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Are De Facto Regimes Bound by Human Rights?

In classical international law, there was only one subject: Only the sovereign state could be the bearer of rights and duties in international law. As a consequence, only the state was bound by treaties, and a transformation of the treaty into national law was always necessary to make the obligations of a state binding on legal persons within it. This was particularly true with regard to an area that increasingly became an object of international legal codification following the Second World War, namely human rights, which is unique inasmuch as the states made a mutual pledge to treat subjects of their domestic law in a particular way.¹ This was a revolution in international law, since international enforcement mechanisms aimed at combating human rights violations contributed to establishing the partial international legal personality of individuals. This means that individuals can directly assert rights derived from a treaty of international law at the international level.

States Are Obligated to Implement Human Rights Standards

States bear the main responsibility for the protection and enforcement of human rights. This applies to both fundamental constitutional rights and international obligations derived from human rights treaties. This is explicitly underlined in Article 1 of the European Convention on Human Rights (ECHR) of 1950: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Of course, demanding implementation in this way assumes a functioning state power, as only the state can make rights applicable in practice. And this ultimately assumes the existence of effective institutions of justice and law enforcement. A further requirement is the rule of law, which binds both the state and the subjects of laws to the law.

States have to grant human rights to everyone who is subject to their sovereignty. This does not only apply to their own citizens, and the obligation is not restricted to the territory of the state. States also exercise sovereignty on board ships and aircraft registered with them. Moreover, in cases of armed conflict, when the armed forces of one state occupy the territory of another, the former becomes the occupying power and exercises sovereignty. The same applies if the state turns the occupied territory into a dependent state

¹ Fundamental human rights are now considered to be *erga omnes* rights and absolutely binding on all states. As a consequence, any state can demand of any other state that it uphold them. Cf. Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford 2006, pp. 96ff.

that can definitely be considered as a de facto regime. This was shown by the case of *Loizidou v. Turkey* before the European Court of Human Rights (ECtHR).² This case concerned the fact that the Cypriot plaintiff could no longer make use of her property in Northern Cyprus following the Turkish invasion in 1974. In 1989 she filed a complaint against Turkey with the ECtHR as a result of the continuous refusal to grant her access to her property, which she considered a breach of Article 1 of the First Additional Protocol to the European Convention on Human Rights (ECHR). At the heart of the case was the question of who exercised sovereignty in Northern Cyprus, as Turkey contended that it was not the appropriate defendant.³ Instead, Turkey argued, the responsible party was the Turkish Republic of Northern Cyprus, which, as an independent state, was accountable for its own actions. Turkey felt compelled to take this position because it is the only state that has recognized Northern Cyprus as a state. The Court, however, did not share this view. Rather, it argued that the concept of jurisdiction applied in Article 1 ECHR is not restricted to a state's own territory. The Court saw this as a matter of state sovereignty, which can apply both within and outside state territory. For instance a state may enjoy effective control of a region outside its territory as a result of military measures, it being irrelevant whether control is held directly by the state's own forces or by a subordinate local administration. Since it was the presence of Turkish troops that was preventing the plaintiff from returning to her property, the incident occurred under Turkish jurisdiction. Consequently, on 28 July 1998, the ECtHR handed down a judgment that obliged Turkey to pay compensation.

The *Loizidou* example shows the extent to which states are obliged to respect human rights. If a state can be held responsible for its actions outside its territory, it is bound by human rights.

This example relates to the enforcement of treaty obligations. However, human rights are not only part of treaty law. Fundamental human rights currently also belong to the field of customary international law. They must therefore be respected by all states and by non-state actors.

The Legal Status of De Facto Regimes in International Law

International law is a legal system whose central task is to secure international peace. It must therefore be focused on real conditions. The clearest manifestation of this pragmatic approach taken by international law is to be

2 Cf. Hans-Joachim Heintze, On the Relationship between Human Rights Law Protection and International Humanitarian Law, in: *International Review of the Red Cross* No. 856, 2004, pp. 789-814, here: pp. 806-808.

3 Cf. André Husheer, Die völkerrechtliche Verantwortlichkeit der Türkei für Menschenrechtsverletzungen in Nordzypern [Turkey's Responsibility for Human Rights Violations in Northern Cyprus in International Law], in: *Zeitschrift für Europarechtliche Studien* 3/1998, p. 389.

found in the Second Protocol Additional to the Geneva Conventions of 8 June 1977. The Protocol is concerned with non-international conflicts, which it defines in Article 1 as armed conflicts that take place in the territory of a state between its armed forces and “other organized armed groups, which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.⁴ It is easy to understand why it is hard for the states to accept this definition when it is a matter of respecting the rights and duties of insurgents that have undermined the state monopoly on the use of force. Nonetheless, insurgents do exercise power in practice and, in the interest of victim protection, a minimum of co-operation is necessary.⁵

If international law grants even insurgents the status of partial subjects of international law, this must a fortiori apply to quasi-state entities that have consolidated their positions over a longer period of time.⁶ The principle of effectiveness means that they can gradually be granted international legal personality while remaining unrecognized. Developments on the ground have ultimately led to the emergence of a “stable de facto regime”, as the territory is being governed effectively. Such an entity therefore fulfils the preconditions for statehood and cannot permanently be regarded as legally null.⁷ According to Jochen A. Frowein, the existence of stable de facto regimes is a consequence of the “imperfect nature” of international law, which provides no criteria by which it can be determined whether an unrecognized entity possesses the quality of statehood or not. Against this background, we can refer to state practice, which demonstrates that the international legal subjectivity of even unrecognized entities cannot be denied.⁸

This approach is necessary to ensure that the fundamental norms of international law apply to de facto regimes. This is true above all with regard to the renunciation of violence. The UN General Assembly Definition of Aggression explicitly states that the term “state” is used in the resolution “without prejudice to questions of recognition or to whether a State is a member of the United Nations”.⁹ This explicitly underlined the fact that the renunciation

4 Office of the United Nations High Commissioner for Human Rights, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), 8 June 1977, available online at: <http://www2.ohchr.org/english/law/protocol2.htm>.

5 Cf. Hans-Peter Gasser, *International Humanitarian Law and Human rights Law in Non-International Armed Conflict*, in: *German Yearbook of International Law*, Vol. 45, Berlin 2003, pp. 149ff.

6 Especially since de facto regimes often arose from non-international armed conflicts. Cf. Georg Dahm/Jost Delbrück/Rüdiger Wolfrum, *Völkerrecht [International Law]*, Vol. 1/2, Berlin 2002, p. 303.

7 Cf. Volker Epping, *Völkerrechtssubjekte [Subjects of International Law]*, in: Knut Ipsen, *Völkerrecht [International Law]*, Munich 2004, p. 107, para. 15.

8 Cf. Jochen Abr. Frowein, *De facto Regime*, in: Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. I, Amsterdam 1992, p. 966.

9 United Nations, General Assembly, *Definition of Aggression*, A/RES/29/3314, 14 December 1974, Article 1, available online at: <http://www.un-documents.net/a29r3314.htm>.

of violence also applies to non-state entities. The same is true of the liability of these entities in international law. In its advisory opinion on Namibia, the International Court of Justice (ICJ) ruled that “physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States”.¹⁰ Further evidence that these entities have a status in international law is provided by the fact that they are allowed to join multilateral treaties in the interests of international security – the GDR and Taiwan becoming members of the Nuclear Test Ban Treaty in the 1960s, for instance, though both were unrecognized at that time. Stable de facto regimes also continue to play a major role today thanks to their significance for security policy. This suddenly became clear in 2008 with the outbreak of the South Ossetia conflict.¹¹ South Ossetia satisfies the criteria for statehood; it declared its independence again most recently following the referendum held on 12 November 2006. South Ossetia’s participation in the multilateral agreements between Russia and Georgia establishing a ceasefire and committing the parties to the renunciation of violence further supports the notion that it has a status in international law. On the other hand, the South Ossetian government does not effectively control the entire territory, and both the government and the economy are dependent on Russia. But this is no hindrance to characterizing the entity as a de facto regime, even though it is not sovereign. The high degree of dependence on Russia, as Luchterhandt relevantly points out, is precisely the reason for the stability and durability of this entity.¹² The same also applies to other entities, such as Northern Cyprus, with its links to Turkey.

The hallmark of a stable de facto regime is the lack of recognition. Consequently, recognition brings an end to this status and the awarding of statehood. The fate of the GDR shows, however, that recognition merely by one’s allies (in this case, the other members of the Eastern bloc) is not enough to eliminate the status of a stable de facto regime.¹³ The same can be expected to apply to South Ossetia’s recognition by Russia and Nicaragua, which has been condemned as a violation of international law by the Council of Europe.¹⁴ Russia is thus behaving in a similar way to Turkey with regard to Northern Cyprus and is likely to be equally unsuccessful. A de facto entity

10 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, *ICJ Reports* (1971), para. 118.

11 For more on the conflict itself see Otto Luchterhandt, *Völkerrechtliche Aspekte des Georgien-Krieges* [International Legal Aspects of the Georgia War], in: *Archiv des Völkerrechts* 46 (2008), pp. 435ff.

12 Cf. *ibid.*, p. 459.

13 For the basis of this, see Jochen Abr. Frowein, *Das de-facto-Regime im Völkerrecht* [The De Facto Regime in International Law], Heidelberg 1968, pp. 35ff.

14 “The Assembly condemns the recognition by Russia of the independence of South Ossetia and Abkhazia as a violation of international law and Council of Europe statutory principles.” Council of Europe, Parliamentary Assembly, Resolution 1633 (2008).

that can only survive thanks to the deployment of foreign troops will never be recognized by the international community, but will remain isolated.¹⁵

It is in the interest of the international community to see de facto statehood overcome. As the situation in the Caucasus shows even “frozen conflicts” can represent a major threat to regional peace, as violence may break out at any time. Moreover, after the conflicts have been resolved and the new states recognized – as occurred in Yugoslavia – they can seek to become part of the international community, which would require them to respect certain values as formulated by the CSCE/OSCE and EC/EU.¹⁶ This is certainly an advantage. Nonetheless, one may still ask whether non-recognized quasi-state entities are already obliged to respect human rights even though they have not joined the relevant treaties.

The Human Rights Obligations of Non-State Actors

If pragmatic international law accepts that de facto regimes are bearers of international legal rights, this means that they must also have duties. Given the *erga omnes* applicability of fundamental human rights, there can be no doubt that they belong to the catalogue of duties of de facto regimes. That means that the latter, similarly to states, are bound to respect human rights wherever they exercise jurisdiction.

By following this approach, international law does justice to a development that has been visible for decades. Academic commentators have seen in the strengthening of human rights protection a tendency to replace the principle of sovereignty with that of subsidiarity.¹⁷ This development encompasses the obvious trend towards the creation of sub-state entities.¹⁸ As a result, many autonomous entities and federal states have recently emerged – a process that has been characterized as the transcendence of the “one-dimensional state”.¹⁹ Sub-state entities are characterized by the creation of territorial entities that fulfil the classical criteria of statehood – territory, population, government – below the level of state formation.

It is therefore possible that human rights protection may become the responsibility of the de facto regime. It is true to say that this development may not always transpire peacefully and undoubtedly represents a major challenge

15 Cf. Uwe Halbach/Sabine Jenni, Nachkriegsentwicklung in Südossetien und Abchasien [Post-War Developments in South Ossetia and Abkhazia], in: *SWP-Aktuell* 28, June 2009, p. 2.

16 Cf. Christian Hillgruber, The Admission of New States to the International Community, in: *European Journal of International Law* 1998, p. 492.

17 Cf. Paolo G. Carozza, Subsidiarity as a Structural Principle of International Human Rights Law, in: *American Journal of International Law* 2003, pp. 41ff.

18 Cf. Gnanapala Welhengama, The Legitimacy of Minorities' Claim for Autonomy through the Right to Self-Determination, in: *Nordic Journal of International Law* 1999, p. 413.

19 Zelim A. Skurbaty, Summary Conclusions, in: id. (ed.), *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* Leiden 2005, pp. 565ff.

for international law, particularly in cases where several armed groups exercise regional power as the central government disintegrates. There are also problems when the command structure of the insurgents collapses and regional warlords come to power. Such fragmentation complicates the acceptance of certain rules and of human rights, particularly since an essential foundation of the validity of any legal order is now lacking. This is the expectation of reciprocity, according to which a subject of international law behaves in conformity with the law in the expectation that other subjects of international law will do the same. Things are further complicated by the fact that, in negotiations with warlords, it is difficult to offer them benefits that could be considered as a *quid pro quo* for their respect of human rights.²⁰

Nonetheless, *de facto* rulers must also be required to observe human rights, for “we need not abandon human rights thinking in the absence of a government ready to carry out all the traditional functions of statehood”.²¹ The literature provides examples of insurgents signing specific human rights undertakings. The refusal of *de facto* rulers to conclude agreements to secure human rights should not, however, be taken as meaning that they are not obliged to respect human rights. The fact that non-state actors are subject to them is derived entirely from the fact that the former exercise sovereignty and must observe human rights as a matter of customary law. There is thus no need for non-state actors to make any kind of commitment to uphold them.

The extent to which human rights need to be observed as a matter of customary law is of course an open question. Intensive discussion of this culminated in the adoption of the Turku Declaration on minimum humanitarian standards in 1990.²² These minimum standards are derived from non-derogable human rights and international humanitarian law and must be observed by all sovereign states. The study on customary law by the International Committee of the Red Cross (ICRC) pursued a similar goal.²³

Both documents make clear that the normative basis for binding non-state actors to the fundamental human rights that the documents enumerate has been laid. It is therefore time to turn to the question of enforcement.

20 Cf. Riikka Koskenmäki, Legal Implications Resulting from State Failure in the Light of the Case of Somalia, in: *Nordic Journal of international law* 73 (2004), pp. 20ff.

21 Clapham, cited above (Note 1), p. 14.

22 For details, see: Asbjørn Eide/Theodor Meron/Allan Rosas, Combating Lawlessness in Grey Zone Conflicts through Minimum Humanitarian Standards, in: *American Journal of International Law* 89 (1995), pp. 215ff.

23 Jean-Marie Henckaerts/Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge 2005, pp. 20ff.

The Enforcement of Human Rights Standards

The example of Northern Cyprus, as mentioned at the start, shows that judicial proceedings provide the most complete protection for human rights. For instance, all the judgments of the European Court of Human Rights have so far been satisfied, even if they have been the subject of intense discussions on various occasions. Even Turkey was ultimately willing to pay Ms. Loizidou compensation. State practice in the cases of Northern Cyprus, Chechnya, and Moldova demonstrates that human rights can also be enforced against de facto regimes.²⁴ However, these procedures could only take place because the human rights violations could be attributed to a signatory state of the European Human Rights Convention. This state could then be obliged to pay compensation and reparations to the victims. Court cases of this kind could also be used to punish human rights violations in places such as South Ossetia, as that “state” is similar to Northern Cyprus in that it only exists by virtue of Russia’s military intervention.

Against this background it is understandable that Russia has little sympathy for the ECtHR. The flood of complaints, very many of them stemming from Russia, has led to the Court becoming overwhelmed.²⁵ The complex procedure used so far therefore urgently needs to be simplified. At present, admissibility of each complaint is examined by three judges. It is intended to change this by means of an additional protocol to the Convention that will make it possible for a judge and two assessors to evaluate the admissibility of a claim. Where there are similar cases, as in the example of human rights violations by the Russian Army during the war in Chechnya, the aim is to introduce abbreviated procedures. As a precondition of these simplifications, all 47 member states need to ratify the protocol. So far, 46 have done so; only Russia has not. In 2006, however, the Duma explicitly rejected ratification, making Russia responsible for the current and growing ineffectiveness of the ECtHR. One factor behind the Russian rejection was the decision in the case of *Ilascu v. Moldova and Russia*, which made Russia responsible in part for human rights violations committed in the “Moldavian Republic of Transnistria”.²⁶

The example of Russia shows that barriers can even be put in the way of the juridical enforcement of human rights when the violations can be ascribed to a member state. The chances are even slimmer in the case of de facto regimes that do not belong to a treaty regime designed to protect human rights.

Under these conditions, the possibility of pursuing the perpetrators of serious human rights violations at the international level – i.e. via international criminal justice – is all the more interesting. There have been inter-

24 Cf. Hans-Joachim Heintze, *Las Palmeras v. Bamaca-Velasquez und Bankovic v. Loizidou?* in: *Humanitäres Völkerrecht* 18 (2005), pp. 177ff.

25 While the court can rule on 1,500 cases, around 2,300 are brought each month.

26 Cf. Alastair Mowbray, *Faltering Steps on the Path to Reform of the Strasbourg Enforcement System*, in: *Human Rights Law Review* 2007, p. 609.

esting developments in this area in recent years. The statute of the International Criminal Court (ICC)²⁷ contains a list of definitions of genocide, crimes against humanity, and war crimes. The perpetrators can be punished for such crimes regardless of whether they acted in the name of a state, as private individuals, or as the representatives of a non-state actor. International criminal justice is a complementary set of instruments for the punishment of crimes under international law. According to Article 17 of the Statute, it only comes into play when a state is either unwilling or genuinely unable to carry out the investigation or prosecution itself. For a case to come under the jurisdiction of the ICC, it is also necessary that the crime in question represents a violation of international law and is thus of concern to the international community. One consequence of this is that criminal acts committed by non-state actors would also come under the jurisdiction of the Court.

The idea behind international criminal justice is one of prevention. The hope is that potential perpetrators – and particularly non-state actors from territories in which there is a lack of functioning jurisdiction based on the principles of the rule of law – will in the future be deterred by the existence of the Court. Admittedly, in such cases, the Court always does have to examine whether the acts carried out by the perpetrator can be ascribed to a state. In this respect, the International Criminal Tribunal for the former Yugoslavia (ICTY) established a much-discussed standard in the case of Duško Tadić, when examining whether the actions of the Bosnian Serbs in the war in Bosnia and Herzegovina could be ascribed to the Federal Republic of Yugoslavia. The tribunal affirmed this on the grounds that the wages of Bosnian Serb troops were paid by the Yugoslavian army, so that a sufficient degree of control could be said to exist.²⁸

But even when the acts are ascribed not to states but to de facto regimes, international criminal justice offers a procedure to prevent and punish the most serious violations of human rights.

It is quite possible that a failure to enforce human rights standards may lead to the creation of obligations for other states. This is visible in the asylum law of the European Union. If many European states used to assume that an asylum claim was only justified in the case of state oppression, this changed in 2004 with the directive on minimum standards for qualification as refugees.²⁹ Article 6 explicitly names non-state actors as a group the persecu-

27 *Rome Statute of the International Criminal Court*, available online at: <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools>.

28 Cf. Axel Buchwald, *Der Fall Tadic vor dem Internationalen Jugoslawientribunal im Lichte der Entscheidung der Berufungskammer vom 2. Oktober 1995* [The Case of Tadic at the International Criminal Tribunal for the former Yugoslavia in the Light of the Decision of the Appeals Chamber of 2 October 1995], Berlin 2005, pp. 62f.

29 *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, available online at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>.

tion or infliction of serious harm by whom must be recognized as grounds for granting refugee status.

Summary

De facto regimes possess partial international legal personality and are bound by both treaty law and customary international law. The obligation to observe fundamental human rights is, in the first instance, a consequence of the fact that they belong to customary international law and have *erga omnes* character. It is possible to enforce human rights against a de facto regime. On the one hand, proceedings can be brought on the basis of treaty law when the establishment of the de facto regime was made possible by the military presence of a state that belongs to a regime such as the EHRC. This state is then responsible for the payment of compensation to the victims of human rights violations.

If the human rights violation is attributable to the de facto regime, all that remains are the means of enforcing general human rights protection under customary international law, i.e. above all the exertion of political pressure by the UN and the international community. Since de facto regimes are generally keen to seek international acceptance, this pressure can certainly be effective.

A further means of enforcement is international criminal justice. It serves to punish the perpetrators of serious human rights violations and to eliminate impunity. This is only of indirect benefit to the victims.