Human Rights Law Review **13**:4 © The Author [2013]. Published by Oxford University Press.

doi:10.1093/hrlr/ngt033 Advance Access publication 25 October 2013

The Human Rights of Individuals in *De Facto* Regimes under the European Convention on Human Rights

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Abstract

The objective of this article is to evaluate the extent to which we can regard individuals in the territories of *de facto* regimes in the Council of Europe region (Abkhazia, South Ossetia, Nagorno-Karabakh, Transdniestria and Turkish Republic of Northern Cyprus) as enjoying the protection of the European Convention on Human Rights. The work considers the utility of recognising *'de facto* regimes' as subjects of international law, before examining the relevant case law of the European Court of Human Rights and wider international law on the human rights obligations of such political entities. It then draws on the doctrine of acquired human rights to recognise, in certain circumstances, that the European Convention on Human Rights can be opposable to such regimes and concludes by reflecting on the implications of the analysis for understanding human rights in world society.

Keywords: *de facto* regimes – jurisdiction – acquired human rights doctrine – European Convention on Human Rights

1. Introduction

The objective of this article is to evaluate the extent to which we can regard the estimated one-and-a-quarter million inhabitants of the territories of *de facto*

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regimes in the Council of Europe region—Abkhazia, South Ossetia, Nagorno-Karabakh, Transdniestria and the Turkish Republic of Northern Cyprus—as enjoying the protection of the rights established under the European Convention on Human Rights (ECHR).[1] *De facto* regimes are, in terms of international recognition, located within a State that is party to the Convention, but lie outside the effective control of the government of the territorial State,[2] which is consequently not able to guarantee the full enjoyment of Convention rights to the populations of the territories. The position of the European Court of Human Rights (ECtHR) is that the Convention operates with the objective of avoiding a vacuum in the protection of Convention rights in circumstances that 'would normally be covered by the Convention'.[3] The importance of avoiding a vacuum in the protection of Convention rights has been consistently emphasised by the ECtHR, which has consequently interpreted the ECHR so as not to deprive a population of rights and freedoms,[4] or remove from individuals 'the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court'.[5] The concept functions in support of the established position of the ECtHR that the Convention is to 'be interpreted and applied so as to make its safeguards practical and effective'.[6]

The concern here is to assess whether the ECHR can be understood to be opposable to (that is, valid against) *de facto* regimes, which can be understood as 'third parties' in relation to the ECHR, either in terms of the *lex lata* or *lex ferenda*, or even, if it is possible consistent with international law doctrine, to provide an explanation as to how we might regard *de facto* regimes as being subject to a human rights regime established by an inter-State agreement. The question concerns the opposability of the ECHR normative regime and not its supervisory arrangements, that is, whether individuals in *de facto* regimes can be understood to enjoy the protection of Convention rights with correlative

1 Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5 (as amended).

2 For the purposes of this article, the term territorial State is used to describe the State on which the separatist territory is located. Any other State is described (neutrally) as an outside State.

3 *Banković and Others v Belgium and 16 Other Contracting States* 2001-XII; 44 EHRR SE5 at para 78.

4 *Al-Skeini and Others v United Kingdom* 53 EHRR 18 at para 142.

5 *Cyprus v Turkey* 2001-IV; 35 EHRR 731 at para 78.

6 In *Loizidou v Turkey* (*Preliminary Objections*) A 310 (1995); 20 EHRR 99 at para 72, the European Court of Human Rights observed the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms, concluding that 'the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective'; see also *Al-Skeini and Others v the United Kingdom*, supra n 4 at para 162.

obligations imposed on *de facto* authorities, even if the *de facto* regime cannot be a respondent in a case before the ECtHR.[7]

The analysis developed in this article is not only relevant for our understanding of the theory, doctrine and practice of human rights as applied to extant putative *de facto* regimes, which are often seen as 'criminalised, ethnic fiefdoms . . . founded on aggression',[8] but is also important for understanding any future transitional arrangements concerning the Convention rights of persons in separatist territories such as Catalonia and Scotland,[9] in particular where *de facto* independence might be followed by a period of non-recognition. The work proceeds as follows. It first defends the utility of the '*de facto* regime' as a subject of international law, before examining the case law of the ECtHR on the position of individuals under the control of *de facto* regimes, observing a development in the jurisprudence to the effect that an outside State in effective or decisive control can discharge its international responsibilities where remedies are available through the legal system of the *de facto* regime. The article then evaluates the possibilities of holding *de facto* regimes to human rights standards before addressing the complexities of imposing treaty obligations on a 'non-State' actor, which by definition cannot be party to the relevant instrument. The required conceptual shift is to understand *de facto* regimes in terms of political entities in some form of long-term, or even suspended, *statu nascendi*, that is, in the process of 'being born' into statehood, and to consider the implications of the acquired human rights

7 If it is accepted that the primary function of international human rights in world society is the construction of the idea of legitimate political authority and socialisation of political communities around the 'norm' of human rights (and not the provision of individual remedies), the distinction may be less important than many would presume. Cf Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935; see also Risse and Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction', in Risse, Ropp and Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999) 1 at 1; and Goodman and Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 *Duke Law Journal* 621.

8 Caspersen, 'From Kosovo to Karabakh: International Responses to De Facto States' (2008) 56 *Südosteuropa* 1 at 6.

9 A report on the international law aspects of Scottish independence in relation to the 'special case' of the European Convention on Human Rights (at para 116) concludes that 'Scotland will probably have to accede to the Council of Europe as a new member, but the application of the ECHR to Scotland will continue uninterrupted' (at para 140). The conclusion follows an assumption that Scotland would wish to be a party to the ECHR. If this were not the case, the Report observes that the position of the European Court of Human Rights 'that fundamental rights "belong to individuals living in the territory of the State party concerned, notwithstanding its subsequent dissolution or succession" suggests that if that situation arose the Court might well still resist the conclusion that the ECHR would cease to apply' (at para 141): see Crawford and Boyle, 'Annex A: Referendum on the Independence of Scotland – International Law Aspects', available at: www.gov.uk/government/publications/scotland-analysis-devolution-and-the-implications-of-scottish-independence [last accessed 14 August 2013].

doctrine for entities that are not yet, and might never be, 'States'. It concludes by reflecting on the complexities inherent in the argument and its implications for understanding the function of human rights in world society.

2. *De Facto* Regimes

The focus here is those territories that have achieved *de facto* independence in the face of opposition from the territorial State, but have not been accepted as 'States' by the international community following a policy of collective non-recognition. The analysis does not include disputed cases of statehood where a political entity is recognised by one part of the international community, as in the case of Kosovo.[10] Relevant examples of self-proclaimed authorities (in the terminology of the ECtHR) include Abkhazia and South Ossetia (Georgia), Nagorno-Karabakh (Azerbaijan), Transdniestria (Moldova), and the Turkish Republic of Northern Cyprus (Cyprus). Borgen refers to these as incomplete secessions: political entities have established *de facto* political independence for considerable periods of time with limited, if any, recognition in the international community.[11] Three possibilities emerge: recognition/acceptance by the international community of the status of *de facto* regimes as States; continuation of the status quo; or reintegration of the entities within the structures of the territorial State. In relation to negotiations for the reintegration of *de facto* regimes, Weller observes the acceptance of their distinctive status, with reference to the possibility of establishing the United Cyprus Republic, consisting of a federal government and two 'constituent States';[12] a 'State' of Nagorno-Karabakh within Azerbaijan;[13] and 'two sovereign entities (Abkhazia and Georgia) under the roof of the Georgian constitution'.[14]

The ECtHR uses the expression 'self-proclaimed authority' in relation to the territories under discussion here. The etymology of the term is not clear,[15] although it follows the language in the instrument of ratification deposited by the Republic of Moldova, which referred to the 'self-proclaimed Trans-Dniester

10 Cf. *Naskovic v Serbia* Application No 15914/11, Admissibility, 14 June 2011 at footnote 1.
11 Borgen, 'The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia' (2009) 10 *Chicago Journal of International Law* 1 at 27.
12 Weller, 'Settling Self-determination Conflicts: Recent Developments' (2009) 20 *European Journal of International Law* 111 at 125.
13 Ibid. at 126.
14 Ibid. at 134.
15 The earliest (pejorative) use appears to be by Hitchens: 'The privilege of *de facto* recognition is instead accorded to the Bosnian Serb "parliament" and its self-proclaimed authority over the territory': see Hitchens 'Bosnia actually demands to be left alone to fight its own battles', *The Nation*, 7 June 1993.

republic'.[16] The expression was first used by the Court in *Ilaşcu and Others v Moldova and Russia*[17] in relation to the Moldavian Republic of Transdniestria (MRT). In *Solomou and Others v Turkey*,[18] the term was employed in relation to the Turkish Republic of Northern Cyprus (TRNC). Applicants before the Court have used the expression in respect of Chechnya[19] and Nagorno-Karabakh.[20] Outside of the Council of Europe region, the ECtHR has referred to the 'self-proclaimed Republic of Somaliland',[21] and in *Al-Skeini and Others v United Kingdom*,[22] the Government of the UK used the term to distinguish the position of the Coalition Provisional Authority, established to govern Iraq during the occupation by the UK and the US forces, from that of the Moldavian Republic of Transdniestria and TRNC, observing that the Coalition Provisional Authority was recognised by the international community.

Other terms that have been applied to these political entities include *'de facto* States',[23] 'unrecognized States',[24] 'quasi-States'[25] and *'de facto* regimes'.[26] The last of these terms is used by Frowein to include political entities that claim to be a State and control more or less clearly defined territories, without being recognised by the international community as States. The examples given include the German Democratic Republic, the People's Republic of Korea and the Democratic Republic of Vietnam. Talmon concludes that the status

16 Declaration contained in the instrument of ratification, deposited on 12 September 1997: 'The Republic of Moldova declares that it will be unable to guarantee compliance with the provisions of the Convention in respect of omissions and acts committed by the organs of the self-proclaimed Trans-Dniester republic within the territory actually controlled by such organs, until the conflict in the region is finally settled.'

17 2004-VII; 40 EHRR 46 at para 318; see also reference in *Kommersant Moldovy v Moldova* Application No 41827/02, Merits, 9 January 2007 at para 8.

18 Application No 36832/97, Merits, 24 June 2008 at para 46.

19 Reference to the 'self-proclaimed "Chechen Republic of Ichkeria"': see *Sayd-Akhmed Zubayrayev v Russia* Application No 67797/01, Merits, 10 January 2008 at para 8; and 'self-proclaimed Chechen government': see *Akhmadova and Akhmadov v Russia* Application No 20755/04, Merits, 25 September 2008 at para 70.

20 Reference to the 'self-proclaimed, unrecognised "Nagorno-Karabakh Republic"': *Fatullayev v Azerbaijan* Application No 40984/07, Merits, 22 April 2010 at para 10.

21 *Salah Sheekh v The Netherlands* Application No 1948/04, Merits and Just Satisfication, 11 January 2007 at para 91. The case concerned the deportation of Somali nationals to Somaliland and Puntland (*de facto* regimes within Somalia).

22 53 EHRR 18 at para 113. The Court concluded at para 142 that where a State party, as a consequence of military action, exercises effective control over an area inside the territory of another State, it should be held accountable under the Convention, 'because to hold otherwise . . . *would result in a "vacuum" of protection within the "Convention legal space"*' (emphasis added).

23 Pegg, *International Society and the De Facto State* (Aldershot: Ashgate, 1998).

24 Caspersen, 'Democracy, Nationalism and (Lack Of) Sovereignty: The Complex Dynamics of Democratisation in Unrecognised States' (2011) 17 *Nations and Nationalism* 337.

25 Weller, supra n 12 at 130, concludes that Transdniestria established itself 'as a quasi-State outside the control of the Moldovan government, with the informal support of a Russian-led "peace-keeping" presence'. Weller also refers, ibid. at 148, to the idea of a *'de facto* State' where there is agreement 'on the *de facto* configuration of the projected new States, which will confirm at least its potential independence'.

26 Frowein, *Das* de facto-*Regime im Völkerrecht* (Köln: Heymann, 1968).

accorded to unrecognised *de facto* regimes follows from 'their status as States'.[27] In subsequent work, Frowein confirms that the concept of the *de facto* regime extends to political entities such as Northern Cyprus, Abkhazia and South Ossetia, whose status 'as States' is more contested.[28]

The classic definition of the State is provided in Article 1 of the Montevideo Convention on the Rights and Duties of States.[29] The State as a legal person in international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; (d) and the capacity to enter into relations with other States (usually understood as independence). Article 3 provides that the existence of the State does not depend on its recognition by other States. The concept of 'State' in international law is a question of fact: an independent political community characterised by the exercise of government functions in relation to a people and territory is a State.[30] Consider, in this context, the decision of the International Criminal Tribunal for the Former Yugoslavia to define 'State' to include *'a self-proclaimed entity de facto* exercising governmental functions, whether recognised as a State or not'.[31]

Recent developments point in a different direction, however, with the non-recognition of a number of political entities without reference to the question of effectiveness: Southern Rhodesia (statehood denied as a result of a violation of the principle of self-determination);[32] the Turkish Republic of Northern Cyprus (violation of the prohibition on the use of force);[33] and Republika

27 Talmon, 'The Constitutive Versus The Declaratory Theory of Recognition: *Tertium Non Datur*?' (2004) 75 *British Yearbook of International Law* 101 at 104.

28 Frowein, 'De Facto Regime', in Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008), online edition at para 1, available at: www.mpepil.com [last accessed 14 August 2013].

29 Adopted 26 December 1933, reprinted (1934) 28 (Supplement) *American Journal of International Law* 75.

30 The Badinter Commission opined that, in accordance with the principles of public international law, 'the existence or disappearance of the State is a question of fact [and] that the effects of recognition by other States are purely declaratory': see Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, 31 ILM 1488 (1992), Opinion No 1 at para 1(a). The Commission relied (at para 1(b)) on the following definition of a State: 'a community which consists of a territory and a population subject to an organized political authority'.

31 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence, IT/32/Rev. 3, 30 January 1995; see also International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, Rules of Procedure and Evidence, IT/32/Rev. 46, 20 October 2011.

32 SC Res 217, 20 November 1965, S/RES/217 (1965): determining that the unilateral declaration of independence by the 'illegal authorities in Southern Rhodesia' had 'no legal validity'.

33 SC Res 541, 18 November 1983, S/RES/541 (1983): determining that the declaration 'purporting' to establish an independent State of the Turkish Republic of Northern Cyprus (TRNC) was 'legally invalid' and calling on all States not to recognise the TRNC.

Srpska (ethnic cleansing).[34] One possibility is to regard non-recognition as being determinant of a failure by a *de facto* regime to achieve the status of a 'State'. Hillgruber argues that recognition 'is an act that confers a status[:] a (new) State is not born, but chosen as a subject of international law'.[35] The acceptance that *de facto* regimes are protected by certain international law norms also follows from the recognition that an entity is a *de facto* regime.[36] Hillgruber concludes that the practice of collective non-recognition confirms the importance of recognition in the construction of a State as a legal person in international law.[37] The constitutive theory enjoys though minority support in state practice and the international law literature. The dominant position is that recognition is not constitutive of statehood: the declaratory theory.[38] Stefan Talmon, for example, asserts that a *de facto* regime that meets the classic criteria of statehood—of population, territory and public authority—is a State. In relation to the TRNC, he argues that the majority of international lawyers would presume the existence of statehood.[39] Once a political entity achieves statehood it enjoys the inherent rights of a State to territorial integrity and political independence and self-defence against armed attack.[40] Non-recognition (in the form of a binding decision of the UN Security Council or countermeasure) is a sanction in response to some illegality in the formation or functioning of the State. The objective, Talmon argues, is 'to induce the State to dissolve itself and to return to the status quo ante'.[41] The extant independent political entity is, though, 'a State', with the responsibilities of a State under general and customary international law, albeit accepting that other States will not engage in voluntary relations, relating, *inter alia*, to the conclusion of treaties and participation in treaty regimes. Talmon concludes that the main difference between these 'local *de facto* governments' and Frowein's *de facto* regimes is the 'legal fiction' that the territory of the local *de facto* government continues to be part of the territory of the 'parent State', which continues to exercise certain limited competences with regard to that territory and its inhabitants.[42]

Even accepting the declaratory theory, recognition cannot be regarded as irrelevant to the question as to whether *de facto* regimes are—in fact—States. Kelsen observes that whether or not a political entity meets the criteria of statehood is

34 SC Res 787, 16 November 1992, S/RES/787 (1992): determining, in the context of the conflict in Bosnia and Herzegovina, that 'any entities unilaterally declared . . . will not be accepted'.
35 Hillgruber, 'The Admission of New States to the International Community' (1998) 9 *European Journal of International Law* 491 at 492.
36 Ibid. at 498.
37 Ibid. at 494.
38 Peters, 'Statehood after 1989: "Effectivités" between Legality and Virtuality' (2010) 3 *Proceedings of the European Society of International Law* (SSRN) at 4–5.
39 Talmon, supra n 27 at 117.
40 Ibid. at 149.
41 Ibid. at 181.
42 Ibid. at 148.

determined by the function of recognition by States in the international community.[43] The act of recognition concerns the application of a general rule to a factual situation. It can also provide evidence of a change in the general rule where the consistent practice of recognition changes.[44] The function of recognition then is to evaluate the application of a rule of general international law (the definition of 'State') and to reflect any change in the underlying rule.

De facto regimes are prospective separatist/secessionists units:[45] they are political entities that seek to establish a sovereign and independent State and its recognition by the international community. The Independent International Fact-Finding Mission on the Conflict in Georgia (Tagliavini Report) concluded that Abkhazia was not permitted to secede from Georgia under international law 'because the right to self-determination does not entail a right to secession'.[46] The conclusion goes too far.[47] As the International Court of Justice (ICJ) observed in the Kosovo Opinion, 'the scope of the principle of territorial integrity is confined to the sphere of relations between States'.[48] The standard position of international law on secession is one of neutrality: where a political entity achieves *de facto* independence and fulfils the criteria of statehood, it is a State. A number of States before the Court in the Kosovo hearings advanced the argument 'that the creation of a State is always a simple fact remaining outside the realm of law'.[49] In *Unilateral Declaration of Independence in Respect of Kosovo*, the Court avoided dealing with the substance of the international law on secession and creation of new States. It did though refer to the 'illegality' that attached to certain declarations of independence, including in relation to northern Cyprus, stemming 'from

43 Kelsen, 'Recognition in International Law: Theoretical Observations' (1941) 35 *American Journal of International Law* 605 at 607.

44 Ibid. at 610.

45 International law distinguishes between acts of separation and secession. Separation is a process whereby a new sovereign and independent political unit is created *with* the consent of the existing State. Secession refers to the situation where a new State is established and recognised *without* the consent of the territorial State: see Crawford, *The Creation of States in International Law*, 2nd edn (Oxford: Oxford University Press, 2006) at 330. Crawford uses the terms 'secession' and 'devolution'.

46 Independent International Fact-Finding Mission on the Conflict in Georgia Vol II, September 2009, at 147, available at: www.ceiig.ch/Report.html [last accessed 23 September 2013].

47 The right to self-determination does not establish a right to secession opposable to the territorial State outside of the colonial context, with the exception of any possible application of the 'saving clause': where a territorially concentrated group is systematically excluded, secession is a potential remedy of last resort in cases of serious human rights abuses against members of the group: see GA Res 2625 (XXV), 24 October 1970, A/8082. Cf. *Reference re Secession of Quebec* (1998) 2 SCR 217 at paras 134–135; see also *75/92, Katangese Peoples' Congress v Zaire* 8th Annual Activity Report of the ACHPR (1995), ACHPR/RPT/8th, Annex VI; 3 IHRR 136 (1996) at para 6. External military support does not invalidate the exercise of secession in cases of an application of the saving clause.

48 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010 403 at para 80.

49 Christakis, 'The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?' (2011) 24 *Leiden Journal of International Law* 73 at 81.

the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)'.[50] The passage provides support for the position—in contrast to the standard declaratory account—that certain State-like entities might not actually be 'States' as a matter of law. Collective non-recognition is understood to reflect some underlying or background norm precluding the acceptance of statehood for an independent political community established in violation of a *jus cogens* or other fundamental norm.[51] The test for statehood becomes one of effectiveness *provided* that the establishment of an independent political community does not involve the violation of an international law norm of *jus cogens* standing, either by the secessionist entity (for example, South Rhodesia) or by an outside State acting in support of the secessionist entity (for example, the TRNC).[52] The doctrinal justification for the position is explained by Peters in terms that the establishment of a political entity in violation of an international law norm of *jus cogens* standing must be 'a legal nullity[:] "wrongful birth" precludes statehood'.[53] Effectiveness is then a necessary, but not sufficient criterion of statehood: it must be complemented by criteria of legality and legitimacy. It is not clear as a matter of doctrine whether it is possible for a *de facto* regime to 'cure' the defect inherent in its existence as an international actor (Peters refers to the entity as a 'legal nullity'),[54] although it is possible to see attempts by *de facto* regimes to comply with regional standards of government, including the rights established under the ECHR, establishing the rule of law,[55] and holding

50 *Kosovo Advisory Opinion*, supra n 48 at para 81.

51 It might be tempting to conclude that the international community will regard all attempted secessions as legally problematic. Crawford observes that the position in international law 'is that secession is neither legal nor illegal'. Since 1945, however, the international community has been 'extremely reluctant' to accept unilateral secession and no new State has been admitted to the United Nations against the declared wishes of the government of the territorial State: see Crawford, supra n 45 at 390.

52 Roth argues that a modern varient of the 1930s Stimson Doctrine (concerning the non-recognition of Manchukuo) has precluded the recognition of *de facto* regimes 'unlawfully sponsored' by Russia (Abkhazia and South Ossetia, and Transnistria), Armenia (Nagorno-Karabakh) and Turkey (Turkish Republic of Northern Cyprus): see Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine Assessing the Decline of the Effective Control Doctrine' 11 *Melbourne Journal of International Law* 1 at 8.

53 Peters, supra n 38 at 6.

54 Peters, ibid. at 6, concludes that an effective political entity should not 'be placed in an international legal vacuum, because this would result in a lack of protection of the affected populations'. Crawford observes the following: 'It may also be argued that, if international law withholds legal status from effective illegal entities, the result is a legal vacuum undesirable both in practice and principle. But this assumes that international law does not apply to *de facto* illegal entities; and this is simply not so.' The example adduced is Taiwan, which 'whether or not a State, is not free to act contrary to international law, nor does it claim such a liberty': see Crawford, 'The Criteria for Statehood in International Law' (1976–77) 48 *British Yearbook of International Law* 93 at 145.

55 Waters, 'Law in Places that Don't Exist' (2006) 34 *Denver Journal of International Law and Policy* 401.

democratic elections,[56] as an attempt to remedy the illegitimacy of their 'unlawful birth' which precludes the recognition of the statehood of *de facto* regimes.

3. *De Facto* Regimes as Subjects of International Law

For the purpose of this article, the terms self-proclaimed authority and *de facto* regime are used interchangeably to refer to political entities that exercise effective and organised political authority over a territory and population, coupled with the political intention to be a sovereign and independent State. A *de facto* regime is organised in accordance with its own constitution and system of law; has the capacity to regulate social, economic and political life within a defined territory and to exclude executive action by other political authorities, including the sovereign State in which the self-proclaimed authority is formally located; but does not enjoy recognition by the international community as a State.

There may be legitimate questions as to whether the examples here meet the criteria of a *de facto* regime. Consider the cases of Abkhazia and South Ossetia, which have organised themselves as *de facto* autonomies supported by Russia on the territory of Georgia.[57] Abkhazia formally declared independence in 1999 after enjoying *de facto* independence from 1993. It has been recognised by Russia and four other States. South Ossetia first declared its independence in 1991. Following an attempt by Georgia to re-assert control, a political settlement was reached providing for *de facto* independence under the protection of Russian peacekeepers. In 2006, South Ossetia voted for independence. In the aftermath of an armed conflict between Russia and Georgia in 2008,[58] South Ossetia again declared independence from Georgia and was recognised by Russia along with five other States. The conclusion of the Independent International Fact-Finding Mission on the Conflict in Georgia was that South Ossetia did not reach the threshold of effectiveness required in international law for statehood: it was '*not a state-like entity,* but only an entity short of statehood'. By contrast, Abkhazia was more advanced 'in the process of State-building' and might have reached the threshold of effectiveness, and 'may therefore

56 Caspersen, supra n 24.

57 See generally Ryngaert and Sobrie, 'Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia' (2011) 24 *Leiden Journal of International Law* 467; see also Müllerson, 'Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia' (2009) 8 *Chinese Journal of International Law* 2.

58 For the implications of the conflict for the protection of human rights, see Okowa, 'The International Court of Justice and the Georgia/Russia Dispute' (2011) 11 *Human Rights Law Review* 739.

be qualified as a *state-like entity*'.[59] In making the distinction, the Report concluded that Russia's control of the decision-making process in South Ossetia was systematic and permanent, and South Ossetia was not effective on its own account. This is not the position of the Russian Federation, which in pleadings before the ICJ asserted that its presence in South Ossetia could not be categorised as either belligerent occupation or effective control.[60] Where it is determined that a territory is under the belligerent occupation or effective control of an outside State, the proper focus for the applicable law will be on the responsibility of the outside State that exercises governmental power nominally through a self-proclaimed authority. Nonetheless the research question addressed in this article remains valid in its analysis of the complexities concerning the protection of Convention rights, with the objective of establishing the basis for holding *de facto* regimes, where and were they to exist, to the normative standards established under the ECHR.

4. *De Facto* Regimes under the ECHR

In accordance with the conclusions of the previous section, *de facto* regimes are, by definition, non-State actors, that is, they are not accorded the status of 'State' under the rules of general international law. One non-State actor has hitherto been party to the ECHR.[61] Saarland was established as an internationalised territory in 1945, enjoying *de facto* autonomy before being reincorporated into the German Federal Republic from 1 January 1957. In 1953, it became one of the first parties to the ECHR. The example is not relevant for the argument developed here, which excludes the position of internationalised territories, including (arguably) Kosovo. The example of Saarland notwithstanding, it is not possible for *de facto* regimes to accede to the ECHR. Article 59(1) provides that the Convention shall be open to the signature of the members of the Council of Europe. Article 4 of the Statute of the Council of Europe establishes that '[a]ny European *State* . . . may be invited to become a member of the Council of Europe by the Committee of Ministers'.[62] The extent

59 Independent International Fact-Finding Mission on Georgia, supra n 46 at 134 (emphasis added).

60 *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* Preliminary Objections of the Russian Federation Vol I, 1 December 2009, at para 5.61, available at: www.icj-cij.org/docket/files/140/16099.pdf [last accessed 23 September 2013].

61 Article 59(2) of the European Convention on Human Rights further provides that one non-State (supranational) actor—the European Union—may accede to the Convention.

62 Statute of the Council of Europe, CETS 1 (emphasis added). Consider the example of Andorra, which acceded to the European Convention on Human Rights on 22 January 1996. Its status as an independent State was established in 1993. Prior to that the international community and European Court of Human Rights did not regard Andorra as a State because the political entity was ruled by two Co-Princes: the President of the French Republic and the Bishop of Urgel (Spain). The ECtHR accepted that the Convention did not apply on the territory of

to which individuals in *de facto* regimes or self-proclaimed authorities enjoy the Convention rights recognised in the ECHR must be addressed from the perspective of the States parties to the Convention and in terms of its opposability to *de facto* regimes.

A. Responsibility of the Territorial State

Article 1 of the ECHR provides as follows: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.'[63] The position of the ECtHR is that the Convention is presumed to apply throughout the territory of a State party, notwithstanding any difficulties experienced by the central authorities in ensuring compliance by a regional or local self-government entity. In *Assanidze v Georgia*, the applicant complained of his continued detention by the Adjarian Autonomous Republic despite his acquittal by the Supreme Court of Georgia. The ECtHR declined to accept that the presumption of jurisdiction and accountability should be rebutted where an autonomous regime refused to comply with the directives of the central government, concluding that Georgia remained responsible for events occurring anywhere within its national territory.[64] In reaching this conclusion, the ECtHR observed that Georgia had ratified the Convention for the whole of its territory and it was accepted that the Ajarian Autonomous Republic 'ha[d] no separatist aspirations and that no other State exercises effective overall control there'.[65]

Where part of the territory of a State party is under the effective control of another State, the territorial State is relieved of its international responsibility. This is the case in relation to northern Cyprus, where the Grand Chamber has concluded that the effective overall control over northern Cyprus by Turkey had resulted in the territorial State's inability to exercise its

Andorra as the Principality was not a member of the Council of Europe and could not be a party to the ECHR in its own right: see *Drozd and Janousek v France and Spain* A 240 (1992); 14 EHRR 745 at para 89. A dissenting minority disagreed with the conclusion that as Andorra was a not, 'at least not fully', an international entity that the population of the Principality should not enjoy the protection of Convention rights, as long as Andorra remained '*a* de facto *regime*': Joint Dissenting Opinion of Judges Pettiti, Valticos and Lopes Rocha, approved by Judges Walsh and Spielmann (emphasis added).

63 Article 1 European Convention on Human Rights. Article 56 ECHR is not relevant to these debates. Article 56(1) provides that a State party may extend the protection of the Convention 'to all or any of the territories for whose international relations it is responsible'. The provision is concerned with non-metropolitan or non-self-governing territories. Cf. Moor and Simpson, 'Ghosts of colonialism in the European Convention on Human Rights' (2005) 76 *British Yearbook of International Law* 121.

64 *Assanidze v Georgia* 2004-II; 39 EHRR 32 at para 146.

65 Ibid. at para 140.

Convention obligations.[66] The situation is distinguished from the position where a *de facto* regime operates with the support of an outside State, where the territorial State retains a positive obligation to take appropriate diplomatic measures in support of the guarantee of convention rights. This is the case in relation to Moldova and individuals subject to the *de facto* authority of the Moldovan Republic of Transdneistra (MRT), which has enjoyed *de facto* independence since 1991 under the support of Russian armed forces, although it has not been recognised by any State, including Russia.[67]

In *Ilaşcu and Others v Moldova and Russia*, the applicants were accused of anti-Soviet activities and illegally combating the MRT and charged with a number of offences. In December 1993, the 'Supreme Court of the Transdniestrian region' sentenced the applicants variously to death, imprisonment and property confiscation. The European Court of Human Rights accepted that the Moldovan Government—which it referred to as the only legitimate government of Moldova under international law—did not exercise authority over the part of its territory under the control of the separatist MRT.[68] The Court affirmed its position that Convention rights applied to individuals within the jurisdiction of a State party and that jurisdictional competence was presumed to be exercised throughout the entire territory of the State. The presumption could be limited where the State was prevented from exercising its authority, including in cases of acts of rebellion and the actions of a foreign State supporting the installation of a separatist *de facto* regime within the territory.[69] The factual situation reduced the scope of its jurisdiction to the legal and diplomatic measures that the State party was able to take in support of the guarantee of the rights of those living in the territory.[70] The determination as to whether the territorial State has discharged its positive obligations in relation to territories outside of its effective control is made on a case-by-case basis.[71] The position of the ECtHR is that the territorial State

66 *Cyprus v Turkey*, supra n 5 at paras 77–78. The ECtHR held, at para 78, Turkey responsible under the ECHR in order to avoid 'a regrettable vacuum in the system of human-rights protection in the territory'.

67 See, generally, Borgen, 'Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia's "Frozen Conflicts"' (2007) 9 *Oregon Review of International Law* 477.

68 Supra n 17 at para 330.

69 Ibid. at para 312. In a Partly Dissenting Opinion, Judge Loucaides argued that jurisdiction 'means actual authority, that is to say the possibility of imposing the will of the State' and there was nothing to demonstrate that Moldova had any direct or indirect authority over the territory of the MRT. Cf. also Partly Dissenting Opinion of Judge Ress at para 5.

70 Ibid. at para 333.

71 Gondek argues that the judgment 'blurs rather than clarifies' the idea of jurisdiction under the Convention. Not only does the ECtHR confuse and conflate the concepts of jurisdiction and responsibility, 'but also the concept of positive obligations is brought about in a way that causes puzzlement, because any obligations whether negative or positive, can be owed under the ECHR only to persons being within the jurisdiction of the State in question': see Gondek, 'Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?' (2005) 52 *Netherlands International Law Review* 349 at 368.

retains an obligation under the ECHR to use all diplomatic means to secure the protection of Convention rights in the territory of the self-proclaimed authority, including through diplomatic dealings with the occupying State or self-proclaimed authority and by peaceful attempts to re-establish effective control over the separatist territory, notwithstanding the refusal of the ECtHR to ask the question as to whether the territory under consideration is in fact a new State: lack of recognition by the territorial State and wider international community is taken to be determinant of the issue of status.

B. Responsibility of the Outside State

In *Ilaşcu and Others*, the ECtHR also examined the responsibility of the Russian Federation, which it found to be providing extensive military and political support to the MRT. Under the rules of general international law, a State is responsible for the actions of a non-State actor outside of its territory where the relationship is 'one of [complete] dependence on the one side and control on the other'.[72] Such a finding will be exceptional.[73] In order to establish the international responsibility of an outside State for the internationally wrongful conduct of a secessionist *de facto* regime, it must be shown that the obligations of the outside State extend to the entity and are attributable to the outside State. This requires evidence that the *de facto* regime is part of the outside State or empowered to act on its behalf, or that the authorities of the outside State took part directly in the impugned activities of the *de facto* regime.

The European Court of Human Rights has not followed the general rules outlined by the International Court of Justice on the question of the responsibility of States parties to the ECHR: it does not require evidence of complete dependence and control.[74] In *Loizidou v Turkey*, the ECtHR concluded that it was not necessary to determine whether Turkey actually exercised detailed control over the policies and actions of the TRNC: it was 'obvious' from the presence of the large number of troops in northern Cyprus that the Turkish army

72 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v* Serbia and Montenegro), Judgment, ICJ Reports 2007 43 at para 391, reference to *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) Merits, ICJ Reports 1986 14 at para 109.

73 Ibid. at para 393.

74 Talmon argues that the approach taken by the European Court of Human Rights has inappropriately extended the notion of control well beyond that recognised by the International Court of Justice, whilst accepting that the justification for the different standard is provided by the stated objective of ECtHR to avoid a 'regrettable vacuum in the system of human rights protection in the territory in question': see Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 *International and Comparative Law Quarterly* 493 at 512. Cf. Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649 at 665: there is a requirement to ensure that an outside State is held responsible for extensive support for secessionist groups without the need to prove that in each specific instance of violation that the *de facto* regime was under the control of the outside State.

exercised 'effective overall control', which entailed the responsibility of the outside State for the policies and actions of the TRNC.[75] Rudolf observes that the conclusion was not subject to detailed evaluation by the ECtHR, which simply stated that the presence of a large number of troops 'clearly indicated effective Turkish control over the territory'.[76] In *Ilaşcu*, the Court expanded the scope of responsibility beyond that of effective overall control, determining that the responsibility of the Russian Federation for the guarantee of Convention rights was engaged by the actions of the MRT, regard being had to the military and political support provided in the establishment of the separatist regime and in enabling it to survive and maintain its autonomy in relation to Moldova.[77] Moor and Simpson conclude that *Ilaşcu and Others* provides the basis for a coherent foundation for establishing the responsibilities of States parties to secure Convention rights: responsibility should be coterminous with the *de facto* ability to secure protection.[78]

In the later case of *Ivantoc and Others v Moldova and Russia*, the ECtHR again determined that the applicants fell within the jurisdiction of the Russian Federation and its responsibility was engaged as a consequence of Russia's close relationship with the MRT, including the provision of political, financial and economic support; the presence of the Russian army on Moldovan territory and the fact that the Russian Federation had done nothing to prevent the violations of the Convention or put an end to the unsatisfactory situation of the applicants brought about by its agents.[79] In the more recent decision of *Catan and Others v Moldova and Russia*, the Grand Chamber confirmed its position on Russia's responsibility for the subordinate local administration. Here, the applicants—Moldovans living in Transdniestria—complained under Article 2 of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (right to education) about the closure of schools; commandeering of school buildings by the MRT; and of a systematic campaign of harassment and intimidation. The ECtHR determined that the impugned actions were intended to enforce the 'Russification' of the language and culture of the Moldovan community in Transdniestria in accordance with the MRT's objectives of uniting with Russia and separating from Moldova. The Court concluded that there had been a violation of the right to education, holding the Russian Federation responsible by virtue of its continued support for the MRT, which could not otherwise survive.[80]

75 *Loizidou v Turkey* 1996-VI; 23 EHRR 513 at para 56.
76 Rudolf, '*Loizidou v Turkey* (Merits)' (1997) 91 *American Journal of International Law* 532 at 536.
77 *Ilaşcu and Others v Moldova and Russia*, supra n 17 at para 382.
78 Moor and Simpson, supra n 63 at 125.
79 *Ivantoc and Others v Moldova and Russia* Application No 23687/05, Merits and Just Satisfaction, 15 November 2011 at paras 118–119.
80 *Catan and Others v Moldova and Russia* Application Nos 43370/04, 8252/05 and 18454/06, Merits and Just Satisfaction, 19 October 2012 at para 149.

In its judgment in *Ilaşcu*, the ECtHR appeared to regard the *de facto* regime of the Moldavian Republic of Transdniestria as a private actor, focusing on the actions and omissions of the territorial and outside States parties to the case. The normative position of the self-proclaimed authority was determined indirectly through the obligations imposed on the respondent States to exercise, respectively, influence and decisive control, with the Court concluding that the acquiescence or connivance of a State in the acts of private individuals that violate the Convention rights of others can engage the responsibility of the State and that this is 'particularly true in the case of recognition by the State in question of the acts of self-proclaimed authorities which are not recognised by the international community'.[81] Whilst it might be possible to understand the position of *de facto* regimes exclusively in terms of the responsibilities of the territorial State and any outside State, this has been made difficult by a development in the jurisprudence of the ECtHR to the effect that a State party can rely on the functioning of the legal system of a self-proclaimed authority to avoid a finding of a violation of a Convention right by demonstrating that an interference has been remedied at the domestic level, or is 'prescribed by law', or 'necessary in a democratic society'. The relevant case law relates to the TRNC.

C. The Turkish Republic of Northern Cyprus under the ECHR

Cyprus has been divided since 1974 when Turkey invaded the northern part of the State. In 1983 the area inhabited by Turkish Cypriots declared itself the TRNC, with a TRNC Constitution enacted on 7 May 1985. The TRNC is recognised only by Turkey, which regards the political entity as a democratic and constitutional State, independent of all other sovereign States and established by the Turkish–Cypriot people in the exercise of its right to self-determination.[82] The position of the ECtHR is that individuals within the territory of the TRNC are under the *de jure* sovereign authority of Cyprus, the overall control of Turkey, and subject to the exercise of *de facto* authority by the TRNC. The ECtHR holds Turkey responsible under the ECHR for the acts of the TRNC, which survives by virtue of its military and other support. Hoffmeister notes that the imputability of Turkey under the ECHR weakens the claim of the TRNC to be an independent State, confirming the impression that, in view of the Turkish military control on the ground and the need for substantial

81 Supra n 17 at para 318; see also *Solomou and Others v Turkey*, supra n 18 at para 46.

82 *Cyprus v Turkey*, supra n 5 at para 15. In a Concurring Opinion, Judge Wildhaber, joined by Judge Ryssdal, argued that the refusal of the international community to recognise the TRNC implied a rejection of the claim to self-determination by way of secession on the basis that the exercise of the right in this case did not strengthen the human rights and democracy of all persons and groups involved: see *Loizidou v Turkey*, supra n 75 at Concurring Opinion of Judge Wildhaber, joined by Judge Ryssdal.

yearly financial transfers from Turkey to northern Cyprus, 'the TRNC is far from being politically and economically independent'.[83]

In *Loizidou v Turkey*, the ECtHR observed that the international community did not regard the TRNC as a State and that the Republic of Cyprus remained the sole legitimate Government of Cyprus.[84] The conclusion was objected to by Judges Pettiti and Gölcüklü. Judge Pettiti argued that the status of the TRNC should have been more fully considered, concluding that non-recognition was 'no obstacle to the attribution of national and international powers', asserting that the example of Taiwan was comparable.[85] Judge Gölcüklü (the elected judge of Turkish nationality) went further, concluding that TRNC enjoyed sovereign authority and that it was 'of little consequence whether that authority is legally recognised by the international community'. There was no legal vacuum in northern Cyprus, but 'a politically organised society, whatever name and classification one chooses to give it, with its own legal system and its own State authority'.[86] The position of the ECtHR remains, however, that it should follow the lead of the international community and not accord recognition to the TRNC as a 'State'.

In *Loizidou v Turkey*, the applicant complained of an interference in her property rights as a result of the occupation and control of northern Cyprus by Turkish armed forces. Following its determination that the TRNC lacked international recognition, the Grand Chamber concluded that the Court could not attribute legal validity for purposes of the Convention to the TRNC Constitution, which established the legal code in the territory of the TRNC.[87] Loucaides summaries the conclusions as follows:[88] as a consequence of the occupation of the northern part of Cyprus by Turkey, the outside State was considered to be exercising *de facto* jurisdiction and was accountable for any violations of Convention rights; the TRNC, 'being legally invalid', could not lawfully expropriate property; accordingly, the applicant could not be deemed to have lost title to her property as a result of the TRNC Constitution.[89] As Rudolf notes, the determination that the TRNC Constitution and legal system had no legal validity was central to the judgment: the violation of the right to property was the result of a legal act, but its legal effects could not be taken into account.[90]

83 Hoffmeister, '*Cyprus v Turkey*' (2002) 96 *American Journal of International Law* 445 at 450.
84 *Loizidou v Turkey*, supra n 75 at para 56.
85 Ibid. at Dissenting Opinion of Judge Pettiti.
86 Ibid. at Dissenting Opinion of Judge Gölcüklü, para 3.
87 *Loizidou v Turkey*, supra n 75 at para 44.
88 Judge Loucaides served on the European Court of Human Rights from 1998 until 2008; he is a Cypriot national.
89 Loucaides, 'The Protection of the Right to Property in Occupied Territories' (2004) 53 *International and Comparative Law Quarterly* 677 at 684.
90 Rudolf, supra n 76 at 536.

In reaching its conclusion in *Loizidou v Turkey*, the ECtHR determined that it was not necessary to elaborate a general theory on the lawfulness of legislative and administrative acts of the TRNC. It did follow the position in international law that not all acts of a *de facto* government are to be regarded as being without legal validity.[91] This '*Namibia* principle' was first articulated by the ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa), where the Court concluded that the responsibility of South Africa for the violations of the rights of the people of Namibia followed from the physical control of the territory, and not sovereignty or legitimacy of title.[92] The non-recognition of the illegal administration should not, however, result in depriving the people of the territory of any advantages derived from international co-operation or result in the invalidity of those acts of the *de facto* power 'such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory'.[93] As Judge Dillard explained in his Separate Opinion, the legal consequences that flowed from a determination of the illegal occupation did not entail the automatic application of the doctrine of nullity and regard must be had to the welfare of the inhabitants of Namibia.[94]

Frowein makes the point that whilst the *Namibia* judgment related to a *recognized* State whose administration of a territory was not recognised, the underlying principle can be applied to *de facto* regimes.[95] The *Namibia* principle is now well established under international law,[96] and has been referred to by the ECtHR in its case law on self-proclaimed authorities.[97] In *Cyprus v Turkey*, the Court affirmed its conclusion that Turkey was responsible for the acts of the local administration, which survived by virtue of Turkish military and other support as a consequence of its effective overall control over northern Cyprus.[98] The Court also accepted that it would be wrong to make a State party responsible for acts occurring in a territory unlawfully occupied and administered by it and to deny the State the opportunity to avoid such responsibility 'by correcting the wrongs imputable to it in its courts'. The ECtHR concluded that the remedies available in the TRNC could be regarded as the domestic remedies of the respondent State and that it was necessary for

91 *Loizidou v Turkey*, supra n 75 at para 45.
92 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa) *notwithstanding Security Council Resolution 276 [1970]* (Advisory Opinion) [1971] ICJ Reports 16 at para 118.
93 Ibid. at para 125.
94 Ibid. at Separate Opinion of Judge Dillard, para 167.
95 Frowein, supra n 28 at para 7.
96 See Restatement (Third) of Foreign Relations Law of the United States (1987).
97 *Loizidou v Turkey*, supra n 75 at para 45.
98 The continuing inability of the territorial State to exercise its Convention obligations meant that any other finding would result in a 'regrettable vacuum' in the system of human-rights protection in the territory in question: *Cyprus v Turkey*, supra n 5 at para 78.

individuals within northern Cyprus to exhaust those remedies before bringing a case before the Court in Strasbourg.[99] In reaching this judgment, the Court determined that the absence of judicial institutions in the TRNC would act to the detriment of the community. It further outlined a more general function for the *de facto* regime: '[l]ife goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected *by the* de facto *authorities*'. To disregard the acts of the *de facto* authorities 'would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled.'[100]

In *Cyprus v Turkey*, the Grand Chamber accepted that the judicial system in the TRNC could be considered to be established by law.[101] In a partly dissenting opinion, Judge Palm, joined by five of the seventeen Judges on the Grand Chamber, argued that the ECtHR should have upheld its position in *Loizidou* and followed the logic of that reasoning by refusing to elaborate a general theory concerning the validity and effectiveness of the remedies established by the TRNC, 'particularly if it is to be built around the minimalist remarks of the [ICJ] in its Advisory Opinion on Namibia'. Three justifications supported a policy of judicial self-restraint: that as the remedies were provided under the TRNC Constitution, it would inevitably confer a degree of legitimacy on the entity; it was not possible to examine the remedies afforded by the TRNC as if it were a normal State party; as Turkey regarded the TRNC as an independent and sovereign State, the ECtHR was confronted with the paradox that Turkey was seeking to rely on remedies that supposedly belonged to another legal system. Judge Palm concluded that, notwithstanding the utility of the local courts in the TRNC, the ECtHR should not require applicants to exhaust the remedies offered by an occupying authority before accepting that it had jurisdiction to examine their complaints.[102] Loucaides concurs, arguing that the approach is to be preferred to the one adopted by the majority, specifically in relation to the reliance on the *Namibia* principle established by the ICJ, which does not require the inhabitants of an occupied territory 'to resort to illegal remedies established by the *de facto* organs before they have a right to bring their case before an international court'.[103]

99 Ibid. at para 101.
100 Ibid. at para 96 (emphasis added).
101 Ibid. at para 237.
102 Ibid. at Partly Dissenting Opinion of Judge Palm, joined by Judges Jungwiert, Levits, Pantîru, Kovler and Marcus-Helmons.
103 Loucaides, 'The Judgment of the European Court of Human Rights in the *Case of Cyprus v Turkey*' (2002) 15 *Leiden Journal of International Law* 225 at 235; see also Ronen, 'Non-recognition, jurisdiction and the TRNC before the European Court of Human Rights' (2003) 62 *Cambridge Law Journal* 534 at 537; and Greenwood and Lowe, 'Unrecognised States and the European Court' (1995) 54 *Cambridge Law Journal* 4 at 6.

In subsequent cases, the ECtHR has continued to recognise the utility of the government system established under the TRNC Constitution. In *Foka v Turkey*,[104] the applicant argued that as the TRNC was not a recognised State no deprivation of liberty by the TRNC authorities could be regarded as lawful within the meaning of Article 5 of the ECHR, which provides that no one shall be deprived of their liberty except in accordance with a procedure 'prescribed by law'. Where the idea of law is understood in terms of an expression of sovereign will, only the normative provisions of the State can be regarded as 'law' (properly so-called). The ECtHR disagreed, concluding that the acts of the TRNC should in principle be regarded as having a legal basis in domestic law for the purposes of the Convention.[105] In *Protopapa v Turkey*,[106] the applicant, who had been convicted for attempting to enter the territory of the TRNC contrary to relevant regulatory provisions, observed that Article 7(1) ECHR establishes that no one can be found guilty of a criminal offence for an act which did not constitute a criminal offence 'under national or international law' when it was committed. The Court concluded that where an act of the TRNC authorities was in compliance with the laws in force in the territory of northern Cyprus, it should in principle be regarded as having a legal basis in domestic law for the purposes of the Convention.[107] It further accepted that an interference in the right to peaceful assembly could be regarded as necessary in a democratic society (presumably the democratic society of the TRNC, although the judgment is not clear on the point). Having regard to the margin of appreciation, the ECtHR accepted that the interference was not disproportionate in the circumstances.[108]

In *Demopoulos and Others v Turkey*,[109] the Grand Chamber affirmed its position concerning the exhaustion of domestic remedies. The applicants, Greek Cypriots, claimed that they had been deprived of their property rights in the northern part of Cyprus under the control of the TRNC. The overall control exercised by Turkey entailed its responsibility for the policies and actions of the TRNC with the consequences that those affected by such policies or actions came within the jurisdiction of the outside State for the purposes of the Convention. The central aspect of the case was the requirement to exhaust 'domestic' remedies through an application to the TRNC Immovable Property Commission (IPC), established by the TRNC Parliament, following the adoption of a pilot judgment by the ECtHR, to decide issues on restitution, exchange of properties or payment of compensation, with a right of appeal lying to the TRNC High Administrative Court. The TRNC Constitutional Court upheld the

104 Application No 28940/95, Merits and Just Satisfaction, 24 June 2008.
105 Ibid. at para 84.
106 Application No 16084/90, Merits, 24 February 2009.
107 Ibid. at para 94.
108 Ibid. at para 111.
109 Application Nos 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04/ 19993/04, Admissibility, 1 March 2010.

new law following a legal challenge, concluding that it should interpret the TRNC Constitution in a manner consistent with international law and that the IPC regime was consistent with international human rights, including the decisions and judgments of the ECtHR. None of the individuals had made an application to the Immovable Property Commission for restitution or compensation in respect of their property. The government of Cyprus (intervening) argued that the law on compensation was 'null and void' on the basis that it was adopted by 'an unlawful legislature', which the ECtHR had previously concluded should not be recognised. Further, the 'Namibia exception' was not sufficiently broad to confer recognition on otherwise invalid measures of the TRNC, as it concerned routine aspects of daily life and not the large-scale taking of property. The Court agreed that the issue before the ICJ in the *Nambia* case was different to that before the ECtHR and that the situation in Namibia differed from that in Northern Cyprus, 'in particular since the applicants in these cases are not living under occupation in a situation in which basic daily reality requires recognition of certain legal relationships'. Nonetheless, the ECtHR derived support from the *Namibia* judgment 'that the mere fact that there is an illegal occupation does not deprive all administrative or putative legal or judicial acts therein of any relevance under the Convention'.[110]

5. The Opposability of the ECHR to *De Facto* Regimes

The case law of the ECtHR establishes that Turkey will not be found responsible for a violation of the Convention rights of individuals subject to the *de facto* authority of the TRNC where the actions of the TRNC are in accordance with the obligations established under the ECHR—including the requirement for any interference to be established by 'law'. The position of the Court can be seen as a practical response to allow the outside State to remedy a violation of the Convention through the authorities of the *de facto* regime and avoid all complaints arriving before the ECtHR in Strasbourg.[111] In *Demopoulos*, the ECtHR affirmed its subsidiary and supervisory function and noted that it did not have the capacity to adjudicate on large numbers of cases involving claims for the compensation for the appropriation of property in the territory under the control of the TRNC. In reaching this decision, Solomou argues that the Court modified its position concerning the TRNC Constitution.

110 Ibid. at para 94.

111 The position of the ECtHR is that the ECHR regime is 'subsidiary to the national systems safeguarding human rights': *Austin and Others v United Kingdom* Application Nos 39692/09, 40713/09 and 41008/09, Merits and Just Satisfaction, 15 March 2012 at para 61. This explains the procedural requirement for victims to exhaust domestic remedies: Article 35(1) ECHR. Cf. *De Souza Ribeiro v France* Application No 22689/07, Merits and Just Satisfication, 13 December 2012 at para 77.

Previously, in *Loizidou v Turkey*, the ECtHR refused to attribute legal validity to the Constitution and in deciding for the applicant without considering whether the TRNC courts could provide a remedy effectively assumed responsibility for protection of property rights in Northern Cyprus. When the ECtHR observed the significant increase in its docket from the TRNC, it decided that it was in the interests of the population to be able to seek the protection of the judicial organs of the *de facto* regime, and that, accordingly, they were required to exhaust those remedies before bringing a claim before the ECtHR.[112]

It is also possible to regard the jurisprudence of the ECtHR as subjecting the TRNC to the normative authority of the ECHR regime, albeit accepting that any case before the ECtHR can only involve a State party, that is, to conclude that the ECHR normative regime (but not the supervisory arrangement) is opposable to the *de facto* regime. This follows a reverse reading of the case law: Turkey will avoid being held responsible for a violation of Convention rights where the TRNC acts in a way that is compatible with the obligations under the ECHR; it follows that the TRNC is under an obligation to comply with the human rights obligations established under the ECHR. The conclusion—that the ECHR is valid against the *de facto* regime of the TRNC—is consistent with the general recognition in international law that emerged in the post-World War II settlement that the *de facto* ability to legislate and enforce political law norms is no longer sufficient to establish *de jure* political authority.[113] Whilst the Universal Declaration on Human Rights and international human rights law are primarily concerned with the obligations of States, there is an argument that all *de facto* and *de jure* political regimes should be subject to the authority of human rights. Judge Kotaro Tanaka, in his Dissenting Opinion in *South West Africa (Second Phase)*, argued, for example, that human rights exist 'independently of, and before, the State'.[114] States do not create human rights, 'they can only confirm their existence and give them protection.[115] Whilst many would be wary of any quasi-natural law reading of the basis of international human rights law, it is increasingly accepted that the effective guarantee of human rights defines conceptually the idea of legitimate political authority, limiting the exercise of *de facto* power in whatever form.

6. The Human Rights Obligations of *De Facto* Regimes

De facto regimes are characterised by their rejection of the authority of the State government and political control of territory with the object of

112 Solomou, 'Demopoulos and others *v* Turkey (Admissibility)' (2010) 104 *American Journal of International Law* 628 at 633.

113 Cf. GA Res 217(III)A, 10 December 1948, A/810.

114 *South West Africa (Second Phase)* ICJ Reports 1966 6, at Dissenting Opinion of Judge Tanaka, at 297.

115 Ibid. at 295; he further asserted at 298: 'There must be no legal vacuum in the protection of human rights'.

establishing a sovereign and independent State. In terms of the typology of non-State actors, *de facto* regimes can be understood to be insurrectional or equivalent movements. Whatever the doubts about the sufficiency of the doctrine and practice,[116] it appears to be an established rule of international law that the actions of an insurrectional or other movement that succeeds in establishing a new State in part of the territory of a pre-existing State will be considered to be an act of the new State.[117] The rule does not apply where an insurrectional movement succeeds in its political objective of achieving union with another State (consider, for example, the objective of many in South Ossetia for union with Russia).[118] The justification for the rule is explained in the Commentaries to the Articles on State Responsibility by reference to the fact of continuity between the movement and the government of the new State.[119] No distinction is made between different categories of movements on the basis of international legitimacy or illegality in the establishment of the new government: the focus is on the impugned conduct and its lawfulness or otherwise under applicable rules of international law.[120] The Articles and

116 Cf. d'Aspremont, 'Rebellion and State Responsibility: Wrongdoing by Democratically Elected Insurgents' (2009) 58 *International and Comparative Law Quarterly* 427 at 438; see also Dumberry, 'New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement' (2006) 17 *European Journal of International Law* 605.

117 Article 10(2) International Law Commission, 'Responsibility of States for Internationally Wrongful Acts', GA Res 56/83, 12 December 2001, A/RES/56/83. The standard example concerns the mistreatment of foreign nationals, where an outside State has a remedy against the State immediately and the insurrection movement once it has established a new State. The legal position cannot be read across to the nationals of the State under the control of a *de facto* regime as the injury, as a matter of doctrine, is suffered by the outside State, which can only take a legal interest in the mistreatment of persons where the victims are its nationals or where there is a violation of an obligation owed to the international community as a whole. In articulating the concept of obligations *erga omnes*, the International Court of Justice restricted its application to 'the basic rights of the human person, including protection from slavery and racial discrimination': *Barcelona Traction, Light and Power Company, Limited*, ICJ Reports 1970 3 at para 34.

118 Commentary on Article 10 at para 10 in International Law Commission, Articles on State Responsibility with Commentaries, Report of the International Law Commission, OR 53rd session, A/56/10 (2001) at 112.

119 Ibid. at para 6. Ago outlines the argument in the following terms: '[T]he structures of the insurrectional movement become, after its victory, the structures of the newly independent State and that the organization of what was only an embryo State, a potential State, becomes the organization of a fully and definitively formed State': see Fourth Report on State Responsibility, by Roberto Ago, Special Rapporteur on State Responsibility, A/CN.4/264, reproduced in Yearbook of the International Law Commission 1972 (Vol II) at 131.

120 The basis for the attribution of responsibility is provided by a reading of Articles 2 and 10 of the Articles on Responsibility of States for Internationally Wrongful Acts. Article 2 provides that there is an internationally wrongful act of a State when conduct (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State. Article 10(2) establishes that the conduct of an insurrectional movement 'which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law'. The general rule can be reformulated that a new State is responsible for an internationally wrongful act where conduct is 'attributable to the [insurrectional movement] under international law'.

Commentary are not clear, though, as to whether the international law obligation is one that is opposable to a State, but actionable against the insurrectional movement *as if it were a State* at the moment of the impugned act or omission, or whether the norm must be opposable to the insurrectional movement *as a non-State actor*.[121] The first possibility would hold the movement responsible for the human rights obligations opposable to the territorial State;[122] the second (and better) argument holds that an insurrectional movement is responsible for those international law norms opposable to the movement, which become actionable once statehood is achieved.[123] The approach accords with the view that a new State is not responsible for the violations of international law committed by the territorial State and the general principle that a legal actor is only responsible in relation to norms opposable to it, and not others.[124]

It is a well-established principle under international humanitarian law that both State and non-State actors are responsible for the conduct of hostilities during the period of an insurrection and Article 3, common to the four Geneva Conventions of 1949, binds all parties to respect a set of minimum humanitarian standards in armed conflicts 'not of an international character'.[125] The interpretation of 'armed conflict not of an international character' has

121 The legal position depends on a reading of the Article 2(b), which refers to 'a breach of an international obligation of the State'.

122 This is consistent with the implied mandate doctrine developed by Schoiswohl, which provides that a *de facto* regime is subject to the implied authority of the *de jure* State government regime. An implied mandate is provided by the State to the *de facto* regime for the purpose of carrying out the necessary functions of government in the territory. It would, Schoiswohl argues, be irrational to conclude that only the functions of government and not its limitations would be devolved given the interests of the de jure government in the effective protection of human rights in the territory: see Schoiswohl, 'De Facto Regimes and Human Rights Obligations: The Twilight Zone of Public International Law?' (2001) 6 *Austrian Review of International and European Law* 45 at 78–9. The difficulty with the implied mandate doctrine is that it represents an exercise in counterfactual hypothetical reasoning as neither the *de jure* nor the *de facto* regime accepts the idea of an implied mandate in reality.

123 The commentaries to the Articles on State responsibility accept that an insurrectional movement may itself be held responsible for its own conduct, for example for a breach of international humanitarian law committed by its forces. The Articles and commentaries do not however deal with the position of 'unsuccessful insurrectional or other movements', as they are concerned with the responsibility of States: Commentary on Article 10, supra n118 at para 16. International Law Commission, Articles on State Responsibility.

124 Ago outlines the position as follows: the actions of persons belonging to an insurrectional movement that operates in parallel with the State can involve the responsibility of the movement 'where they constitute a violation of an international obligation *assumed by that subject*': Fourth Report on State Responsibility, supra n 119 at 129 (emphasis added).

125 Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287. Even before the adoption of the four Geneva Conventions of 1949, the doctrine of belligerency allowed for the application of international humanitarian standards to non-State actors provided certain criteria were met. See, generally, Castrén, *Civil War*

developed to include situations of 'protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'.[126] A number of arguments have been advanced in the literature to explain the opposability of international humanitarian law to non-State actors, in terms of the international legal personality of insurgents;[127] the opposability of treaties to third parties;[128] and the idea that when a State ratifies a humanitarian law treaty it does so on behalf of all individuals and groups within its territory.[129] Whatever the justification, the position in international law is that international humanitarian law is binding on all non-State actors, including *de facto* regimes, engaged in armed conflict.[130]

Certain international humanitarian law norms have equivalents in human rights law, establishing, *inter alia*, rules to protect human life, prohibit torture, prescribe certain basic rights in relation to the criminal justice process, and to prohibit discrimination.[131] Given the normative overlap between international humanitarian law and international human rights law, it would appear peculiar for a non-State actor to be held responsible for violations of international

(Helsinki: Suomalainen Tiedeakatemia, 1966); and Cullen, 'Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law' (2005) 183 *Military Law Review* 65 at 74–9.

126 *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-AR72 at para 70; see also Cullen,'The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)' (2007) 12 *Journal of Conflict & Security Law* 419.

127 According to the Darfur Commission of Inquiry, 'all insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts': see Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, at para 172; see also Kleffner, 'The applicability of international humanitarian law to organized armed groups' (2011) 93 *International Review of the Red Cross* 443 at 454–56; and Sassòli, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law Vol 1*, 3rd edn (Geneva: ICRC, 2011) at 347.

128 Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 *International and Comparative Law Quarterly* 416 at 439.

129 Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 *International and Comparative Law Quarterly* 369 at 381.

130 On the applicability of international humanitarian law to non-State actors, see, for example, Sivakumaran, ibid.; Henckaerts, 'Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law', *Proceedings of the Bruges Colloquium, Relevance of International Humanitarian Law to Non-State Actors*, 25th–26th October 2002, in *Collegium* No 27, Spring 2003 at 123; and Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2002).

131 ICRC Advisory Service on International Humanitarian law, 'International Humanitarian Law and International Human Rights Law: Similarities and Differences', January 2003 at 1, available at: www.icrc.org/eng/resources/documents/misc/57jr81.htm [last accessed 23 September 2013]. In the words of the UN Human Rights Council, international human rights law and international humanitarian law provide protection that is 'complementary and mutually reinforcing' in situations of armed conflict: see Preamble UN Human Rights Council Resolution 9/9, Protection of Human Rights of Civilians in Armed Conflict, A/HRC/9/L.21, 18 September 2008.

law under one legal regime and not to be held liable for the same acts under the other (consider for example the prohibition on torture).[132] Whilst there is some evidence of a willingness to hold insurrectional movements responsible for violations of certain basic or fundamental rights obligations—the contours of which remain unclear,[133] the focus of this article is not the human rights obligations of *de facto* regimes and insurrectional movements generally, but the question as to whether individuals subject to the authority of *de facto* regimes enjoy the protection of rights recognised in the ECHR, and whether the Convention regime is opposable to *de facto* regimes and self-proclaimed authorities. The argument would need to be made that global and regional customary human rights law regimes are opposable to (that is, valid against) insurrectional movements and *de facto* regimes and that the normative system established by the ECHR represented a customary human rights regimes for States parties. There is no evidence in the practice of States and limited evidence in the literature in support of either position.[134] Further, it is difficult to accept that the normative provisions in a human rights treaty can *in toto* be regarded as an expression of general or regional customary law and it is noteworthy that the Human Rights Committee has concluded that the idea of customary human rights law contains a limited number of prohibitions, including slavery, torture, arbitrary deprivation of life and detention, denial of freedom of religion, and denial of the rights of minorities and that 'customary human rights law' is not defined by reference to the International Covenant on Civil and

132 Clapham identifies a number of instances in which non-State actors have been held responsible for violations of international human rights law: see Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88 *International Review of the Red Cross* 491. The examples adduced include the conclusions of the Guatemalan Historical Clarification Commission that certain 'general principles common to international human rights law', including prohibitions on torture and hostage-taking and guarantees of fair trial and physical liberty for the individual, could be imposed on insurgents: ibid. at 503–4, reference to Guatemala Memory of Silence, Executive Summary Conclusions and Recommendations, A/53/928 Annex, 27 April 1999. Cf. Hannum, 'Review of Andrew Clapham, Human Rights Obligations of Non-State Actors' (2007) 101 *American Journal of International Law* 514.

133 Cf. *Sosa v Alvarez-Machain* 542 U.S. 692, 732 at n 20, citing *Tel–Oren v Libyan Arab Republic* 726 F.2d 774, 791–795 (C.A.D.C.1984) (Edwards J. concurring) (insufficient consensus in 1984 that torture by private actors violates international law) and *Kadic v Karădzíc* 70 F.3d 232, 239–241 (C.A.2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).

134 The one exception appears to be an article by Cunningham, which is primarily focused on the reception of the ECHR by domestic courts in the United Kingdom prior to the introduction of the Human Rights Act 1998. His conclusions are tentative though: 'There is no evidence . . . of any English court expressly accepting that parts of the European Convention are declaratory of customary international law[,] [although] [t]here are . . . cases that suggest this is what they are doing, even if not saying so *expresses verbis*': see Cunningham, 'The European Convention on Human Rights, Customary International Law and the Constitution' (1994) 43 *International and Comparative Law Quarterly* 537 at 564–65.

Political Rights taken as a whole.[135] It is, then, not possible to conclude that international law, as presently conceptualised, holds insurrectional movements to the standards established in the ECHR regime as a matter of general or customary international law.

7. The Acquired Human Rights Doctrine

The stated political objective of *de facto* regimes and self-proclaimed authorities is the establishment of a sovereign and independent State. The emergence of a new State through separation or secession can be conceptualised in three phases. In the first stage, the position is one of non-independence/non-recognition: the separatist territory is subject to the authority of the territorial State and not accepted by the international community as a State. In the second, once the *de facto* regime has established exclusive and effective authority within the separatist territory, the position is one of independence/non-recognition (or non-acceptance). Non-recognition may result from a view that the support of an outside State precludes statehood given the lack of independence of the political entity or through the operation of the 'wrongful birth' doctrine outlined by Peters. In the third and final stage, the political entity is recognised as a sovereign and independent State (independence/recognition). *De facto* regimes occupy the intermediary stage between the time when a territory is recognised as part of the territorial State and the time of its acceptance in the international community as a State. In order to evaluate whether *de facto* regimes can be subject to the authority of the ECHR, we must first examine whether a successful insurrectional movement, that is, one that achieves its objective of establishing an independent State on the territory of an existing State party, would be bound by the Convention, and then, reading backwards, decide whether the ECHR is opposable to *de facto* regimes regarded as being in *statu nascendi*.

The regime on State succession to human rights treaties is not settled as a matter of international law doctrine.[136] The Vienna Convention on Succession

135 Human Rights Committee, General Comment No 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 4 November 1994, CCPR/C/21/Rev.1/Add.6; 2 IHRR 10 (1994) at para 8.

136 See Craven, *The Decolonization of International Law* (Oxford: Oxford University Press, 2007) at 253, and references cited; see also Pocar, 'Some Remarks on the Continuity of Human Rights and International Law Treaties', in Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford: Oxford University Press, 2011) at 279–93. An International Law Association research committee on the law on State succession concluded that international practice on the succession of States to human rights treaties was not homogeneous and that the general rules on State succession remained applicable to human rights treaties: see Principle 11, Resolution No 3/2008 on 'Aspects of the Law on State Succession', adopted at the 73rd Conference of the International Law Association, Rio de Janeiro, 2008.

of States in Respect of Treaties establishes that in the case of newly independent States there is no automatic secession to treaties, including human rights treaties: 'A newly independent State *is not* bound to maintain in force . . . any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates'.[137] In the case of separation, a principle of automatic succession applies:

> When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist: (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State *continues in force* in respect of each successor State so formed.[138]

De facto regimes can be regarded as peoples exercising a right to self-determination outside of the decolonisation context, with the aim of establishing a newly independent State (when the 'clean slate' doctrine would apply).[139] *De facto* regimes can also be understood as political entities seeking separation from the State, with the international community withholding recognition in the absence of the recognition by the territorial State (automatic succession). Given that the provisions on newly independent States are concerned with the processes of decolonisation and that this does not describe the position of self-proclaimed authorities, *de facto* regimes should be regarded as *prospective separatist entities* to which a principle of automatic succession to human rights treaties would apply.

In relation to States parties to the Vienna Convention on Succession of States in Respect of Treaties, including Cyprus and Moldova, the principle of automatic succession would apply in relation to the ECHR. The conclusion is though problematic as it depends on the proposition that the territorial State can bind an autonomous and effective separatist territory to a regime established by the accession of the territorial State to an international treaty *after* the self-proclaimed authority has established its *de facto* independence (Cyprus acceded to the Vienna Convention on 12 March 2004, the Turkish Republic of Northern Cyprus was proclaimed in 1983; the Republic of Moldova acceded on 9 February 2009, the Moldavian Republic of Transdniestria become independent in 1990). Further, the position of the Vienna Convention on separatist territories is controversial as a statement of

137 Article 16 Vienna Convention on Succession of States in Respect of Treaties 1946, UNTS 3 (emphasis added).

138 Article 34(a) Vienna Convention on Succession of States in Respect of Treaties 1946 (emphasis added).

139 Kamminga argues that the concept of the newly independent State would include those self-proclaimed authorities that achieve sovereign independence: see Kamminga, 'State Succession in Respect of Human Rights Treaties' (1996) 7 *European Journal of International Law* 469 at 471.

international law. A leading text concludes that the general rule in cases of succession where the predecessor State is not extinguished is the 'clean slate' doctrine, that is, there is no automatic succession to treaties.[140] Claimed exceptions include boundary treaties; localised treaties on the use of territories, concerning, for example, rights of transit, navigation and fishing; and arms control agreements.[141] In relation to human rights treaties, the work observes that recent State practice indicates that successor States will often accept the human rights obligations of their predecessors, 'although this is *arguably* contingent on the successor State's consent rather than a rule of automatic succession' (note the hesitancy in the conclusion).[142] The relevant question is whether the 'clean slate' principle can be applied to human rights treaties in general, and the ECHR in particular.

There is limited State practice here. The examples concern the consensual dissolution of Czechoslovakia (Czech and Slovak Federal Republic) and the separation of Montenegro from the State Union of Serbia and Montenegro. The Czech and Slovak Federal Republic signed the ECHR on 21 February 1991 and ratified it on 18 March 1992, with the ECHR coming into force on 1 January 1993 for both independent States—which were regarded as successor States in relation to the period March to December 1992.[143] The example suggests that automatic succession is the appropriate model in the case of dissolution.[144] The conclusion is affirmed and extended to the practice of separation in relation to the position of Montenegro. The ECHR entered into force for the State Union of Serbia and Montenegro on 3 March 2004. Montenegro declared its independence on 3 June 2006. In *Bijelic v Montenegro and Serbia*, the ECtHR was required to determine the obligations of Montenegro under the Convention in the period between the accession of Serbia and Montenegro and its emergence as an independent State.[145] In its judgment, the ECtHR observed that the Committee of Ministers of the Council of Europe regarded Serbia as the successor State and Montenegro as a new State, which would be

140 Crawford, *Brownlie's Principles of Public International Law*, 8th edn (Oxford: Oxford University Press, 2012) at 438–39.

141 Ibid. at 339–40. Logically these agreements should also bind *de facto* regimes in control of the relevant territory as it would be incoherent to hold those in *de facto* control to be bound by international agreements on boundaries, the use of a territory, and the control of armaments (where the territory is controlled by the territorial State), then not bound (when under the control of the *de facto* regime), then bound again (when the *de facto* regime is established as a sovereign and independent State).

142 Ibid. at 440 (emphasis added).

143 See *Brezny v Slovak Republic* 85 DR-B 65.

144 Rasulov, 'Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?' (2003) 14 *European Journal of International Law* 141 at 167.

145 The case originated in an application against the State Union of Serbia and Montenegro under the right to property (Article 1 Protocol No 1 to the ECHR) concerning the non-enforcement of an eviction order and the consequent inability of the applicant to live in the flat located in Podgorica, Montenegro. On 9 August 2007, in response to a question from the ECtHR, the applicants stated that they wished to proceed against both Montenegro and Serbia, as two independent States.

regarded as a party to the ECHR with effect from 6 June 2006.[146] The Court identified three relevant factors in deciding whether Montenegro could be held responsible for the impugned inaction of the authorities between 3 March 2004 and 5 June 2006: the provisions of the Constitution of the Republic of Montenegro and its domestic law, which suggested that Montenegro considered itself bound by the ECHR from the date when it entered into force in respect of the State Union of Serbia and Montenegro; the acceptance by the Committee of Ministers that, because of the earlier ratification by the State Union of Serbia and Montenegro, it was not necessary for Montenegro to deposit its own formal ratification; and the practice of the ECtHR in relation to the Czech and Slovak Republics, which established that the States parties succeeded to the Convention retroactively from their independence.[147] The ECtHR concluded that the ECHR should be considered as having continuously been in force in respect of Montenegro as of 3 March 2004. In doing so it followed the position of the UN Human Rights Committee (see below), referring to 'the principle that fundamental rights protected by international human rights treaties should indeed belong to individuals living in the territory of the State party concerned, notwithstanding its subsequent dissolution or succession'.[148]

Even if automatic succession was not held to be the general rule on succession to treaties in relation to separatist territories (cf. the Vienna Convention on Succession of States in Respect of Treaties), there are arguments against the application of the 'clean slate' doctrine in relation to regional or universal human rights treaties—which are law-making treaties in the area of human rights. Jenks argues that the rule that treaty obligations do not pass to a successor State has no application to multilateral instruments of a legislative character, with the objective to avoid a legal vacuum.[149] Where the law-making treaty vests rights in individuals, 'this is an additional reason for regarding the obligations of the instrument as being of a continuing character'.[150] There is limited support for the conclusion as a matter of doctrine, however.[151] In *Application of the Convention on the Prevention and Punishment of the Crime of*

146 *Bijelic v Montenegro and Serbia* Application No 11890/05, Merits and Just Satisfaction, 28 April 2009 at para 56.
147 Ibid. at para 68.
148 Ibid. at para 69.
149 Jenks, 'State Succession in Respect of Law-Making Treaties' (1952) 29 *British Yearbook of International Law* 105.
150 Ibid. at 142.
151 Aust observes that a number of writers 'consider that treaties which embody or reflect generally accepted rules of international law (in particular those concerned with human rights of international humanitarian law) bind a successor State by virtue of the concept of the acquired rights of the inhabitants of the States. There is, however, no good authority for this (well meant, but rather politically motivated) view': see Aust, *Modern Treaty Law and Practice*, 2nd edn (Cambridge: Cambridge University Press, 2007) at 371.

Genocide, the ICJ refused to be drawn on the question as to whether automatic succession applied in the case of the Convention on the Prevention and Punishment of the Crime of Genocide.[152] It did though repeat its finding in the Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, which emphasised the distinctive moral and humanitarian character of the Convention.[153] Craven observes that the purpose of reproducing the earlier opinion is not immediately apparent, although it is possible to read the passage as supporting the doctrine of automatic succession.[154] The argument is made explicitly by Judge Weeramantry in his Separate Opinion. Judge Weeramantry observed that if the principle of automatic succession were not accepted in the case of human rights treaties it would result in 'the strange situation' that a population which had enjoyed the protection of human rights would cease to be protected, and may then be protected again, depending on the political choices of the government of the new State, and that such a position 'seems to be altogether untenable, especially at this stage in the development of human rights'.[155] He further noted that where international recognition of a separatist entity was delayed this would have the effect of leaving the population without the protection of human rights treaties during the period of non-recognition—the longer the delay in recognition, the longer the citizens are left unprotected: a position 'totally inconsistent with contemporary international law – more especially in regard to a treaty protecting . . . universally recognized rights'.[156]

The position on the automatic succession to human rights treaties can be explained by reference to the acquired human rights doctrine, which establishes that the laws of State succession do not affect the *recognized* human rights of the population of a territory, which can only be removed by the procedures established in the treaty. Where the treaty does not provide for withdrawal or modification, the legal protection can be thought of in terms of inalienable acquired human rights. The argument builds on the acquired rights doctrine first articulated by Lauterpacht, who observes that a revolutionary act within the State creates a schism between the old legal order and the new with the consequence that the new government is not bound by the laws of its predecessor. Lauterpacht points out that this is not the position of international law, which provides that the obligations accepted by one government are binding on its successors, even following an act of revolution. The

152 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* Preliminary Objections, Judgment, ICJ Reports 1996 595 at para 23.

153 Ibid. at para 22; reference to *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* ICJ Reports 1951 at 23.

154 Craven, 'The Genocide Case, The Law of Treaties and State Succession' (1997) 68 *British Yearbook of International Law* 127 at 152.

155 Supra n 152 at Separate Opinion of Judge Weeramantry, para 649.

156 Ibid. at 650.

requirement of the new government to recognise and give effect to the obligations of its predecessor 'constitutes the bridge between two facts otherwise totally disconnected'.[157] Lauterpacht concludes that the basic function of law is the protection of acquired rights—a notion first applied in *Case concerning German Settlers in Poland*, where the Permanent Court of International Justice concluded that property rights acquired under the previous sovereign must be respected by the new government: 'Private rights acquired under existing law do not cease on a change of sovereignty.'[158]

Kamminga argues that, in the present day, the most important category of rights belonging to the individual are human rights. Where human rights are established as a consequence of treaty obligations accepted by the State, it is, he argues, difficult to conclude that the individual beneficiaries of those rights should be deprived of them 'simply because they have ended up under the jurisdiction of a successor State'.[159] The argument is supported by the interest that the international community has in the protection of human rights at times of uncertainty and by State practice during the 1990s.[160] Müllerson concurs, concluding that for new States emerging as the result of secession or dissolution there is a strong argument in favour of their succession to multilateral human rights instruments, as these treaties encompass not only the reciprocal commitments of States, but also confer rights on the individual: 'In a sense these rights and freedoms constitute "acquired rights" which the new State is not at liberty to remove.' Müllerson concludes that the practice of States and international law doctrine establishes that new States are bound by general and customary international law and those universal human rights treaties 'which were obligatory for their predecessors'.[161]

This is also the position of the Human Rights Committee, which has determined that the ICCPR, which codifies certain rights enshrined in the Universal Declaration of Human Rights, cannot be understood in terms of inter-State obligations and that the rights in the ICCPR 'belong to the people living in the territory of the State party'. Once a population has been accorded the protection of the ICCPR, 'such protection devolves with territory and continues to belong to them'.[162] According to Pocar, the position of the Human Rights Committee has been followed by all of the treaty monitoring bodies

157 Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, Green and Co. Ltd, 1927) at 130.
158 *German Settlers in Poland* (Advisory Opinion) 10 September 1923, PCIJ Ser B No 6, 36.
159 Kamminga, supra n 139 at 472.
160 Ibid. at 483.
161 Müllerson, 'The continuity and succession of States, by reference to the former USSR and Yugoslavia' (1993) 42 *International and Comparative Law Quarterly* 473 at 493.
162 Human Rights Committee, General Comment No 26: Continuity of obligations, 8 December 1997, CCPR/C/21/Rev.1/Add.8/Rev.1; 5 IHRR 301 (1998) at para 4.

established under the United Nations human rights treaties.[163] The position is explained by two former members of the Committee. Higgins observes that the Human Rights Committee regards human rights treaties as being of a special character with new States bound by the existing human rights obligations that already apply to the territory.[164] Buergenthal concludes that the position of the Committee is that individuals subject to the jurisdiction of a State party 'acquire an independent or vested right' to the protection of the rights guarantees in the ICCPR.[165]

Whether or not State practice supports the acquired human rights doctrine is a matter of debate. Rasulov doubts whether evidence for the 'Kamminga model' can be found in the practice of human rights bodies, or that of new States. He concludes that the only genuine example of automatic succesion is provided by Bosnia and Herzegovina in relation to the ICCPR. Rasulov's focus is though on instances of dissolution—Union of the Soviet Socialist Republics (USSR), Socialist Federal Republic of Yugoslavia and Czechoslovakia—and not secession, and it is to be remembered that *de facto* regimes are prospective secessionist/separatist territories. Rasulov does however accept the policy-based argument for automatic succession to human rights treaties, concluding that the principle 'possesses enough inherent legitimacy to make its way into positive international law' and that there are sufficient historical examples of situations where human rights were treated on the basis of an 'acquisition logic'.[166]

8. Conclusion

This article began by questioning whether individuals in *de facto* regimes in the Council of Europe region enjoyed the protection of the ECHR. The answer is clearly in the affirmative as the case law of the ECtHR establishes that both the territorial State and any outside State exercising effective control have international law obligations in relation to the human rights of the subjects of

163 Pocar, 'On the Continuity of Human Rights and International Humanitarian Law Treaties' in Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford: University Press, 2011) 279 at 284.

164 Higgins, 'Ten years on the UN Human Rights Committee: Some Thoughts Upon Parting' (1996) 6 *European Human Rights Law Review* 570 at 580. Support for the claim that human rights treaties are categorically different from other treaties—in particular those dealing with inter-State relations—can be found in Article 60(5) of the Vienna Convention on the Law of Treaties, which reflects the special character of human rights treaties that 'often establish a higher standard of protection than general international law': Corten and Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary (Vol 2)* (Oxford: Oxford University Press, 2012) at 1367; see also Article 50(1)(b) of the International Law Commission, Articles on State Responsibility, with Commentaries, on countermeasures and fundamental human rights.

165 Buergenthal, 'The UN Human Rights Committee' in Frowein and Wolfrum (eds), (2001) 5 *Max Planck Yearbook of United Nations Law* 341 at 361.

166 Rasulov, supra n 141 at 168.

self-proclaimed authorities—with those obligations establishing correlative Convention rights. These Convention rights might, though, be thought to be illusory, and the ECtHR has repeatedly affirmed the need for the rights in the ECHR to be made practical and effective, and that the role of the ECtHR and Convention is supplementary to local enforcement.[167] The case law in relation to the Turkish Republic of Northern Cyprus further demonstrates that the Court is prepared to accept that Convention rights can be realised through the governmental institutions of a *de facto* regime, including its courts and legal systems. The basis for accepting that the actions of the TRNC authorities can be subject to the ECHR regime is not self-evident, however: the TRNC is not a party to the Convention, nor is it a political entity, that is, a State, that can accede to the Convention.

The analysis here understood the position of *de facto* regimes in international law in terms of an intermediary stage of *statu nascendi*: one of independence/non-recognition between a prior stage of non-independence/non-recognition and the objective of independence/recognition. The argument concerning the acquired human rights doctrine concluded that in the first and third stages, the population in the separatist region would enjoy the protection of the human rights obligations accepted by the territorial State by way of international treaty, following the principle of automatic succession to human rights treaties. Given the imperative of the international community to avoid a legal vacuum in the protection of human rights—a doctrine specifically embraced by the ECtHR—there is no good reason to conclude that human rights obligations would not be imposed on the *de facto* regime, with correlative rights being enjoyed by the populations of unrecognised *de facto* regimes (in the Hohfeldian sense).[168] The conclusion is deduced from an application of related concepts to the position of *de facto* regimes in four steps—all of which are contestable. First, the acceptance that the principle of automatic succession applies to separatist/secessionist territories in the case of human rights treaties. Second, that the creation of a new State by separation or secession is regarded as a process and not an event.[169] Third, that a separatist/secessionist territory in *statu nascendi* enjoys a form of international personality, as a '*de facto* regime', and can be held responsible for violations of international law committed in the process of its emergence as a sovereign and independent State, with some form of retroactive allocation of personality and capacity. Finally, that in the protection of human rights there is no rupture in the applicable regime during the process of separation or secession, with the underlying

167 Cf. *Demopoulos and Others v Turkey*, supra n 107 at para 96.

168 Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16 at 30.

169 Cf. Crawford, supra n 140 at 135: 'a political community with considerable viability, controlling a certain area of territory and having statehood as its objective, may go through a period of travail before that objective has been achieved.'

objective of avoiding a legal vacuum. Taken together these rules and principles establish that a *de facto* regime will have the same international human rights treaty obligations as the territorial State, and that in the case of *de facto* regimes on the territories of the forty-seven member States of the Council of Europe, the ECHR can be understood to be opposable to (that is, valid against) these political entities—consistent with international law doctrine. Simply put: *de facto* regimes and self-proclaimed authorities, which, according to their own self-understanding, are engaged in a process leading to the establishment of a sovereign and independence State, are subject to the human rights treaty obligations of the territorial State—including, in the case of territorial States parties to the ECHR, the obligations under the ECHR.

The conclusion is not without complexity. The ECHR entered into force for the population of Cyprus in 1962. The TRNC was proclaimed in November 1983. The acquired rights doctrine provides that the Convention rights enjoyed by the population of northern Cyprus continue to be enjoyed by the population and are opposable to the *de facto* authority. The position in relation to other self-proclaimed authorities is less straightforward as the territorial State acceded to the ECHR *after* the establishment of the *de facto* regime: Abkhazia achieved *de facto* autonomy in 1993 and South Ossetia in 1991, whilst Georgia did not accede to the ECHR until 1999; the same can be observed in relation to Nagorno-Karabakh (independent in 1991, with Azerbaijan acceding to the ECHR in 2001),[170] and Transdniestria (independent in 1991, with Moldova acceding in 1995). The acquired human rights doctrine does not provide support for holding rights established under the ECHR to be opposable to a *de facto* regime where there were no Convention rights to 'acquire' at the point at which the regime established its independence—notwithstanding the accession by Moldova to the Vienna Convention on Succession of States in Respect of Treaties. In order to recognise that the accession of a sovereign State to the ECHR has the consequence of subjecting a *de facto* regime on its territory to the obligations established under the Convention we would have to conclude that the territorial State had the capacity to accede to international law obligations in the area of human rights that were then opposable to the *de facto* regime. The argument cannot be made under the acquired human rights doctrine—as presently conceptualised.[171]

170 Nagorno-Karabakh is a mainly ethnic Armenian territory located in Azerbaijan. With the break-up of the Soviet Union in late 1991, Karabakh declared itself an independent republic, escalating an existing conflict into a full-scale war. Nagorno-Karabakh has not been recognized by any State. It has been recognised by Abkhazia, South Ossetia and Transdniestria. All are members of the *Community for Democracy and Rights of Nations*. Cf. Jacobs, 'Transnistrian Time-Slip' *New York Times*, 22 May 2012.

171 The argument can be made in relation to the implied mandate doctrine: see Schoiswohl, supra n 122. Schoiswohl concludes at 87, however, that 'there currently is no international human rights law explicitly applicable to *de facto* regimes as an international legal person (though certainly desirable)'.

More promisingly we might accept the possibility that a *de facto* regime could subject itself to the authority of the ECHR. This would not imply 'recognition' of the *de facto* regime in terms of some form of international status, but an understanding that those with coercive power can only exercise legitimate political authority where they act in a way that is consistent with the ECHR normative regime. The possibility is not without precedent. Kosovo, whose status as a 'State' is contested, has, for example subjected itself to the normative and supervisory regime established by the Council of Europe for the protection of national minorities,[172] notwithstanding the fact that only States can accede to the Framework Convention for the Protection of National Minorities.[173] The argument is not that *de facto* regimes might be admitted to the supervisory mechanism established in the form of the European Court of Human Rights, but that the ECHR regime (as developed by the Court) can be understood to be opposable to *de facto* regimes without the contortions required by the extant doctrinal understandings of the acquired rights doctrine. Convention rights would then, in part, constitute the ways in which *de facto* authorities and the subjects of *de facto* regimes characterise the exercise of power in those political communities in the same way that the ECHR influences the conceptualisation of legitimate government power in domestic political and legal discourses within States parties. It is in this sense that *de facto* regimes would be 'subjects' of the ECHR.

That is not to suggest that the conclusions are irrelevant to the practice of the ECtHR. Given that *de facto* regimes are located within States that are parties to the Convention and that individuals within *de facto* regimes fall within the jurisdiction of a territorial State and/or outside State, the Court should follow its recent practice in relation to Turkish Republic of Northern Cyprus of evaluating the Convention rights of individuals subject to the authority of *de facto* regimes *as if* the regime were subject to the formal authority of the ECHR—where there is evidence on the part of the regime of a good faith commitment to comply with the requirements of the ECHR. In these cases the ECtHR should rely on the margin of appreciation doctrine and the related principle of subsidiarity, which, according to the ECtHR, is at the very basis of a human rights regime, and recognise that the primary responsibility for the guarantee of Convention rights lies with those authorities with *de facto* power over individuals.

The adoption of the ECHR represented a commitment by States parties to exercise political power in accordance with the values of a 'democratic society'.[174] It also represented an acceptance of the difficulties of establishing

172 Article 1, Agreement between the United Nations Interim Administration Mission in Kosovo (UNMIK) and the Council of Europe on technical arrangements related to the Framework Convention for the Protection of National Minorities.

173 Article 27, Framework Convention for the Protection of National Minorities 1995, CETS 157.

174 Cf. *Leyla Şahin v Turkey* 2005-XI; 41 EHRR 8 at para 108.

a detailed conception of a democratic culture in isolation from other political communities sharing the same commitment. The original 'subjects' of the normative regime were the States parties and one non-State actor (Saarland). There is however no reason to conclude that only the States parties or only States could be subjects of the normative regime constituted by the ECHR. A focus on the ability of an institution to determine the normative situation of subjects (in this case the ECHR, as interpreted by the ECtHR) and not the formal processes of accession to a treaty regime, allows us to explore the possibility that an actor might subject itself to the regulatory system established by a legal order. One possibility would be for a *de facto* regime to expressly accept the authority of the ECHR regulatory regime through a unilateral declaration.[175] A second is that a *de facto* regime manifest its acceptance of international human rights standards by way of reference in its domestic constitutional framework.[176] A third, and more likely, possibility is for the acceptance of the authority of the ECHR to be manifested in the conduct of the *de facto* regime. Consider, for example the practice of the courts of the Turkish Republic of Northern Cyprus to act in a way that is consistent with human rights recognised in international law[177] and the ways in which the TRNC has sought to make its domestic legal order consistent with the ECHR.[178] We can regard the fact that the authorities in the TRNC have acted in a way that is consistent with the European Convention on Human Rights as evidence that the *de facto* regime has subjected itself to the authority of the human rights instrument and there is no reason to conclude that other *de facto* regimes could not accept the authority of the ECtHR and act in a way consistent with the recognised Convention rights of individuals within their legal jurisdiction.

There is no conceptual difficulty in international law imposing human rights obligations on non-State actors, or holding *de facto* regimes to the standards accepted by the territorial State, or subjecting a self-proclaimed authority

175 Analogous to this are declarations issued by non-State actors agreeing to abide by international humanitarian law. For the text of such declarations see the Geneva Call website at: www.genevacall.org/resources/nsas-statements/nsas-statements.htm [last accessed 23 September 2013].

176 See, for example, Article 11 Constitution of the Republic of Abkhazia: 'The Republic of Abkhazia shall recognize and guarantee the rights and freedoms proclaimed in the Universal Declaration of Human Rights, the International covenants of economic, social, cultural, civil and political rights and other universally recognized international legal instruments.' See: apsnypress.info/en/constitution [last accessed 23 September 2013]; see also Article 5 Constitution of the Nagorno Karabakh Republic: 'The state guarantees the protection of individual and citizen's rights and freedoms in accordance with the international human rights principles and norms.' Further, Article 44(4): 'Everyone, for the protection of his or her rights and freedoms is entitled to appeal to the international bodies for the protection of human rights and freedoms.' See: www.nkr.am/en/constitution/9/ [last accessed 23 September 2013].

177 Hoffmeister, supra n 83 at 452.

178 A notable example concerns the establishment of the Immovable Property Commission after the adoption of a pilot judgment by the ECtHR requiring Turkey to introduce a remedy that effectively protected Convention rights. Cf. *Demopoulos and Others v Turkey,* supra n 107.

to the regulatory regime established by a human rights instrument. As the International Court of Justice observed in *Reparation for Injuries Suffered in the Service of the United Nations*: 'The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.'[179] One of the requirements of the international community, reflected in the adoption of numerous declarations and instruments on the importance of a universal conception of human rights, is for the effective guarantee of human rights to individuals consistent with the Universal Declaration on Human Rights—and it is to be remembered that the ECHR was introduced to give effect to the rights recognised in the Universal Declaration.[180] Accepting that *de facto* regimes can be subjects of the ECHR regime requires further engagement with the conceptual foundations of human rights, which can no longer be understood in terms of limits on the exercise of sovereign authority or grounds for intervention in the internal affairs of a sovereign political community: one of the functions of human rights in world society is that of defining legitimate political authority and the limits and conditions for the exercise of government power, in whatever form. The conclusion, following the emergent case law of the ECtHR and factual existence of *de facto* regimes in the Council of Europe region and beyond, establishes an important research agenda for the conceptualisation of human rights in non-sovereign spaces.

179 *Reparation for Injuries Suffered in the Service of the United Nations* ICJ Reports 1949 178.
180 Preamble ECHR.