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In some cases, the government appears unable to control parts of the national territory, and thus to ensure full respect for human rights on the concerned portions of the territory. Consider the following examples, try to guess what the reaction of courts has been, and consider whether you agree with the reasoning provided:

### Example 1. Ajaria

Ajaria is located in the south-western part of territory of Georgia. It has the status of an Autonomous Republic, but it is an integral part of the national territory of Georgia. In the case of *Assanidze v. Georgia*, before the European Court of Human Rights, the applicant had been held in custody in the Ajarian Autonomous Republic for a number of years, after having been arrested and convicted for allegedly illegal financial dealings. Although the Georgian President had granted him a pardon in 1999 suspending the remaining two years of his sentence, he had remained in detention. Indeed, soon after the presidential decree granting the pardon had been adopted, the Ajarian High Court had declared the pardon null and void, and the judgments of the Georgian Supreme Court quashing that latter judgment had been ignored by the local authorities in the Ajarian Autonomous Republic. After the applicant was again convicted on another ground in 2000 by the Ajarian High Court, the Supreme Court of Georgia acquitted him. That acquittal judgment was also never executed, however. Despite all the best efforts of the General Prosecutor's Office of Georgia, the Public Defender, the Georgian Ministry of Justice and the Legal Affairs Committee of the Georgian Parliament, and even the President of the Republic of Georgia, seeking the immediate release of Mr Assanidzé, the local authorities concerned in the Ajarian Autonomous Republic refused to comply, apparently believing that he has been conspiring against the President of the Autonomous Republic. Would you say that this situation falls under the jurisdiction of Georgia, the responsibility of which therefore may be engaged in such a situation? (Read excerpts of the judgment here (/c4x/LouvainX/Louv2.01x/asset/\_Materials\_\_Extraterritorial\_situations\_ex1\_Final\_.pdf))

### Example 2. Moldova

*Ilascu and others v. Moldova and Russia*, the central authorities of Moldova appeared unable to secure the release of the applicants, who were arbitrarily detained in the hands of a separatist regime established on the Eastern border of the country, with the strong logistical and financial support of the Federation of Russia. The European Court of Human Rights thus was requested to decide whether the "jurisdiction" of Moldova extended to the part of the national territory that escaped the effective authority of Chisinau, the capital city, or whether, since the central authorities were unable to control that territory (which had called itself the "Moldavian Republic of Transdniestria"), the situation denounced should be considered to fall outside their "jurisdiction" for the purposes of determining the scope of their obligations under the European Convention on Human Rights. How would you have assessed this situation? (Read excerpts of the judgment here (/c4x/LouvainX/Louv2.01x/asset/\_Materials\_\_Extraterritorial\_situations\_ex2\_Final\_.pdf)).

**Example 3. The Federal Clause**

Some human rights treaties contain a "federal clause". One example is Article 28 of the American Convention of Human Rights:

1. Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.
2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.

In the case of *Garrido and Baigorria v. Argentina*, the defending State asserted at various stages of the proceeding either that, by virtue of the federal clause, any responsibility in the instant case was imputable to the Province of Mendoza, not to the State; or that, in any case, Argentina would have difficulties adopting certain measures to put an end to the violation given the federal structure of the State. Are these acceptable arguments under the American Convention on Human Rights, given that this instrument includes a "federal clause" (that one does not find, for instance, in the European Convention on Human Rights)?

In its judgment of 27 August 1998 delivered in the case of *Garrido and Baigorria v. Argentina* (Reparations and Costs) (Series C No. 39), the Inter-American Court of Human Rights took the view that :

"When a federal state's constituent units have jurisdiction over human rights matters, Article 28 of the Convention makes provision for said federal state becoming a party to the Convention. However, from the time of its approval and ratification of the Convention, Argentina has conducted itself as if the federal State had jurisdiction over human rights matters. Hence, it can hardly argue the contrary now, as this would imply a breach of the principle of estoppel. As for the 'difficulties' invoked by the State at the January 20, 1998 hearing, the Court should note that the case law, which has stood unchanged for more than a century, holds that a State cannot plead its federal structure to avoid complying with an international obligation (*cf.* arbitral award of July 26. VII. 1875 in the *Montijo* case, La Pradelle-Politis, *Recueil des arbitrages internationaux*, Paris, 1954, t. III, p. 675; decision of the France-Mexico Mixed Claims Commission of 7.VI.1929 in the *Hyacinthe Pellat* case, *UN Report of International Arbitral Awards*, vol. V, p. 536)" (para. 46).

In effect, this clarifies the limited scope that should be recognized to the federal clause. While this clause should reassure the constituent units of States organized according to a federal structure that accession to a human rights treaty by the State shall not lead the central government to expand its powers vis-à-vis the sub-units of the State, it cannot be relied on by the State to justify not fully complying with its international obligations, since this would amount to allowing a State to rely on its own constitution to limit the scope of such obligations. This would be in violation of Article 27 of the Vienna Convention on the Law of Treaties, according to which "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". The position of the Inter-American



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