council of Europe, "*Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), as amended by Protocols Nos. 11, 14 and 15*" (hereinafter – ECHR), 4 November 1950, ETS 5, Accessed 11 November 2021. Available at: https://www.echr.coe.int/documents/convention_eng.pdf
[2] European Court of Human Rights' Public Relations Unit, *The European Convention on Human Rights – A living instrument* (Strasbourg, 2021), 5. Available at: https://www.echr.coe.int/Documents/Convention_Instrument_ENG.pdf
[3] Danutė Jočienė, *Europos žmogaus teisių konvencijos taikymas Lietuvos Respublikos teisėje* (Vilnius: Eugrimas, 2000), 31-35.
[4] Article 1 of the ECHR.

freedoms set out in the Convention and, at the same time, in its respective Protocols, if that State is a party to certain Protocols[5].

With an eye on this fact, this Master thesis needs to clarify how the European Court of Human Rights (hereinafter – ECtHR or the Court), which has been established and operates under Article 19 of the Convention (has an international obligation to monitor the fulfilment of state's obligations under the Convention), interprets and applies the concept of "state jurisdiction" as referred to in Article 1 of the Convention.

Thus, the practical application of the Convention in relation to a State Party also depends on the concept of State jurisdiction used in Article 1 of the Convention. Accordingly, questions arise as to the definition of "jurisdiction" in international law in general and as to the interpretation and application of the concept of "jurisdiction" under Article 1 of the Convention by the international judicial body established by the Convention, i.e., the European Court of Human Rights and, at the same time the former European Commission of Human Rights, which functioned before the reform presented in 1998 based on the Protocol No. 11[6].

Whereas, over time, States on their behalf or on behalf of international organisations have been engaged in cross-border activities in respect of which State jurisdiction can be found, established or, even more, some cases can be exempted from the notion of the "state jurisdiction" in exceptional circumstances. Therefore, the interpretation and application of the notion of the "state jurisdiction" in the case-law of the European Court of Human Rights is not only extremely relevant but also vital of importance, since the Court has to deal with the notion of the jurisdiction in many very complex cases, where it is not that self-evidently clear, whether the applicant can be regarded as falling within the jurisdiction of the one or another States Parties or none at all within the meaning of Article 1 of the Convention[7].

On the other hand, due to the various activities of the States Parties, the interpretation of the concept of "jurisdiction of the state" in the case-law of the Court also raises the questions which are the aspects that generate imputability to the States Parties for the alleged violations of the Convention and what are the relations among these aspects.

Hence, the concept of "state jurisdiction" is considered one of the grounds for the application of the Convention set out in Article 1 of the Convention, which remains very relevant

[5] See "*Vizgirda v. Slovenia*, no. 59868/08", Judgment, 28 August 2018.

[6] Danutė Jočienė, *Europos žmogaus teisių konvencijos taikymas Lietuvos Respublikos teisėje* (Vilnius: Eugrimas, 2000), 21 – "*Article 19 has been essential. It established two bodies: the European Commission of Human Rights and the European Court of Human Rights. These were the first bodies in the international human rights system to monitor compliance with the commitments made by states. Protocol No. 11, which entered into force on 1 November 1998, amended Article 19 of the Convention and envisaged European Court of Human Rights in place of the two former bodies*."

[7] See the cases "*Drozd and Janousek v. France and Spain*, no. 12747/87", para. 84-98, 26 June 1992, "*Banković and others v. Belgium and others* (dec.) [GC], no. 52207/99", 12 December 2001.

both for States and for legal persons since the concept of "state jurisdiction" determines the fact whether the alleged violations of the Convention or its Protocols might be attributable to the concerning state, against which the victims presented the complaint due to state's acts or omissions.

Therefore, States Parties have to consider the interpretations of the mentioned notion of the "state jurisdiction" in the case-law of the ECtHR to act in compliance with their commitments related to the Convention; moreover, the alleged victims of the Convention rights have also to consider such interpretation to raise the violations of their rights and freedoms under the Convention or its relevant Protocols that the States Parties have allegedly violated.

Scientific novelty and overview of the research on the selected topic. The issue of the interpretation of the concept of the "state jurisdiction" in the case-law of the ECtHR had been investigated only in an incomplete manner that covered parts of the research topic, among them are the current judge of the ECtHR Ganna Yudkivska[8], William A. Schabas[9], Marko Milanovic[10], Loukis G. Loucaides[11], Anna Cowen[12], Işıl Karakaş[13], Matthew Happold[14], and Michal Gondek[15]. Furthermore, the Press Unit of ECtHR had published factsheets as well. However, these were unable to exceed the non-exhaustive features[16]. Since our research topic is closely related to the case-law of the ECtHR, the fundamental base for our research is the case-law of the ECtHR. The following base is "Guide on Article 1 of the European Convention on Human Rights: Obligation to respect human rights – Concepts of "jurisdiction" and imputability"[17] prepared by the ECtHR. It has guided us to be familiar with the issues of the aspects that allow generating imputability to

[8] Ganna Yudkivska, "Territorial Jurisdiction and Positive Obligations of an Occupied State: Some Reflections on Evolving Issues under Article 1 of the Convention," in *The ECHR and General International Law*, Anne van Aaken, Iulia Motoc (Oxford: Oxford University Press, 2018), 135-151.

[9] William A. Schabas, *The European Convention on Human Rights*: *A Commentary*, (Oxford: Oxford University Press, 2015), 84-113.

[10] Marko Milanovic, "Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court," in *The ECHR and General International Law*, Anne van Aaken, Iulia Motoc (Oxford: Oxford University Press, 2018), 97-111. "From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties," *Human Rights Law Review* 8, 3 (2008): 411-448. "Al-Skeini and Al-Jedda in Strasbourg," *European Journal of International Law* 23, 1 (2012):121-139.

[11] Loukis G. Loucaides, *The European Convention on Human Rights*: *Collected Essays* (Leiden: Brill, 2007).

[12] Anna Cowen, "A New Watershed? Reevaluating Banković in Light of Al-Skeini," *Cambridge Journal of International and Comparative Law* 1, 1 (2012): 213–227. Available at: doi:10.7574/cjicl.01.01.44.

[13] Işıl Karakaş and Hasan Bakırcı, "Extraterritorial Application of the European Convention on Human Rights: Evolution of the Court's Jurisprudence on the Notions of Extraterritorial Jurisdiction and State Responsibility," in *The ECHR and General International Law*, Anne van Aaken, Iulia Motoc (Oxford: Oxford University Press, 2018), 112-134.

[14] Matthew Happold, "Bankovic v. Belgium and the Territorial Scope of the European Convention on Human Rights," *Human Rights Law Review* 3, 1 (2003):77-90.

[15] Michal Gondek, "Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalisation?," *Netherlands International Law Review* 52,1 (2005): 349-387.

[16] See Press Unit of European Court of Human Rights, "*Factsheet – Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights*," July 2018. Available at: https://www.echr.coe.int/documents/fs_extra-territorial_jurisdiction_eng.pdf.

[17] See European Court of Human Rights, "*Guide on Article 1 of the European Convention on Human Rights: Obligation to respect human rights – Concepts of "jurisdiction" and imputability*," 31 August 2021. Available at: https://www.echr.coe.int/documents/guide_art_1_eng.pdf.

the States Parties for the alleged violations under the Convention. However, it does not concentrate on ways to address the issues. We have endeavoured to emphasise the main issues identified in this publication and find accomplishable solutions. Due to the activities of the states and international organisations in the globalising world, where legal certainty on the state jurisdiction becomes more and more complex, and lack of comprehensive and detailed research, this research topic requires more scientific discussions and research. Indeed, as cross-border activities of international organisations and states ascend, the necessity of establishing the aspects that generate imputability to the States Parties provides vivid ambition to clarify these aspects.

Significance of the research. The present research is merely related to the proper application of the Convention since the concept of "state jurisdiction" has vital of importance either both for the States Parties and the victims since one of the admissibility requirements from the perspective of the victim is to be "present in the jurisdiction of the High Contracting Party" and from the perspective of the State Party is to exercise jurisdiction over the person or area during the time of the conventional violation[18]. In this regard, the research results would clarify the aspects that generate the imputability of the alleged acts or omissions to the States Parties and would enlighten the relations among these aspects.

Thus, national legislators could take conclusions and recommendations into account when adopting legal acts, which require prior supervision of the actions on the matter, whether the State Party has jurisdiction over the particular conduct. In terms of domestic law, it would be consistent with the updated precedent of the ECtHR. Also, conclusions would assist national courts in interpreting and applying the notion of "state jurisdiction" within the meaning of Article 1 of the Convention. Moreover, the present research would encourage other legal scholars to deepen their research under Article 1 of the Convention in light of the recent case-law of the ECtHR. It would help to build democratic societies that have been very desirable. Significantly, students could benefit from the present research and use it as a study material.

Aim of research. The rationale of the present research is to examine the interpretation and application of the concept of "state jurisdiction" in the case-law of the ECtHR to identify some uncertainties and find the aspects that generate imputability to the States Parties under Article 1 of the Convention.

The research objectives are set up to achieve the aim of the research.

1. To ascertain the concept of jurisdiction under international law, including forms and principles of the notion of "jurisdiction";

[18] See ECHR, Art. 1.

2. In interpreting Article 1 of the Convention and the concept of "state jurisdiction" used therein, to analyse the scope and content of Article 1 of the Convention;
3. to examine at the same time the provisions of Articles 13, 15, 32, 34, 35 and 56 of the Convention concerning their relationship with Article 1 of the Convention;
4. To examine and compare the jurisprudence of the ECtHR based on Article 1 of the Convention and ascertain the changing trends (tendencies) in the case-law of the ECtHR by interpreting the concept of the "state jurisdiction";
5. To discuss the aspects that, in the Court's view, generate imputability to the States Parties within the framework of Article 1 of the Convention and the relations among these aspects.

Research methodology. The present research required several research methodologies to embrace all the relevant aspects. These are provided as follows:

1. The doctrinal method has been used for the legal analysis of the legal definitions, legal provisions and legal research related to the concept of the "state jurisdiction";
2. The comparative method has been used to analyse the jurisprudence of the ECtHR in a comparative manner that would guide us to perform an in-depth analysis of the ECtHR judgments and decisions;
3. To appropriately analyse the jurisprudence of the ECtHR, a linguistic method has been used as well.

Structure of the Master Thesis.

The thesis consists of four main chapters.

The first chapter provides a general understanding and overview of the “state jurisdiction” concept under international law. In the chapter, the forms of the jurisdiction together with the principles of the jurisdiction under international law are examined.

The second chapter is dedicated to introducing the European Convention on Human Rights and Article 1 of the Convention. In the chapter, the peculiarities of Article 1 of the Convention are examined deeply in terms of *ratione loci, ratione temporis, ratione materiae, and ratione personae.* Moreover, the relationship of Articles 1 of the Convention with Articles 13, 15,34, 35, and 56 are analysed.

Chronologically, the third chapter provides our examination of the case-law of the Court concerning the application and implementation of Article 1 of the Convention, and thus concerning the concept of the "state jurisdiction". This chapter also includes indirectly related issues, such as the relationship between the idea of "state jurisdiction" and the state of emergency cases.

The fourth chapter, considering the case-law of the Court, tries to generalise the aspects generating imputability to the States Parties and tries to find a very comprehensive and appropriate

concept of "state jurisdiction" in the light of the case-law of the Court. In addition to these, it examines the relationship between the extension of the "state jurisdiction" concept and the obligations imposed by the Convention.

Defence Statement. In the light of the case-law of the Court, the ECtHR has constantly expanded the concept of the "state jurisdiction" within the meaning of Article 1 of the Convention. Therefore, an extension of the "state jurisdiction" innately leads to imposing more obligations (or to a larger extent) to the States Parties since the extension of the "state jurisdiction" means the extension of the obligation to secure the entire range of substantive or procedural rights set out in the Convention and those additional Protocols which the States Parties have ratified. The broader interpretation of the “state jurisdiction” concept has also broadened the States Parties' obligations under the Convention.

1. THE CONCEPT OF THE STATE JURISDICTION IN THE INTERNATIONAL LAW

The ECtHR has noted that the term "state jurisdiction" enshrined in Article 1 of the Convention reflects the meaning of "state jurisdiction" in public international law[19]. Hence, the necessity of becoming acquainted with the understanding of the concept of "state jurisdiction" in public international law, in which the states act as the main subject of international law, is significant.

Jurisdiction is a term derived from the Latin word "*iurisdictio*", which consists of "*ius*", which means "the law", and "*dicere*", which means "to dictate". "Thus, it is apparent from the Latin origin of the word, *jurisdiction* – that is the legal power and, above all, the legitimate power to "assert the law" (fr. *dire le droit*) authoritatively and definitively.[20]" Jurisdiction under international law is essential for states to exercise their functions. Before discussing how the concept of jurisdiction is considered in international law, one of the fundamental principles of international law should be mentioned, demonstrating the importance of the term "jurisdiction" in the international legal sphere[21].

The duty not to intervene in matters within the domestic jurisdiction of any State is enshrined in the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States[22]. Today, it is widely accepted that the duty not to interfere is undoubtedly a principle of customary international law[23]. The principle of sovereign equality of states is linked to the principle of non-interference since the reasoning for the principle of non-interference is the principle of the sovereign equality of states[24].

Thus, the notion of state jurisdiction is essentially linked to the state's sovereignty, which is appropriately defined as "the power states do have at any given moment of the development of

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[19] See "*Gentilhomme, Schaff-Benhadji and Zerouki v. France*, nos. 48205/99, 48207/99 and 48209/99," 14 May 2002, para 20, "*Assanidze v. Georgia* [GC], no. 71503/01, 8 April 2004, para. 137, "*Banković and others v. Belgium and others* (dec.) [GC], no. 52207/99," 12 December 2001, para. 59-61, "*Nada v. Switzerland* [GC], no. 10593/08," para. 119, ECHR 2012.

[20] Renata Vaišvilienė, "Tarptautinių baudžiamųjų tribunolų jurisdikcijos santykis su nacionaline baudžiamąja jurisdikcija" (doctoral dissertation, Vilnius University, 2018), 32. Available at: http://talpykla.elaba.lt/elaba-fedora/objects/elaba:26913433/datastreams/MAIN/content.

[21] Seyfullah Cezmi Acar, "Valstybės jurisdikcijos sampratos aiškinimas Europos žmogaus teisių teisme" (bachelor's thesis, Mykolas Romeris University, 2019), 6.

[22] General Assembly resolution 2625 (XXXV) of 24 October 1970 (Declaration on principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations). Available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2625(XXV).

[23] Dire Tledi, "The Duty Not to Intervene in Matters within Domestic Jurisdiction," in *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law*, Jorge E. Viñuales (Cambridge: Cambridge University Press, 2020), 90.

[24] Ibid, 90.

the international legal system"[25]. Jurisdiction is defined as an aspect of sovereignty and means juridical, legislative, and administrative competence under international law to regulate the conduct of natural and juridical persons[26]. Under international law, jurisdiction is considered the capacity of states to prescribe and enforce the law[27]. However, jurisdiction becomes a matter for the regulation of international law when a state, to extend its national interests beyond its territory, adopts laws that govern not only its domestic interests[28]. In the view of F. A. Mann, jurisdiction under international law, is the right of a state to adopt specific rules considering not only the domestic interests of the state[29].

The jurisdiction of a state under the public international law ensures that the individual interests of each state are considered as well since there is a rule that the exercise of jurisdiction based on the sovereignty of one state may not unreasonably infringe the sovereignty of other states[30]. Whereas state jurisdiction under international law designates the extent of the state law concerning its *ratione loci* application, many questions about the state jurisdiction arise in international law[31]. In this case, that is doable to realise the guidance of the customary international principles, such as non-intervention and sovereign equality of states, to address these problems, as these principles ensure that states, in particular powerful states, do not claim jurisdiction over other states, and that is tightly linked with the mentioned principles[32].

State jurisdiction under international law is sometimes referred to as "extraterritorial jurisdiction"[33]. As jurisdiction becomes a matter for international law when a State endeavours to regulate matters outside the State to pursue national interests in the international sphere, this fact gives rise to the term "extraterritoriality"[34].

The use of the term "extraterritorial jurisdiction" is appropriate when it relies on the personality, protective, or universality principle of jurisdiction since, in these cases, it would be considered as claims over persons, property, or activities that do not have any link with regulating

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[25] Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2015 (Second edition)), 5; cited from Anthony J. Colangelo, *Spatial Legality*, 107 Nw. U. L. Rev. 69 (2012):106.
[26] Ian, Brownlie, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 9th edition 2019), 456.
[27] Catherine Redgwell, " Sovereignty and jurisdiction over energy resources," In *Elgar Encyclopedia of Environmental Law*, edited by Michael Faure, (Cheltenham: Edward Elgar, 2021), 12. Available at: https://doi.org/10.4337/9781788119689.IX.1.
[28] Ibid, 5; cited from Frederick Alexander Mann, *"The Doctrine of Jurisdiction in International Law,"* (1964-1) 111 RCDAI 1, 9.
[29] Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2015 (Second edition)), 5.
[30] Ibid, 6.
[31] Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2015 (Second edition)), 5; cited from Frederick Alexander Mann, *The Doctrine of Jurisdiction in International Law*, (1964-1) 111 RCDAI 9, 15.
[32] Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2015 (Second edition)), 6.
[33] Ibid, 6.
[34] Ibid, 6.

state[35]. From the perspective of the C. Ryngaert, even such a jurisdiction would not be considered entirely extraterritorial, as is claimed by the state or its courts in a given territory[36]. However, in the case-law of the International Court of Justice, more precisely in the dissenting opinion of the judges, judges state that when a State seeks to exercise jurisdiction over persons, property or acts which have no territorial connection with the regulatory State, the term "territorial jurisdiction for extraterritorial events" is used to describe the situation, as public authorities still operate in their territory[37].

In some instances, under international law, not only States or their delegated entities may have jurisdiction, but also organisations or bodies established by agreement between States; their jurisdiction is considered as a particular type of jurisdiction, namely international jurisdiction since the jurisdiction of each body resulting from agreements between States is determined only by its Constitutive Act[38]. For example, Article 1 of the Statute of the International Court of Justice makes explicit the source of the jurisdiction of the International Court of Justice (hereinafter – ICJ) by stating that "*The International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute.*[39]" The conditions for the jurisdiction of the ICJ are set out in Articles 36 and 37 of the Statute. Article 36 of the Statute emphasises the limits of the jurisdiction of ICJ[40]. It has jurisdiction over the cases which satisfy the conditions set out in its Constitutive Act, in this case, the Statute of the ICJ.

Accordingly, the jurisdiction of international bodies or organisations differs from that of a State in terms of its source[41]. Thus, the concept of extraterritorial jurisdiction does not coincide with the concept of international jurisdiction; however, it relates only to the grounds for implementing international jurisdiction, i.e. protective principle, principles of territoriality, personality and universality[42].

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[35] Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2015 (Second edition)), 7.
[36] Ibid, 7.
[37] Renata Vaišvilienė, "Tarptautinių baudžiamųjų tribunolų jurisdikcijos santykis su nacionaline baudžiamąja jurisdikcija" (doctoral dissertation, Vilnius University, 2018), 30. Available at: http://talpykla.elaba.lt/elaba-fedora/objects/elaba:26913433/datastreams/MAIN/content; cited from Judgment of the International Court of Justice on the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 42. Available at: https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-05-EN.pdf.
[38] Ibid, 32-33; cited from 2 October 1995 Decision of the Appeals Chamber of the International Tribunal for Former Yugoslavia in the case *Prosecutor v. Tadić*, 94-1-AR72, para. 11. Available at: https://www.icty.org/x/cases/tadic/acdec/en/51002.htm. See also 18 June 1997 Decision of the International Criminal Tribunal for Rwanda *Prosecutor v. Kanyabashi* (Trial Chamber), case No. ICTR-96-15-T, para. 66.
[39] United Nations, *Statute of the International Court of Justice*, 18 April 1946. Available at: https://www.un.org/en/about-us/un-charter/statute-of-the-international-court-of-justice
[40] See Article 36 of the Statute of the International Court of Justice.
[41] Andre Nollkaempe, *National Courts and the International Rule of Law* (Oxford University Press, 2011), 22.
[42] Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2015 (Second edition)), 6.

1.1. Forms of the State Jurisdiction

This part of the Master's thesis will briefly discuss the forms of jurisdiction since they are interconnected to the state's jurisdiction. In the view of C. Ryngaert, the main focus in terms of jurisdiction has been on "prescriptive" or "legislative" jurisdiction[43]. Prescriptive jurisdiction refers to as the power of the state to legislate[44]. This was explained in the Foreign Relations Law of the United States as "*to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court*"[45]. Prescriptive jurisdiction was subject to the examination of the Permanent Court of International Justice (hereinafter – PCIJ) in the 1927 *Lotus case*[46], in which PCIJ upheld the principle that unless an inhibitive rule adversely could be established, states are free to exercise prescriptive jurisdiction in a given situation as they wish[47].

The term "enforcement jurisdiction" means State's jurisdiction "to *induce or compel compliance or punish non-compliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other non-judicial action*"[48]. In the Lotus case, it was indicated that States do not have the right to enforce their laws outside their territory, including the territories where they have jurisdiction to prescribe their laws extraterritorially; however, the enforcement of jurisdiction resulting from "*a permissive rule derived from international custom or from a convention*"[49] was excluded from it[50]. Thereby, enforcement could be exercised through

[43] Cedric Ryngaert, "The Concept of Jurisdiction in International Law", from *Research Handbook on Jurisdiction and Immunities in International Law*, J. Craig Barker, Robert Cryer, Elizabeth Helen Franey, Richard Garnett, François Larocque, Alexander Orakhelashvili, Cedric Ryngaert, Aurel Sari, Yoshifumi Tanaka, Xiaodong Yang, Sienho Yee (Cheltenham: Edward Elgar Publishing, 2015), 54. Available at: https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/The-Concept-of-Jurisdiction-in-International-Law.pdf.
[44] Ibid, 54.
[45] Restatement (Third) of the Foreign Relations Law of the United States (Am Law Inst 1987), Art. 401 (a). See also John B. Houck, "Restatement of the Foreign Relations Law of the United States (Revised): Issues and Resolutions," *20 International Lawyer* (1986): 1367. Available at: https://scholar.smu.edu/til/vol20/iss4/12.
[46] See "S.S. 'Lotus' case between France v Turkey, No 9", Judgment, Permanent Court of International Justice, 7 September 1927, PCIJ Series A No 10, 18-19. Available at: http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm.
[47] Cedric Ryngaert, "The Concept of Jurisdiction in International Law", from *Research Handbook on Jurisdiction and Immunities in International Law*, (Cheltenham: Edward Elgar Publishing, 2015), 54.
[48] Restatement (Third) of the Foreign Relations Law of the United States (Am Law Inst 1987), Art. 401 (c).
[49] "S.S. 'Lotus' case between France v Turkey, No 9", Judgment, Permanent Court of International Justice, 7 September 1927, PCIJ Series A No 10, 18-19, para. 285. Available at: http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm.
[50] Cedric Ryngaert, "The Concept of Jurisdiction in International Law", from *Research Handbook on Jurisdiction and Immunities in International Law*, (Cheltenham: Edward Elgar Publishing, 2015), 56-57.

territorial measures[51]. However, there are *de facto* examples of exercising enforcement jurisdiction abroad, e.g., Adolf Eichmann was kidnapped in Argentina by Israeli secret agents[52].

The term "adjudicatory jurisdiction" means State's jurisdiction "to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, and whether or not the state is a party to the proceedings"[53]. Thus, in the view of C. Ryngaert, such jurisdiction does not mean the reachability of state law but the jurisdiction of state courts to settle a dispute in state courts[54]. States would lack adjudicative jurisdiction while exercising the prescriptive jurisdiction based on a permissible principle over a case due to non-overlapping of prescriptive and adjudicatory jurisdiction under international law, e.g., in the absence of any relationship of the defendant with the State or in cases where the parties to a particular contract have chosen another jurisdiction[55]. The principles of adjudicatory jurisdiction are enhanced within the framework of private international law, e.g., such jurisdiction is substantially linked to the defendant's domicile in civil and commercial matters[56] in the European Union[57].

The term "functional jurisdiction", which means limited jurisdiction of the coastal state over the activities in its maritime zones[58], and jurisdiction over particular activities[59] on the high seas, e.g. piracy and slave trade, is commonly encountered within the law of the sea[60]. From the point of C. Ryngaert, such jurisdiction is intended primarily to protect the legitimate interests of the coastal state[61]; however, it is also designed to protect the general interest[62] in exceptional

[51] Cedric Ryngaert, "The Concept of Jurisdiction in International Law", from *Research Handbook on Jurisdiction and Immunities in International Law*, (Cheltenham: Edward Elgar Publishing, 2015), 57.
[52] Ibid, 57.
[53] Restatement (Third) of the Foreign Relations Law of the United States (Am Law Inst 1987), Art. 401 (b).
[54] Cedric Ryngaert, "The Concept of Jurisdiction in International Law", from *Research Handbook on Jurisdiction and Immunities in International Law*, (Cheltenham: Edward Elgar Publishing, 2015), 57-58.
[55] Ibid, 57-58.
[56] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L 351, 20.12.2012, p. 1–32.* Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215.
[57] Cedric Ryngaert, "The Concept of Jurisdiction in International Law", from *Research Handbook on Jurisdiction and Immunities in International Law*, (Cheltenham: Edward Elgar Publishing, 2015), 57-58.
[58] See detailed maritime zones (the territorial sea, the contiguous zone, the exclusive economic zone, continental shelf) United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (hereinafter – UNCLOS), Articles 99-197. Available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
[59] UNCLOS, Articles 99-197
[60] Cedric Ryngaert, "The Concept of Jurisdiction in International Law", from *Research Handbook on Jurisdiction and Immunities in International Law*, (Cheltenham: Edward Elgar Publishing, 2015), 59-60.
[61] See UNCLOS Art. 220 (1) – "When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may, subject to section 7, institute proceedings in respect of any violation of its laws and regulations adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the exclusive economic zone of that State."
[62] See UNCLOS Art. 216 - Enforcement with respect to pollution by dumping.

cases[63]. As C. Ryngaert states that functional jurisdiction consists of both prescriptive and enforcement veins that do not necessarily overlap, e.g., the coastal State may enact laws concerning the peaceful passage through the territorial sea[64]; however, just in limited circumstances[65], those laws may be applied there[66].

1.2. The principles of the jurisdiction in the international law

The principles of jurisdiction in international law are divided into territorial and extraterritorial, consisting of the principle of personality, the protective principle and the principle of universality[67]. Those principles are sometimes described in doctrine as the ground for exercising jurisdiction since the principles are regarded as the basis for having jurisdiction[68]. The claim concerning jurisdiction requires reasonably establishing at least one of the grounds for exercising jurisdiction[69].

Under international law, the territoriality principle is the essential principle of jurisdiction[70]. According to the territoriality principle, the state has the right to exercise its jurisdiction over all acts when they have been committed in the state's territory; however, historically, the main principle of jurisdiction has been personality rather than territoriality because only in the seventeenth-century did territoriality become apparent[71]. Thus, under the territoriality principle, actions carried out in the territory of a state fall within the jurisdiction of that state since that principle is linked to the territory of the state[72]. However, on closer inspection, territoriality can be complex, as crimes or other acts for which a state may seek to exercise its jurisdiction may cross national borders: action may be initiated in one state ("subjective territoriality") but terminated or have consequences in another ("objective territoriality ")[73]. The territorial location or links of the operator may be used by states or international organisations, such as European

[63] Cedric Ryngaert, "The Concept of Jurisdiction in International Law", from *Research Handbook on Jurisdiction and Immunities in International Law*, (Cheltenham: Edward Elgar Publishing, 2015), 58-59.
[64] See UNCLOS, Art. 21 (1)
[65] See UNCLOS, Art. 27 (Criminal jurisdiction on board a foreign ship) and Art. 28 (Civil jurisdiction in relation to foreign ships)
[66] Cedric Ryngaert, "The Concept of Jurisdiction in International Law", from *Research Handbook on Jurisdiction and Immunities in International Law*, (Cheltenham: Edward Elgar Publishing, 2015), 58-59.
[67] Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2015 (Second edition)), xi.
[68] Renata Vaišvilienė, "Tarptautinių baudžiamųjų tribunolų jurisdikcijos santykis su nacionaline baudžiamąja jurisdikcija" (doctoral dissertation, Vilnius University, 2018), 47. Available at: http://talpykla.elaba.lt/elaba-fedora/objects/elaba:26913433/datastreams/MAIN/content. Author examined principles of the jurisdiction under the title of "The grounds for exercising of jurisdiction".
[69] Ibid, 48.
[70] Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2015 (Second edition)), 49.
[71] Ibid, 49.
[72] Cedric Ryngaert, "The Concept of Jurisdiction in International Law", from *Research Handbook on Jurisdiction and Immunities in International Law*, (Cheltenham: Edward Elgar Publishing, 2015), 54.
[73] Ibid, 54.

Union, to apply their legal regulations affecting the global activities of the operator under the territoriality principle[74].

The protective principle means that states may exercise jurisdiction over the activities outside of their territory which have a hazardous impact on the state's security, economy, or welfare[75]. The basis for applying the protective principle is the interests protected by law and infringement of them by a specific act[76]. The protective principle has evolved since the French Revolution by the influence of a nationalist political philosophy[77]. First formulated in the French Code of Criminal Procedure of 1808[78], which under French criminal law established control with regard to the extraterritorial activities of an alien considered a crime against national security, counterfeiting of the seal of the state, national currency, national papers or banknotes[79]. It is considered that extraterritorial acts of nationals or aliens, which threaten the security or integrity of the state of the forum, justify the extension of its jurisdiction, even if those acts are not considered offences under the *lex loci* (the law of the place)[80]. A. Lenhoff states that if the application of the protective principle does not exceed these limits, this is a universally accepted exception to the territorial principle[81].

In the case of the principle of universality, on the other hand, the jurisdiction of the state depends on the nature (gravity) of the offence and not on the specific relationship with the state; however, universal jurisdiction is often exercised only when the suspect or accused person is in the territory of the concerning state[82].

The personality (nationality) principle is universally recognised and allows the state to exercise its jurisdiction over its citizens regarding their extraterritorial behaviour[83]. This is also

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[74] Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2015 (Second edition)), 50.
[75] Catherine Redgwell, "Sovereignty and jurisdiction over energy resources," In *Elgar Encyclopedia of Environmental Law*, edited by Michael Faure, (Cheltenham: Edward Elgar, 2021), 15. Available at: https://doi.org/10.4337/9781788119689.IX.1.
[76] Andrius Nevera, *Valstybės baudžiamosios jurisdikcijos principai* (Vilnius: Mykolo Romerio universitetas, 2006), 111.
[77] Arthur Lenhoff, "International Law and Rules on International Jurisdiction," *Cornell Law Review* 50, 5 (1964): 12, http://scholarship.law.cornell.edu/clr/vol50/iss1/2.
[78] See "Code d'instruction criminelle, 18 November 1808" – Art. 5 and 6. Article 5 – "Any Frenchman, outside the territory of France, who is guilty of a crime hazardous to the security of the state, of counterfeiting the seal of the state, national currencies in circulation, national papers, banknotes authorized by law, may be prosecuted, tried and punished in France, according to the provisions of French law". Available at: https://ledroitcriminel.fr/la_legislation_criminelle/anciens_textes/code_instruction_criminelle_1808/code_instruction_criminelle_1.htm.
[79] Arthur Lenhoff, "International Law and Rules on International Jurisdiction," *Cornell Law Review* 50, 5 (1964): 12, http://scholarship.law.cornell.edu/clr/vol50/iss1/2.
[80] Ibid, 12.
[81] Ibid, 12.
[82] Cedric Ryngaert, "The Concept of Jurisdiction in International Law", from *Research Handbook on Jurisdiction and Immunities in International Law*, (Cheltenham: Edward Elgar Publishing, 2015), 55-56.
[83] Arthur Lenhoff, "International Law and Rules on International Jurisdiction," *Cornell Law Review* 50, 5 (1964): 13, http://scholarship.law.cornell.edu/clr/vol50/iss1/2.

called the active personality principle[84]. The victim's nationality is the basis for exercising jurisdiction under the passive personality principle[85]. However, Judge Loder, in his dissenting opinion in the Lotus case, strongly expressed his objections to extending the jurisdiction of *lex fori* abroad that does not fall within the proper limits of these exceptions by stating: "The criminal law of a State may extend to crimes and offences committed abroad by its nationals since such nationals are subject to the law of their own country; but it cannot extend to offences committed by a foreigner in foreign territory, without infringing the sovereign rights of the foreign State concerned, since the State enacting the law has no jurisdiction in the territory of another sovereign State.[86]"

[84] Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2015 (Second edition)), 104.
[85] Catherine Redgwell, " Sovereignty and jurisdiction over energy resources," In *Elgar Encyclopedia of Environmental Law*, edited by Michael Faure, (Cheltenham: Edward Elgar, 2021), 13. Available at: https://doi.org/10.4337/9781788119689.IX.1.
[86] "S.S. 'Lotus' case between France v Turkey, No 9", Judgment, Permanent Court of International Justice, 7 September 1927, PCIJ Series A No 10, para. 108. Available at: http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.html.

2. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ARTICLE 1 OF THE CONVENTION

The European Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950, entered into force in 1953 after ten states had ratified the Convention in accordance with Article 66 of the 1950 version[87] of the Convention[88]. Article 19 of the 1950 Convention established two bodies responsible for monitoring the fulfilment of the obligations undertaken by High Contraction Parties under the Convention; herewith, The European Commission of Human Rights in 1954 and the European Court of Human Rights in 1959 were set up[89]. However, the ECtHR remained the sole main and permanent judicial body with the entry into force of Protocol No. 11 of 1 November 1998 that amends the Convention[90]. It should also be noted that the protocols which add rights to the Convention are binding only on those States that have signed and ratified them to the Convention[91]; today, we have seventeen protocols[92].

The jurisdiction of the Court is enshrined in Article 32 of the Convention, which reads as follows "*The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47*"[93].

Article 33 of the Convention envisages the opportunity for the High Contracting States to bring an action before the ECtHR against another High Contracting Party for a breach of the provisions of the Convention and its relevant Protocols, and Article 34 envisages the opportunity for natural persons, non-governmental institutions or groups of persons to submit an individual petition concerning a violation by High Contracting Parties of the rights enshrined in the Convention and its relevant Protocols[94].

In addition, for the Court to have and be able to exercise its jurisdiction, that is to say, to hear the case before it, such a case should satisfy the conditions for the admissibility of applications laid down in Article 35 of the Convention. The issues of admissibility also relate to Article 1 of

[87] See also Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol*, 4 November 1950, ETS 5. Available at: https://www.echr.coe.int/Documents/Archives_1950_Convention_ENG.pdf.
[88] Danutė Jočienė, *Europos žmogaus teisių konvencijos taikymas Lietuvos Respublikos teisėje* (Vilnius: Eugrimas, 2000), 19.
[89] Ibid, 19.
[90] Ibid, 21.
[91] See Public Relations Unit of the Court, "European Court of Human Rights: The ECHR in 50 Questions" (Strasbourg: European Court of Human Rights, 2021), 3. Accessed on 19 February 2022. Available at: https://www.echr.coe.int/Documents/50Questions_ENG.pdf.
[92] See Protocols to ECHR, Council of Europe. Accessed on 19 February 2022. Available at: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=005
[93] Article 32 of ECHR.
[94] Article 33 and 34 of ECHR.

the Convention since it is Article 1, which emphasises the scope (framework) of the Convention in relation to entities, territories, validity period and substantive rights[95]. In the absence of any aspects set out in Article 1 of the Convention, the application will be considered inadmissible under Article 35 of the Convention.

For an individual petition to be admissible on the merits, the petition must satisfy the following requirements: in particular, the applicant must fall within the jurisdiction of a State which has ratified the ECHR; secondly, the human rights or fundamental freedoms enshrined in the Convention or its protocols (if the State is a party to the relevant protocol) should be violated[96]. These principles (requirements) were confirmed in the joined case of *Behrami and Behrami v. France, Saramati v. Germany, France and Norway*, in which the Court concluded under Article 1 of the Convention that cases were inadmissible under Article 35 of the Convention because there was no appropriate subject (*ratione personae*)[97]. These cases were given simply because we expose the interrelation of the "state jurisdiction" and the admissibility requirements. It is also necessary to point out that later on, the European Court departed from its position in *Behrami and Saramati* case and found that the applicants fell within the jurisdiction of the States Parties even in some cases where the International Organisations were involved[98]. Chapter III will consider how the concept of state jurisdiction has been differently interpreted and applied by the ECtHR in its case-law during different periods.

In the context of an individual petition referred to in Article 34 of the Convention, individuals should fall within the jurisdiction of a State party to the Convention for the Court to rule on alleged violations of the Convention[99]. In other words, the Court's jurisdiction depends, in principle, on the jurisdiction of the High Contracting State since, under Article 1 of the Convention, a person should be subject to the jurisdiction of the State Party concerned.

2.1. The analysis of Article 1 of the Convention

Article 1 of the Convention reads as follows: "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this*

[95] William A. Schabas, *The European Convention on Human Rights*: *A Commentary*, (Oxford: Oxford University Press, 2015), 93.
[96] "*Penafiel Salgado v. Spain,* no. 65964/01", Judgment of the ECtHR, 2002 April 16, para. En droit, 3 – In the case it was stated that the petition of the applicant is inadmissible, since the right of a foreign national to enter and reside in the territory of a Contracting Party is not guaranteed by the Convention or its protocols in force.
[97] Danutė Jočienė, "Pagrindinių teisių apsauga pagal Europos žmogaus teisių konvenciją ir Europos Sąjungos teisę," *JURISPRUDENCIJA* 121, 3 (2010): 108.
[98] See also "*Al-Jedda v. The United Kingdom* [GC], no. 27021/08," 7 July 2011, "*M.S.S. v. Belgium and Greece* [GC], no. 30696/09," 21 January 2011.
[99] Ibid, 101.

Convention"[100]. The term "High Contracting Parties" is archaic usage of the "States Parties" and means the States that have ratified or acceded to it[101]. Hereby, the States Parties must act in accordance with the customary international principle of *pacta sunt servanda*, reflected in Article 26 of the Vienna Convention on the Law of Treaties, which reads as follows: "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*[102]"

The Court has emphasised the specific features of Article 1 of the Convention as follows:

> Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above, a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement". <...> By substituting the words "shall secure" for the words "undertake to secure" in the text of Article 1 (art. 1), the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States.[103]

In the eyes of former judge of ECtHR, D. Jočienė, "this amendment emphasised the direct effect of the Convention; however, although the change in these wordings tends in principle to the direct applicability of the Convention, this does not mean that such a provision can be considered a strict obligation of the state[104]".

Article 1 of the Convention contains within itself both negative and positive dimensions[105]. The negative obligation is regarded as the State's obligation not to violate substantive provisions of the Convention and the Protocols ratified by the relevant State Party[106]. The positive obligation is viewed as the State's obligation to establish a legal framework for the protection of concerning rights and take measures, including judicial measures[107], to ensure its compliance[108]. The difference between the positive obligations and negative obligations is that the positive obligations require positive intervention by the state, while the latter requires it to refrain from interference[109].

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[100] Article 1 of the ECHR.
[101] William A. Schabas, *The European Convention on Human Rights*: *A Commentary*, (Oxford: Oxford University Press, 2015), 88.
[102] Ibid, 89. See also: "*1969 Vienna Convention on the Law of Treaties*," United Nations, Treaty Series 1155 (May): 331, Article 26. See "*Janowiec and Others v. Russia* [GC], nos 55508/07 and 29520/09," 21 October 2013, para. 211.
[103] "*Ireland v. The United Kingdom*, no. 5310/71," 13 December 1977, para. 239.
[104] Danutė Jočienė, *Europos žmogaus teisių konvencijos taikymas Lietuvos Respublikos teisėje* (Vilnius: Eugrimas, 2000), 39.
[105] William A. Schabas, *The European Convention on Human Rights*: *A Commentary*, (Oxford: Oxford University Press, 2015), 91.
[106] Ibid, 91.
[107] See "*(VgT) Verein Gegen Tierfabriken v. Switzerland*, no. 24699/94," 28 June 2001.
[108]William A. Schabas, *The European Convention on Human Rights*: *A Commentary*, (Oxford: Oxford University Press, 2015), 91, see also "*Siliadin v. France*, no. 73316/01," 26 July 2005, "*Hokkanen v. Finland*, no. 19823/92," 23 September 1994, "*López-Ostra v. Spain*, no. 16798/90," 9 December 1994.
[109] See Jean-François Akandji-Kombe, *Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights* (Strasbourg: Directorate General of Human Rights Council of Europe, 2007), 11.

Rights and freedoms set up in the Convention must be secured "to everyone", and that should be interpreted with Article 34, according to which "any person, non-governmental organisation or group of individuals" can submit an individual petition to the Court[110].

In its decision, the ECtHR, with regard to Article 1 of the Convention, pointed out that the Expert Intergovernmental Committee had replaced the words "*all persons residing in their territory*" with reference to persons *"within their jurisdiction*" to extend the application of the Convention to other persons who may not be legally resident but are nevertheless present in the territory of the Contracting States[111]. The notion of jurisdiction enshrined in Article 1 contains the territorial (*ratione loci*), temporal (*ratione temporis*), personal (*ratione personae*), and subject-matter (*ratione materiae*) jurisdiction[112].

Another peculiarity of the application of Article 1 of the Convention was demonstrated in the ECtHR's case *Ireland v. The United Kingdom*, in which the Irish Government alleged that the United Kingdom had also infringed Article 1 of the Convention[113]. However, neither the Commission nor the British Government accepted such an argument since it was considered that Article 1 of the Convention alone could not be violated, as it did not confer any additional rights in addition to those set out in Section I[114].

With regard to the peculiarities of Article 1 of the Convention, in that case, it was also stated that an infringement of Article 1 *per se* follows from an infringement of the provisions of Section I, but Article 1 itself could not be infringed and, when the Court's found a violation, it never ruled that there had been a violation of Article 1 as well, hence Article 1 confines the scope of the Convention *ratione personae*, *materiae* and *loci*, as it is drafted as a reference to the provisions of Section I, and therefore it is interconnected with the provisions of Section I of the Convention[115].

The subject matter or *ratione materiae* scope of the Convention concerns the substantive provisions enshrined in Section I of the Convention and in the relevant provisions of the Protocols; however, if a State made a reservation, *ratione materiae* scope of the Convention might be limited[116]. *Ratione loci* scope of the Convention concerns the territorial scope of the

[110] William A. Schabas, *The European Convention on Human Rights*: *A Commentary*, (Oxford: Oxford University Press, 2015), 91.
[111] "*Banković and others v. Belgium and others* (dec.) [GC], no. 52207/99," 12 December 2001, para. 63.
[112] William A. Schabas, *The European Convention on Human Rights*: *A Commentary*, (Oxford: Oxford University Press, 2015), 93.
[113] "*Ireland v. The United Kingdom*, no. 5310/71," 13 December 1977, para. 236.
[114] Ibid, para. 236.
[115] Ibid, para. 238.
[116] William A. Schabas, *The European Convention on Human Rights*: *A Commentary*, (Oxford: Oxford University Press, 2015), 94.

Convention; in the III Chapter, it will be analysed with the factors that relatively expand the application of the territorial scope of the Convention.

Ratione personae scope of the Convention concerns the appropriate subject, as Article 1 of the Convention imposes obligations only upon the "High Contracting Parties", however through State's positive obligations, *ratione personae* issues arise since acts of others could be the basis for the attribution of responsibility[117]. Furthermore, *ratione personae* also relate to the applicants since the latter must fall within the jurisdiction of the State Party to the Convention[118].

Ratione temporis scope of the Convention concerns the entry into force of the Convention since the State must be a party to the Convention and its petition mechanism at the time of the alleged violation[119].

2.2. The relationship between Articles 1 and 13 of the Convention

The right to an effective remedy, reflected in Article 13 of the Convention, reads as follows: "*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*[120]"

In the view of the former judge of the ECtHR, D. Jočienė, the case-law of the Commission and the Court does not impose any legal obligation to States Parties to transpose the Convention into their domestic law and attach the appropriate legal status to it[121]. This has also been emphasised in the case-law of the ECtHR itself, stating that neither Article 13 of the Convention nor the Convention, in general, provides a specific way for States Parties to ensure the application of the provisions of the Convention in their domestic law[122].

The Convention, including Articles 1 and 13 of the Convention, does not impose a strict obligation on States Parties to transpose the Convention into domestic law, and the parties to the Convention are not obliged to ensure the direct application of the Convention's domestic law[123].

However, at the same time, the case-law of the ECtHR has stated that in the case of the

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[117] William A. Schabas, *The European Convention on Human Rights*: *A Commentary*, (Oxford: Oxford University Press, 2015), 105.
[118] Danutė Jočienė, "Pagrindinių teisių apsauga pagal Europos žmogaus teisių konvenciją ir Europos Sąjungos teisę," *JURISPRUDENCIJA* 121, 3 (2010): 108.
[119] Laurynas Biekša, "Admissibility Requirements for Individual Petitions," presentation at International Human Rights Litigation lecture, Mykolas Romeris University,Vilnius, 07-10-2020.
[120] See Article 13 of the ECHR.
[121] Danutė Jočienė, *Europos žmogaus teisių konvencijos taikymas Lietuvos Respublikos teisėje* (Vilnius: Eugrimas, 2000), 43.
[122] "*Swedish Engine Drivers' Union v. Sweden*, no. 5614/72," 6 February 1976, para. 50.
[123] Danutė Jočienė, *Europos žmogaus teisių konvencijos taikymas Lietuvos Respublikos teisėje* (Vilnius: Eugrimas, 2000), 45.

incorporation of the Convention into national law[124], Convention finds its proper place, as the drafters of the Convention also intended to indicate that the rights and freedoms set out in Section I of the Convention were directly secured within the jurisdiction of the States Parties concerned[125]. Persons can rely directly on the provisions of the Convention, where it is considered an integral part of domestic law, but if it is not considered an essential part, the application of Article 13 of the Convention may be problematic[126]. Enabling effective remedies under domestic law is regarded as the most significant way to ensure faithful reflection of the Convention[127].

2.3. The relationship between Articles 1 and 15 of the Convention

Derogation in time of emergency is closely related to Article 1 of the Convention, as it was already mentioned that Article 1 stipulates the obligation to respect human rights, and under Article 15 of the Convention,[128] States Parties may take measures derogating from their obligation to respect human rights. In that sense, when the conditions of a valid derogation are met under Article 15, even though State Party is bound by Article 1 of the Convention, the State Party's obligation towards everyone within the jurisdiction of the State Party would be limited. Those conditions were enshrined in Article 15 (1) as follows that:

1) Condition of time and situation – in time of war or other public emergency threatening the life of the nation;
2) Condition of proportionality – the taken measures derogating from obligations under [the] Convention must be to the extent strictly required by the exigencies of the situation;
3) Condition of accordance – the taken measures must comply with the State's other obligations under international law[129].

However, as stipulated in Article 15 (2) of the Convention, "*no derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made*"[130]. In the *Banković* case, ECtHR underlined that Article 15 must be read in light of the limitation on 'jurisdiction' set up in Article 1 of the Convention[131]. Hereby, without deeply

[124] See "*Ireland v. The United Kingdom*, no. 5310/71," 13 December 1977, para. 239, "*That intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law* "
[125] Ibid, para. 239.
[126] Danutė Jočienė, *Europos žmogaus teisių konvencijos taikymas Lietuvos Respublikos teisėje* (Vilnius: Eugrimas, 2000), 45.
[127] Ibid, 45.
[128] Article 15 of the ECHR.
[129] See Article 15 (1) of the ECHR.
[130] Article 15 (2) of the ECHR.
[131] "*Banković and others v. Belgium and others* (dec.) [GC], no. 52207/99," 12 December 2001, para. 63.

analysing, we have exposed the interrelation and fundamental relationship between Articles concerned. Chapter III will deeply examine state emergency and pandemic cases interrelated with the application of Articles 1 and 15 of the Convention.

2.4. The relationship between Articles 1 and 56 of the Convention

Article 56 of the Convention (Article 63 before the entry into force of Protocol No. 11 in 1998) provides the State Party to make a declaration concerning the extension of the Convention to all or any of the territories for whose international relations it is responsible[132]. No jurisdiction arose when the State Party didn't extend the application of the Convention to overseas territories for whose international relations it is responsible, so Article 1 could not be relied on to extend the application of the Convention[133].

In the case-law of ECtHR, the former inhabitants of British Indian Ocean Territory (hereinafter – BIOT) applied to the ECtHR against the United Kingdom concerning the breach of Article 4 of Protocol No. 1, which was not extended to the territory of BIOT. The court in the case could not agree that the possible basis of jurisdiction under Article 1 should prevail over Article 56 to deny inconvenient colonial relic and prevent a vacuum in the safeguarding of the Convention[134]. The court said that the colonial ruins are anachronistic; however, the meaning of Article 56 is apparent; therefore, it cannot be ignored solely based on the perceived injustice[135].

Furthermore, Court pointed out that Article 56, which is still in force, cannot be abolished by the will of the Court for the alleged desideratum[136]. Ultimately, without ruling on any other arguments on the jurisdiction of the State within the meaning of Article 1 of the Convention, Court found the application inadmissible on the grounds of the victim status of the applicants and application issues of relevant substantial Articles[137]. In a word, Article 56 allows States Parties to limit the territorial application of the Convention and, in doing so, to limit state jurisdiction within the meaning of Article 1 of the Convention.

[132] See Article 56 of the ECHR.
[133] See "*Gillow v. the United Kingdom*, no. 9063/80," 24 November 1986, para. 62, Series A no. 109; "*Bui Van Thanh and Others v. the United Kingdom*, no. 16137/90," Commission decision of 12 March 1990, Decisions and Reports 65, p. 330; and "*Yonghong v. Portugal* (dec.), no. 50887/99," ECHR 1999-IX
[134] "*Chagos Islanders v. the United Kingdom* (dec.), no. 35622/04," 11 December 2012, para. 74.
[135] Ibid, para. 74.
[136] Ibid, para. 74.
[137] Ibid, para. 74 and 77-87.

3. CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE STATE JURISDICTION

The jurisdiction of the state has been interpreted in the case-law of the ECtHR in accordance with Article 1 of the Convention since the establishment of the monitoring bodies of the Convention. As already mentioned, for the Court to be able to examine an interstate or individual petition submitted to it under Article 34 of the Convention, one of the conditions for its examination is that the applicant concerned must fall within the jurisdiction of a State Party to the Convention[138].

This chapter will chronologically analyse the interpretation of the jurisdiction of a State under Article 1 of the Convention in the case-law of the ECtHR and the aspects that generate imputability to the States Parties and possibly the right to a legal remedy for particular victims within the framework of Article 1 of the Convention.

As the ECtHR has indicated that "the exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions attributable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention[139]". Hereby, it is necessary to point out that imputability to the State Party does not mean *per se* responsibility of the State Party since the responsibility of the State Party arises when a violation of the Convention could be imputed to the State Party[140]. Responsibility in this sense means that acts and omissions of the State Party are already imputed to the latter; however, imputability does not mean that the State Party is responsible for the acts and omissions of it, as imputability is just one of the requirements for the responsibility of the State Party[141].

It is worth noting that the Court already pointed out that the interpretation of the provisions of the Convention must make its safeguards practical and effective that the requirement of the object and purpose of the Convention, as an instrument for safeguarding individual human beings, to be fulfilled[142]. Moreover, such interpretation has to follow "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society"[143]. Therefore, by analysing the interpretations of the Court, we will consider established requirements upon the interpretation of the provisions of the Convention.

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[138] Danutė Jočienė, "Pagrindinių teisių apsauga pagal Europos žmogaus teisių konvenciją ir Europos Sąjungos teisę," *JURISPRUDENCIJA* 121, 3 (2010): 101.
[139] "*Catan and others v. Moldova and Russia* [GC], no. 43370/04, 8252/05 and 18454/06," 19 October 2012, para. 103.
[140] See "*Loizidou v. Turkey* [GC], no. 15318/89," 18 December 1996, para. 52-56.
[141] See "*Assanidze v. Georgia* [GC], no. 71503/01," 8 April 2004, para. 144.
[142] See "*Artico v. Italy*, no. 6694/74," 13 May 1980, para. 33.
[143] See "Kjeldsen, Busk Madsen and Pedersen v. Denmark, no. 5095/71; 5920/72; 5926/72," 7 December 1976, para. 53.

3.1. The concept of "the state jurisdiction" in the initial 1959-1980 period

3.1.1. Performing consular duties abroad (X v. the Federal Republic of Germany)

The case is related to the expulsion of a German citizen that resided in Morocco. The applicant alleged that Moroccan authorities' request to expel him to Germany violated provisions of Articles 3, 5, 8, 12 and 14 of the Convention[144].

In this case, Commission has constructed the first steps towards the "state jurisdiction" within the meaning of Article 1 of the Convention, even though the latter declared the application inadmissible. The Commission has stressed that:

> [I]n certain respects, the nationals of a Contracting State are within its "jurisdiction" even when domiciled or resident abroad; whereas, in particular, the diplomatic and consular representatives of their country of origin perform certain duties with regard to them which may, in certain circumstances, make that country liable in respects of the Convention.[145]

Therefore, performing specific duties concerning nationals of the State's Party outside the territory of the State Party by the diplomatic, consular representatives in certain circumstances generates imputability of the alleged violations to the State Party. However, the Commission didn't specify what those certain circumstances are. In the following cases, we will examine these certain circumstances as well.

3.1.2. Inferiors' failure to fulfil obligations under the Convention (Ireland v. the United Kingdom)

The Court emphasised essential aspects of the interpretation of State jurisdiction in the inter-State case of Ireland v. The United Kingdom, in which Ireland brought an action before the European Commission of Human Rights against the United Kingdom for alleged violations of various rights and freedoms under the Convention. These violations, in the view of Ireland, manifested themselves from August 1971 to December 1975; the United Kingdom authorities, in the combat against a terrorist group and in the exercise of powers that were given during the period of state emergency, enforced inappropriate measures under the Convention to the persons during their arrest, detention and interrogation. This case concerned the scope and practical

[144] "*X v. Federal Republic of Germany* (dec.), no. 1611/ 62," 25 September 1965, 162-164.
[145] Ibid, 168.

implementation of those measures and whether the United Kingdom had treated persons deprived of their liberty properly within Article 3 of the Convention[146].

In the present case, the Court, in interpreting the State's jurisdiction under Article 1 of the Convention, has emphasised that, under the Convention, state authority is accurately liable for the acts of inferiors, officials or institutions; authorities must impose their will on inferiors, and cannot justify inferior's misconduct on the ground that they have failed to ensure the proper performance of their duties[147]. Therefore, here, factors generating imputability of the violation to the State could be regarded as acts of inferiors, officials or institutions that fail to fulfil the obligations undertaken under the Convention. Accordingly, such interpretation imposes an obligation to States Parties forcing their inferiors to abide by the obligations that the respective States Parties undertake under the Convention.

3.2. The concept of "the state jurisdiction" from the 1980s until 1990

Extradition to the non-Contracting State (Soering v. the United Kingdom)

The applicant, in the present case, a German national, was being held in a British prison since he had killed his girlfriend's parents in the United States (Virginia), and with his girlfriend had fled from the United States to the United Kingdom, as a consequence the process of his extradition to the United States was initiated in connection with the murder of the parents of his girlfriend[148]. The applicant alleged that he could not be extradited to the United States because he would encounter the death penalty, which he would have to wait about 6-8 years to serve; in the applicant's view, such a so-called "death penalty corridor or death row phenomenon" would be regarded as inhuman or degrading treatment in violation of Article 3 of the Convention[149].

The Court noted that Article 1 sets a territorial limit on the scope of the Convention and confines its implementation with the jurisdiction of the State Party; therefore Convention itself does not govern the actions of non-States Parties, nor does it require the Contracting States to set up conventional standards upon other States[150]. However, the ECtHR emphasised that extradition in such circumstances would be contrary to the soul of Article 3; therefore Contracting State, in this case, the United Kingdom, could be held liable for its decision to extradite the

[146] "*Ireland v. The United Kingdom*, no. 5310/71," 13 December 1977, para.11-12.
[147] Ibid, para. 159.
[148] "*Soering v. United Kingdom (Plenary)*, No. 14038/88," 7 July 1989, para. 11-12.
[149] Ibid, para. 25,26 and 76.
[150] Ibid, para. 86.

applicant to the United States if there was a real risk of torture or other ill-treatment in the event of extradition[151].

Court further stated that the responsibility under the Convention could occur to the United Kingdom in the case of performing extradition to the United States since such action has a direct consequence on the applicant by causing him ill-treatment[152]. However, the Court added that mentioned responsibility is closely related to assessing the conditions in the receiving state concerning the standards of Article 3 of the Convention[153].

In this regard, the State Party could be liable for its decision taken within its jurisdiction to extradite a person who would possibly be subjected to ill-treatment outside of its jurisdiction, namely in the receiving country. In this regard, extradition generates imputability to the State Party; however, as Court mentioned, for responsibility to have occurred, conditions in the receiving country must be against the standards of Article 3 of the Convention.

3.3. The concept of "the state jurisdiction" from the 1990s until 2010

3.3.1. Influence upon the entity *sui generis* (Drozd and Janousek v. France and Spain)

In the present case, the Court has clarified the essential facts concerning the state's jurisdiction *ratione loci*. The complaints were against France and Spain, who, according to the Spanish and Czechoslovak applicants, were responsible for the conduct of the Andorran authorities, and another complaint was lodged against France for the enforcement of the judgment of the Andorran court in France because, according to the applicants, enforcement of such judgment was not regulated in French law so that it was unlawful[154].

Even though France and Spain had ratified Convention, neither the governments of France and Spain nor the European Commission of Human Rights (hereinafter – the Commission) accepted that Convention applies to the territory of Andorra[155]. The Commission, by invoking two aspects, pointed out the unusuality and complexity of the status of the Principality of Andorra in public international law as follows: Andorra is often described as *sui generis* since it doesn't belong to either Spain or France; therefore, Convention could not be considered as *per se* applicable in Andorran territories; neither France nor Spain had jurisdiction of their own to act on

[151] "*Soering v. United Kingdom (Plenary)*, No. 14038/88," 7 July 1989, para. 88.
[152] Ibid, para. 91.
[153] Ibid, para. 91.
[154] "*Drozd and Janousek v. France and Spain* (Plenary), no. 12747/87," 26 June 1992, para. 77.
[155] Ibid, 84.

behalf of Andorra since Co-Princes[156] are regarded as equivalent in the exercise of Andorra's international functions based on agreement[157].

However, the applicants claimed that after the ratification of the Convention by France, Convention entered into force in Andorra as well, since Andorra had composed a "vacuum of sovereignty" filled by the French Co-Prince, who was considered to be the leakage of French sovereignty[158]. Contrary to the arguments of the applicants, the ECtHR noted that Andorra is not a member of the Council of Europe, which does not allow the latter to become an independent State Party to the Convention[159], continuing its argumentation said that the territory of Andorra is not a common territory of the French Republic and the Kingdom of Spain, nor is it a condominium[160] belonging to France and Spain[161].

The Court, therefore, held that the objection of jurisdiction *ratione loci* was well-founded; however, at the same time, the ECtHR stated that the lack of jurisdiction *ratione loci* does not exclude the Court from examining this case to answer the question of whether the applicants' conviction by an Andorran court falls within the "jurisdiction" of France or Spain under Article 1 of the Convention[162]. This point is essential that the Court decides to examine the case further whether France or Spain somehow influenced the applicant's convictions by the Andorran Court within the meaning of Article 1 of the Convention.

Moreover, The Court held that it was necessary to examine whether the acts complained of by Mr Drozd and Mr Janousek, even though they had not been exercised in their territory, could be imputed to France, Spain or both[163]. The ECtHR has explained 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 territory.[164]"

In this case, the French Government has stated that decisions taken in the Principality are not subject to the supervision of the French courts, so French courts have no direct or indirect power to review them[165]. In the case, it was stated that the enforcement of Andorran judgments in France was not subjected to the formality of recognition of a judgment as ruled by The First Civil

[156] See Article 43 (1) of the Constitution of the Principality of Andorra – "*[C]oprínceps are, jointly and indivisibly, the Cap de l'Estat* <...>" Available at: http://www.andorramania.com/constit_gb.htm.
[157] "*Drozd and Janousek v. France and Spain* (Plenary), no. 12747/87," 26 June 1992, para. 87.
[158] Ibid, para. 88.
[159] Article 66 (1) (current 59 (1)) of 1950 version of ECHR. "*This Convention shall be open to the signature of the members of the Council of Europe.* <...>."
[160] The legal term derived from Latin consists of the words "com - together" and "dominium - sovereignty", which together mean a territory governed by more than one state.
[161] "*Drozd and Janousek v. France and Spain* (Plenary), no. 12747/87," 26 June 1992, para. 89.
[162] Ibid, para. 89-90.
[163] Ibid, para. 91.
[164] Ibid, para. 91.
[165] Ibid, para. 93.

Division of the Court of Cassation[166]. The Spanish government argued that the Andorran courts do not give their rulings based on the sovereignty of France and Spain; however, on behalf of Andorra[167].

In this case, it has also been established by the Court that judges from France and Spain are members of the Andorran courts, but they do not exercise their function as French or Spanish judges; in addition, Andorran courts, in particular, the Tribunal de Corts, exercised its functions independently, and judgments of Andorran courts are not subject to the review of the French or Spanish authorities[168]. Furthermore, the Court established that there was no sign that would prove any attempt to interfere with the trials' examined in Andorra by French or Spanish authorities in the case-file[169]. In a sense, the ECtHR upheld the objection *ratione personae* that France and Spain lacked jurisdiction under Article 1 of the Convention concerning Article 6 of the Convention (right to a fair trial).

In this regard, as Court already mentioned, "the acts of authorities producing effects outside their territory" should be regarded as within the jurisdiction of the concerned State Party since the State Party, by its act, *de facto* controls such effects; in other saying, acts of the authorities is the reason for effects that have produced. If there were no acts, there would be no effects. "The acts of authorities producing effects outside their territory" are visible factors that generate imputability to the State Party. Furthermore, the Court has mentioned an "attempt to interfere with trials in another state", which can be included in such factors.

3.3.2. Acts of diplomatic or consular agents (M. v. Denmark)

In 1988, the applicant entered the premises of the Danish Embassy in (East) Berlin in an attempt to travel with 17 other citizens of the former German Democratic Republic from East Germany (the German Democratic Republic or DDR) to West Germany (Federal Republic of Germany)[170]. At the request of the Danish ambassador, the German Democratic Republic police entered the Embassy, requesting the applicant and his friends to leave the Embassy and come with them; in the words of the applicant, he spent 33 days in custody and was eventually sentenced to probation[171]. The applicant complained that his transfer to the East German police (hereinafter –

[166] "*Drozd and Janousek v. France and Spain* (Plenary), no. 12747/87," 26 June 1992, para. 93.
[167] Ibid, para. 94.
[168] Ibid, para. 96
[169] Ibid, para. 96.
[170] "*M. v. Denmark* (decision of the Commission), no. 17392/90," 14 October 1992, para. 2-6.
[171] Ibid, para. 2-6.

DDR) had violated his right to liberty and security; and that by being forced to leave the Danish embassy, he had been deprived of his right to move freely on Danish territory[172].

The Commission has established the jurisdiction of Denmark due to the acts of the Danish ambassador by noting as follows:

> It is clear, in this respect, from the constant jurisprudence of the Commission that authorised agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged […]. Therefore, in the present case the Commission is satisfied that the acts of the Danish ambassador complained of affected persons within the jurisdiction of the Danish authorities within the meaning of Article 1 of the Convention.[173]

Thus, the applicant fell within the jurisdiction of Denmark to the extent that the Danish ambassador exercises authority over the applicant. Moreover, the Danish ambassador affected such a person by his act. As it is already visible, the present case shares similarity with the *Soering* case (see Chapter 3.2.) since, contrary to the German Democratic Republic, Denmark is a party to the Convention, and DDR police detained them. Commission touched on that similarity by explaining as follows:

> [T]hat an act or omission of a Party to the Convention may exceptionally engage the responsibility of that State for actions of a State not a party to the Convention where the person in question had suffered or risks suffering a flagrant denial of the guarantees and rights secured to him under the Convention (cf. Eur. Court H.R., Soering judgment of 7 July 1989, Series A no. 161). The Commission finds, however, that what happened to the applicant at the hands of the DDR authorities cannot in the circumstances be considered to be so exceptional as to engage the responsibility of Denmark.[174]

The European Commission of Human Rights didn't consider conduct imposed on the applicant by DDR authorities as exceptional circumstances that would engage the responsibility of Denmark. In this regard, acts or omissions of diplomatic or consular agents at the extent of exercised authority over a person or property and its effect on the person or property generate imputability to the State Party. However, to engage responsibility to State Party, the following conduct must contain the "risk of suffering a flagrant denial of the guarantees and rights secured to him or her under the Convention"[175].

[172] "*M. v. Denmark* (decision of the Commission), no. 17392/90," 14 October 1992, para 4-8.
[173] Ibid, para. 1 (The law).
[174] Ibid, para. 1 (The law).
[175] Ibid, para. 1 (The law).

3.3.3. Political and military support to the illegal regimes (Loizidou v. Turkey)

On 23 March 1995, the applicant lodged an application to the ECtHR for a violation of her property rights under Article 1 of Protocol No. 1 (P1-1) as the occupying Turkish armed forces prevented her from benefiting from her property located in Northern Cyprus[176]. In the case, state jurisdiction or imputability issue has been raised since the Turkish Government has submitted a preliminary objection, and the applicant underlined the exceptionality of the case, as the authority complained that interference with the right to the peaceful enjoyment of properties is not sole legitimate Government of the territory in which the property is situated[177]. At this moment, it is noteworthy to indicate that "on 18 November 1983, the United Nations Security Council adopted Resolution 541 (1983) declaring the proclamation of the establishment of the "TRNC" legally invalid and calling upon all States not to recognise any Cypriot State other than the Republic of Cyprus"[178].

The applicant maintained that Turkey, as occupying state of the northern part of the island, is the only state that can be held responsible for the violations of human rights since the "Turkish Republic of Northern Cyprus – TRNC" was not recognised by any other state, except Turkey and international organisation, furthermore on the northern part of the island there would be formed vacuum concerning responsibility for human rights violations, which is contrary to the principle of effectiveness indicated in the Convention[179]. However, the Turkish Government denied having jurisdiction in the northern part of the island within the meaning of Article 1 of the Convention and argued for exercising effective and overall control over the TRNC[180].

Court reiterated its previous interpretations on state jurisdiction as was indicated in cases *Soering*, *Drozd and Janousek*; however, in this case, Court has developed its case-law and added as follows:

> [I]n conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[181]

[176] "*Loizidou v. Turkey*, no. 15318/89," 18 December 1996, para. 26-27.
[177] Ibid, para 32 and 49.
[178] "*Cyprus v. Turkey* [GC], no. 25781/94," 10 May 2001, para. 14.
[179] "*Loizidou v. Turkey*, no. 15318/89," 18 December 1996, para. 49.
[180] Ibid, para. 51.
[181] Ibid, para. 52.

The Court applied the rule mentioned above to the present case and examined whether the applicant's denial of access to her property could fall within the jurisdiction of Turkey within the meaning of Article 1 of the Convention, so be imputed to the latter. The Court emphasised that a large number of Turkish military forces carried out active duties in Northern Cyprus, and it was evident that her military forces exercised effective overall control over the area concerned; such control, considering the relevant test and circumstances, entails her responsibility for the actions and policies of "TRNC"[182]. It is also noteworthy to refer to Marko Milanovic's arguments as he indicates that the Court in the present case used imprecise terminology, such as "responsibility" of State Parties "under Article 1", which means that the Court didn't make a difference between the responsibility and the "state jurisdiction"; accordingly it was not understandable by the outside observers[183].

Finally, Court has stated its conclusion that "[t]he continuous denial of the applicant's access to her property in Northern Cyprus and the ensuing loss of all control over the property is a matter which falls within Turkey's "jurisdiction" within the meaning of Article 1 (art. 1) and is thus imputable to Turkey[184]."

Hence, considering the interpretation of the Court, exercised control over an area outside of the national territory could be regarded as a factor that generates imputability to the State Party regardless of whether such control was lawful or unlawful, or directly exercised or by way of armed forces or subordinate local administration[185].

3.3.4. Acts and omissions of the illegal authority (Cyprus v. Turkey)

Our subsequent case is an inter-state case brought by Cyprus against Turkey. The case is related to the continuing division of the territory of Cyprus[186]. The Cypriot Government requested the Court to "decide and declare that the respondent State is responsible for continuing violations and other violations of Articles 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 13, 14, 17 and 18 of the Convention and Articles 1 and 2 of Protocol No. 1"[187]. It is necessary to point out that in the *Loizidou* case, the

[182] "*Loizidou v. Turkey*, no. 15318/89," 18 December 1996, para. 56.
[183] Marko Milanovic, "Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court," in *The ECHR and General International Law*, Anne van Aaken, Iulia Motoc (Oxford: Oxford University Press, 2018), 103-104.
[184] "*Loizidou v. Turkey*, no. 15318/89," 18 December 1996, para. 57.
[185] Ibid, para. 52-56.
[186] See Press release issued by the Registrar: Registry of the European Court of Human Rights. *Judgment in the case of Cyprus v. Turkey*. Available at: https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-68489-68957%22]}.
[187] "*Cyprus v. Turkey* [GC], no. 25781/94," 10 May 2001, para. 18.

applicant's rights and freedoms were violated by the Turkish armed forces; in the present case, Cyprus brought allegations against Turkey for the acts and omissions of the TRNC authorities.

Hereby, we will directly focus on the issue of imputability. In the case, the Court has referred to the *Loizidou* case several times, as it has addressed some key issues within itself. The Court, in addition to explanations on jurisdiction issue in the *Loizidou* case, has stressed out additional remarks as follows:

> 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.[188]

This interpretation has also been mentioned in our next *Banković* case[189]. Consequently, in the cases where State Party has overall control over an area, it is not decisive and crucial whether the complained acts are done by the State Party's officials or by the officials of the illegal authority that survives by virtue of the State Party's military and other support. Moreover, the extension of the jurisdiction, principally, means the extension of the obligation to secure the entire range of substantive rights set out in the Convention and those additional Protocols that the State Party has ratified.

3.3.5. Collective military operation (Banković and others v. Belgium and others)

Six applicants (whose relatives were deceased – one applicant was injured), residents of Belgrade, lodged a complaint to the ECtHR against 17 NATO Member States, which are also parties to the Convention, by invoking Article 2 (the right to life), Article 10 (freedom of expression) and Article 13 (the right to an effective remedy) and by complaining about the bombing of *Radio Televizije Srbije* (hereinafter – RTS) headquarters by NATO aircrafts, resulting in 16 deaths, 16 serious injuries and material damage to the building[190].

Governments concerned argued that the application is incompatible *ratione personae* with the provisions of the Convention since applicants and their deceased relatives didn't fall within the jurisdiction of the respondent States[191]. Contrary to the Governments concerned, applicants relied

[188] "*Cyprus v. Turkey* [GC], no. 25781/94," 10 May 2001, para. 77.
[189] "*Banković and others v. Belgium and others* [GC] (dec.), no. 52207/99," 12 December 2001, para. 70.
[190] Ibid, para. 9-11 and 28.
[191] Ibid, para. 35.

on the "effective control" criteria developed in *Loizidou's* judgment and suggested that "jurisdiction" could be determined by adopting such criteria[192]. Furthermore, applicants have based their arguments on the *Soering* case as well by stating that the decisions concerning carrying out an airstrike had been taken on the territory of the respondent States, so the extra-territorial effect of prior decisions can be the reason for the establishment of the jurisdiction as it was in *Soering* case[193].

Court has pointed out the meaning and relevant principles of jurisdiction in international law and concluded that "[a]rticle 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case [...].[194]"

The court, by referring to *Al-Adsani v. the United Kingdom* case,[195] explained that in the cases of extradition or expulsion, liability is incurred by the action of the respondent State while the applicant was in the territory of the respondent State, clearly within its jurisdiction, and in such circumstances respondent State doesn't exercise State's competence or jurisdiction abroad[196]. Furthermore, Court, after analysing the case law, has indicated that "[r]ecognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when 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.[197]"

Hence, the Court has exposed aspects that generate imputability of the alleged violation of the Convention to the State Party, as mentioned factors constitute extra-territorial jurisdiction within the meaning of Article 1 of the Convention. So, exercising all or some of the public powers is usually to be exercised by the local authorised Government:

a) through effective control over relevant territory, persons or property; or

b) through consent, invitation or acquiescence of the Government of the territory,

is regarded as an aspect that generates imputability to the State Party, as it constitutes extra-territorial jurisdiction[198].

Furthermore, Court has made a difference from the *Cyprus* case by noting that inhabitants of northern Cyprus were already enjoying these conventional benefits since Cyprus was

[192] "*Banković and others v. Belgium and others* [GC] (dec.), no. 52207/99," 12 December 2001, para. 46.
[193] Ibid, para. 53.
[194] Ibid, para. 61.
[195] "*Al-Adsani v. the United Kingdom* [GC], no. 35763," 21 November 2001, para. 39.
[196] "*Banković and others v. Belgium and others* [GC] (dec.), no. 52207/99," 12 December 2001, para. 68.
[197] Ibid, para. 71.
[198] Ibid, para. 71.

Contracting Party, and inhabitants found themselves excluded from these benefits due to Turkey's effective control over territory and inability of the Cypriot Government to fulfil the obligations under the Convention[199].

However, ECtHR was not persuaded that there was any jurisdictional link between victims and respondent States; it was underlined that "[t]he Convention is a multilateral treaty operating, subject to Article 56 of the Convention, 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.[200]"

This conclusion of the Court remained controversial. L. Loucaides, former judge of ECtHR, specified his criticism that: the Court's statement, which states that "extra-territorial jurisdiction is exceptional, requiring special justification in the particular circumstances of each case", is problematic, vague and legally unworkable, as term "jurisdiction" can have only one acceptable meaning, therefore there cannot be several meanings of the same term, which can be adjusted in exceptional cases based on "special justifications"[201].

Furthermore, in his concurring opinion in the *Assanidze* case, Judge of the ECtHR L. Loucaides remarked his disagreement with the *Banković* judgment as follows: "To my mind "jurisdiction" means actual authority […]. And it may, in my opinion, take the form of any kind of military or other State action on the part of the High Contracting Party concerned in any part of the world.[202]" In this regard, Judge L. Loucaides believed that this decision hampered the effort to achieve the effective promotion of and respect for human rights by the States Parties to the Convention concerning the exercise of any State activity within or outside their country[203].

3.3.6. The Autonomous Republic within the territory of State Party (Assanidze v. Georgia)

The present judgment of the ECtHR concerned the illegal imprisonment of a Georgian national by Ajarian authorities within the territory of the Ajarian Autonomous Republic in violation of the Convention even though the Presidential Decree pardoned the applicant afterwards acquitted by presidential pardon, moreover acquitted by the Supreme Court of Georgia[204]. Issues

[199] "*Banković and others v. Belgium and others* [GC] (dec.), no. 52207/99," 12 December 2001, para. 80.
[200] Ibid, para. 80.
[201] Loukis G. Loucaides, *The European Convention on Human Rights*: *Collected Essays* (Leiden: Brill, 2007), 78.
[202] Concurring opinion of judge Loucaides in case of "*Assanidze v. Georgia* [GC], no. 71503/01," 8 April 2004.
[203] Loukis G. Loucaides, *The European Convention on Human Rights*: *Collected Essays* (Leiden: Brill, 2007), 94.
[204] "*Assanidze v. Georgia* [GC], no. 71503/01, 8 April 2004, para. 20-99.

had been seen between the central government and the local Ajarian authorities, as the applicant was not released despite being acquitted by the Supreme Court of Georgia, nonetheless remained in the custody of the local Ajarian authorities[205]. Hereby, we will directly pass on the jurisdiction and imputability issue in the case.

Court has established a presumption of competence within the territory of Ajarian Autonomous Republic that "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.[206]"

Subsequently, the Court established Georgian jurisdiction by finding such presumption correct since the Ajarian Autonomous Republic had no separatist aims and that no other State exercised effective overall control there[207]. Moreover, the Court has exposed the difference between Loizidou v. Turkey case by stating that in the Loizidou case zone, the concerned was under the effective control of another State; however, no other State except Georgia exercised control in the present case - so had jurisdiction - over the Ajarian Autonomous Republic[208]. Court has indicated that responsibility lies with the Georgian State, not with a domestic authority or organ; therefore, allegations of the violations fall within the jurisdiction of Georgia within the meaning of Article 1 of the Convention[209].

In the present case, through competence and control over an integral part of the State, namely the Autonomous Republic, the State Party had jurisdiction within the meaning of Article 1 of the Convention and, therefore, had also the competence and control over an integral part of the State – such aspects, in this case, were generating imputability to the State Party.

3.3.7. Collaboration with an illegal authority and failure to discharge positive obligations (Ilaşcu and others v. Moldova and Russia)

The present case is against both Moldova and Russia. Before giving facts of the case, we need to underline that Court has established jurisdiction of both Respondent States in the present case. The circumstances of the case are as follows: on 4 June 1992, the applicants were arrested at their home in Tiraspol by officers, and some of the arresting officers were wearing the uniforms

[205] "*Assanidze v. Georgia* [GC], no. 71503/01, 8 April 2004, para. 47-59.
[206] Ibid, para. 139.
[207] Ibid, para. 140-143.
[208] Ibid, para. 144.
[209] Ibid, para. 149-150.

of the Fourteenth Army of the former United Soviet Socialist Republics (USSR)[210]. The applicants have been found guilty of murdering a representative of the Moldavian Republic of Transdniestria (hereinafter – MRT) and other terrorism-related charges[211]. On 9 December 1993 Transnistrian Supreme Court sentenced the first applicant to death and confiscation of his properties and sentenced other applicants to imprisonment, respectively, from 12 to 15 years and confiscation of their properties[212].

The ECtHR has reiterated its arguments with regard to the primacy of territorial jurisdiction and limitation thereto in exceptional circumstances as referred to in *Loizidou* and *Banković* cases; however, concerning such limitation in exceptional circumstances added that "this presumption may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory. That may result from [...] acts of war or rebellion, or the acts of a foreign State supporting the installation of a separatist State within the territory of the State concerned.[213]" Furthermore, in the judgment, it was explained how the Court concludes the fact that whether the exceptional circumstances exist, so the ECtHR has to examine:

a. the objective facts that might limit the effective exercise of a State's authority over its territory;
b. the State's own conduct[214].

In this regard, point a. limitation of effective exercise of Moldovan authorities over its - Transdniestrian – territory would be related to the establishment of the jurisdiction of the Russia, and point b. The state's own conduct would be associated with the establishment of the jurisdiction of Moldova within the meaning of Article 1 of the Convention.

The Russian Government alleged that the Russian Federation had not any jurisdiction within the meaning of Article 1 of the Convention towards acts complained of. On the contrary, by referring to the Loizidou case, the Moldovan Government had clearly asserted that responsibility for the acts complained falls within the jurisdiction of the Russian Federation, as the latter had stationed its military troops and equipment in Transdniestrian territory[215]. The applicants alleged that the Russian Government recognised MRT and that MRT was, in fact, a puppet of the Russian Government[216].

The Court has divided examination of the state jurisdiction issue before the ratification and after the ratification of the Convention by Russia. With regard to the period before the ratification,

[210] "*Ilaşcu and others v. Moldova and Russia* [GC], no. 48787/99," 8 July 2004, para. 188.
[211] Ibid, para. 216-219.
[212] Ibid, para. 212-219.
[213] Ibid, para. 312.
[214] Ibid, para. 313.
[215] Ibid, para. 353-363.
[216] Ibid, para. 364-370.

Court has stated that the leaders of the Russian Federation supported separatist authorities through the political declarations, and on top of that, the latter drafted the ceasefire agreement and also signed it as a party[217]. The ECtHR considered that military, political and economic support that was given to Transdniestrian separatists and the participation of the Russian military personnel in the fighting contributed both militarily and politically to the creation of a separatist regime within the territory of the Republic of Moldova and enabled the separatist authority to survive by strengthening itself and by acquiring a certain amount of autonomy, by doing so Russian Federation is regarded as responsible for the unlawful acts committed by the Transdniestrian separatists[218]. The court found Russia to have jurisdiction before the ratification of the Convention as follows:

> [A]pplicants came within the jurisdiction of the Russian Federation within the meaning of Article 1 of the Convention, although at the time when they occurred the Convention was not in force with regard to the Russian Federation. [...] [A]ll of the acts committed by Russian soldiers with regard to the applicants, including their transfer into the charge of the separatist regime, in the context of the Russian authorities' collaboration with that illegal regime, are capable of engaging responsibility for the acts of that regime.[219]

Furthermore, in the judgment, it was explained whether such support remained after the ratification of the Convention by Russia; Court has stated that:

> [M]RT 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. [S]o, [...] there is a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate, as [...] the Russian Federation made no attempt to put an end to the applicants' situation brought about by its agents, and did not act to prevent the violations allegedly committed after 5 May 1998.[220]

Considering all the facts and circumstances, the Court has concluded that applicants come within the jurisdiction of the Russian Federation within the meaning of Article 1 of the Convention[221].

With regard to the jurisdiction of Moldova, Court has pointed out that even in the cases when the exercise of the State's authority is limited in part of its territory, States Parties still have positive obligations to take all appropriate measures, which are still within their powers to take[222]. In this regard, Court has established jurisdiction of Moldova by stating that "[e]ven in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under

[217] "*Ilaşcu and others v. Moldova and Russia* [GC], no. 48787/99," 8 July 2004, para. 381.
[218] Ibid, para. 382.
[219] Ibid, para. 384-385.
[220] Ibid, para. 392-393.
[221] Ibid, para. 394.
[222] Ibid, para. 313.

Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.[223]" G. Yudkivska says that the argument of the Court clearly means that the territorial State is excluded of its positive obligations in the cases when nothing can practically be done to preserve human rights standards in the territory of the State Party concerned[224].

Hence, Moldova was found responsible as well on account of its failure to discharge its positive obligations. Such finding of the Court has subjected to the criticism of the judges, and the separate opinion of Judge Loucaides expresses the possible errors of such finding as follows:

> In other words, it would, in my opinion, be a fallacy to accept that 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. Such a position would in my view 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. I believe that the interpretation of a treaty should avoid a meaning which leads to a result which is manifestly absurd.[225]

Considering the soul of the Convention together with the reality, we, while agreeing with the judge's opinion, still consider that such positive obligations should be examined on a case-by-case basis for each particular case, as generalising the legal solution under such complex cases would also be a fallacy. Moreover, G. Yudkivska suggests that the occupied State Party would have jurisdiction under Article 1 of the Convention when a connection exists between this State and the occupation regime, since just in this situation is the State "still within its power to take" some measures[226]. Christos Rozakis, former ECtHR judge and Vice President of the Court, stressed that the Court had constructed the question of positive obligations within the notion of jurisdiction, thus disregarding the test of effective control that is necessary for the establishment of the state jurisdiction[227].

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[223] "*Ilaşcu and others v. Moldova and Russia* [GC], no. 48787/99," 8 July 2004, para. 331.
[224] Ganna Yudkivska, "Territorial Jurisdiction and Positive Obligations of an Occupied State: Some Reflections on Evolving Issues under Article 1 of the Convention," in *The ECHR and General International Law*, Anne van Aaken, Iulia Motoc (Oxford: Oxford University Press, 2018), 143.
[225] Partly dissenting opinion of Judge Loucaides in the case of *Ilaşcu and others v. Moldova and Russia* [GC].
[226] Ganna Yudkivska, "Territorial Jurisdiction and Positive Obligations of an Occupied State: Some Reflections on Evolving Issues under Article 1 of the Convention," (Oxford: Oxford University Press, 2018), 144.
[227] Christos Rozakis, "The Territorial Scope of Human Rights Obligations: The Case of the European Convention on Human Rights" in *The Status of International Treaties on Human Rights* (Council of Europe Publishing, 2005) 57–74.

Thus, we have two sides of the coin in the present case. Firstly, from the perspective of the State Party that provides support to the separatists: effective authority or at the very least under the decisive influence over the particular separatist authority and collaboration with illegal authority within the territory of another State Party could be regarded as an aspect that generates imputability to the State Party (see para. 384-393). Furthermore, such imputability of the acts complained of becomes continuous if the separatist authority survives with the help of the military, economic, financial and political support of the State Party (see para. 392-393). Secondly, from the State Party's perspective, jurisdiction was limited to some extent: failure to take the diplomatic, economic, judicial or other measures that it is still in its power would be regarded as an aspect that generates imputability.

3.3.8. Military operation on foreign soil (Issa and others v. Turkey)

Six women from northern Iraq complained to the ECtHR, alleging that their deceased relatives - shepherds - near the Turkish border had encountered Turkish soldiers allegedly carrying out military operations in the mountains and that Turkish soldiers had firstly taken shepherds away and afterwards killed them[228]. However, as the facts of the case were in dispute between the applicants and the respondent State, the respondent Government stated that the records of the armed forces don't show any presence of Turkish soldiers in the area indicated[229]. Also, near the area where shepherds were seen with the Turkish soldiers were found bodies, and on the bodies were found several bullet wounds, and their bodies had been inhumanly mutilated - ears, tongues, and genitals were missing[230].

The respondent Government, based on the *Banković* case and maintained that the "jurisdiction" was not synonymous with the mere presence of soldiers for a limited time and a limited purpose in northern Iraq; contrary to this, applicants based on "effective overall control" approach developed in *Loizidou* judgment by pointing out circumstantial difference with *Banković* case, as shepherds were targeted, murdered and mutilated[231].

Considering the general principles with regard to "state jurisdiction" within the meaning of Article 1 of the Convention and reiterating its previous findings in *M. v. Denmark* and *Loizidou v. Turkey* cases Court has said that the "accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted to allow a State party to perpetrate violations of

[228] "*Issa and others v. Turkey*, no. 31821/96," 16 November 2004, para. 12-18.
[229] Ibid, para. 25.
[230] Ibid, para. 19.
[231] Ibid, para. 62-64.

the Convention on the territory of another State, which it could not perpetrate on its own territory.[232]"

In this regard, States Parties are not allowed to violate provisions of the Convention even outside of their respective territory. The ECtHR established that Turkey had jurisdiction by stating that "[a]s 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 […].[233]"

In this case, contrary to the *Banković* case, Court accepted that even temporary exercising of effective control would cause a jurisdictional link with the respondent State. However, due to a lack of evidence that the Turkish armed forces conducted the military operation, Court could not establish jurisdiction of Turkey[234]. Nevertheless, temporary effective control during the military operation abroad is regarded as an aspect that generates imputability to the State Party.

3.3.9. Subsidiary organs under international organisations (*Behrami* and *Saramati* case)

In the *Behrami* case, the main complaint concerned the fact that in 2000 the boy playing with his friends in the Mitrovica region for which security was responsible, the French-led multinational brigade (one of the four brigades of the international security assistance force (KFOR) authorised by UN Security Council Resolution 1244 of 10 June 1999), found an unexploded cluster bomb, which was dropped during the 1999 NATO bombing, and believing it was safe threw it in the air, so non-detonated cluster bomb exploded, consequently killed one child, and another was seriously injured[235]. The relatives of the children applied to the ECtHR to recognise France's liability for the incident in breach of Article 2 of the Convention[236].

In the *Saramati* case, the applicant Saramati was arrested by UNMIK police and re-arrested by order of the KFOR Commander, adopted based on the UN mentioned above Security Council Resolution 1244 (1999), as the applicant was considered to be a threat to security; consequently,

[232] "*Issa and others v. Turkey*, no. 31821/96," 16 November 2004, para. 71.
[233] Ibid, para. 74.
[234] Ibid, para. 81.
[235] "*Behrami and Behrami* v. *France* and *Saramati* v. *France, Germany and Norway* (dec.) [GC], no. 71412/01 78166/01," 2 May 2007, para. 5-7.
[236] Ibid, para. 61.

the applicant complained to the ECtHR that there had been a violation of Articles 5, 6 and 13 as regards his detention by, and on the orders of, KFOR[237].

By referring to KFOR's duties outlined in the MTA, in UNSC Resolution 1244, applicants maintained that KFOR was responsible for de-mining in the region[238]. In regards Saramati case, the commander of KFOR was not accountable to NATO, and ordering detention was a separate exercise of jurisdiction by each commander of KFOR[239]. Finally, applicants alleged that State Parties are still responsible while they are acting within the body of the international organisation, as there was no conflict between the Resolution 1244 (1999) and the Convention; moreover, they have relied on the presumption of the "equivalent" protection that was established in *Bosphorus* case[240].

In their submission, respondent States and third parties argued the applicants' arguments by invoking that the applicants did not fall within the scope of the jurisdiction of the respondent States, as they were acting within the bodies of international bodies, namely NATO and UN[241].

The Court considered that ultimate authority and control belongs to UNSC in delegating its security powers by UNSC Resolution 1244[242]. Further, the ECtHR indicated that the commander of KFOR was performing his duties related to issuing detention orders, and it was not a break in a unified command structure as commander of KFOR, as at all times, the latter was responsible to NATO through a chain of command, so the action of KFOR (detention in *Saramati*) attributable to UN[243]. Moreover, it noted that the inaction of UNMIK (failure to de-mine in *Behrami*) is still attributable to the UN, as it was a subsidiary body of the UN[244].

The Court has exposed the difference between the present and the *Bosphorus* case by pointing out that in the *Bosphorus* case, the alleged act was conducted by the authorities of the State Party within its national territory and through the decision of its Ministers; however, in the present cases alleged acts and omissions cannot be imputed to the respondent States, as they committed by KFOR and UNMIK; furthermore, the events took place outside of the national territory of respondent States or were not the outcome of the decisions of their authorities[245].

The ECtHR underlined that UNMIK was created under Chapter VII of the UN, and KFUR was performing its delegated duties under Chapter VII of the UN by the UNSC; consequently, the

[237] "*Behrami and Behrami* v. *France* and *Saramati* v. *France, Germany and Norway* (dec.) [GC], no. 71412/01 78166/01," 2 May 2007, para. 62-63.
[238] Ibid, para. 73.
[239] Ibid, para. 78.
[240] Ibid, para. 80.
[241] Ibid, para. 82-117.
[242] Ibid, para. 134.
[243] Ibid, para. 139-141.
[244] Ibid, para. 142-143.
[245] Ibid, para. 151.

actions of these bodies were directly attributable to the UN, that have universal jurisdiction to fulfil its imperative collective security objective[246]. Therefore, the Court found that complaints must be declared incompatible *ratione personae* with the provisions of the Convention.

Hence, Court concluded that applicants don't fall within the jurisdiction of the respondent States within the meaning of Article 1. In the present case, Court simply established that acts or omissions of the subsidiary bodies within the international organisations could be imputable to the international organisation concerned; in so doing Court didn't even consider whether such action or inaction of the bodies concerned was the outcome of a right that the subsidiary organisations realised. However, as it was given in 2007, this decision is not in-line with the further case-law of the ECtHR. We will see the reason behind it in further cases.

3.4. The concept of "the state jurisdiction" from 2010 until today

3.4.1. Alternative measures within the framework of international obligations (M.S.S. v. Belgium and Greece)

In the present case, the Court's explanation of the "state jurisdiction" has increased the obligation levels undertaken by the States Parties. Applicant entered the territory of the European Union via Greece, then fled to Belgium and submitted an asylum application there; however, under the Dublin Regulation[247], which is a directly applicable instrument in the EU Member States and identifies, among other things, which EU country is responsible for examining an asylum application, the Belgian authorities decided to send the applicant to Greece, as it was responsible for the examination of applicant's asylum application under the Dublin Regulation[248]. The applicant complained that his expulsion was in violation of Articles 2 and 3 of the Convention and that in Greece, he had been subjected to prohibited treatment by Article 3, also that there was a lack of a remedy under Article 13 of the Convention[249].

The Belgian Government alleged that it was not responsible for examining the applicant's request for asylum, as it is provided in the Dublin Regulation[250]. However, due to third-party interveners' observations, the ECtHR drew attention to the case of *Bosphorus Hava Yolları Turizm*

[246] "*Behrami and Behrami* v. *France* and *Saramati* v. *France, Germany and Norway* (dec.) [GC], no. 71412/01 78166/01," 2 May 2007, para. 151.
[247] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003, p. 1–10.
[248] "*M.S.S. v. Belgium and Greece* [GC], no. 30696/09," 21 January 2011, para. 11-30.
[249] Ibid, para. 3.
[250] Ibid, para. 326.

ve Ticaret Anonim Şirketi v. *Ireland,* in which the ECtHR established the relationship between "equivalent protection" under European Union law and the Convention and the obligations of EU Member States. Court mentioned as follows[251]:

> The States nevertheless remain responsible under the Convention for all actions and omissions of their bodies under their domestic law or under their international legal obligations. State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides. However, a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it exercised State discretion.[252]

In that case, the ECtHR found that European Union law could be regarded as "equivalent" to the protection of the Convention system at the relevant time[253]. Furthermore, in the present case, the Court reiterated its finding in the case of *Waite and Kennedy v. Germany*[254] that when States cooperate in a specific area that might have an impact on the protection of Conventional rights, it would be incompatible with the purpose and object of the Convention if States Parties concerned were exempted from all responsibilities raised from such cooperation[255].

With regard to the application of the Dublin Regulation, the Court has indicated that "[t]he States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention.[256]"

Moreover, the Court noted that Article 3(2) of the Dublin Regulation enshrined the so-called "sovereignty" clause that provides an opportunity to examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation[257]. Considering provisions of the Dublin Regulation, the Court concluded that if Belgian authorities had considered that Greece was not fulfilling its obligations under the Convention, they could have avoided transferring the applicant; therefore, a transfer of the applicant by the Belgian authorities did not strictly fall within Belgium's international legal obligations, accordingly stated that the presumption of equivalent protection does not apply in the present case[258]. Finally, The ECtHR found that there had been a violation of

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[251] "*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* ([GC], no. 45036/98," 30 June 2005, para. 152-157.
[252] "*M.S.S. v. Belgium and Greece* [GC], no. 30696/09," 21 January 2011, para. 338.
[253] "*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* ([GC], no. 45036/98," 30 June 2005, para. 165.
[254] "*Waite and Kennedy v. Germany* [GC], no. 26083/94," 18 February 1999, para. 67.
[255] "*M.S.S. v. Belgium and Greece* [GC], no. 30696/09," 21 January 2011, para. 342.
[256] Ibid, para. 342.
[257] Ibid, para. 339.
[258] Ibid, para. 340.

Article 3 of the Convention on the ground that the Belgian authorities knew or ought to have known that asylum seekers in Greece could be treated unfairly and were neither provided with a minimum standard of living nor will their requests be properly examined in accordance with the standards required by the Convention[259].

Hence, alternative measures or, more precisely, the right to apply more favourable measures that are provided in the legal provisions that the State Party undertakes within the body of the international organisation are regarded as an aspect that generates imputability to the latter within the meaning of Article 1 of the Convention.

3.4.2. State Party's separate effective control on the conduct within the UN

Hereby, we will assess two cases against the UK under the same title, as both cases were concluded on the same day by the Grand Chamber of the ECtHR. In the cases, facts are different, but the main issue at stake is the establishment of the state jurisdiction under Article 1 of the Convention, where the State Party alleges that it acts within the body of the UN. Furthermore, cases include the concept of the effective control of the international organisations that clearly expose or distinguish, in our point of view, whether the State Party or the International Organisation had jurisdiction over the conduct. In both cases, the ECtHR departed from its position in its previous cases of the *Behrami and Saramati* and *Banković* and developed its interpretation of the concept of the "state jurisdiction" within the meaning of Article 1 of the Convention. Accordingly, it has led to the enlargement of the “state jurisdiction” concept, imposing more obligations on the State Parties. M. Milanovic also says that in terms of the quality of the reasoning in the cases of *Al-Skeini* and *Al-Jedda,* the Court has taken lessons from *Banković* and *Behrami*[260]. The first case will be examined deeply; the second one will be shorter to prevent repetition.

3.4.2.1. Al-Jedda v. The United Kingdom

In the present case, the ECtHR examined the concept of "State's jurisdiction" under Article 1 of the Convention in the events where the State Party seems to perform its obligations under the

[259] "*M.S.S. v. Belgium and Greece* [GC], no. 30696/09," 21 January 2011, para. 353-368.
[260] Marko Milanovic, "Al-Skeini and Al-Jedda in Strasbourg," *European Journal of International Law* 23, 1 (2012):139.

United Nations. The case is related to the internment[261] of an Iraqi civilian in a detention centre in Basra, Iraq, which was run by British forces for more than three years[262].

The respondent Government, by relying on *Behrami and Saramati* case, denied that the detention of the applicant fell within the jurisdiction of the United Kingdom and claimed that such an act was attributable to the UN as a universal international organisation, whereas, in the present case, the British army did not exercise the sovereign authority of the United Kingdom, however, the international authority of a Multinational Force (hereinafter – MF), which was acting in accordance with a binding decision of the United Nations Security Council[263]. However, the applicant claimed that there is no use of language in Resolution 1511 that would support the Government's interpretation that the responsibility shifts from the UK to the UN since paragraph 1 of Resolution 1511 recognised not the UN but the Coalition Provisional Authority (hereinafter – CPA), and it could exercise authority until a representative government could be established[264].

In the case, it was cited as a part of the judgment[265] of the International Court of Justice (hereinafter – ICJ) on Article 103 of the UN Charter, stating that Article 103 of the UN Charter stipulates that the obligations of the Member States of the UN prevail over conflicting obligations under another international treaty, whether or not it was concluded before, or after the establishment of the UN[266]. In addition, the Court has referred to the case of *Libyan Arab Jamahiriya v. the United Kingdom*[267] on the questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie, which was concluded by ICJ, in which it was stated that Article 25 of the UN Charter implies that the obligations of the Member States of the UN under the Security Council Resolution take precedence over any other international obligations arising out of any other international agreement[268].

The Court again has stated that "the jurisdiction" is a threshold criterion, and "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

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[261] See internment (n): the act of putting somebody in prison during a war or for political reasons, although they have not been charged with a crime, accessed on 7th of April, 2022. Available at: https://www.oxfordlearnersdictionaries.com/definition/english/internment.
[262] "*Al-Jedda v. The United Kingdom* [GC], no. 27021/08," 7 July 2011, para. 9-15.
[263] Ibid, para. 64.
[264] Ibid, para. 72.
[265] "*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*," Judgment of International Court of Justice, 26 November 1984, ICJ Reports 1984, 392-443. Available at: https://www.icj-cij.org/public/files/case-related/70/070-19841126-JUD-01-00-EN.pdf.
[266] "*Al-Jedda v. The United Kingdom* [GC], no. 27021/08," 7 July 2011, para. 48.
[267] "*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*," Order of ICJ," 14 April 1992, para. 39. Available at: https://www.icj-cij.org/public/files/case-related/88/088-19920414-ORD-01-00-EN.pdf.
[268] "*Al-Jedda v. The United Kingdom* [GC], no. 27021/08," 7 July 2011, para. 48.

freedoms set forth in the Convention.[269]" The Court addressed the inconsistency of the respondent Government that the latter accepted that the event fell within the jurisdiction of the UK before the Divisional Court and the Court of Appeal; however, the Government only before the House of Lords argued that the applicant did not fall within the jurisdiction of UK, alleging that his detention was attributable to the UN; accordingly, the majority of the House of Lords rejected the Government's argument and found that the detention was attributable to British forces[270].

The ECtHR found that the invasion began on 20 March 2003; however, it indicated that at that time, there was no UN Security Council resolution allocating roles in Iraq to displace the regime in power[271]. The Court noted that on 1 May 2003, the regime was displaced by the UK and USA, followed by the establishment of a CPA to take over government functions temporarily, and one of the powers of the government - provision of security in Iraq - was to be exercised by the UK and USA through the CPA, however, in the letter of UK and USA to the UNSC, it was acknowledged that the role of the UN was to provide humanitarian assistance, to support the reconstruction of Iraq and to assist in the formation of an interim Iraqi authority[272]. The Court further noted that Resolution 1483 did not assign any security role to the UN, nor does the Government claim that the actions of its armed forces at this stage of the invasion and occupation were in any way attributable to the UN[273]. Furthermore, the Court said that the temporary nature of the CPA authority was underlined in Resolution 1511 of the UNSC, as such authority would be ceased when the internationally recognised Iraqi government could swear in[274].

The ECtHR stated that the USA and the UK continued to function as a government in Iraq through the CPA, which was established at the beginning of the occupation by them; moreover, the UN didn't deem any control over either the MF or any other of the governmental functions of the CPA, since the UNSC requested from the USA to periodically report about the activities of the MF[275]. The Court has also mentioned the last relevant Resolution 1546, of which adoption the UNSC reconfirmed the authorisation for the MF established under Resolution 1511; however, the Court from Resolution 1546 considered that the UN still didn't intend to assume any control over the MF[276]. The Court further noted that the UNSC periodically received reports from the Secretary-General and the United Nations Assistance Mission for Iraq (hereinafter – UNAMI) that argued the extent of the security internment used by the MF[277]. Moreover, the UNSC resolution explicitly

[269] "*Al-Jedda v. The United Kingdom* [GC], no. 27021/08," 7 July 2011, para. 74.
[270] Ibid, para. 75.
[271] Ibid, para. 77.
[272] Ibid, para. 71-77.
[273] Ibid, para. 78.
[274] Ibid, para. 79.
[275] Ibid, para. 80.
[276] Ibid, para. 81.
[277] Ibid, para. 82.

or implicitly didn't require the UK to place an individual whom its authorities perceived to constitute a risk to the security of Iraq in indefinite detention without charge[278].

The Court referred to the test that the International Law Commission established in Article 5 of its Draft Articles on the Responsibility of International Organisations and in its commentary[279], which states that "the conduct of an organ of a State placed at the disposal of an international organisation should be attributable under international law to that organisation if the organisation exercises effective control over that conduct", therefore the ECtHR considered that UNSC had not had any effective authority and control over the acts and omissions of the MF, accordingly, detention of the applicant was not imputable to the UN[280].

The Court, in accordance with its case-law,[281] said that the British forces exclusively controlled the detention facility, and the applicant was therefore within the authority and control of the United Kingdom; moreover, such a decision to hold the applicant in internment was made by the British officer in charge in the detention facility[282]. Consequently, the ECtHR "agreed with the majority of the House of Lords that the internment of the applicant was attributable to the United Kingdom and that during his internment, the applicant fell within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention.[283]"

As it is apparent that separate exercise of effective authority or control on the events or conducts generates the imputability to the States Parties, even if they seem to be involved in the performance of its international obligations, where its international obligations do not cover such acts and where the international organisation does not exercise effective control over the conduct, State Party concerned would have jurisdiction within the meaning of Article 1 of the Convention.

3.4.2.2. Al-Skeini and Others v. the United Kingdom

The present case is related to the deaths of the Iraqi civilians; six relatives on behalf of the deceased civilians applied to the ECtHR and complained of the acts committed by the British forces[284]. Hereby, we would like to remind you that these facts occurred in the same circumstances as indicated in the previous *Al-Jedda* case, while the UK and the USA were exercising executive powers in Iraq.

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[278] "*Al-Jedda v. The United Kingdom* [GC], no. 27021/08," 7 July 2011, para. 109.
[279] See "The Report of the International Law Commission on the work of the fifty-sixth session on the Responsibility of International Organisations," 50-52. Accessed on 4th of April, 2022. Available at: https://legal.un.org/ilc/reports/2004/english/chp5.pdf.
[280] "*Al-Jedda v. The United Kingdom* [GC], no. 27021/08," 7 July 2011, para. 84.
[281] See "*Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07," 7 July 2011, para. 136.
[282] "*Al-Jedda v. The United Kingdom* [GC], no. 27021/08," 7 July 2011, para. 85.
[283] Ibid, para. 86.
[284] "*Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07," 7 July 2011, para. 34-71.

The ECtHR, in accordance with its previous case-law,[285] reiterated that the State jurisdiction under Article 1 is primarily territorial, and there is a presumption that it is exercised normally throughout the State's territory; however, in exceptional circumstances, High Contracting Parties exercise extraterritorial jurisdiction within the meaning of Article 1[286]. The Court subsequently explained the State agent authority and control in accordance with its case-law that "whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual.[287]" Moreover, effective control over the area was explained[288].

As regards the conclusion on the jurisdiction of the UK in the present case, the ECtHR pointed out that after the displacement of the Ba'ath regime and until the establishment of the interim Iraqi government, the UK (together with the USA) exercised some of the executive powers, so the UK established authority and had responsibility for the maintenance of security in south-east Iraq; therefore the Court considered such facts as the exceptional circumstances and held that the UK exercised authority and control over individuals killed during such security operations through its soldiers participated in security operations, consequently found that the deceased individuals fall within the jurisdiction of the UK under Article 1 of the Convention[289].

The Court concluded the case in the same way as it has done in the *Al-Jedda* case, that even if State Party seems to be involved in the performance of its international obligations, where its international obligations do not cover such acts and where the international organisation does not exercise effective control over the conduct, State Party concerned would have jurisdiction within the meaning of Article 1 of the Convention.

3.4.3. Implementation of the international obligations at the national level (Nada v. Switzerland case)

The present case concerned the States Parties' compliance with the UN obligations. Facts of the case could be introduced as follows: the Swiss authorities have added the applicant Nada, who lives in the Italian exclave (island) of Switzerland (*Campione d'Italia*), to the federal list of Taliban-linked persons, in the implementation of a UNSC Resolution on sanctions against

[285] See "*Assanidze v. Georgia* [GC], no. 71503/01," 8 April 2004, para. 139, "*Soering v. United Kingdom* (Plenary), no. 14038/88," 7 July 1989, para. 86.
[286] *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07," 7 July 2011, para. 131-132.
[287] Ibid, para. 137.
[288] See ibid, para. 138-140.
[289] Ibid, para. 149.

terrorism[290]. Accordingly, the applicant was unable to leave his place of residence in Italy, and his requests to remove his name from the list of suspected terrorists were dismissed[291].

The ECtHR distinguished the present case from the *Al-Jedda* by indicating that the UNSC Resolution 1390 (2002), which explicitly requires States not to allow persons on the UN list to enter or transit through their territory, is more specific and detailed than the UNSC Resolution in *Al-Jedda* case[292]. It should also be noted that in the case of *Al-Dulimi v. Switzerland*, the ECtHR noted that the Court has the presumption that "the Security Council does not intend to impose any obligation on the Member States to breach fundamental principles of human rights" and emphasised that this presumption had been rebutted in the *Nada* case (which is the present case) since Resolution no. 1390 (2002) used clear wording obliging states to take measures that may violate human rights[293].

As a third-party intervener, the UK argued that Switzerland had been obliged to apply measures at stake.[294] The intervening French Government, relying on the decisions on admissibility in the *Behrami and Saramati* cases, argued that in the cases where UN Member States take measures to implement Security Council resolutions under Chapter VII of the UN Charter, such measures are attributable to the UN and are therefore incompatible *ratione personae* with the Convention[295].

The ECtHR deemed such argument inappropriate since, contrary to the *Behrami and Saramati*, in the present case, the relevant Security Council resolutions obliged States to implement measures at the national level by acting in their names, however, in the *Behrami and Saramati* cases[296], powers of KFOR were validly delegated to it by the UNSC under Chapter VII of the Charter, and of the UNMIK (UN subsidiary organ) as well, accordingly, their acts and omissions were directly attributable to the UN, an international organisation of universal jurisdiction that fulfils its imperative collective-security objective[297].

The Court said that the acts complained of relating to the implementation of the UNSC resolutions at the national level since an Ordinance of the Federal Council implemented the measures imposed by the relevant UNSC resolutions, and as a consequence of such implementation, the applicant's requests to exempt him from the ban on entry into Swiss territory

[290] "*Nada v. Switzerland* [GC], no. 10593/08," 12 September 2012, para. 11-26.
[291] Ibid, para. 27-40.
[292] Ibid, para. 172.
[293] "*Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08," 21 June 2016, para. 141.
[294] Ibid, para. 111.
[295] "*Nada v. Switzerland* [GC], no. 10593/08," 12 September 2012, para. 120.
[296] See "*Behrami and Behrami* v. *France* and *Saramati* v. *France, Germany and Norway* (dec.) [GC], no. 71412/01 78166/01," 2 May 2007, para. 151.
[297] "*Nada v. Switzerland* [GC], no. 10593/08," 12 September 2012, para. 120.

were rejected by the Swiss authorities[298]. Moreover, the wording of the UNSC resolution urged to all states "take immediate steps to enforce and strengthen through legislative enactments or administrative measures, where appropriate, the measures imposed under domestic laws or regulations against their nationals and other individuals or entities operating on their territory"; therefore the wording "necessary" and "where appropriate" also exposed that the national authorities had certain flexibility on the implementation of the Resolution[299]. Accordingly, the ECtHR found that "Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the UNSC.[300]" Therefore, the Court considered that the alleged violations are attributable to Switzerland, as Switzerland had taken the measures by exercising its jurisdiction within the meaning of Article 1 of the Convention[301].

It is apparent that the acts or omissions related to the implementation of the UNSC resolutions, or more broadly, international obligations imposed on the High Contracting Parties at the national level, to the extent that it was implemented at the national level, generate imputability to the High Contracting Parties.

Consequently, States Parties could exercise due diligence in implementing their international obligations at the national level to prevent any possible violation of the Convention.

3.4.4. (Al-Dulimi and Montana Management Inc. v. Switzerland case)

The present case relates to the relationship between the implementation of UN obligations and the obligations of States Parties under the Convention. Moreover, as the case's merits are closely related to the concept of "state jurisdiction", we will also analyse them.

The facts of the case are as follows: Iraq invaded Kuwait, and subsequently, UNSC adopted resolutions 661 (1990) and 670 (1990)[302] to impose a general embargo on Iraq and Kuwaiti resources confiscated from Iraq after its invasion of Kuwait[303]. Soon after, based on those resolutions authorised body of Switzerland froze the applicants' assets[304]. In the meantime, according to UNSC, the first applicant was the head of finance for the Iraqi secret services under the regime of Saddam Hussein, and the second applicant was a legal entity registered in Panama,

[298] "*Nada v. Switzerland* [GC], no. 10593/08," 12 September 2012, para. 121.
[299] Ibid, para. 177-178.
[300] Ibid, para. 180.
[301] Ibid, para. 121-122.
[302] UNSC Resolution 661 (1990) of 6 August 1990 and Resolution 670 (1990) of 25 September 1990.
[303] "*Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08," 21 June 2016, para. 11.
[304] Ibid, para. 12.

of which the managing director was the first applicant[305]. The UNSC adopted Resolution 1483 (2003), amending and abolishing Resolution 661 (1990)[306]. The applicant and his company were included in the lists of sanctions due to the UNSC Resolution 1483 (2003) on Iraq; as a result, the confiscation procedure was initiated in respect of the applicants' assets, which already had been frozen in Switzerland[307].

The Swiss authority sent the applicants a draft decision concerning the confiscation of their assets in Geneva; the applicants challenged such decision and applied to the Swiss Federal Court for the annulment of the relevant decision and alleged violation of his rights, including a violation of the right to a fair trial enshrined in Article 6 of the Convention; however, the Federal Court merely confined itself whether the applicants' name had been properly included in the lists drawn up by the UNSC and whether the assets in question belonged to him[308].

It must also be noted that the present case was also concluded by the Second Section of the Court, which reiterated the Court's findings from its previous case-law[309] and indicated that the measures imposed by the UNSC resolutions were implemented at the national level by an authorised Swiss body, and therefore alleged acts are imputable to Switzerland, accordingly found that Switzerland exercised its jurisdiction within the meaning of Article 1 of the Convention[310].

Furthermore, Grand Chamber said that the Second Section applied the presumption of equivalent protection to the case, although the starting point of the presumption was defined in the light of the obligations of the European Union[311], as in the Chamber's view, it can also be applied, in principle, to situations with regard to the compatibility with the Convention of acts of UN[312]. Moreover, it was found that the system established by the UN didn't afford equivalent protection to the required by the Convention, and the UNSC Resolution didn't confer any discretion to the States; accordingly, the presumption of equivalent protection was rebutted in the present case[313].

The Swiss Government objected and asked the Court to declare the application inadmissible on the ground of *ratione personae* incompatible with the provisions of the Convention[314]. In the view of the respondent Government, the facts of this case were different from those of the *Nada* case, in which the ECtHR found that an infringement was not inevitable,

[305] "*Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08," 21 June 2016, para. 10.
[306] Ibid, para. 14.
[307] Ibid, para. 15-19.
[308] Ibid, para. 22-29.
[309] Those are *Banković and others v. Belgium and others* [GC] (dec.), 2001, *Assanidze v. Georgia* [GC], 2004, *Ilaşcu and others v. Moldova and Russia* [GC], 2004, *Nada v. Switzerland* [GC], 2012.
[310] "*Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08," 26 November 2013, para. 86-93.
[311] See "*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* ([GC], no. 45036/98," 30 June 2005, para. 152-157.
[312] "*Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08," 21 June 2016, para. 83.
[313] Ibid, para. 83.
[314] Ibid, para 85.

as Switzerland had a degree of discretion in implementing the UN Resolution in question[315]. In addition, it contended that there was no such discretion in the present case because the description of the impugned measures in the text of those resolutions was detailed, so interpretation of the text wasn't possible, and Switzerland acted as a kind of representative of the UN in that regard, therefore had to enforce UNSC Resolution strictly[316]. As the Swiss authorities could not repeal or amend this resolution and could not control the addition or removal of names to or from the sanctions list, the respondent Government doubted that the applicant fell within the "jurisdiction" of Switzerland within the meaning of Article 1 of the Convention[317].

In its judgment, the Grand Chamber cited part of the judgment of the Second Section of the ECtHR on the determination of the state jurisdiction within the meaning of Article 1 of the Convention as follows:

> In the present case, the measures imposed by the Security Council resolutions were implemented at the national level by an Ordinance of the Federal Council. The applicants' assets were frozen and the Federal Department for Economic Affairs issued a decision […] whereby certain assets were to be confiscated. The acts in question therefore correspond clearly to the national implementation of a UN Security Council resolution […]. The alleged violations of the Convention are thus imputable to Switzerland […]. The measures in issue were therefore taken in the exercise by Switzerland of its 'jurisdiction' within the meaning of Article 1 of the Convention.[318]

In addition, Grand Chamber didn't see any reason not to follow the legal arguments and findings of the Second Section, and differently from the Section, it has contributed its findings as follows:

> [A] Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention[319]. The State is thus considered to retain Convention liability in respect of treaty commitments undertaken after the entry into force of the Convention[320].[321]

Hereby, ECtHR, for the first time, has indicated that it is not important whether the alleged acts or omissions are a "consequence of domestic law or international legal obligations" State Party is responsible under Article 1 of the Convention. As a conclusion on the imputability, the Court

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[315] "*Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08," 21 June 2016, para. 86.
[316] Ibid, para. 86.
[317] Ibid, para. 86.
[318] Ibid, para. 94, see also "*Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08," 26 November 2013, para. 91-92.
[319] See "*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* ([GC], no. 45036/98," 30 June 2005, para. 153, "*United Communist Party of Turkey and Others v. Turkey* [GC], no. 19392/92," 30 January 1998, para. 29.
[320] See "*Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08," para. 128, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* ([GC], no. 45036/98," 30 June 2005, para. 154.
[321] "*Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08," 21 June 2016, para. 95.

dismissed the objection of the respondent Government and declared that the application is admissible and *ratione personae* compatible with the Convention; accordingly, the applicants fell within the jurisdiction of Switzerland[322].

As regards the merits of the case, the respondent Government stated that the presumption of "equivalent protection" could not be applied in the light of the obligations arising from the UN Charter since such presumption ensures that the conflicts of norms at the same hierarchical level (EU Law and the Convention) are to be resolved, however, due to rule of primacy in Article 103 of the UN Charter, the obligations arising from UNSC resolutions and the Convention were not on the same hierarchical level, in addition, the only exception to the rule of primacy would be the *jus cogens* norms, and procedural safeguards enshrined in Article 6 (1) of the Convention is not considered as *jus cogens*[323].

The ECtHR has stated that although it is not its role to examine the legality of the acts of UNSC, the necessity to examine the wording and scope of the text of the UNSC resolution remains, as the respondent State justifies its limitation on the conventional rights by relying on the resolution, so such examination was for the purposes of ensuring effective and consistent compliance with the Convention[324]. The Court continued its argumentation by referring to its case-law that in the *Al-Jedda* case, the UNSC resolution didn't require placing an individual in indefinite detention without charge and that in the *Nada* case, the respondent Government had enjoyed some discretion[325]. Subsequently, as regards to mentioned hierarchy of the legal norms at stake, the Court has said that the determination of the hierarchy question between obligations arising from the UN Charter and the Convention is unnecessary since the respondent State while relying on the obligations arising from UNSC resolution, should have proved that it had individualised the applicant's situation, and had taken – or at least had attempted to take – all possible measures to adapt the imposed sanctions to such situation[326]. Furthermore, the ECtHR noted that if an emergency legislative decree did not contain clear wording, which excludes the possibility of the judicial supervision of the measures taken for its implementation, it must be understood as authorisation of the judicial supervision of the respondent State that could prevent any possible arbitrariness[327].

The Court accepted the fact that the UNSC was the ultimate authority and further noted that although the respondent State had an obligation to ensure that such listing was not arbitrary,

[322] "*Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08," 21 June 2016, para. 96.
[323] Ibid, para. 109.
[324] Ibid, para. 139, see also "*Al-Jedda v. The United Kingdom* [GC], no. 27021/08," 7 July 2011, para. 76.
[325] Ibid, para. 141.
[326] Ibid, para. 141.
[327] Ibid, para. 146.

the domestic courts confined themselves to affirming that the applicants' names, in fact, appeared on the sanction lists and that assets were theirs, however, in Court's opinion, it was not sufficient to ensure that the such listing was not arbitrary[328].

Moreover, the ECtHR noted that it was necessary to allow the applicants they could submit evidence to the domestic courts for examination of the case; by doing so, they could endeavour to expose that their names were included arbitrarily[329]. In addition, the fact that applicants didn't submit any argument concerning the arbitrariness of inserting their names on the list makes no difference, as the domestic courts didn't rely on such omission of the applicants while they had rejected to examine the case[330].

The ECtHR also emphasised that in a democratic society, it is difficult to imagine that the applicants were not allowed to challenge the confiscation of their assets and that they had not been given access to their assets for a long time[331]. Lastly, the Court found that there was a violation of Article 6 (1) of the Convention by noting that the UNSC Resolution 1483 (2003) could be applied more flexibly, as the Swiss authorities had taken some measures to improve the applicants' situation, however, in the Court's view, those measures were insufficient under Article 6 (1) of the Convention[332].

Consequently, as it was already mentioned that the international obligation, namely obligations arising from UNSC Resolution, was implemented at the national level; accordingly, state jurisdiction was established[333]. However, in this case, merits and the concept of the "state jurisdiction" are closely related, therefore in our opinion, in the light of the present case, the rebuttal of the presumption of "equivalent protection" generates imputability in the cases, where States Parties could not prove that they have individualised the possible victim's situation and have taken – or at least have attempted to take – all possible measures to adapt imposed measures by the UNSC to the possible victim's situation[334].

3.4.5. Armed conflict between States Parties (Georgia v. Russia (II))

The present case is linked to the armed conflict between Georgia and Russia that took place in 2008 because of interference in the territorial integrity of Georgia within its territory, namely part of unrecognised South Ossetia and Abkhazia. After the armed conflict, Russia recognised

[328] "*Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08," 21 June 2016, para. 150.
[329] Ibid, para. 151.
[330] Ibid, para. 151.
[331] Ibid, para. 152.
[332] Ibid, para. 154-155.
[333] See also ibid, para. 94.
[334] See also, ibid, 141-155.

South Ossetia and Abkhazia as independent States by a presidential decree; however, the international community did not follow such recognition[335].

Georgian Government alleged that Articles 2, 3, 5, 8 and 13 of the Convention, Articles 1 and 2 of Protocol 1 to the Convention and Article 2 of Protocol 4 to the Convention were infringed by Russian Federation, and the latter failed to carry out an investigation, moreover, maintained that Russian Federation exercised authority and control over the relevant areas where the violations took place, therefore acts concerned fall within the jurisdiction of the Russian Federation under Article 1 of the Convention[336].

The Russian Government alleged that Russia did not have effective control over areas of conflict and argued the premise of the application of the Convention, where International Humanitarian Law exclusively applied[337].

In the present case, the Court has divided legal issues of the case under separate titles and each time separately examined the jurisdiction issue under Article 1 of the Convention.

A. With regard to active armed conflict with the participation of Russian armed forces (from 8 August to 12 August)

This part concerns the alleged attacks of Russian armed forces and South Ossetian forces starting on 8 August 2008 and ending on 12 August 2008, so it concerns the complaints of Georgia under Article 2 of the Convention[338]. The applicant Government indicated that Russian ground forces had entered and moved into the undisputed Georgian territory through South Ossetia, and it was assisted by the Russian air force and the Black Sea fleet; consequently, there had been more than 75 aerial attacks on Georgian national territory by the Russian Federation[339]. However, the Russian Government replied that firstly Russian forces would not have been attacking the areas that they already controlled with their own men, and secondly, by invoking the *Banković* case, they have stated that mere the act of bombarding or shelling would not constitute effective control over the territory that has been bombarded, therefore in their view armed conflict was the proof that there was no effective control[340].

The ECtHR has acknowledged that within the indicated period, in August 2008, there was an international armed conflict between Georgia and the Russian Federation and that the latter undeniably carried out military operations within the territory of Georgia[341]. However, Court has stated that first of all, it has to determine whether events that occurred during the active armed

[335] "*Georgia v. Russia (II)* [GC], no. 38263/08," 21 January 2021, para. 41.
[336] Ibid, para. 48.
[337] Ibid, para. 49.
[338] Ibid, para. 51.
[339] Ibid, para. 106.
[340] Ibid, para. 107.
[341] Ibid, para. 109.

conflict fall within the jurisdiction of Russia, accordingly to the nature of the control exercised by Russia[342].

The Court has underlined that it is the first time since the *Banković* case that it will examine the question of jurisdiction in relation to undisputed international armed conflict[343]. Subsequently, the ECtHR, by referring *Al-Skeini* case, pointed out that with regard to extraterritorial jurisdiction, there were established two criteria, which are that of "effective control" by the State over territory, called a special concept of jurisdiction, and that of "State agent authority and control" over individuals, called as the personal concept of jurisdiction[344].

Concerning applying the principle of effective control by the state over an area, the Court reiterated its findings from its case-law[345] that "in determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area […]. Other indicators may also be relevant, such as how its military, economic and political support for the local subordinate administration provides it with influence and control over the region"[346].

With regard to the application of the principle of State agent authority and control, Court, by giving factual examples from its case-law[347] has indicated its previous findings[348] that the ECtHR "does not consider that jurisdiction in the […] cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.[349]"

Subsequently, the ECtHR examined whether extraterritorial jurisdiction principles could be applied to the present case where international armed conflict occurs[350]. In this regard, Court's opinion was close to the arguments of the Russian Government that there is no control over the territory, as both military forces seeking to establish control over the territory concerned in a context of chaos; therefore, no one can generally speak of "effective control" over the territory concerned, moreover control over the territory changes, as previously it was under Georgian

[342] "*Georgia v. Russia (II)* [GC], no. 38263/08," 21 January 2021, para. 110.
[343] Ibid, para. 113.
[344] Ibid, para. 115.
[345] See "*Catan and others v. Moldova and Russia* [GC], no. 43370/04, 8252/05 and 18454/06," 19 October 2012, para. 106-107, "*Chiragov and others v. Armenia* [GC], no. 13216/05," 16 June 2015, para. 168, and "*Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10," 23 February 2016, para. 98.
[346] "*Georgia v. Russia (II)* [GC], no. 38263/08," 21 January 2021, para. 116.
[347] See "*Öcalan v. Turkey* [GC], no. 46221/99," 12 May 2005, para. 91, "*Issa and others v. Turkey*, no. 31821/96," 16 November 2004, "*Al-Saadoon and Mufdhi v. the United Kingdom* ((dec.)," no. 61498/08, 30 June 2009, para. 86-89. "*Medvedyev and Others v. France* [GC]," no. 3394/03, para. 67.
[348] See "*Hassan v. United Kingdom* [GC], no. 29750/09," 16 September 2014, para. 74, "*Jaloud v. the Netherlands* [GC], no. 47708/08," 20 November 2014, para. 74.
[349] "*Georgia v. Russia (II)* [GC], no. 38263/08," 21 January 2021, para. 117.
[350] Ibid, para. 125.

control[351]. Therefore, Court turned towards the question of whether there was "State agent authority and control" over individuals[352].

However, Court found that "the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos […] also excludes any form of "State agent authority and control" over individuals"[353]. It would be hard to agree with such a result of the Court, as the Russian military forces for sure had State agent control over the individuals; moreover, such control's outcome was quite apparent that individuals' right to life was violated due to alleged attacks (bombing, shelling, artillery fire) by the Russian armed forces.

Consequently, the ECtHR considered that in the present case, conditions for the exercise of extraterritorial jurisdiction by the State Party had not been met during the active phase of hostilities in the context of an international armed conflict[354]. In Court's view, the practices of the State Parties support the conclusion of the Court, as they have not derogated under Article 15 of the Convention when they have engaged in the international armed conflict outside their own territory, by having in mind that they don't exercise jurisdiction within the meaning of Article 1 of the Convention[355]. Unlike Court's view, from our point of view, such argument is problematic, as in any case, any kind of legal practice of the States Parties could not be regarded as the basis or justification of the exclusion from the application of the state jurisdiction within the meaning of Article 1 of the Convention. In other saying, as the jurisdiction is a necessary condition for liability to occur under the Convention, the Court's duty – is to supervise whether, at present, any practice of the States Parties related to the concept of the "state jurisdiction" could be considered as justification of any gap, which is contrary to the soul of the Convention – gains more importance.

Even the ECtHR has acknowledged that such interpretation was unsatisfactory by emphasising that "such an interpretation of the notion of "jurisdiction" in Article 1 of the Convention may seem unsatisfactory to the alleged victims […] during the active phase of hostilities in the context of an international armed conflict outside its territory but in the territory of another Contracting State, as well as to the State in whose territory the active hostilities take place.[356]" At this point, we would like to remind Court's argument in the *Banković* case, as the ECtHR made a difference between the *Banković* case and the *Cyprus* case by noting that the inhabitants of northern Cyprus were already enjoying these conventional benefits since Cyprus

[351] "*Georgia v. Russia (II)* [GC], no. 38263/08," 21 January 2021, para. 126.
[352] Ibid, para. 127.
[353] Ibid, para. 137.
[354] Ibid, para. 138.
[355] Ibid, para. 139.
[356] Ibid, para. 140.

was Contracting Party, and inhabitants found themselves excluded from these benefits due to Turkey's effective control over territory and inability of the Cypriot Government to fulfil the obligations under the Convention[357], comparably in the present case, Georgia was Contracting Party, and inhabitants of it found themselves excluded from these benefits as well, especially right to life under Article 2 of the Convention due to Russian forces alleged attacks (bombing, shelling, artillery fire). However, the active phase of the hostilities in the context of international armed conflict constitutes the mere and main difference between cases.

The Court has also mentioned why it could not develop its case-law by noting as follows:

> [H]aving regard in particular to a large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict), the Court considers that it is not in a position to develop its case-law beyond the understanding of the notion of "jurisdiction" as established to date.[358]

Furthermore, the ECtHR has indicated that there is no legal basis for the Court to assess acts of war outside the territory of a respondent State by stating that "if, as in the present case, the Court is to be entrusted with the task of assessing acts of war and active hostilities in the context of an international armed conflict outside the territory of a respondent State, it must be for the Contracting Parties to provide the necessary legal basis for such a task.[359]"

However, in our opinion legal basis for the Court to assess the acts of war is enshrined in Article 15 (2) of the Convention, which reads as follows "no derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.[360]" As stipulated in Article 15(2) of the Convention, derogation from Article 2 under the Convention is only possible in respect of deaths resulting from lawful acts of war. In order to determine whether such derogation from Article 2 of the Convention is valid, Court should assess whether acts of war were lawful or not. Even in the cases of derogation Court would have a legal basis to assess, so in the present case for sure Court would have a legal basis to assess whether acts of war were lawful or not, and accordingly, in the cases of unlawful acts of war, Court could have established jurisdictional link towards the alleged violation of Article 2 of the Convention.

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[357] "*Banković and others v. Belgium and others* [GC] (dec.), no. 52207/99," 12 December 2001, para. 80.
[358] "*Georgia v. Russia (II)* [GC], no. 38263/08," 21 January 2021, para. 141.
[359] Ibid, para. 142.
[360] See Article 15 (2) of the ECHR.

Consequently, the Court concluded that "the events which occurred during the active phase of the hostilities (8-12 August 2008) did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention.[361]"

B. With regard to the occupation phase after the active armed conflict (ceasefire agreement of 12 August 2008)

The Court assessed the jurisdiction issue regarding the occupation phase after the active armed conflict in terms of Russian military presence and economic, military, and political support from the Russian Federation[362]. The ECtHR dismissed the preliminary objection of Russia and concluded that the events which occurred during the occupation phase fell within the jurisdiction of the Russian Federation by considering as follows:

> [T]he Russian Federation exercised "effective control", within the meaning of the Court's case-law, over South Ossetia, Abkhazia and the "buffer zone" from 12 August to 10 October 2008, the date of the official withdrawal of the Russian troops. Even after that period, the strong Russian presence and the South Ossetian and Abkhazian authorities' dependency on the Russian Federation, on whom their survival depends, as is shown particularly by the cooperation and assistance agreements signed with the latter, indicate that there was continued "effective control" over South Ossetia and Abkhazia.[363]

This conclusion of the Court is in line with its previous case-law, such as *Loizidou*, *Cyprus, Ilaşcu and Others*. Consequently, international cooperation and assistance agreements, which provide survival of the separatist regimes and their dependence on the respondent State Party concerned, indicate that the respondent State Party has jurisdiction within the meaning of Article 1 of the Convention, as it exercises effective control over the territory.

The Court, in accordance with its case-law[364] with regard to detailed proof of the control, has pointed out that Russia was responsible for the actions of the South Ossetian forces, without proof of "detailed control" of each of those actions, in the territories of South Ossetia and the "buffer zone", since Russia exercised "effective control" over the territories concerned[365]. Regarding violations, the Court has stated that there was "official tolerance" by Russian authorities, as they didn't carry out effective investigations into the alleged violations[366]. The ECtHR concluded as follows:

> [B]eyond reasonable doubt that there was an administrative practise contrary to Articles 2 and 8 of the Convention and Article 1 of Protocol No. 1 as regards the killing of civilians and the torching and looting of houses in Georgian villages in

[361] "*Georgia v. Russia (II)* [GC], no. 38263/08," 21 January 2021, para. 144.
[362] Ibid, para. 165-173.
[363] "*Georgia v. Russia (II)* [GC], no. 38263/08," 21 January 2021, para. 174.
[364] See "*Al-Skeini and others v. the United Kingdom* [GC], no. 55721/07," 7 July 2011, para. 138 and 142.
[365] "*Georgia v. Russia (II)* [GC], no. 38263/08," 21 January 2021, para. 214.
[366] Ibid, para. 218-219.

> South Ossetia and in the "buffer zone". Having regard to the seriousness of the abuses committed, which can be classified as "inhuman and degrading treatment" owing to the feelings of anguish and distress suffered by the victims, who, furthermore, were targeted as an ethnic group (see, mutatis mutandis, Cyprus v. Turkey, cited above, §§ 305-11), the Court considers that this administrative practice was also contrary to Article 3 of the Convention.[367]

As regards to liability of the Russian Federation, the Court has stated that Russian Federation violated Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No. 1[368].

C. Regarding the detention of civilians

The Georgian Government alleged that 160 civilians, for approximately fifteen days, were illegally detained in inappropriate conditions by the South Ossetian forces in violation of Article 5 of the Convention and that some of the detainees had also been subjected to the ill-treatment contrary to Article 3 of the Convention[369].

The ECtHR noted that after the active phase of armed conflict, around 160, of whom one third were women, mostly elderly Georgian civilians, were detained by South Ossetian forces in the basement of the "Ministry of Internal Affairs of South Ossetia", and this fact was not disputed, therefore Court by referring to the "effective control" concluded that such event falls within the jurisdiction of the Russian Federation within the meaning of Article 1 of the Convention[370].

After assessing the humiliating acts and poor conditions, the ECtHR found a violation of Article 3 of the Convention, which was responsible Russian Federation[371]. Furthermore, the Court concluded that there was an administrative practice contrary to Article 5 of the Convention for which the Russian Federation was responsible regarding the arbitrary detention of Georgian civilians[372].

D. Concerning treatment of prisoners of war

In the present case, the allegations concerning the ill-treatment and torture of the Georgian prisoners of war by South Osetian forces were submitted by the Georgian Government[373]. The Russian Government replied that the latter had neither involved nor exercised control over the buildings concerned[374].

By referring to the Human Rights Watch, Amnesty International and "August Ruins" reports, the ECtHR confirmed that South Ossetian forces detained Georgian prisoners of war

[367] "*Georgia v. Russia (II)* [GC], no. 38263/08," 21 January 2021, para. 220.
[368] Ibid, para. 222.
[369] Ibid, para. 223.
[370] Ibid, para. 238-239.
[371] Ibid, para. 242-252.
[372] Ibid, para. 253-256.
[373] Ibid, para. 257.
[374] Ibid, para. 259.

during the specified time[375]. Accordingly, the Court rejected preliminary objections and concluded the events fell within the jurisdiction of the Russian Federation within the meaning of Article 1 of the Convention[376].

The Court reiterated the same argument that since Russia exercised effective control and its jurisdiction was established, "the latter was also responsible for the actions of the South Ossetian forces, without it being necessary to provide proof of "detailed control" of each of those actions"[377]. Consequently, the ECtHR found a violation of Article 3 of the Convention, as the ill-treatment caused "severe" pain and suffering, which falls within the scope of torture within the meaning of Article 3 of the Convention; moreover, the Court has stated that the prisoners of war have a special protected status under the international humanitarian law, and that makes the acts more serious[378].

E. Concerning freedom of movement of displaced persons

The Georgian Government claimed that the about 23,000 forcibly displaced ethnic Georgians had been prevented from returning to their residence by Russia and the *de facto* authorities of Abkhazia and South Ossetia, so accordingly, such fact amounted to a violation of Article 2 of Protocol No. 4[379]. The Russian Government replied that the borders were under the South Ossetian and Abkhazian governments' authority, even though Russia signed cooperation agreements on 30 April 2009, ensuring border protection[380].

The ECtHR again reiterated that Russia exercised effective control over the territories concerned; however, it also added that the establishment of a jurisdictional link between the Russian Federation and Georgian nationals concerned depends on the very fact that their residences were situated in areas under the "effective control" of Russia, and the fact that Russia exercised "effective control" over the administrative borders, at this point, the Court also referred *to Loizidou v. Turkey* case, as it was also related to the prevention to the property[381]. Consequently, the Court has concluded that the Georgian nationals in question fell within the jurisdiction of the Russian Federation[382].

Members of the so-called South Ossetian "Government" did not deny the fact; however, they emphasised that such prevention was for the purposes of their safety in the region; however,

[375] "*Georgia v. Russia (II)* [GC], no. 38263/08," 21 January 2021, para. 268.
[376] Ibid, para. 269.
[377] Ibid, para. 276.
[378] Ibid, para. 278-281.
[379] Ibid, para. 282-283.
[380] Ibid, para. 285.
[381] Ibid, para. 292-294.
[382] Ibid, para. 295.

the Court found such administrative practice contrary to Article 2 of the Protocol No. 4 and concluded this question with the liability of Russia[383].

F. About the right to education

The applicant Government stated that the actions of the Russian military forces and the separatist authorities (destroying public schools and libraries and intimidating ethnic Georgian pupils and teachers) amount to a violation of Article 2 of Protocol No. 1[384].

The ECtHR dismissed the preliminary objection and reiterated "effective control" of Russia and further examined the case to determine whether there was a violation of Article 2 of Protocol No. 1[385]. The Court found that there was no violation of Article concerned, as the Court didn't have sufficient evidence in its possession, therefore could not conclude beyond reasonable doubt that there was a violation of Article 2 of Protocol No. 1[386]. Concerning jurisdiction, we agree with the Court's finding; however, as regards to liability of Russia in this context, in our opinion, there was a violation of Article 2 of Protocol No. 1, as bombing and destroying schools in the region could be regarded as the denial of the right to education.

G. Concerning the obligation to investigate

The applicant Government alleged that there was a violation of Article 2 in its procedural aspect, as Russia had not conducted any investigations into the events regarding Article 2 of the Convention[387].

Under this title, the Court didn't assess the jurisdiction issue separately; however, we include this part of the judgment as well, since it is related to the obligation to investigate the conducts where the State Party didn't have jurisdiction; however, then had an obligation to investigate the allegations.

The Court, considering the allegations that it had committed war crimes during the active phase of the hostilities, has indicated that even if Russia didn't have jurisdiction during the active phase of armed conflict within the meaning of Article 1 of the Convention, it still possesses an obligation to investigate according to rules of international humanitarian law and its domestic law[388]. Moreover, the ECtHR has found a violation of Article 2 of the Convention in its procedural aspect, as the nature and the scale of the serious crimes was at stake, and investigations carried out by the Russian authorities were neither prompt nor effective nor independent[389].

[383] "*Georgia v. Russia (II)* [GC], no. 38263/08," 21 January 2021, para. 296-301.
[384] Ibid, para. 302-303.
[385] Ibid, para. 312.
[386] Ibid, para. 314.
[387] Ibid, para. 282-283.
[388] Ibid, para. 331.
[389] Ibid, para. 328-337.

3.4.6. State jurisdiction within the framework of the emergency situations

3.4.6.1. COVID-19 and the State jurisdiction (Terheş v. Romania)

The present case is indirectly related to the "state jurisdiction" concept within Article 1 of the Convention. Before analysing the case, it would be useful to remind that under Article 15 of the Convention, States Parties may take measures derogating from their obligation to respect human rights under Article 1 of the Convention; accordingly, State Party would limit its obligation (at some extent) under Article 1 of the Convention, provided that the conditions of a valid derogation are met under Article 15 of the Convention. Those conditions are enshrined in Article 15 (1) as follows that:

1) Condition of time and situation – in time of war or other public emergency threatening the life of the nation;
2) Condition of proportionality – the taken measures derogating from obligations under [the] Convention must be to the extent strictly required by the exigencies of the situation;
3) Condition of accordance – the taken measures must comply with the State's other obligations under international law[390].

In the present case, Romania introduced a state of emergency by a presidential decree, followed by the ordinance of the Minister of the Interior, which restricts freedom of movement[391].

The ECtHR assessed whether the respondent State's measures had reached the level of detention[392]. The Court has stressed that the restriction was not designated only to the applicant; on the contrary, it was a collective restriction designated to everyone living in Romania, and the regulation under the state of emergency had enabled to leave the house in the exceptional circumstances, where there was a necessity for the medical treatment or everyday shopping[393]. In addition, the applicant could not prove that he was a real victim and that he was unable to satisfy his needs due to regulations[394]. As the measures impugned were a collective one, they had affected everyone living in Romania, not only the applicant; moreover, exceptions stipulated in the state of

[390] See Article 15 (1) of the ECHR.
[391] See "*Terheş v. Romania* (dec.), no. 49933/20," 13 April 2021, the Registrar of the Court, "*The lockdown ordered by the authorities to tackle the COVID-19 pandemic not to be equated with house arrest*", ECHR 159 (2021), 20.05.2021. Available at: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7024603-9478039&filename=Decision%20Terhes%20v.%20Romania%20-%20lockdown%20ordered%20by%20the%20authorities%20to%20tackle%20the%20COVID-19%20pandemic%20could%20not%20be%20equated%20with%20house%20arrest.pdf
[392] "*Terheş v. Romania* (dec.), no. 49933/20," 13 April 2021, para. 36.
[393] Ibid, para. 42-43.
[394] Ibid, para. 44.

emergency regulation were relatively broad in the sense that even short walk was permitted[395]. The Court, with consideration of the all facts had, found that the measures taken by the respondent State didn't fall under the scope of Article 5 (1) of the Convention, so there was no violation which could be amounted to house arrest as complained by the applicant and that the application is *ratione materiae* incompatible with the Convention[396].

In the present case, the Court didn't examine possible violation of the freedom of movement enshrined in Article 2 (1) of the Protocol No. 4 since the applicant didn't rely on the mentioned Article; however, we would like to examine the interrelation of Article 1 and Article 15 of the Convention in the light of Article 2 (1) of the Protocol No. 4.

Considering the circumstances of the epidemic case, it is quite obvious that the main aim of the Romanian authorities was the protection of health which is indicated in Article 2 (3) Protocol No[397]. The state of emergency regulation prescribed the restriction that pursues one of the legitimate aims referred to in the relevant Article. The proportionality test is the last step in assessing the possible violation.

The measures introduced were very restrictive as regards the freedom of movement in a sense that the persons living in Romania were asked to provide some sort of document while they leave their house, and without providing one of the exceptions from the regulation of the state of emergency, they were not allowed to leave their house[398]. K. Koch says that it should be taken into account that at the beginning of the coronavirus crisis, the virus was spreading rapidly, and in some European countries, the hospitals and intensive care units were overcrowded and didn't have sufficient capacities for the treatment of all patients[399]. At that time, due to the lack of information, the overall situation was quite complex still; there was no precise information as regards the transmission of the virus, vulnerable groups and the symptoms of the virus, and the governments were not sure which measures to take for the protection of the health[400]. Accordingly, under such circumstances, the States Parties to the Convention would have a wide margin of appreciation concerning necessary actions in a life-threatening situation, so they were allowed to take more restrictive measures for a limited period; however, those measures require continuous monitoring

[395] See the Registrar of the Court, "*The lockdown ordered by the authorities to tackle the COVID-19 pandemic not to be equated with house arrest*", ECHR 159 (2021), 20.05.2021, 2-3.
[396] See the Registrar of the Court, "*The lockdown ordered by the authorities to tackle the COVID-19 pandemic not to be equated with house arrest*", ECHR 159 (2021), 20.05.2021, 3.
[397] "*Terheş v. Romania* (dec.), no. 49933/20," 13 April 2021, para. 23.
[398] Katharina Koch, "Lockdown measures as detention? – The case Terheş & La Roumanie," *Jean-Monnet-Saar: Europarecht online*, September 24, 2021, https://jean-monnet-saar.eu/?page_id=101545.
[399] See example Giorgia Orlandi, "Bergamo hospitals full as Italy's coronavirus nightmare worsens," *Euronews*, March 19, 2020, https://www.euronews.com/2020/03/19/bergamo-hospitals-full-as-italy-s-coronavirus-nightmare-worsens.
[400] Katharina Koch, "Lockdown measures as detention? – The case Terheş & La Roumanie," *Jean-Monnet-Saar: Europarecht online*, September 24, 2021, https://jean-monnet-saar.eu/?page_id=101545.

and adaption to newest scientific information, immediately when such information became available[401].

In the present case, as the measures adopted in Romania were more restrictive than in other European countries, and as their implementation period was relatively short (30 days in the beginning, and later on 30 days extended), impugned measures would fall within a wide margin of appreciation of Romania, in addition to that, such measures were the most effective ones to stop spreading of the virus up to that day[402].

In conclusion, the Court wouldn't examine the validity of Romania's derogation according to Article 15 of the Convention, even if the applicant would have invoked Article 2 (1) of Protocol No. 4[403]. However, as it is seen, if the implementation of such strict measures would last more than the necessary period, the Court would examine the validity of the State Party's derogation under Article 15 of the Convention. Herein, it would be useful to cite from Court's case-law that:

> It falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para. 1 (art. 15-1) leaves those authorities a wide margin of appreciation.[404]

Thus, States Parties in favour of Article 15 (1) of the Convention limit their - to some extent - obligation under Article 1 of the Convention to everyone within their jurisdiction by having a wide margin of appreciation. Nonetheless, the Court has indicated as follows:

> Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, […], is responsible for ensuring the observance of the States' engagements […], is empowered to rule on whether the States have gone beyond the "extent strictly required by the exigencies" of the crisis (Lawless judgment of 1 July 1961, Series A no. 3, p. 55, para. 22, and pp. 57-59, paras. 36-38). The domestic margin of appreciation is thus accompanied by a European supervision.[405]

It is apparent from the case-law of the Court that the Court is supervising such limitation on the obligations undertaken; therefore, such supervision proves that the enjoyment of the wide margin of appreciation is not absolute. To determine the "strictly required" nature of the derogations, there are three factors to be examined; those are as follows:

i) The necessity of the derogations to deal with the threat;

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[401] Katharina Koch, "Lockdown measures as detention? – The case Terheş & La Roumanie," *Jean-Monnet-Saar: Europarecht online*, September 24, 2021, https://jean-monnet-saar.eu/?page_id=101545..
[402] Ibid.
[403] Ibid.
[404] "*Ireland v. the United Kingdom*, no. 5310/71 (Plenary)," 18 January 1978, para. 207.
[405] Ibid, para. 207.

ii) The proportionality of the measures in consideration of the threat;

iii) The duration of the derogations[406].

The ECtHR has also referred to these significant key points concerning the exercising of supervision by noting that "the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to the duration of the emergency situation"[407]. In addition to that, supervision concerned requires the examination of the case on the merits, as it was stressed by the Court that "as to whether the measures taken […] were strictly required by the exigencies of the situation and consistent with the other obligations under international law, the Court considers it necessary to examine the applicant's complaints on the merits"[408].

The Court, in its case-law, also has stressed that "even in the framework of a state of emergency, the fundamental principle of the rule of law must prevail. It, therefore, considers that this general order cannot be regarded as an appropriate response to the state of emergency, and such an interpretation would negate the safeguards provided by […] the Convention.[409]"

Thus, if under epidemic circumstances, States Parties would continue to implement strict measures that are more than necessary and not proportionate in the light of the up-to-date scientific research, States Parties could not rely on Article 15 of the Convention as a justification for the implemented measures.

Consequently, even State Parties derogating from their obligations under the Convention would still have jurisdiction and could be held liable for the violations of the provisions of the Convention in the cases where the exigencies do not strictly require taking measures of the crisis and where such measures are inconsistent with the States Parties' other obligations under international law. In other words, derogation under Article 15 *per se* does not limit the obligation to respect human rights under Article 1 of the Convention; it must fulfil the preconditions and the conditions of Article 15 of the Convention. Hence, State Party does not have a '*carte blanche*' to do what it wants when it declares a 'public emergency threatening the nation's life' under Article

[406] P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights: Third Edition*, (Antwerp: Kluwer Law International, 1998), 737.
[407] "*A. and Others v. the United Kingdom* [GC], no. 3455/05," 19 February 2009, para. 173; "*Ireland v. the United Kingdom*, no. 5310/71 (Plenary)," 18 January 1978, para. 207; "*Brannigan and McBride v. the United Kingdom* (Plenary), nos. 14553/89 14554/89," 26 May 1993, para. 43.
[408] "*Şahin Alpay v. Turkey*, no. 16538/17," 20 March 2018, para. 78, *Mehmet Hasan Altan* v. Turkey, no. 13237/17, 20 March 2018, para. 94, "*Kavala v. Turkey*, no. 28749/18," 10 December 2019, para. 88.
[409] "*Ahmet Hüsrev Altan v. Turkey*, no. 13252/17," 13 April 2021, para. 165; see also "*Baş v. Turkey*, no. 66448/17," 3 March 2020, para. 160.

15[410]. In a sense, it requires a balance between individual rights and collective interest at the same time, as the scholars principally assert it[411].

3.4.6.2. Taken other domestic measures without a formal act of derogation

Not always do States Parties declare a state of emergency by utilising Article 15 of the Convention; sometimes, they introduce emergency powers and implement other domestic measures without a formal act of derogation and without informing the Secretary-General of the Council of Europe (hereinafter – Secretary-General), therefore we will examine whether it would have an impact on the "state jurisdiction" within the meaning of Article 1 of the Convention. In other words, we will examine whether, under such circumstances, States Parties would limit their obligation to respect human rights under Article 1 of the Convention to limit their jurisdiction.

If a state of emergency is not declared, it means that the State Party claims that the exceptional measures implemented are ideally and perfectly in line with the normal legal regulations of the State Party[412]. Moreover, the fact that the State Party fails to utilise Article 15 of the Convention raises concerns as the level of human rights protection is readjusted downwards since it risks normalising exceptional powers[413]. In other words, it would mean that domestic legal regulation, in a sense, will be restrictive that there will be no need to utilise Article 15 of the Convention.

Thus, the ECHR would still function to the extent that it has functioned until the adoption of the national regulation at the domestic level without utilising Article 15 of the Convention. Therefore, any complaint to the ECtHR brought by the applicant would be examined ordinarily, which means that three key points would play a significant role whether the restriction prescribed by the law; whether it pursues the legitimate aim stipulated in article concerned; and lastly whether it is proportionate to the aims pursued. At this point, it is quite apparent that State Party doesn't derogate from any conventional obligation; however, by adopting domestic legal acts, State Party possibly restricts the enjoyment of the possible rights and freedoms. Adoption of domestic

[410] Alan Greene, "Derogating from the European Convention on Human Rights in Response to the Coronavirus (COVID-19) Pandemic," *University of Birmingham*, July 2020, 5. Available at: https://www.birmingham.ac.uk/Documents/research/Public-Affairs/2019-20/uob-briefing-greene-article-15-echr-and_covid-19-July-2020.pdf.

[411] Mohamed M. Zeidy, "The ECHR and States of Emergency: Article 15 - A Domestic Power of Derogation from Human Rights Obligations," *San Diego International Law Journal* 4, 1 (2003): 316. Available at: https://digital.sandiego.edu/ilj/vol4/iss1/10.

[412] Alan Greene, "Derogating from the European Convention on Human Rights in Response to the Coronavirus (COVID-19) Pandemic," *University of Birmingham*, July 2020, 2. Available at: https://www.birmingham.ac.uk/Documents/research/Public-Affairs/2019-20/uob-briefing-greene-article-15-echr-and_covid-19-July-2020.pdf.

[413] Ibid, para.1-2.

rules could also cause additional issues as regards the criterion on the prescription by law, since the criterion prescription by law "not only requires that the impugned measure should have some basis in domestic law but also refers to the quality of the law in question, requiring that it should be accessible to the persons concerned and foreseeable as to its effects[414].

Moreover, if the State Party utilised and relied on Article 15 of the Convention, the Court, before the merits, examines the validity of the derogation; however, if the latter didn't utilise Article 15 of the Convention, the case would be examined as usual.

In the case of Cyprus v. Turkey, the Commission explained the issue of whether the State Party could rely on Article 15 in the cases where the declaration was made in certain areas; however, it was not made in the area where violation of the Convention occurred. In its report, the Commission stressed that "no communication was made by Turkey, under Art. 15 (3) of the Convention, concerning persons or property under her jurisdiction in the north of Cyprus.[415]"
Lawless v. Ireland (no. 3), 1 July 1961, Series A no. 3

The Commission further referred to the *Lawless* case[416] and noted as follows:

> [T]he obligation to inform the Secretary-General of a measure derogating from the Convention is "an essential link in the machinery provided in the Convention for ensuring the observance of the engagements undertaken by the High Contracting Parties" and further observed that, without such information, the other Parties will not know their position under Art. 24 of the Convention and the Commission itself will be unaware of facts which may affect the extent of its jurisdiction with respect to acts of the State in question.[417]

Consequently, the Commission has stated that "in any case, Art. 15 requires some formal and public act of derogation, such as a declaration of martial law or state of emergency, and that, where no such act has been proclaimed by the High Contracting Party concerned, although it was not in the circumstances prevented from doing so, Art. 15 cannot apply.[418]" Accordingly, in the cases where the State Party doesn't declare a state of emergency and inform the Secretary-General, the State Part concerned cannot rely on Article 15 of the Convention.

Finally, taking domestic measures through non-declaration of a state of emergency and non-informing Secretary-General would not limit the obligation to respect human rights within the jurisdiction of the State Party under Article 1 of the Convention. Thus, these cases would not differ from the ordinary cases and would be subjected to the usual examination from the perspective of prescriptiveness, a legitimate aim and the proportionality test.

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[414] See "*De Tommaso v. Italy* [GC], 2017, no. 43395/09, 23 February 2017, para. 106", "*Sissanis v. Romania*, no. 23468/02," 25 January 2007, para. 66, "*Khlyustov v. Russia*, no. 28975/05," 11 July 2013, para. 68.
[415] "*Cyprus v. Turkey* (Commission), nos. 6780/74 6950/75, 10 July 1976, para. 526.
[416] "*Lawless v. Ireland (No. 3)*, no. 332/57 (A/3)," 1 July 1961, Series A no. 3.
[417] "*Cyprus v. Turkey* (Commission), nos. 6780/74 6950/75, 10 July 1976, para. 526.
[418] Ibid, para. 527.

4. ASPECTS GENERATING IMPUTABILITY

This chapter will remark on aspects generating imputability in general and its relation to the enlargement of the conventional obligations.

Considering the case-law of the Court that in our thesis begins with the case of *X v. Germany*, which concluded in 1965, and ends with the cases of *Georgia v. Russia (II)*; and *Terheş v. Romania*, which concluded in 2021, it is apparent that the concept of the "State jurisdiction" within the meaning of Article 1 of the Convention in the progress of time has developed by the Court. At the same time, this development can be regarded as an enlargement of the "State jurisdiction" concept. Such enlargement has naturally broadened obligations to the States Parties to secure the entire range of substantive and procedural rights set out in the Convention and those additional Protocols which the States Parties have ratified.

The very first comprehensive categorisation of the Court on the concept of "State jurisdiction" was in the cases of *Al-Jedda v. the United Kingdom* and *Al-Skeini v. the United Kingdom*. In the *Al-Skeini*, the Court has divided the issue of jurisdiction into four sections. Those are specified as follows[419]:

a) the principle of territoriality;

b) State agent authority and control;

c) effective control over an area;

d) the legal space ("*espace juridique*") of the Convention.

The territorial principle is mentioned almost in every case that we have examined. It means the state jurisdiction under Article 1 is primarily territorial, so there is a presumption that States Parties exercise their jurisdiction over their national territories; only in exceptional circumstances do States Parties exercise extraterritorial jurisdiction; in such cases, this presumption is rebutted[420].

The Court then examines whether exceptional circumstances would be considered an exercise of an "effective control over an area" or of "state agent authority and control". State Party exercises effective control directly through its military forces or indirectly through subordinate separatist administration[421], and such control generates imputability to the State Party, so in cases of the violation of the provisions of the Convention, the State Party is considered liable. Consequently, if the domination of the State Party is established over the territory concerned, the Court doesn't examine any further exercise of detailed control of the State Party over the policies and actions of the separatist regime or administration[422]. Cases related to the occupation of

[419] See "*Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07," 7 July 2011, para. 131-142.
[420] See also ibid, para. 131-132; "*Soering v. United Kingdom* (Plenary), no. 14038/88," 7 July 1989, para. 86;
[421] See "*Cyprus v. Turkey* [GC], no. 25781/94," 10 May 2001, para. 76.
[422] "*Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07," 7 July 2011, para. 138.

Northern Cyprus, *Loizidou* and *Cyprus* or *Ilaşcu v. Moldova and Russia*, *Assenidze v. Georgia*, and *Georgia v. Russia (II)* must be regarded as examples.

In cases where effective control is lacking, the Court examines whether State Party exercised "State agent authority and control", which means that alleged acts are under State Party's "authority and control through its agents operating whether lawfully or unlawfully"[423]. The example cases could be *Ireland v. UK*; *Soering v. UK*; *Drozd v. France and Spain*; *M. v. Denmark*; *Issa v. Turkey*; *Al-Jedda v. UK*; *Al-Skeini v. the UK*.

"State agent authority and control" can be exercised through exercising all or some of the public powers[424] normally exercised by the Government that had such opportunity through the "consent, invitation or acquiescence of the Government of that territory[425]".

It also includes the use of force by a State's agents; the *Medvedyev* case could be an example where the Court has established French jurisdiction by referring to state agent authority. In this case, French agents had exclusive and full control over a ship and the crew of the ship right after the interception in the international waters; consequently, Court has found that France had jurisdiction within the meaning of Article 1 of the Convention[426]. Under the "use of force by State agent" cases, the Court considers that "the exercise of physical power and control over the person in question[427]" is decisive.

On top of such examinations Court also examines the legal space of the Convention, which means 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"[428].

In the case of *Georgia v. Russia (II)*, the Court stated that during the active phase of the hostilities, Russia didn't exercise effective control over territory or State's agent authority in a context of chaos. We have expressed our opinion that the Court could establish jurisdiction even active phase of hostilities (see Chapter 3.4.5.).

In our opinion, concerning the concept of "state jurisdiction", L. Loucaides', the former judge of the ECtHR, the explanation is the most appropriate one that ideally suits the interpretations of the Court, with some exceptions, such as *Banković* and *Behrami and Saramati* cases, however those cases, in our opinion, already keep errors within the arguments on the concept

[423] "*Issa and others v. Turkey*, no. 31821/96," 16 November 2004, para. 71.
[424] See also "*Drozd and Janousek v. France and Spain* (Plenary), no. 12747/87," 26 June 1992.
[425] "*Banković and others v. Belgium and others* [GC] (dec.), no. 52207/99," 12 December 2001, para. 71.
[426] See "*Medvedyev and Others v. France* [GC], no. 3394/03," 29 March 2010, para. 67
[427] See "*Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07," 7 July 2011, para. 136.
[428] "*Soering v. United Kingdom* (Plenary), no. 14038/88," 7 July 1989, para. 86.

of the "state jurisdiction". In the progress of time, the Court has already been coming to the same finding as Judge L. Loucaides had come. In this regard, Judge L. Loucaides says:

> What is decisive in finding whether a High Contracting Party has violated the Convention in respect of any particular person or persons is the question whether such Party has exercised *de facto* or *de jure* actual authority, i.e. the power to impose its will, over the alleged victim. The correct approach is that the Convention laid down rules of conduct for the States Parties whenever and wherever they exercise effective authority over individuals.[429]

This was also expressed in the *Assanidze* case by L. Loucaides, as he remarked his disagreement with the *Banković* judgment as follows: "to my mind "jurisdiction" means actual authority […]. And it may, in my opinion, take the form of any kind of military or other State action on the part of the High Contracting Party concerned in any part of the world.[430]"

In addition to that, in his dissenting opinion in the case of *Ilaşcu v. Moldova and Russia*, the former judge has supported his aforesaid position and added that "a State may also be accountable under the Convention for failure to discharge its positive obligations in respect of any person if it was in a position to exercise its authority directly or even indirectly over that person or over the territory where that person is.[431]" This view of the former Judge also includes the situations, when State Party acts within the body of international organizations, and, were in a position to exercise their authority to some extent, such as *M.S.S. v. Belgium*, *Nada v. Switzerland* and *Al-Dulimi v. Switzerland*. Therefore, we think that this comprehensive and practical understanding should also be included in the "state jurisdiction" concept within the meaning of Article 1 of the Convention.

Ultimately, the extension of the "state jurisdiction" concept broadened the obligation to secure the entire range of substantive and procedural rights set out in the Convention and those additional Protocols which the States Parties have ratified.

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[429] Loukis G. Loucaides, *The European Convention on Human Rights*: *Collected Essays* (Leiden: Brill, 2007), 84.
[430] Concurring opinion of judge Loucaides in case of "*Assanidze v. Georgia* [GC], no. 71503/01," 8 April 2004.
[431] Dissenting opinion of judge Loucaides in case of "*Ilaşcu and others v. Moldova and Russia* [GC], no. 48787/99," 8 July 2004.

CONCLUSIONS AND RECOMMENDATIONS

1. Under international law, the concept of jurisdiction is regarded as the capacity of states to prescribe and enforce the law, and it is linked to the sovereignty and power of the State. In international law, forms of state jurisdiction are split up into a) prescriptive or legislative jurisdiction; b) jurisdiction of enforcement; c) adjudicatory jurisdiction; d) functional jurisdiction. Moreover, States rely on principles of jurisdiction to legitimise enforcing their jurisdiction; those principles are territorial and extraterritorial. Extraterritorial jurisdiction within itself is divided into a) protective principle; b) principle of universality; c) principle of nationality or personality, which is subdivided into principles of active and passive personality.

2. The jurisdiction of the ECtHR to hear all individual complaints or interstate petitions submitted to it is enshrined in Article 32 of the Convention; meanwhile, the concept of the "state jurisdiction" is enshrined in Article 1 of the Convention, which is closely related to Articles 13, 15, 32, 34, 35 and 56 of the Convention. In addition, Article 1 of the Convention is of vital importance for interpreting other articles of the Convention, such as Article 15 of the Convention, which is also interpreted and applied in accordance with the aspects of "state jurisdiction" set out in Article 1 of the Convention. The case-law of the Court on Article 1 doesn't affect the application of Article 56 of the Convention.

3. Article 13 of the Convention aims to ensure effective remedies for the violations of the human rights and fundamental freedoms outlined in Section I of the Convention to all persons (regardless of their legal status) within the jurisdiction of States Parties. However, the Convention does not lay down any specific way in which the provisions of the Convention are to be properly applied in domestic law. That means that the States Parties have discretion right to choose the method of securing the rights enshrined in Section I of the Convention in their domestic law.

4. The responsibility of the State Party arises when a violation of the Convention could be imputed to the State Party concerned; in this regard, imputability to the State Party does not mean *per se* responsibility of the latter.

5. The concept of the "state jurisdiction" by the ECtHR has been interpreted in accordance with the principles of public international law; therefore, that concept is primarily linked to the territorial jurisdiction of the State concerned. However, this concept is not limited to the national territory of a State, which means that in exceptional circumstances, States Parties exercise extraterritorial jurisdiction.

6. In the cases where the issue at stake is the extraterritorial jurisdiction, the Court examines whether the respondent State Party had exercised State agent authority and control (personal

model) or effective control over an area (spacial model). Moreover, the Court also considers the legal space ("espace juridique") of the Convention.

7. Effective control can be exercised directly and indirectly. In this regard, directly exercise could be through its military forces. Indirectly, it could be exercised through the subordinate separatist administration that survives due to the State Party's military and other support.

8. Exercising all or some of the public powers or use of force by a State's agents are considered within the scope of State's agents' authority or control, which is another type that generates imputability to the States Parties in the cases where they act extraterritorially.

9. Considering the case-law of the ECtHR, the conduct or event could be imputable to the States Parties in the cases where the alleged act or omission at stake does not fall within their strict international legal obligations undertaken by them, especially in the cases where they have enjoyed latitude or discretion (see cases of *Al-Jedda*, *Al-Skeini*, *Nada* and *Al-Dulimi*).

10. Article 15 and Article 1 of the Convention is closely interrelated. State Party would have a wide margin of appreciation and would limit its obligation (to some extent) to respect human rights under Article 1 of the Convention, provided that the conditions of the valid derogations are met. However, such limitation of the obligation to respect human rights is not absolute, so States Parties cannot enjoy unlimited power since the Court supervises and examines the factors, such as the natures of the rights affected; necessity of the derogation; proportionality of the measures that are taken; and the duration of the derogation. By making derogations under Article 15 of the Convention, States Parties cannot do whatever they want; the very example could be COVID-19. The possible validity of derogation would change compared to when humanity faced the COVID-19 for the first time. Therefore, the "State jurisdiction" concept is closely and indirectly dependent on the validity of the derogation within the meaning of Article 15 of the Convention, where the State Party has made derogation under Article 15 of the Convention. In that sense, abiding by the soul of the Convention together with the requirements of Article 15 would be our recommendation.

11. Article 15, in terms of the State Party concerned, is not applicable without a formal act of derogation and without informing Secretary-General. As a result, the state jurisdiction of the State Party would not be limited in such circumstances, and, the case would be examined using the test of prescriptiveness, pursuing legitimate aims and proportionality.

12. The very comprehensive and appropriate explanation of the concept of the "state jurisdiction" within the meaning of Article 1 of the Convention is (as an aspect that generates imputability to the States Parties) the exercise of *de facto* or *de jure* actual authority - whenever and wherever - over the alleged victim by the States Parties. Moreover, "failure to discharge its positive obligations in respect of any person if it was in a position to exercise its authority directly

or even indirectly[432]" must be supplemented to the aforementioned explanation of the concept of the "state jurisdiction" within the meaning of Article 1 of the Convention since it would include the situations, when the State Party acts within the body of international organization.

13. In the progress of time, the Court has developed its interpretation of the concept of the "state jurisdiction" within the meaning of Article 1 of the Convention. Accordingly, the concept of the "state jurisdiction" has been enlarged by the interpretations of the Court. Considering our research as a whole, it is quite apparent that the enlargement of the concept of the "state jurisdiction" within the meaning of Article 1 of the Convention imposes more obligations to the States Parties. From the point of substance, these obligations were already the imposed obligations by the Convention; however, by its case-law, the Court made these obligations visible. In other words, an extension of the jurisdiction, principally, means the extension of the obligation to secure the entire range of substantive and procedural rights set out in the Convention and those additional Protocols that the States Parties have ratified. Since broadening of obligations of the States Parties as a result of the extension of the "state jurisdiction concept" can generate imputability, we, combining the aspects that generate imputability to the States Parties, highly recommend exercising due diligence in every situation, where States Parties "exercise *de facto* or *de jure* actual authority - whenever and wherever - over the alleged victim[433]". Furthermore, exercising such due diligence may be useful in preventing any failure to discharge positive obligations, because "failure to discharge respective positive obligations in respect of any person if the States Parties were in a position to exercise their authority directly or even indirectly over that person or over the territory where that person is[434]" may result imputability to the States Parties.

[432] Dissenting opinion of judge Loucaides in case of "*Ilaşcu and others v. Moldova and Russia* [GC], no. 48787/99," 8 July 2004.
[433] Judge Loucaides view.
[434] Dissenting opinion of judge Loucaides in case of "*Ilaşcu and others v. Moldova and Russia* [GC], no. 48787/99," 8 July 2004

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ABSTRACT

Acar, S. C. (2022). *The Interpretation and Application of the Concept "the Jurisdiction of the State" Under Article 1 of the European Convention on Human Rights: Aspects Generating the Imputability to the States Parties* / Master's thesis in International Law. Supervisor – Prof. dr. Danutė Jočienė – Vilnius: Mykolas Romeris University, Mykolas Romeris Law School, Institute of International and European Union Law, 2022.

The concept of the "jurisdiction of the State" is enshrined in Article 1 of the European Convention on Human Rights, which stipulates the obligation to respect human rights. "State jurisdiction" also impacts the effective application of the Convention, as it consists of the aspects that generate imputability to the States Parties. Our research has examined the “state jurisdiction” concept under international law. The peculiarities of Article 1 of the Convention and its relation with relevant Articles have been given appropriately. The case-law on the concept of the "state jurisdiction" is analysed, and the very comprehensive and appropriate concept of the "state jurisdiction" is tried to be given.

The thesis provides a chronological examination of the case-law of the ECtHR. Considering the case-law of the Court, the concept of the "state jurisdiction" has been constantly expanded. Initially, such expansion has led to the expansion of the obligations that the States Parties have undertaken by signing and ratifying the Convention and its relevant Protocols. Consequently, this work recommends States Parties to perform due diligence when they exercise *de facto* or *de jure* actual authority.

Keywords: imputability, authority, the concept of the jurisdiction of the State, Article 1 of the ECHR, obligation to respect human rights.

SUMMARY

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The concept of the "jurisdiction of the State" is a *sine qua non* for the effective and practical application and implementation of the European Convention on Human Rights, as the victim must fall within the jurisdiction of one of the High Contracting Parties in order for the petition to be declared admissible by the Court. This Master's thesis, namely "the Interpretation and Application of the Concept "the Jurisdiction of the State" Under Article 1 of the European Convention on Human Rights: Aspects Generating the Imputability to the States Parties" examines chronologically how the concept of "state jurisdiction" was explained by the Court, what are the aspects that generate imputability to the States Parties, and whether the development of the case-law of the Court on the concept of the "state jurisdiction" imposes more obligations to the States Parties.

Hence, the Master's thesis aims to analyse the case-law of the ECtHR, identify some uncertainties and find what are the aspects that generate imputability to the States Parties, and examine the development of the case-law of the Court. The thesis consists of four main chapters.

The first chapter provides a general understanding and overview of the “state jurisdiction” concept under international law. The chapter examines the forms of the jurisdiction, as well as the principles of the jurisdiction, as a legitimization of the enforcement of "state jurisdiction" under international law. It concludes that the "state jurisdiction" concept is regarded as the capacity of states to prescribe and enforce the law, and it is linked to the sovereignty and power of the State.

The second chapter introduces the European Convention on Human Rights and the peculiarities of Article 1 of the Convention. These peculiarities are examined deeply in terms of *ratione loci, ratione temporis, ratione materiae, and ratione personae.* It reveals the relationship of Articles1 of the Convention with Articles 13, 15,34, 35, and 56. This chapter concludes that the application of Article 1 of the Convention is deeply interconnected with the above-mentioned Articles.

The third chapter, chronologically, provides our examination of the case-law of the Court concerning the application and implementation of Article 1 of the Convention, and thus concerning the concept of "state jurisdiction". Moreover, chapter includes indirectly related issues, such as the

relationship between the idea of "state jurisdiction" and the state of emergency cases, and, develops an understanding. It concludes that the "state jurisdiction" concept is constantly developed and extended by the ECtHR.

The fourth chapter, considering the case-law of the Court, tries to generalise the aspects generating imputability to the States Parties and tries to find a very comprehensive and appropriate concept of "state jurisdiction" in the light of the case-law of the Court. In addition to these, it examines the relationship between the extension of the "state jurisdiction" concept and the obligations imposed by the Convention. It concludes that aspects generating imputability to the States Parties could be regarded as effective control and the state agent authority and control. The very comprehensive would be considered an exercise of *de facto* or *de jure* actual authority. Lastly, the extension of the "state jurisdiction" concept broadened the obligation to secure the entire range of substantive and procedural rights set out in the Convention and those additional Protocols which the States Parties have ratified.