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# ADMINISTRATION OF JUSTICE, RULE OF LAW AND DEMOCRACY

## Human rights and State sovereignty

**Working paper prepared by Mr. Vladimir Kartashkin pursuant to Sub-Commission decision 2005/105**

* Pursuant to General Assembly resolution 60/251, all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights will be assumed as of 19 June 2006 by the Human Rights Council, which will review them as appropriate.

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## Introduction

1. In its decision 2005/105, the Sub-Commission on the Promotion and Protection of Human Rights requested Mr. Vladimir Kartashkin to prepare, without financial implications, a working paper on human rights and State sovereignty that should address, among other things: the notion of sovereignty not only as a right of States but also as a responsibility; grounds for restriction of State sovereignty; the scope of the obligations of States to respect human rights and fundamental freedoms; State sovereignty and international human rights law; and State sovereignty and criminal violations of human rights. The Sub-Commission further requested Mr. Kartashkin to submit his working paper to it at its fifty-eighth session.

2. In the process of preparing the working paper, the author focused on a number of questions relating to the topic under study and also considered them in the light of new developments on the international scene. That was dictated by the fact that at the end of the twentieth and the beginning of the twenty-first centuries, fundamental changes were taking place in international relations and international law which also affected questions of relevance to the topic under study. A globalizing world has led to a rethinking of many principles and norms of international law, which are constantly changing in response to new realities. The author has sought to reflect these changes in the present working paper.

3. Owing to the limited scope of the working paper, the author was unable to consider many aspects of the topic in depth. Moreover, some of them were outside the terms of reference. Questions relating to human rights and State sovereignty are not only legal in nature, but concern political and other interests of States. Their detailed study requires considerable time and does not fit in the limited space of the working paper.

## Chapter 1

## NOTION OF STATE SOVEREIGNTY

4. The problem of sovereignty concerns virtually all areas and principles of contemporary international law. The substance and nature of the whole system of contemporary international relations cannot be understood without an explanation of the essence of State sovereignty. Legally and politically speaking, sovereignty is an inalienable attribute of the State. It predetermines the legality or illegality of any restriction on the power of the State and the limits of its political, economic and other authority in domestic and foreign policy.

5. State sovereignty is reflected in the supremacy of the State over its territory and its independence in international affairs.[1] That supremacy and that independence are manifested in the activity of the highest government bodies, the legislature and the executive. Sovereignty is vested not in the government and its highest bodies, however, but in the State itself. That clearly emerges in international law, which regards the State as a whole as one of its main subjects, rather than the government or its individual representatives. Questions of State sovereignty on the international scene, restrictions on such sovereignty and the relation to specific institutions and principles of international law are decided accordingly.

6. Sovereignty is inherent in any State from the moment of its creation. The extent of that sovereignty does not remain constant, however, but changes in response to the development of the State, its involvement in international relations and the degree to which it has contracted international obligations. State sovereignty is reflected in its territorial supremacy within the boundaries of the State borders and in foreign policy, in which the actions of the State and its authorities are determined by a number of factors. The sovereign power of the State both within its territorial boundaries and in the foreign policy arena is not absolute. The contemporary State does not possess full political or economic independence. The supremacy of the State on its own territory is evident primarily in the concentration of means of State coercion, which is exercised by the duly authorized agencies. That does not mean, however, that the State has unlimited power on its territory. Its powers are restricted by law, by the action of the legislative, judicial and executive branches. Moreover, different centres of power on the territory of the State may flourish at different historical periods and fight among themselves. The sovereignty of each State is determined by the actual domestic and foreign conditions in which it exists and functions. In addition, the freedom of the State is restricted not only at foreign policy level, but also in domestic matters through principles and norms of international law and its foreign policy obligations. A State may not, for example, pass laws which limit fundamental human rights and freedoms in violation of its own obligations.

Formally speaking, the State is independent; this independence is not absolute, but is restricted by norms of international law. Moreover, in the case, for example, of acts by a State that are a threat to international peace and security, coercive measures may be taken against it.

7. Sovereignty is vested in the State as a whole. It is one and indivisible. National or ethnic minorities that make up a multi-ethnic State may not claim their own part of that sovereignty. A people or nation only becomes emblematic of the sovereignty of a newly formed State if it has exercised its right to self-determination and has formed an independent State.

8. State sovereignty is usually identified with the notion of the sovereignty of a people and nation. The French Constitution of 1791 asserted that sovereignty "is one, indivisible, inalienable, and imprescriptible. It appertains to the nation; no section of the people nor any individual may assume the exercise thereof".[2] The constitutions of modern States either do not refer to the sovereignty of the people or nation at all (United States of America) or they confirm the sovereignty of the people (Italy) or the nation (France). Article 3 of the Constitution of the Russian Federation speaks of the multinational people as the bearer of sovereignty and the sole source of power in the Russian Federation. Sovereignty in the sense of the above-mentioned constitutions is vested not in the individual ethnic or population groups, but in the people of a State as a whole. The notion of State sovereignty is identified with the sovereignty of the people or the nation.[3]

9. Historically, the notion of sovereignty emerged as a result of protracted and bloody conflicts which played out in Western Europe. The Treaty of Westphalia of 1648, which put an end to the Thirty Years War in Europe, declared the right of its participants to State territory and supremacy, and laid down the principles of equality, independence and sovereignty. Over the centuries, the propositions proclaimed by the Treaty of Westphalia have served as the foundation for the development of inter-State relations.

10. The development and establishment of the principle of respect for State sovereignty, as with many general principles and norms of contemporary international law, ordinarily proceeded through recognition of existing customs. They have also been gradually enshrined in international agreements and have become treaty principles. The Treaty of Westphalia played an important role in establishing in treaties respect for State sovereignty, the territorial integrity of States and a number of other principles. The principles confirmed in the Westphalia world order were not immutable. They developed and underwent change under the influence of the development of inter-State relations and the conclusion of new bilateral and multilateral agreements. In that connection, it should be pointed out that, even today, some scholars and State representatives, citing the dogmas of Westphalia, have stressed the absolute nature of the principle of State sovereignty. Moreover, they reject the primacy of international law and the direct effect of its norms, because, in their view, that would undermine national legal systems.[4]

Scholars who underscore the absolute nature of State sovereignty also argue against placing any restrictions on it. They consider that the establishment through international law of legal boundaries on the freedom of States to take foreign policy action is not a restriction on their sovereignty but, on the contrary, a confirmation of State sovereignty in international relations. Professor I. Lukashuk argues that a State, in concluding an agreement, does not restrict, but realizes its sovereignty.[5] Indeed, some have contended that it is precisely sovereignty that creates international law.[6] Such views run counter to practice in international relations. The State is not only entitled to restrict its sovereignty, but it may even forfeit such sovereignty by uniting with another State.

As a fundamental principle of contemporary international law, State sovereignty may not be viewed as being entirely unrestricted or having precedence over all other principles and norms. As rightly pointed out by Professor Starke, State sovereignty means the residuum of power which it possesses within the confines laid down by international law.[7] Today the principle of respect for State sovereignty, like other principles of contemporary international law, should be interpreted on the basis of the Charter of the United Nations and other international instruments in which they are set out and further developed.

## Chapter 2

## PRINCIPLES OF RESPECT FOR HUMAN RIGHTS AND STATE SOVEREIGNTY IN THE CHARTER OF THE UNITED NATIONS

11. The Charter of the United Nations was the first multilateral agreement in the history of international relations to establish a broad list of principles and norms of international law which acquired a generally recognized *erga omnes* character. The establishment of the United Nations and the adoption of its Charter paved the way for a qualitatively new era in international relations based on respect for human rights and State sovereignty.

12. Right up to the end of the Second World War, international agreements confirmed the absolute nature of State sovereignty and presupposed the obligation for unrestricted observance of that sovereignty. That was the basis not only for the Westphalia system, but also for the

League of Nations. It was reflected, in particular, in the fact that, with the exception of certain specific questions, all decisions by the highest bodies of the League - the Assembly and the Council - were only taken unanimously (Article 5 of the Covenant of the League of Nations). The Covenant of the League of Nations did not contain any provisions regarding respect for or observance of fundamental human rights and freedoms. It only required the members of the League, with certain limitations, to "endeavour" to maintain fair conditions of labour for men, women, and children (Article 23 of the Covenant). In inter-State relations, the individual had virtually no rights or obligations in the period preceding the establishment of the United Nations. At that time there were no bodies of international justice. An individual who committed offences, even when they were of a transboundary nature, was answerable to the courts of the national State, which prosecuted.

13. The Charter of the United Nations changed, in a fundamental way, the relationship of States to the need to respect and observe human rights. This did not come about immediately, however. Initially, after the adoption of the Charter of the United Nations, many States, citing Article 1, paragraph 3, and Article 55 of the Charter, which refer to achieving international cooperation and promoting and encouraging respect for human rights and for fundamental freedoms, as well as promoting their observance, rejected the binding legal character of those provisions.[8] As the United Nations adopted a succession of international documents in this area, however, acceptance began to grow for the binding legal nature of the human rights provisions of the Charter.[9] Moreover, in their time the Charter's founders had stressed that if serious and flagrant violations of basic rights and freedoms took place which were a threat to international peace and security, States could not invoke their domestic affairs, and sovereignty could be restricted.[10] Following the establishment of the United Nations and the adoption of the Charter, States have gradually given up State sovereignty in its absolute form and have begun to acknowledge the possibility of lawful restrictions on it.

14. The Charter of the United Nations, along with other instruments, has enshrined the principle of sovereign equality of States (art. 2, para. 1). The article essentially lays down two principles: respect for State sovereignty and equality of States. These principles are further fleshed out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in 1970, the Final Act of the Conference on Security and Cooperation in Europe (Helsinki Final Act, 1975) and a number of other international instruments. An analysis of these documents enables us to formulate the basic rights and duties pertaining to State sovereignty. Noteworthy among these are: (a) States are juridically equal; (b) States have the duty to respect the juridical personality of other States; (c) each State has the right to territorial integrity and political independence; (d) each State has the right freely to choose and develop its political, economic, social and cultural systems; (e) each State has the right to conduct its relations with other States, including the right to determine whether or not to be a party to bilateral or multilateral treaties and to international organizations; (f) each State has the right to lay down its legislation and administrative regulations and to exercise sovereignty over its own territory and independence in international relations. This is by no means an exhaustive list of the basic rights and duties of States.

The sovereign equality of States presupposes their juridical (de jure) equality as subjects of international law, but this does not imply substantive (de facto) equality. States differ in the size of their territories, populations, economic potential, military might and so forth. Consequently, their role in international relations, their formal juridical equality notwithstanding, is essentially dissimilar. It is noteworthy that at least two exceptions are permitted to the principle of juridical equality of States. The first is when decisions are taken by the Security Council by a majority vote of nine of its members, including a unanimous vote of its permanent members. The second is the adoption of decisions by a number of international organizations through so-called “weighted” voting.

15. Some scholars and statesmen question the viability of the principle of sovereignty equality of States in contemporary international relations. “In such a world”, writes Professor Thomas Lee, “there is no way to enforce sovereign equality against the most powerful states should they perceive it in their self-interests to exercise their rights to wage war in a manner not authorized by existing law”.[11] He cites the United States’ invasion of Iraq in 2003 as a case in point. On the basis of this argument, Professor Lee draws the conclusion that, in contemporary international relations, stability results not from respect for the principle of sovereign equality of States, but from preservation of the balance of power among the militarily most powerful States.[12]

16. In addition to proclaiming the principle of respect for State sovereignty, the Charter of the United Nations contains provisions on grounds for limiting State sovereignty. These include the provisions on respect for and observance of human rights and fundamental freedoms, Chapter VII on the use of force, and others. The adoption of the Universal Declaration of Human Rights and the international human rights covenants introduced further limitations in this area. The Universal Declaration, in acknowledging in its very first article the intrinsic nature of human rights, by the same token rejects absolute State sovereignty. The creation of the United Nations treaty monitoring bodies and of the international juridical bodies has led to the further considerable narrowing of the confines of State sovereignty. The rules and principles of international law relating to human rights have gradually gained broad and general recognition. As the English scholar Lauterpacht wrote in 1950, “in so far as international law as embodied in the Charter and elsewhere recognizes fundamental rights of the individual independent of the law of the State, to that extent it constitutes the individual a subject of the law of nations”.[13]

17. The stormy progress of inter-State relations from the late twentieth to the early twenty-first centuries, the radical transformations in the arena of foreign affairs and the processes of globalization have caused fundamental changes in international law. In recent decades, hundreds of new international agreements have been concluded, affecting the development and transformation of principles and norms of international law. Particularly spectacular changes have occurred in the field of human rights. These have resulted in major restrictions on the sovereignty of States, which have voluntarily renounced part of their sovereign rights and given some of them over to international bodies. Individuals, including high-ranking government officials, are now being prosecuted for violations of human rights.

## Chapter 3

## HUMAN RIGHTS AND THE LIMITATION OF STATE SOVEREIGNTY IN CONTEMPORARY INTERNATIONAL RELATIONS

18. State sovereignty in contemporary international relations is subject to strict limitations:

- When the State voluntarily assumes certain international obligations;
- When it becomes a party to a bilateral or multilateral treaty;
- When it joins any of the international organizations thereby, undertaking the corresponding obligations;
- When international or regional organizations adopt decisions that have binding force for States;
- When a State acknowledges the supremacy of international norms over national legislation.

State sovereignty is also limited by the principles of *jus cogens* that operate *erga omnes*. This is by no means an exhaustive list of the limitations of sovereignty imposed upon States by their international obligations.

19. It was still fairly recently, in the early twentieth century, that human rights were regulated almost solely through domestic law. Each country's legislation laid down the legal status of the individual, this being considered to fall within domestic competence. With the adoption of the Charter of the United Nations, the situation changed substantially and a completely new era opened up in cooperation among States in the field of human rights and the corresponding limitation of State sovereignty. Human rights are now regulated both by the domestic law of States and by international law. At the same time, the role of international law has continued to expand. This process was intensified after the adoption of the Universal Declaration of Human Rights and of the international human rights covenants. At present, seven international instruments on human rights have treaty bodies for monitoring compliance by States with their obligations. These are: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Five of the seven treaty bodies established under the above-mentioned agreements consider not only the reports of States on measures they have adopted to fulfil their obligations but also complaints by individuals about infringement of their rights by States parties. These are the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the

Committee on the Elimination of Discrimination against Women, the Committee against Torture and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Two of these - the Committee against Torture and the Committee on the Elimination of Racial Discrimination - are empowered not only to investigate violations of the rights concerned but also, with the consent of States, to visit their territories for that purpose. Moreover, the Subcommittee on Prevention, set up under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has the right to visit, with the "consent or acquiescence" of a State party to the Protocol, any place under its jurisdiction and control where persons are or may be deprived of their liberty (art. 4).

20. Even more stringent restrictions on the sovereign rights of States are contained in the European conventions on human rights. For example, the Committee set up under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has the right to visit, without prior authorization by the State party, any place within its jurisdiction where persons are deprived of their liberty (art. 2). The State party "shall provide the Committee with the following facilities to carry out its task: (a) access to its territory and the right to travel without restriction; (b) full information on the places where persons deprived of their liberty are being held; (c) unlimited access to any place where persons are deprived of their liberty, including the right to move inside such places without restriction …" (art. 8).

Special mention should be made of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The mechanism set up under this Convention is essentially a supranational authority. Its creation required the member States of the Council of Europe to renounce established stereotypes of State sovereignty and the notion that it was absolute. The decisions of the European Court of Human Rights, which constitute precedents, have a major impact on the elaboration and development of European legal doctrine. Many of the member States' juridical institutions are guided by them in their daily practice. The members of the Council of Europe modify their legislation and administrative practice in accordance with the Convention and the Court's decisions. When it declares domestic court decisions to be unlawful, the European Court prompts lawmakers to review existing legislation and the way it is applied. As pointed out by Professors Mark Janis and Richard Kay, the implementation of the decisions of the European Court "demonstrates the emergence … of an effective system of international law regulating some of the most sensitive areas of what had previously been thought to be fields within the exclusive domain of national sovereignty".[14] Similar assessments are offered by many scholars. For example, in 1982, analysing the implementation of the European Convention, the French scholar Karel Vasak noted that for the first time there was an international mechanism that operated outside States and "expressed the common values of all mankind".[15]

21. Human rights courts have been created outside Europe as well. In 1969, the Inter-American Court of Human Rights was established and, in 1998, the heads of State and government of the African countries adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. On 25 January 2004, this Protocol entered into force following ratification by 15 member States.

Many prominent figures in the African Union consider that the Court will be a “key organ” on the African continent, making it possible to “build a just, united and peaceful continent free from fear, want and ignorance”.[16]

22. One of the most effective and rapidly developing regional formations to which Governments have handed over a significant portion of their sovereign rights is the European Union. Its members acknowledge the primacy of international law and of European Community law. The commonality of legal traditions in Europe has made it possible to set up a universal legal system in which both national legal systems and European law that is binding upon member States of the European Union coexist. The decisions of the Court of Justice of the European Communities are viewed as precedents, and as such are binding upon all member States of the Union. Likewise binding for all member States of the European Union are many decisions adopted by the institutions of the European Union. On 29 October 2004, 25 States of the European Union signed the Treaty establishing a Constitution for Europe. Following its entry into force, the Constitution will become the fundamental law of the European Union. The European Constitution foresees the election of a President of the European Council and the creation of the post of Union Minister for Foreign Affairs and of many other institutions, greatly “depreciating” the sovereignty of member States. States that are members of the Union will enjoy only such competence as is not exercised by the institutions of the European Union. In fact, the European Union may gradually develop into a federation or even a confederation of States.

23. Thus, State sovereignty in contemporary inter-State relations is limited not only by international law, but also by the law of regional bodies. Some of these bodies are gradually turning into unions of States. Not only domestic law but also regional and international law apply in their territories, something that substantially restricts the sovereign rights of their member States.

24. The progressive limitation of the sovereign rights of States is not a painless process. One indication of its complexity is the rejection of the Constitution of the European Union in referendums held by a number of member States of the European Union. On the one hand, some members of the Union are calling for deeper integration and the transfer of more rights to supranational institutions and, on the other, appeals are being made for decentralization and the restitution to member States of many of their sovereign powers. Contradictions in this process are inevitable and are largely attributable to the highly complex problems facing the international community. In an increasingly globalized world, only through skilful accommodation of the interests of States, individuals and the international community as a whole can a legal order worthy of human civilization in the twenty-first century be created.

## Chapter 4

## CRIMINAL VIOLATIONS OF HUMAN RIGHTS AND STATE SOVEREIGNTY

25. The characterization of a series of gross and massive violations of human rights, whose perpetration entails criminal responsibility, as international crimes, has seriously limited State sovereignty. The establishment and work of the Nuremberg and Tokyo tribunals was of

particular significance in this connection. Article 6 of the Charter of the International Military Tribunal of Nuremberg included three kinds of crimes against humanity in the category of international crimes. These were: crimes against peace, war crimes and crimes against humanity. The commission of these crimes is always accompanied by the most flagrant, massive and gross violations of fundamental rights and individual freedoms. When passing sentence, the Nuremberg Tribunal rejected the defence submission that international law made no provision for the criminal responsibility of individuals who were ostensibly protected by the doctrine of State sovereignty.[17]

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide places genocide in the category of international crimes. According to article 1 of the Convention, genocide is a crime violating the norms of international law. The Convention provides for the criminal responsibility of persons who have committed genocide irrespective of whether they are "constitutionally responsible rulers, public officials or private individuals" (art. 4).

According to the 1949 Geneva Conventions for the protection of war victims, the commission of "grave breaches" of the Conventions are subject to penal sanctions. The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity deems "eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid and the crime of genocide" (art. 1) to be international war crimes and crimes against humanity. As article 2 of the Convention emphasizes, if any of the crimes enumerated in this international treaty are committed, its provisions "shall apply to representatives of the State authority and private individuals". It classifies apartheid as a crime violating the principles of international law and of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. This Convention classifies as a crime policies and practices of racial segregation and discrimination which are similar to apartheid (arts. I and II). Both individuals and representatives of the State who are responsible for the commission of these crimes bear international criminal responsibility (art. III).

In 1993, the United Nations Security Council adopted the Statute of the 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. The Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, was adopted in 1994. The Tribunal was granted jurisdiction over violations of the Geneva Conventions and of the Additional Protocol Relating to the Protection of Victims of Non-International Armed Conflicts.

Lastly, the Statute of the International Criminal Court was adopted in 1998. It entered into force in 2002 after it had been ratified by 60 States. The Court's jurisdiction encompasses the following crimes: the crime of genocide, crimes against humanity, war crimes and the crime of aggression. All these crimes involve the most serious violations of fundamental human rights and freedoms.

In ratifying the Statute of the International Criminal Court, the States parties seriously limited their sovereignty by transferring to the Court some of their sovereign rights. These include the following:

- According to the Statute, it applies to all persons without distinction, including heads of State and government, members of parliament and other State or public officials;

- The Statute lays down that the Court may order the arrest of any citizen of any State and that a State party is bound to take steps to secure the arrest and subsequent extradition of that person;

- The Court may prescribe various forms of punishment for a person found guilty of committing crimes covered by the Statute. This punishment may include measures not provided for in the States parties' legislation;

- According to the Statute, certain actions of the Court may be taken in the territory of a State party without its consent.

These are just some of the provisions of the Statute of the International Criminal Court which clearly show that States have voluntarily limited their sovereignty over a whole series of criminal jurisdiction issues which formerly lay within their domestic competence.

26. In recent years, there has been growing recognition of the lawfulness of bringing criminal proceedings in national courts against senior officials of foreign States on the grounds of massive and gross human rights violations. Court practice in this matter began to develop particularly intensively after the consideration in the United Kingdom of the case of the former Chilean dictator General Augusto Pinochet. The question of the immunity of State officials from foreign criminal jurisdiction is being discussed in the International Law Commission and the International Court.[18] In this connection, there is growing acceptance of the view that the principle of non-immunity from foreign criminal jurisdiction in relation to international crimes is taking shape or already exists.[19]

It is clear that the development of inter-State relations will lead to a lengthening of the list of international crimes and recognition of universal jurisdiction over them. This, in turn, will be accompanied by a further limitation of the sovereign rights of States in international relations.

## Chapter 5

## USE OF FORCE FOR HUMANITARIAN PURPOSES AND STATE SOVEREIGNTY

27. In contemporary international law, the principles of sovereignty and non-interference in internal affairs are limited by human rights, the rights of peoples and individuals' rights. In this context, the efforts made by the international community and individual States to secure the worldwide respect of fundamental rights and freedoms cannot be regarded as interference in internal affairs. As Kofi Annan emphasizes, "The principle of international concern for human

rights [takes] precedence over the claim of non-interference in internal affairs".[20] Hence so-called "internal" conflicts accompanied by massive violations of human rights entitle the international community to "interfere" in order to halt these violations.

In many cases, since such violations constitute a serious threat to universal peace and security and even to the very existence of humankind, the international community not only has a right to express its "concern", but has a duty to intervene. The Secretary-General of the United Nations considers that it may do so even "in the most intrusive and expensive way, which is military intervention". He continues, however: "And yet the most effective interventions are not military".[21] Among these he includes various measures taken by the United Nations and regional organizations, peacekeeping operations and other ways and means of addressing problems which have arisen. Nevertheless, as the Secretary-General rightly underlines, "there will always be some tragic cases where peaceful means have failed, where extreme violence is being used and only forceful intervention can stop it".[22]

No State has the right to violate fundamental human rights and freedoms under the cover of State sovereignty. In the event of these rights being violated, the principles of sovereignty and non-interference may be subject to such restrictions as are necessary in order to halt these violations.

28. Practice in international relations since the establishment of the United Nations and the adoption of its Charter evidences many cases in which a State or group of States have resorted to force "for humanitarian purposes" without the approval of the United Nations Security Council.

After the incursion of several Arab States into the territory of Palestine in 1948, Egypt declared that it was taking part in the intervention in order to defend the life and property of the Arabs living in Palestine. In 1960, Belgium invaded the Congo and justified its action on the grounds that it was protecting Belgians and the citizens of other countries who were present in the territory of that country. In 1965, American marines landed in the Dominican Republic in order to "protect" citizens of the United States of America. In 1975, Indonesia invaded East Timor, stating that its aim was to end the lawlessness and brutality allegedly taking place in the territory of that country. In 1983, the United States and several Caribbean States took part in the military operation in Grenada on the pretext of restoring "order" in the country and of "protecting" their citizens. Mention may be made of the "humanitarian" interventions in Somalia and Iraq in 1991, of the military operation in Haiti in 1994, of the operation conducted by the North Atlantic Treaty Organization (NATO) in Yugoslavia in 1999, of the invasion of Iraq in 2003 by the armed forces of the United States and the United Kingdom, etc.

29. Humanitarian interventions resulting from the unilateral action of States without the approval of the United Nations Security Council are not always dictated by their military, political, economic or other interests. Many such interventions genuinely spring from humanitarian considerations and are justified by large-scale killings of the peaceful population and by the character of the regimes against which they are directed. It suffices to recall India's intervention in 1971 which stopped the civil war in East Pakistan and as a result of which the Republic of Bangladesh achieved independence. In 1978, Viet Nam carried out a humanitarian intervention in Cambodia, thereby putting an end to the Government of the Pol Pot regime, which had unleashed genocide in that country, leading to the deaths of 2 to 3 million people.

In 1979, the United Republic of Tanzania intervened in Uganda and overthrew the dictator Idi Amin. The list of interventions conducted for genuinely humanitarian purposes could be further extended. History will scarcely condemn these invasions, inasmuch as the intervention was justified by extreme forms of oppression, as well as by large-scale and brutal killings of the peaceful population. On the other hand, all these humanitarian interventions were unilateral and no one authorized the States concerned to take military action without the corresponding approval of the United Nations Security Council.

30. In today's globalizing world, when international security and universal peace can be threatened by States' unilateral acts of force, it is impossible to allow each State to decide on its own whether it is entitled to embark on a humanitarian intervention. The only exception to this general rule might be acts of force carried out by a State genuinely in order to save the lives of its citizens in foreign territory.

In these circumstances, many diplomats and statesmen countenance the unilateral use of force by States for humanitarian purposes. In doing so, they rely on customary law and even on the Charter of the United Nations, while at the same time proposing various criteria for the permissibility of the humanitarian intervention, the most typical of these being:

- Flagrant violations of human rights must be imminent or already taking place;
- All possible peaceful means must have been exhausted;
- The State must be presented with an ultimatum demanding the end of the gross violations of human rights;
- Time permitting, a State must inform the United Nations Security Council of the aims to be achieved through the humanitarian intervention;
- A humanitarian intervention may be launched if the United Nations Security Council is taking no action;
- In these circumstances, whenever possible, it is desirable to receive an invitation from the State in question for troops to be sent into its territory;
- The exclusive aim of the use of force must be to halt flagrant violations of human rights; it must not serve any other interests of the State;
- The use of force must not be directed at bringing about a change in the political, social or economic order of a State or at overthrowing the lawful Government;
- The size of the contingent of troops deployed in the course of the humanitarian intervention must be limited and commensurate with the aim of the intervention;
- Armed forces must be deployed only for a limited period of time and as soon as the aim of the humanitarian intervention has been attained, they must be immediately withdrawn from foreign territory.[23]

31. The members of the High-level Panel on Threats, Challenges and Change, who, on the instructions of the Secretary-General of the United Nations, drew up the report "A more secure world: our shared responsibility", put forward some interesting ideas regarding humanitarian intervention.[24]

They correctly hold that every State has a responsibility to protect its citizens and that the principle of non-interference in internal affairs does not apply when acts of genocide, ethnic cleansing and other criminal violations of human rights threatening international security are committed. In these cases, the international community, acting in accordance with a decision of the United Nations Security Council, has a responsibility to intervene and to adopt the appropriate measures, including, if necessary, and as a last resort, armed force.

The report offers five criteria which must be examined by the United Nations Security Council when deciding whether to use armed force for humanitarian purposes:

- Ethnic cleansing, large-scale killing, genocide or serious violations of international humanitarian law must be actual or imminently apprehended;
- The purpose of the use of force must be to halt or avert such action;
- Military force can and must be used as a last resort when other means have proved unsuccessful;
- The scale, duration and intensity of the proposed military actions must be the minimum necessary in order to meet the existing threats;
- The consequences of using force must not be worse than the consequences of inaction.

Admittedly, several of these criteria are not precise enough and can only make it harder for the Security Council to take a decision. Nor are these criteria exhaustive.

32. At the current stage of development of international relations, humanitarian interventions usually take place not in order to protect the citizens of the intervening country, but in order to halt massive, flagrant, criminal violations of human rights or to overthrow dictatorships. In the future, however, their use for the elimination of weapons of mass destruction is a distinct possibility. In this connection, as recent practice in foreign policy shows, humanitarian intervention is not restricted to the short and temporary use of force. Such intervention often leads to the establishment of a legislature, executive and judiciary, as well as other authorities, which are set in place for extended periods by the international community. This is precisely what has occurred in Kosovo, where American and NATO troops are present, following an intervention against Yugoslavia which was carried out in breach of the Charter of the United Nations.

In contrast to what happened in Kosovo, with regard to East Timor the Security Council adopted a resolution on the use of force to halt systematic violations of international law and human rights committed in that country.[25] In accordance with this resolution, authority in East Timor was transferred to the United Nations, which, on 25 October 1999, by decision of the

Security Council, set up a transitional administration. This administration was endowed with responsibility for providing security and maintaining law and order throughout the territory of East Timor and for establishing an "effective administration".[26]

33. As far as international relations are concerned, practice in a globalizing world shows that the use of force for humanitarian and other purposes can lead to the establishment of long-term control over all or part of a State's territory by a group of States or by the international community (Yugoslavia, East Timor, Afghanistan and Iraq). For this reason, it is especially important that armed force be resorted to only in accordance with the Charter and a Security Council resolution and only when other measures for bringing influence to bear on the State in question have been exhausted. Otherwise the doctrine of humanitarian intervention will be used exclusively for foreign policy aims by various States.

In this connection, it must be noted in particular that the inaction of the United Nations Security Council, or its inability to take a decision on humanitarian intervention, is fraught with the most serious consequences for the international rule of law. As many writers and statesmen rightly hold, the United Nations must be ready to take immediate action in the event of a humanitarian disaster. Otherwise, as Ramesh Thakur and Albrecht Schnabel write, "we might see more NATO-style actions" [*author's note:* viz., the bombing of Yugoslavia], "with less or no UN involvement - and thus less order and justice in the global community".[27] They go on to say that, if the member States of the United Nations do not work out principles for settling the question of engagement in humanitarian intervention, the precedent of Kosovo will dangerously undermine the international order.[28] Such a solution is all the more vital because support is often voiced for the unilateral use of force for humanitarian aims. For example, a leading specialist in international law, Lori Darmosh, expresses doubt about the possibility of the international community arriving at consensus with regard to humanitarian interventions. For this reason she thinks that, in the foreseeable future, it may be inevitable or possibly even morally justified for force to be used by individual States, which "have the capability to respond" and "also have motivations for undertaking the burdens of [humanitarian] intervention".[29]

34. In their report "The responsibility to protect: core principles", which was transmitted to the Secretary-General in December 2001,[30] the members of the independent International Commission on Intervention and State Sovereignty, also endeavour, by means of certain reservations, to justify humanitarian interventions mounted without the approval of the Security Council. They consider that, in exceptional cases, when the Security Council is taking no action, a decision on humanitarian intervention may be adopted by the General Assembly at an emergency session, by regional organizations "subject to their seeking subsequent authorization" from the Security Council or even by "concerned States". The various proposals of this kind, designed to legitimize the use of force while circumventing the Security Council, are extremely dangerous. They not only result in a breach of the Charter and undermine the whole system on which the United Nations is built, but they can also jeopardize universal peace and security.

35. The sole exception to this might be the unilateral use of force by a State to protect the life of its citizens who are present in the territory of a foreign State. This issue has repeatedly arisen n practice in international relations, although it has sometimes been used by States in their political interests. When one or other State has used force exclusively in order to protect its citizens, such action has received the tacit or overt backing of the international community. In

this connection, it suffices to recall the freeing of Israeli citizens taken hostage in Uganda or the attempt by the United States to free American diplomats held captive in Iran. Thus, while the International Court of Justice found that the seizure of the American embassy in Tehran constituted an "armed attack", it declined to consider the question of the lawfulness of the action taken by the United States.[31]

Under the Charter of the United Nations, States pledge themselves to take joint and separate action in cooperation with the Organization for the purposes of achieving universal respect for and observance of human rights (Article 56). The phrase "separate action", clearly means that States not only can, but are bound to take measures to defend the rights and freedoms of their citizens in cooperation and consultation with the United Nations. If the Organization fails to take action for any reason, the individual State may therefore use force exclusively in order to save its citizens, while at the same time informing the United Nations Security Council as a matter of urgency. A State's response to the criminal violation of its citizens' rights and freedoms must be rapid and effective. This said, the use of armed force must be short-term and limited to a small contingent of troops. Large-scale military action to seize territory or overthrow Governments is absolutely inadmissible. As soon as the aim of the humanitarian intervention has been achieved, the armed forces should quickly be withdrawn from the territory of the foreign State. The United Nations Security Council must immediately assess the action of the State which has carried out the humanitarian intervention and adopt an appropriate decision.

The "intrusion" of international law into the domain of human rights will continue in the future. Clearly this "intrusion" goes beyond the limits of what is currently regarded as lawful and possible.

## Conclusions

36. Only some of the issues linked to the subject under investigation are considered in this working paper in the form of a thesis. The limited scope of the paper did not permit the author to present the questions under consideration in detail, or to discuss such issues as State sovereignty and the relationship between international and domestic law in the domain of human rights; State sovereignty and the use of force against illegal regimes, terrorism and drug traffickers; the position of the individual in international law and State sovereignty; the human rights activities of regional organizations and State sovereignty; and a number of other questions. In view of the fact that issues related to human rights and State sovereignty affect the political and other interests of States, such a study must, of necessity be complex in nature and its conduct should be assigned to a group of Sub-Commission experts representing various regions of the world.

37. For this reason, the Sub-Commission should, in the present author's opinion, ask the Human Rights Council to appoint a special rapporteur or special rapporteurs to conduct such a study. These rapporteurs will require expert assistance from the Office of the United Nations High Commissioner for Human Rights.

38. Should the Sub-Commission recommend the appointment of a single special rapporteur to carry out a study of the subject of human rights and State sovereignty, he or she should be helped by at least two members of the Sub-Commission acting as peer-reviewers, to ensure, together with its author, a detailed analysis of the research material.

## Notes

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[2] Конституции и законодательные акты буржуазных государств XVII-XIX вв. М., Госюриздат, 1957, стр. 255.

[3] The view is also expressed that international law protects the sovereignty of peoples, not States. M. Reisman, "Sovereignty and human rights in contemporary international law", *American Journal of International Law*, October 1990, 84 No. 4, pp. 866-876.

[4] В.Д. Зорькин, «Об угрозах конституционному строю в XXI веке и необходимости проведения правовой реформы в России». Журнал Российского права, № 6, 2004, стр. 3-17; Общая теория государства и права. В 2-х томах. Москва, 2001, т. 2, стр. 207-228.

[5] И. Лукашук, «Глобализация, Государство, Право XXI век», Москва, 2000, стр. 140.

[6] R. Anand, *International Law and Developing Countries*, N. Delhi, 1986, p. 95.

[7] J.G. Starke, *Introduction to International Law*, London 1977, p. 113.

[8] L. Oppenheim, "International Law", London, vol. 1. 1949; С.Б. Крылов, История создания Организации Объединенных Наций. М., 1960.

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[10] Documents of the United Nations Conference on International Organizations, San Francisco, 1945, vol. VI, p. 1705.

[11] Lee Thomas, "International Law, International Relations Theory and Preemptive War: The Vitality of Sovereign Equality Today", *Law and Contemporary Problems*, vol. 67, Autumn 2004, No. 4, p. 156.

[12] Ibid., pp. 147-157.

[13] H. Lauterpacht, *International Law and Human Rights*, London 1950, p. 4.

[14] Mark W. Janis, Richard S. Kay, *European Human Rights Law*, 1990, Connecticut. p. vii.

[15] K. Vasak, "The Council of Europe", in *The International Dimensions of Human Rights*, Paris, 1982, vol. 2, p. 673.

[16] Африканский союз. К вступлению в силу Протокола Африканского суда прав человека и прав народов. Пресс-релиз № 121, 2003.

[17] Ответственность за военные преступления против человечества. Сборник документов. Moscow, 1969, p. 42.

[18] R. Kolodkin, "Immunity of State officials from foreign criminal jurisdiction", *International Lawyer*, No. 3, 2005, pp. 2-10.

[19] A. Borghi, *L'immunité des dirigeants politiques en droit international*, Geneva, 2003, pp. 287-333.

[20] K. Annan, *The Question of Intervention*, New York, 1999, p. 6.

[21] Ibid., p. 8.

[22] Ibid., p. 10.

[23] Cf. *The International Law Association: Report of the Fifty-fourth Conference*, L., 1974, pp. 633-641; *Humanitarian Intervention and the United Nations*, Charlottesville, 1973*:* T. Farrer, *Inquiry into the Legitimacy of Humanitarian Intervention/Law and Force in the New International Order*, Boulder, 1991, pp. 185-201; S. Solarz and M. O'Hanlon, "Humanitarian Intervention: When is force justified?", *The Washington Quarterly*, 1997, vol. 20, No. 4, pp. 3-14.

[24] A/59/565. Report of 1 December 2004, "A more secure world: our shared responsibility".

[25] Resolution 1264 (1999) of the Security Council of 15 September 1999.

[26] Resolution 1272 (1999) of the Security Council of 25 October 1999.

[27] R. Thakur and A. Schnabel, "Unbridled humanitarianism: Between justice, power and authority", in *Kosovo and the Challenge of Humanitarian Intervention*, New York, 2000. p. 498.

[28] Ibid., p. 500.

[29] L. Darmosh, "The inevitability of selective response? Principles to guide urgent international action", in *Kosovo and the Challenge of Humanitarian Intervention,* pp. 414-415.

[30] *The Responsibility to Protect*, December 2001, Ottawa, Canada, pp. xii-xiii.

[31] See also: Вне конфронтации. Международное право в период после холодной войны. Сборник статей. М., 1996, стр. 123-124.

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