

STATE SOVEREIGNTY AND PROTECTION OF HUMAN RIGHTS

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Abstract

This article explores the concept of “state sovereignty” and its transformation into “divided sovereignty” upon a state’s ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the Convention). It proposes a dialectical approach to the Council of Europe’s competence in protecting human rights in non-government-controlled areas, guided by the Convention’s spirit. The study highlights the dualistic responsibility for human rights violations in such territories, linked to foreign jurisdiction and the positive obligations of states with limited sovereignty. It examines the legal foundations for these “positive obligations” toward individuals whose rights are violated in non-government-controlled areas. The research analyzes case law from the European Court of Human Rights, emphasizing the balance between sovereignty and human rights obligations. By exploring the interplay of territorial and extraterritorial jurisdiction, the article underscores the Council of Europe’s subsidiary role in addressing human rights vacuums. This applied research contributes to understanding how states can uphold sovereignty while fulfilling international human rights commitments, proposing practical measures to ensure protection in contested territories.

Keywords: non-government-controlled area; human rights; positive obligations; divided sovereignty; subsidiary; jurisdiction.

Introduction

By the middle of the 20th century, Europe endured two world wars, resulting in millions of casualties. By the 21st century, parts of some European states were de facto occupied. Turkey controls northern Cyprus through the Turkish Republic of Northern Cyprus, while Russia has subordinated territories of post-Soviet states: South Ossetia and Abkhazia in Georgia, Crimea, Donetsk, and Lugansk in Ukraine, and Pridnestrovie in Moldova. Consequently, these states, while formally sovereign, cannot ensure human rights in these areas, particularly effective legal remedies (Popovschii, Dunaev, and Kuzmin 2021, 5).

This article studies the sovereign rights of states to ensure human rights in non-government-controlled areas, analyzing the tension between sovereignty and international obligations.

Materials and methods

Materials

The study utilizes primary legal sources, including the UN Charter, the 1970 Declaration on Principles of International Law, the 1975 Helsinki Final Act, and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. Case law from the European Court of Human Rights (ECHR), such as **Catan and Others v. Moldova and Russia** (2012) and **Mozer v. Moldova and Russia** (2016), provides judicial insights. Secondary sources include scholarly works by Tunkin (1977), Terentyeva (2019), and Donnelly (2003), alongside reports from the OSCE (2015) and Apriori Center (2021). Internet sources include the Universal Declaration of Human Rights and OSCE reports on conflict zones.

Methods

This research employs a qualitative, doctrinal approach, analyzing legal texts and judicial decisions to interpret the concepts of sovereignty and jurisdiction. Comparative analysis examines the interplay of territorial and extraterritorial jurisdiction in non-government-controlled areas. Dialectical reasoning explores the balance between state sovereignty and human rights obligations, focusing on the ECHR's subsidiary role. The study also uses case study analysis to assess practical implications of positive obligations in contested territories (Tunkin 1977, 415).

Results and discussion

Principle of sovereign equality of states

The concept of "sovereignty" is not defined at the international level. However, par. 1, Article 2 of the UN Charter enshrines the principle of sovereign equality of states as one of the fundamental principles of international law, which was subsequently confirmed by the practice of the International Court of Justice. The principle of territorial sovereignty was recognized as a fundamental principle of international law within the Corfu Channel case, one of the first cases considered by the Court (International Court of Justice n.d.).

The principle of sovereign equality of states is enshrined in the charters of the overwhelming majority of regional international organizations, multilateral and bilateral agreements of states and international organizations. Today, this principle is most fully enshrined in 1970 Declaration on Principles of International Law, 1975 Helsinki Final Act, 1989 Concluding Document of the CSCE Follow-Up Meeting in Vienna, and 1990 Charter of Paris for a New Europe (Helsinki Final Act 1975; Vienna Meeting Concluding Document 1989; United Nations General Assembly 1970).

The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the UN Charter (adopted by Resolution 2625 (XXV) of the UN General Assembly on 24 October 1970) provides the concept of sovereign equality of states. The main content of the principle under consideration is as follows.

All states enjoy sovereign equality. They have the same rights and the same duties and are equal members of the international community, irrespective of differences of an economic, social, political or other nature (par. 1 of the Declaration). The concept of sovereign equality includes, in particular, the following elements:

- a. the states are legally equal;

- b. each state shall enjoy the rights inherent in full sovereignty;
- c. each state shall respect the legal capacity of other states;
- d. the territorial integrity and political independence of the state shall be inviolable;
- e. each state shall have the right freely to choose and develop its political, social, economic and cultural systems;
- f. each state shall fulfill fully and in good faith its international obligations, as well as to live in peace with other states (United Nations General Assembly 1970).

1975 Helsinki Final Act significantly expanded the content of the principle in question by indicating the obligation of the state not only to respect the principle of sovereign equality, as set out in the UN Charter and the 1970 Declaration, but also to respect the rights inherent in sovereignty. In other words, this means that “each state shall be obliged to respect the sovereignty of each other, that is, their right within their own territory to exercise supreme legislative, executive, administrative and judicial power without any interference from other states” (International Court of Justice n.d.).

Thus, the external content of sovereignty is the ability of state power to ensure autonomy, independence and territorial integrity. Autonomy does not allow any power of foreign states, except in cases of explicit and voluntary consent on the part of the state to limit its sovereignty (Oppenheim 1948, 260). Sovereignty is also “external independence, since it concerns the freedom of action of the state beyond its borders, in relations with other states. It is internal independence, since it concerns the state within its borders” (Hastings n.d.). The concept of state sovereignty implies 1) the right of the state to exercise its power over its territorial area, and 2) the right of the state not to be subject to interference while exercising its power by other states (Marchenko 2003, 186–187).

We might say that autonomy and independence characterize, respectively, the internal and external aspects of sovereignty. Territorial integrity, naturally, is understood as the indivisibility of the territory of the state. However, from a legal point of view, the indivisibility of the territory expresses, first of all, the full and supreme nature of power within certain geographical boundaries.

The internal content of state sovereignty means that the state exercises top, supreme power over all persons and associations located on the state territory. Although the concept of sovereignty is polemical (Black 2019, 1523; Grokhalski 1998, 24), nevertheless, it does not cancel its main content, which is understood as the supremacy and independence of power (Dodonov 2001, 533; Diplomatic Dictionary 1986, 437).

The obvious conclusion is that sovereignty excludes two levels of sovereign authorities on a single territory. Consequently, the essence of sovereignty is embodied in law — national (domestic) and international, determines their basis, main content.

Principle of respect for and protection of human rights in international law

The fundamental principles of international law, which include the principle of sovereign equality of states and the principle of respect for and protection of human rights, are interrelated elements of a single system. Complementing each other and having imperative force, they serve as the basis of legal order in the community of sovereign states. Each of these principles has an independent meaning, but “they can function properly only in close interaction” (International Law Course 1989a, 17). The Declaration on Principles of International Law of 1970 specifically emphasizes that “in their interpretation and application the above principles are interrelated and each principle should be construed in

the context of the other principles” (United Nations General Assembly 1970). This condition achieves balance and stability in international relations.

Human rights from the point of view of international law are rights that outline the legal status of a person in any modern society. Naturally, different societies enforce human rights differently, which is explained by the difference in social and economic opportunities for their enforcement. But the views of states on what rights should be granted to individuals and enshrined in national legislation, as a rule, coincide. The actual enforcement of these rights may vary and depends on the level of development of a particular society, on its national, religious and other features. Along with this, there is a certain common understanding of their meaning and role (Kovalev 2013, 19).

Today, international law promotes a sense of personal responsibility among people for compliance with these human right standards. In support of this thesis, we can point to the final act of the meeting of the CSCE member states, which establishes an order for states to respect the rights of their people, to contribute to the development and protection of human rights (Vienna Meeting Concluding Document 1989).

“The principle of respect for human rights encourages States, both individually and jointly, to promote and develop the effective exercise of civil, political, economic, social, cultural and other human rights and freedoms in accordance with the purposes of the Charter of the United Nations” (International Law Course 1989b, 153–154).

Countries that have national minorities on their territory are obliged not only to respect their rights, but also to provide them with the opportunity to fully enjoy their rights and to protect their legitimate interests in this area.

At present, the state-regulated triad of obligations affecting human rights has become widespread: the obligation to respect, to provide and to protect. Unfortunately, the majority of human rights and freedoms cannot be exercised without active involvement of the state.

Regional human rights documents have been signed, which effect is limited to states of a certain region of the world, e.g. 1948 Bogota Declaration, 2009 ASEAN Human Rights Declaration, 1990 Cairo Declaration on Human Rights in Islam. Among regional human rights documents, 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) stands out, since it has an effective mechanism for ensuring the obligations assumed by the High Contracting Parties: the European Court of Human Rights. The European Court of Human Rights has the right to make decisions on cases and final rulings. One of the methods to enforce the execution of the ECHR decisions is the “peer pressure” exercised by the Committee of Ministers. The adoption of these international documents confirms that the principle of respect for and protection of human rights has reached international coverage, and therefore has acquired a new feature, i.e. supranationality.

Human rights can be considered an integral part of the life of each of us, since they are “an individual possesses them by virtue of human nature” (Donnelly 2003, 7).

Relationship between state sovereignty and principle of respect for and protection of human rights in international law

The definition of human rights can be derived from 1948 Universal Declaration of Human Rights, according to which “all human beings are born free and equal in dignity and rights <...> without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status <...> the political,

jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty” (United Nations 1948).

This definition places the principle of human rights protection above the traditional idea of state sovereignty: human rights must be ensured by the state, even under some limitations in its sovereignty.

This principle is also consistent with the case law of the European Court of Human Rights, according to which the state is obliged to comply with its obligations to ensure human rights, including in the non-government-controlled area. The European Court of Human Rights has classified the obligations to ensure human rights in the non-government-controlled area as “positive”, which impose on the state an obligation, in accordance with Article 1 of the Convention, “to take diplomatic, economic, judicial and other measures available to [the state] that are consistent with international law” in order to guarantee all persons living there the respect for the rights and freedoms enshrined in the Convention (European Court of Human Rights 2012, §109; European Court of Human Rights 2016, §§99, 151).

The above allows us to conclude that the state must be committed to its sovereignty, even in the face of any limitations, and this commitment can be demonstrated by fulfilling positive obligations to persons located in the non-government-controlled area.

Article 1 of the Convention limits the obligations of the state to ensure human rights by its jurisdiction. Jurisdiction refers to the sovereign rights of the state, including the right to legislate on the national territory (International Law 1977, 415). Jurisdiction is namely the practical implementation of sovereignty. In essence, jurisdiction is reduced in the legal literature (Shergin 1979, 11; Lukashuk 1998, 112; Panova 2001, 43–44; Serkov 2015, 276; Kayumova 2007, 316–323), to the ability of the state authority to establish, apply and ensure the implementation of legal standards (International Law 1977, 415). The jurisdiction of the state is expressed in the ability of state bodies to legally regulate social relations and to ensure their respect by means of the mechanism of state coercion (Kayumova 2007, 316–323). Having analyzed the existing definitions of the “jurisdiction” concept, Lyudmila Terentyeva highlights “both the substantive aspect of jurisdiction, namely the totality of powers (prescriptive, judicial, executive jurisdiction), and the form of its implementation — the spatial limitation of its action within the boundaries of the state territory” (Terentyeva 2019, 160–180).

Legal science and judicial practice divide jurisdiction into territorial and extraterritorial (Terentyeva 2019, 160–180; European Court of Human Rights 2012, §109).

In turn, not all state territory may be under official control. For example, part of the territory of Georgia, which is occupied by Abkhazia and South Ossetia, is not under the control of the Georgian government; part of the territory of Moldova, called Pridnestrovie, is not under the control of the Moldovan government; part of the territory of Ukraine, which is occupied by Crimea, Donetsk, Luhansk regions, as well as part of the Zaporizhzhya, Kherson and Kharkov regions, are not under the control of the Ukrainian government; also part of the territory of Cyprus, occupied by the so-called Turkish Republic of Northern Cyprus, is not controlled by the government of Cyprus. The non-government-controlled territories are characterized, first of all, by the cessation of the activities of all institutions providing services of justice (OSCE 2015, 10) and the unauthorized appropriation of their powers by the *de facto* authorities. Formally, these bodies declare their commitment to the principle of

respect for and protection of human rights, however, in practice, they systematically violate rights, up to obvious abuse of power (Popovskii, Dunaev, and Kuzmin 2021, 5).

Accordingly, territorial jurisdiction should be divided into jurisdiction extending to the territory under the control of the government (so called plenary jurisdiction) and jurisdiction extending to the territory not under the control of the government (so called limited jurisdiction).

The exercise of plenary jurisdiction over own territory controlled by the government does not cause any difficulties in ensuring the protection of human rights. In particular, the government's complete control over its own territory allows not only theoretically but also in practice to provide everyone in that territory with an effective remedy for violation of rights or freedoms, as required by Article 13 of the Convention.

Violations of human rights in the non-government-controlled area give rise, on the one hand, to extraterritorial jurisdiction on the part of the state that *de facto* exercises control over the territory of another state that has lost control over it, and, on the other hand, to "positive obligations" on the part of the state that has lost control over its own territory.

The freedom of action of a state outside its borders, as an element of independence, gives rise to the responsibility of the state within the framework of extraterritorial jurisdiction (European Court of Human Rights 2011, §132), where

"as a result of legal or illegal hostilities, a State Party exercises effective control over an area outside ... the State's territory. The obligation to secure in such territory the rights and freedoms provided for in the Convention follows from the fact of such control, whether it is exercised directly through the armed forces of the State Party or through a subordinate local administration" (European Court of Human Rights 1995a, §62; European Court of Human Rights 2001a, §§76–78; European Court of Human Rights 2001b, §§66, 70).

The non-government-controlled areas are not necessarily considered as occupied by another state. Various scenarios related to the loss of control are possible, including establishment of an autonomous government system in part of the territory. In the extreme case, a new quasi-state entity may emerge that functions within its own system of governance (e.g. Pridnestrovie, Abkhazia and South Ossetia). However, the jurisdiction of such entities remains non-sovereign and depends on external support. Some of these territories receive official recognition by certain states due to their geopolitical interests. (Nastas A., 2024. P.291)

It should be noted that the Convention imposes on the member state of the Council of Europe the obligation to respect human rights (Article 1 of the Convention) regardless of whether the government controls the entire territory or only part of it.

In this regard, the legal nature of membership in the Council of Europe is of particular interest. Grigory Tunkin notes that "... by joining an [international] organization, each of its members agrees in advance with its institutional aspects, and thus, the principle according to which obligations can arise only with the consent of states, as well as the principle of sovereign equality, is formally observed" (International Law 1977, 415). It seems that such "formality" when a state joins the Council of Europe deprives sovereignty of its very essence — the supremacy of power, since it allows the European Court of Human Rights to exercise judicial power over the state.

However, the Convention, which ratification relates to the entry of a state into the Council of Europe, provides for a mechanism for the protection of human rights that is subsidiary in

nature (Article 35 of the Convention). In the context of the ECHR practice, this principle means that the obligation to ensure the respect for human rights provided for in the Convention is imposed primarily on the member state (European Court of Human Rights 2009, §17; European Court of Human Rights 1999b). In addition, the ECHR has no right to substitute the competent authorities of the member state in the interpretation and application of domestic law, or to perform the functions of the court of appeal or cassation (European Court of Human Rights 1999a, §54; European Court of Human Rights 2004, §100; European Court of Human Rights 1995b, §48).

It seems that the subsidiary nature of the state's concession of its judicial power in favor of the European Court of Human Rights testifies to (a) sovereignty "shared" with the Council of Europe, and (b) the primacy of human rights over the sovereign rights of the member states of the Council of Europe.

In this situation, in accordance with the spirit of the Convention, the Council of Europe has an obligation, although not formalized, to participate in ensuring the protection of human rights in the territory over which, for one reason or another, the government of a Council of Europe member state has lost control. (Nastas A., 2020. P.111) The spirit of the Convention is determined by the objective of the Council of Europe, according to which all persons under the jurisdiction of a Council of Europe member state should enjoy human rights and fundamental freedoms (Article 3 of the Statute of the Council of Europe) (Council of Europe 1949). The spirit of the Convention presupposes the prevention of "a regrettable vacuum in the system of human rights protection" (European Court of Human Rights 2001a, §§76–78).

Since the member states have shared sovereignty with the Council of Europe only in the area of human rights protection, it is implied that the Council of Europe has powers only in this area if the government loses control over part of the territory of the state. The powers of the Council of Europe in the area of human rights protection in the non-government-controlled area are possible only with the sovereign's consent.

Conclusions

The lack of government control over a part of the state's territory that has signed the Convention creates a vacuum in the human rights protection system, which can be addressed through legal measures that are part of the state's positive obligations to individuals whose rights are violated in the non-government-controlled area. These measures will allow the state to establish, although not comprehensive, a limited jurisdiction in the said territory.

In general, the state's fulfilment of these positive obligations is an expression of its jurisdiction and demonstrates its commitment to its own sovereignty.

Scientific evidence of legal measures included in positive obligations will enable the development of special procedures that practically ensure the protection of the rights of a particular person staying in the non-government-controlled area upon full restoration of the jurisdiction.

Also, implementation of legal measures in the above circumstances will help to avoid the "Pandora's box" effect, i.e. the restoration of full jurisdiction, which would require a review of the avalanche of decisions made by de facto judicial bodies acting outside the sovereign jurisdiction.

In this regard, we have to rethink also the status of the Council of Europe as a participant in international relations, called upon to subsidiary protection of human rights in the territory of the Convention signatory states.

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