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# LEAD ARTICLE

## NATIONAL SOVEREIGNTY AND HUMAN RIGHTS IN A POSITIVE LAW CONTEXT

*Jianming Shen\**

### I. INTRODUCTION

More than one year has elapsed since the outbreak of the Kosovo crisis and the NATO bombing of Yugoslavia. What lessons have we learned from such crises in the areas of human rights and national sovereignty? What impact have they had upon the international legal system?

At stake are impacts and lessons from not only the Kosovo crisis, but also from a series of crises preceding and post-dating Kosovo. Major conflicts and events in the last decade of the 20th century – from the Gulf War and its aftermath to atrocities in Bosnia, from Rwanda to Somalia, and from Kosovo to East Timor – have raised serious questions about humanity and the foundational blocks of international law. These have led to revived debates in the United Nations General Assembly about the principle of national sovereignty and the prevention of humanitarian disasters.<sup>1</sup> Ignorance of basic human rights

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1. See, e.g., Press Release, U.N. GA/9629, *Questions Related to State Sovereignty and Role of Security Council in International Peacekeeping Addressed during Assembly Discussion* (Oct. 7, 1999), at <http://www.un.org/News/Press/docs/1999/1999-1007.ga9629.doc.htm>; Press Release, U.N. GA/9633, *Importance of State Sovereignty, Need to Address Human Rights Violations, Council Reform, Discussed in Assembly* (Oct. 8, 1999), at <http://www.un.org/News/Press/docs/1999/19-991008.ga9633.doc.htm>; Press Release, U.N. GA/9627, *General Assembly Begins Discussion on Secretary-*

and dignity, particularly the rights of minority ethnic or religious groups, has been escalating. At the same time, abuses of the concept of human rights *per se*, and intrusions into the reserved areas of domestic jurisdiction of States, also have been on the rise. NATO's aerial bombing of Yugoslavia in 1999, without the United Nations Security Council's authorization, represents the most complicated and forcible threat to the existing international legal system. Quite a number of statesmen and international lawyers, unsurprisingly yet unconvincingly, have come to the defense of the NATO bombing as if State sovereignty, the UN Charter, and fundamental principles of international law were irrelevant. Yet, there are others who have openly criticized the bombing and defended the principle of national sovereignty.

In a recent essay of mine, I concurred with some<sup>2</sup> that NATO's military intervention in Yugoslavia violated the *jus cogens* principles of State sovereignty, non-intervention, and non-use of force, as embodied in the Charter of the United Nations and general international law.<sup>3</sup> I specifically rejected five major arguments that had been advanced to justify the NATO bombing: collective self-defense, regional arrangements, prevention of genocide, humanitarian intervention, and an argument based on a narrow construction of Article 2(4) of the UN Charter.<sup>4</sup> Beyond question is the illegality of NATO's use of force itself, not to mention the mode of its operation and the detrimental consequences it caused. Judging against the *lex lata* of international law, even some of those who somewhat favored or fathomed the NATO operation admit that justifying the bombing is not easy, even with the vainglorious notion of humanitarian intervention.<sup>5</sup>

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*General's Annual Report on Work of Organization* (Oct. 6, 1999), at <http://www.un.org/News/Press/docs/1999/19991006.ga9627.doc.htm>.

2. See, e.g., Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 [1] EUR. J. INT'L L. (1999), at <http://www.ejil.org/journal/Vol10/No1/ab1.htm> (last visited Oct. 15, 2000); Antonio Cassese, *Comment Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 [1] EUR. J. INT'L L. (1999), at <http://www.ejil.org/journal/Vol10/No1/com.htm>; Raju G.C. Thomas, *NATO and International Law* (May 17, 1999), at <http://jurist.law.pitt.edu/thomas.htm>.

3. Jianming Shen, *Intervention, Use of Force and NATO's War Against Yugoslavia* (September 1999) Part A [hereinafter Shen, *Intervention*] (on file with the author).

4. *Id.* at Part B.

5. See, e.g., Simma, *supra* note 2; Cassese, *supra* note 2. See also Kai Am-

Harder to address are the following questions: How important are human rights *vis-à-vis* States' sovereign rights or *vice versa*? Does the stress on one category of rights have to result in the negation of the other? As the new millennium is upon us, how should the international community balance national sovereignty with individual rights? Is it ready to replace the nation-States with a "world government" or global governance? Is it time to change existing international law? In what direction? Toward what aims? To what degree? By whom? Through what? And how? This essay purports to supply hard answers to these hard questions.

## II. NATIONAL SOVEREIGNTY AS THE FOUNDATION OF INTERNATIONAL LAW

Nation-States have been the foundation blocks of the international legal system since the birth of international law in modern time.<sup>6</sup> In the exercise of their national sovereignty, States created international law. The validity and effectiveness of international law depends on the continuing consent and support of nation-States, while the protection of national sovereignty and independence is contingent upon an effective international legal system that is founded upon nation-States.<sup>7</sup> In contemporary conditions, neither States nor international law can exist without the other.<sup>8</sup>

At the outset, the principle of State sovereignty and its corollaries must be understood in a broader context and with reference to one another. They cannot be cut down to pieces and treated in complete isolation. The corollaries of the principle of State sovereignty include, but are not limited to, the following: (1) sovereign equality; (2) political independence; (3) territorial integrity; (4) exclusive jurisdiction over a territory and the permanent population therein; (5) freedom from external intervention and the corresponding duty of non-interven-

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bos, *Comment on: Bruno Simma, NATO, the UN and the Use of Force: Legal Aspects*, 10 [1] EUR. J. INT'L L. (1999), at <http://www.ejil.org/journal/Vol10/No1/coma.htm>.

6. See 1 L. OPPENHEIM, INT'L LAW 305 (H. Lauterpacht ed., 8th ed. 1955) (stating that there is no doubt with respect to the prohibition of intervention by international law).

7. See *id.*

8. See *id.*

tion in areas of exclusive domestic jurisdiction of other States; (6) freedom to choose political, economic, social and cultural systems; and, (7) dependence of obligations arising from international law and treaties on the consent of States.<sup>9</sup>

Of particular importance among these corollaries is the prohibition of interference and intervention. The principle of State sovereignty and sovereign equality inherently requires that a State refrain from interference in the internal or external affairs of another State.<sup>10</sup> As Oppenheim stated, the non-intervention principle grounds itself in the principle of State sovereignty.<sup>11</sup> It is, using the words of two authors, a corollary of "the rule of the independence of states," *i.e.*, the rule of sovereign equality.<sup>12</sup> Non-intervention by States in each other's domestic affairs is one of the "Five Principles of Peaceful Co-existence" (known as *Heping Gongchu Wuxiang Yuanze* in Chinese and *Pancha Shila* in Hindis) jointly espoused by China, India and Burma.<sup>13</sup> It is also the position of the United States that "the right of a state to exist as a juridical person in the international community imposes the correlative duty of non-intervention in both the internal and external affairs of another state."<sup>14</sup>

State sovereignty is the very foundation upon which international law exists. State sovereignty and its corollaries were recognized among the European Nation-States as a fundamental principle from "Day One" when international law came into being. Bodin's proposition that States had absolute, indivisible and perpetual sovereignty<sup>15</sup> was reflective of the practical need to "promot[e] peace by validating the power of the French king against rival claimants."<sup>16</sup> Grotius and his followers,

9. *See id.*

10. *See id.*

11. *See id.*

12. A.V.W. THOMAS & A.J. THOMAS, *NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS* xi (1956).

13. The five principles are: (1) Mutual respect of each other's sovereignty and territorial integrity; (2) Mutual non-aggression; (3) Mutual non-interference in each other's domestic affairs; (4) Equality and mutual benefit; and (5) Peaceful co-existence. *See* INTERNATIONAL LAW 58-62 (Wang Tieya, ed., Law Publishing House 1995); MU YAPING ET AL., *A TREATISE ON CONTEMPORARY INTERNATIONAL LAW* 72-77 (Law Publishing House 1998).

14. M. WHITEMAN, 5 *DIGEST OF INTERNATIONAL LAW* 321 (1965).

15. *See* JEAN BODIN, *SIX LIVRES DE LA REPUBLIQUE* I.8-II.5 (1586).

16. Alexander B. Murphy, *The Sovereign State System as Political-Territorial*

drawing on works of earlier writers, likewise "presupposed a territorial order in which states were free from outside control."<sup>17</sup> Vattel fully recorded the principle of sovereign independence and equality of states in his influential works.<sup>18</sup> From the principle of territorial sovereignty, Vattel derived the proposition that ownership of a territory entitles a State to exercise jurisdiction.<sup>19</sup> For him, all States were equal, with the same rights and obligations, and the actual might of States did not matter; "a small republic is no less a sovereign state than the most powerful kingdom."<sup>20</sup> He argued that no State had the right to intervene in another State's government, stating that "sovereignty is, doubtless, the most precious [right of a nation] . . . which other nations ought most scrupulously to respect."<sup>21</sup> The opinions of these renowned writers were inseparable from the practical need of Nation-States to be treated by each other as equals.

The Peace of Westphalia was the first formal step toward the formation of a nation-State system and nation-States' respective recognition of each other's sovereignty. The principle of State sovereignty or its corollary was repeatedly emphasized in the practice of States as witnessed in the 1776 American Declaration of Independence,<sup>22</sup> the 1778 Franco-American Treaty of Alliance and Treaty of Amity and Commerce,<sup>23</sup> the 1789 French *Déclaration des droit de l'homme et du citoyen*,<sup>24</sup>

*Ideal: Historical and Contemporary Considerations, in STATE SOVEREIGNTY AS SOCIAL CONSTRUCT* 81, 85 (Thomas J. Biersteker & Cynthia Weber, eds., Cambridge 1996).

17. *Id.* at 85, n.20, citing ADAM WATSON, *THE EVOLUTION OF INTERNATIONAL SOCIETY: A COMPARATIVE HISTORICAL ANALYSIS* (Routledge 1992). For Grotius' reference to state sovereignty, see HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 28-44 (Francis H. Kelsey trans., 1925).

18. See EMMERICH DE VATTTEL, *THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATIONS APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS*, Preliminaries, § 4 (C. Fenwick trans., 1916).

19. See *id.* at vol. 6, § 84.

20. *Id.* at Preliminaries, § 18.

21. *Id.* at II.vi.54.

22. See *THE DECLARATION OF INDEPENDENCE* (U.S. 1776).

23. See Treaty of Alliance, Feb. 6, 1778, U.S.-Fr., 8 Stat. 6; Treaty of Amity and Commerce, Feb. 6, 1778, U.S.-Fr., 8 Stat. 12.

24. See *DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN* (1789), translated in 10 *ENCYCLOPEDIA BRITANNICA* 71 (1985), art. 3 (identifying sovereignty with the State by proclaiming, "The source of all sovereignty lies essentially in the Nation. No corporate body, no individual may exercise any authority that does not expressly emanate from it.").

the 1795 French draft *Déclaration du droit des gens*,<sup>25</sup> the Russian Decree of Peace of 8 November 1917, the Declaration of the Rights of Nations of Russia of 15 November 1917,<sup>26</sup> and the 1938 Declaration of Lima concerning the principles governing American States.<sup>27</sup> In short, the principle of national sovereignty has been firmly affirmed and reaffirmed in modern 2 and post-modern international practice and instruments.

The League of Nations Covenant solemnly declared that its members "undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."<sup>28</sup> Although disputes between League Members were to be submitted to judicial or arbitral organs for legal settlement, or to the Council for advice, it was made clear that where "the dispute [was] . . . claimed . . . and . . . found . . . to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement."<sup>29</sup> The Montevideo Convention on Rights and Duties of States of 1933 provided that all States "are juridically equal, enjoy the same rights, and have equal capacity in their exercise," that "[n]o State has the right to intervene in the internal or external affairs of another," and that States have "the precise obligation not to recognize . . . special advantages which have been obtained by force."<sup>30</sup> The 1975 Helsinki Declaration on Principles Guiding Relations Between Participating States declared the "primary significance" of the principles of, *inter alia*, (1) sovereign equality, (2) no-threat or use of force, (3) the inviolability of frontiers, (4) territorial integrity, (5) peaceful settlement of disputes, and (6) non-intervention in internal affairs.<sup>31</sup>

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25. See ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 118-119 (1954).

26. See RUSSIAN DECREE OF PEACE, Nov. 8, 1917; DECLARATION OF THE RIGHTS OF NATIONS OF RUSSIA, Nov. 15, 1917. See also A HISTORY OF INTERNATIONAL RELATIONS 296-298 (Wang Shengzu et al., eds., Law Publishing House 1986).

27. Declaration of Lima, Dec. 24, 1938, para. 1, reprinted in, 3 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1176-1949 534 (Bevans, ed. 1968).

28. LEAGUE OF NATIONS COVENANT art. 10.

29. *Id.* at art. 15, para. 8.

30. Convention on Rights and Duties of States, Dec. 28, 1933, 49 Stat. 3097, T.S. 881, 165 L.N.T.S. 19, arts. 4, 8, 11.

31. Declaration on Principles Guiding Relations Between Participating States,

The principle of State sovereignty and its corollaries are not only reiterated but also strengthened in the UN Charter. The establishment of the United Nations "is based on the principle of the sovereign equality of all its Members."<sup>32</sup> The Charter makes the use of force against the sovereignty of another State illegal by providing that member States must "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>33</sup> It further provides that nothing in the Charter "shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the . . . Charter" except for "the application of enforcement measures under Chapter VII."<sup>34</sup>

The General Assembly has reaffirmed the principle of State sovereignty in a series of resolutions. Resolution 2131 (XX) (1965) declares that "[n]o state has the right to intervene, directly or indirectly, for any reason whatever, in the internal and external affairs of any other state."<sup>35</sup> Resolution 2625 (XXV) (1970) elaborates the principle of State sovereignty by providing:

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social political or other nature.

In particular, sovereign equality includes the following elements:

- (a) States are juridically equal;
- (b) Each State enjoys the rights inherent in full sovereignty;
- (c) Each State has the duty to respect the personality of other States;
- (d) The territorial integrity and political independence of the State are inviolable;
- (e) Each State has the right freely to choose and develop its

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Principles I-VI, Aug. 1, 1975, 14 I.L.M. 1292 [hereinafter Helsinki Declaration].

32. UN CHARTER art. 2, para. 1.

33. *Id.* at art. 2(4).

34. *Id.* at art. 2(7).

35. G.A. Res. 2131/XX, U.N. GAOR, 20th Sess., Supp. No. 14, at 11.



political, social, economic and cultural systems;

(f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.<sup>36</sup>

The same resolution also particularizes two close corollaries of State sovereignty: the principles of non-use of force and non-intervention. The threat, or actual use, of force against the territorial integrity and political independence of another state is declared to be a "violation of international law and the Charter of the United Nations" and can never be employed as a means for the settlement of international issues.<sup>37</sup> The resolution specifically declares aggression to be "a crime against the peace" for which there would be international criminal responsibility.<sup>38</sup> It further condemns armed or any other forms of interventions in the internal or external affairs of another State or against its personality or its political, economic and cultural elements, and declares them to be also a "violation of international law."<sup>39</sup>

Resolution 3314 (XXIX) (1974) renders a detailed definition of aggression, declaring as aggression, *inter alia*, "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."<sup>40</sup>

In Resolution 36/103 (1981), the General Assembly stresses that "full observance of the principles of non-intervention and non-interference in the internal and external affairs of sovereign States . . . is essential to the fulfillment of the purposes and principles of the Charter of the United Nations."<sup>41</sup>

36. See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, Oct. 24, 1970, A/RES/2625 (XXV), Oct. 24, 1970, ("The principle of sovereign equality of States.")

37. *Id.* at para. 1, ("Members shall refrain . . . from the threat or use of force . . ."). See also U.N. CHARTER art. 2, para. 1.

38. *Id.* at para. 2.

39. *Id.* at para. 1 ("The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State.")

40. Definition of Aggression, A/RES/3314 (XXIX), Dec. 14, 1974, Annex, art. 1.

41. Declaration on the Inadmissibility of Intrusion and Interference in the Internal Affairs of States, Annex to G.A. Res. 36/103, U.N. GAOR, 36th Sess., 91st plen. mtg. U.N. Doc. A/RES/36/103 (1981).

The Declaration on the Inadmissibility of Intervention contained therein reaffirms, *inter alia*, (1) that no State has the right to intervene in the internal or external affairs of any other State; (2) that “all States have the duty not to threaten or use force against the sovereignty, political independence or territorial integrity of other States”; (3) that the maintenance and strengthening of international peace and security must be “founded upon freedom, equality, self-determination and independence, respect for the sovereignty of States”; and (4) that full observance of the principle of non-intervention “is of the greatest importance for the maintenance of international peace and security” as well as for fulfilling the principles of the UN Charter.<sup>42</sup> Under the same Declaration, the principle of non-intervention in the first place comprises, *inter alia*, the rights of “[s]overeignty, political independence, territorial integrity, national unity and security of all States.”<sup>43</sup> The principle also comprehends the duty of a State to refrain from, *inter alia*:

a. Promoting, encouraging or supporting “rebellious or secessionist activities within other States, under any pretext whatsoever, or any action which seeks to disrupt the unity or to undermine or subvert the political order of other States”;<sup>44</sup>

b. Concluding agreements with another State or States “designed to intervene or interfere in the internal and external affairs of third States”;<sup>45</sup>

c. “Any measure which would lead to the strengthening of existing military blocs or the creation or strengthening of new military alliances, interlocking arrangements, the deployment of interventionist forces or military bases and other related military installations”;<sup>46</sup> and,

d. Exploiting and distorting “human rights issues as a means of interference in the internal affairs of States, of exert

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42. *Id.*

43. *Id.* at para. 2(I)(a).

44. *Id.* at para. 2(II)(f).

45. *Id.* at para. 2(II)(h).

46. *Id.* at para. 2(II)(i).

ing pressure on other States or creating distrust and disorder within and among States or groups of States."<sup>47</sup>

Numerous other General Assembly resolutions and documents have repeatedly stressed the importance of the principles of State sovereignty, non-intervention and non-use of force. For example, Resolution 40/158 (1985) urges "all States to abide strictly . . . by their commitment to the Charter of the United Nations," including their commitment "[t]o refrain from the use or threat of use of force, intervention, interference, aggression, foreign occupation and colonial domination or measures of political and economic coercion which violate the sovereignty, territorial integrity, independence and security of other States."<sup>48</sup> Resolution 45/151 (1990), concerning "respect for the principles of national sovereignty and non-interference," urges all States to respect the principle of "non-interference in the internal affairs of States and the sovereign right of peoples to determine their political, economic and social system."<sup>49</sup> It condemns "any act of armed aggression or threat or use of force,"<sup>50</sup> and requests the Commission on Human Rights to review "the fundamental factors that negatively affect the observance of the principle of national sovereignty and non-interference in the internal affairs of States."<sup>51</sup> Resolution 50/6 carrying the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations (1995) emphasizes that "[t]he continued promotion and development of international law must be pursued with a view to ensuring that relations between States are based on the principles of justice, sovereign equality, universally recognized principles of international law and respect for the rule of law."<sup>52</sup> Resolution 50/172 (1996)

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47. Declaration on the Inadmissibility of Intervention, *supra* note 40, at para. 2(II)(I).

48. Review of the Implementation of the Declaration on the Strengthening of International Security, G.A. Res. 158, U.N. GAOR, 40th Sess., U.N. Doc. A/RES/40/158 para. 2(a) (1985).

49. Respect for the Principles of Nat'l Sovereignty and Non-Interference in the Internal Affairs of States in their Electoral Processes, G.A. Res. 151, U.N. GAOR, 45th Sess., 69th plen. mtg., para. 4, U.N. Doc. A/RES/45/151 (1990).

50. *Id.* at para. 6.

51. *Id.* at para. 9.

52. Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, G.A. Res. 6, U.N. GAOR, 50th Sess., U.N. Doc. A/RES/50/6, (1995), sec. Justice, para. 1. *See also id.* at sec. Peace, para. 4 (referring to the inviolability of the political independence and territorial integrity of sovereign States).

reaffirms the principles of State sovereignty and non-interference and condemns aggression and use of force in almost the same wording<sup>53</sup> as Resolution 45/151. Resolution 53/144 (1999) acknowledges the need to eliminate gross violations of fundamental rights originating from, *inter alia*, "aggression or threats to national sovereignty, national unity or territorial integrity" of States.<sup>54</sup> Resolution 53/101 (1999) likewise reaffirms the "principles of international law" of sovereign equality of all States, non-intervention, faithful observation of international obligations, and non-use of force.<sup>55</sup>

While the General Assembly does not possess the legislative power to pass binding resolutions, its importance in manifesting the general attitude of UN members cannot be underestimated; especially where the same principles have been repeatedly declared and reaffirmed. The various declarations and resolutions mentioned above, together with relevant Charter provisions and other treaty provisions, provide weighty evidence that the principle of State sovereignty and its corollaries are essential to the existence and proper functioning of the United Nations and the entire system of international law as a whole.

After all, international law is the product of practice, agreements and compromises of nation-States. Since nation-States emerged, no State has ever existed alone in a vacuum. Rather, it is inevitable that each State must to one degree or another enter into relations with other members of the international society. Such relations are determined by the State's national will. Sovereignty and other fundamental rights of the State are the requirements and expressions of the will of the State, while the corresponding obligations to respect the sovereignty and other fundamental rights of other States are the

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53. See Respect for the Principles of National Sovereignty and Non-Interference in the Internal Affairs of States in their Electoral Processes, G.A. Res. 172, U.N. GAOR, 50th Sess., 99th plen. mtg., preamble, and paras. 4 & 6, U.N. Doc. A/RES/50/172 (1996).

54. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Res. 144, U.N. GAOR, 53rd Sess., 85th plen. mtg., Annex, U.N. Doc. A/RES/53/144 (1999), preamble.

55. Principles and Guidelines for International Negotiations, G.A. Res. 101, U.N. GAOR, 53rd Sess., 83rd plen. mtg., para. 1(a), (b), U.N. Doc. A/Res/53/101 (1999).

result of the State's compromise in its national will in exchange for certain benefits, including other States' respect for its own sovereignty and other fundamental rights. That is how a system of international law is agreed upon. It is the nation-States that are simultaneously the law-makers, subjects, and implementers of international law. The States create and maintain a system of international law to regulate their relations with, and to undertake various obligations toward, one another. Despite the many compromises they have had to or will have to make, they continue to participate in and support this system. This is because on the whole it is supposed to protect, and has in fact protected, their national sovereignty and other rights associated with that sovereignty.<sup>56</sup>

### III. THE IMPORTANCE AND RELATIVITY OF HUMAN RIGHTS

While the continuing foundational importance of national sovereignty to the international system should not be underestimated, it is also important to recognize that State sovereignty has never been absolute ever since the creation of international law. Since international law evolves from the compromised will and consent of States, such compromises or compromised "will" and "consent" have necessarily placed certain limits upon States' national sovereignty. In the field of human rights, for example, to the extent that States have agreed to some bilateral, multilateral or general norms by way of treaty or custom, their national sovereignty will be subject to the limitations placed upon them by such norms. One of the restrictions States have agreed to place upon their sovereignty is that they, under the United Nations Charter, have given the Security Council the power to intervene or permit intervention where domestic or inter-State human rights situations are found to constitute an act of aggression or a threat to or breach of international peace.<sup>57</sup>

Nation-States came into existence by historical self-forma-

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56. See Jianming Shen, *The Basis of International Law: Why Nations Observe*, 17 DICK. J. INT'L. L. 287-355 (1999); Jianming Shen, *Theories on the Basis of International Law*, in PEACE, JUSTICE AND LAW: COLLECTION OF ESSAYS IN COMMEMORATION OF THE 80TH BIRTHDAY OF PROFESSOR WANG TIEYA 230-260 (Beijing: China International Broadcasting Publishing House, 1993).

57. See U.N. CHARTER art. 24, para. 1.

tion, conquest, agreement or revolution. States have developed international law to benefit their national interests, including the interests of their subjects - individuals. The normal and perhaps the most effective way to protect the interests and rights of individuals within a particular nation-State was, until recent decades, through its domestic legal system. Since the establishment of the United Nations, human rights issues have increasingly entered the domain of international law, inevitably resulting in further limitations on the scope of national sovereignty and jurisdiction.

At the time the UN Charter was adopted, the world-wide need to solve social problems and to promote the respect and protection of human rights was gaining importance; particularly in view of the conditions that led to the Second World War and the atrocities committed during it. One of the purposes of the United Nations is to solve "international problems of an economic, social, cultural, or humanitarian character," and to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>58</sup> The Preamble of the Charter has indeed reaffirmed "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."<sup>59</sup> Under the Charter, the General Assembly is required to "initiate studies and make recommendations for the purpose of . . . assisting in the realization of human rights."<sup>60</sup> All Members of the United Nations pledge "to take joint and separate action" in cooperation with the United Nations for achieving the purposes specified in Article 55,<sup>61</sup> one of which is to "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion."<sup>62</sup> The Economic and Social Council is authorized to "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all,"<sup>63</sup> and is further charged with the task of

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58. *Id.* at art. 1, para. 3.

59. *Id.* at preamble, para. 2.

60. *Id.* at art. 13(1)(b).

61. *Id.* at art. 56.

62. *Id.* at art. 55(c).

63. U.N. CHARTER art. 62(2).

setting up (and maintaining) commissions "for the promotion of human rights."<sup>64</sup> Finally, the now-obsolete trusteeship system under the Charter was also designed, *inter alia*, to "encourage respect for human rights and for fundamental freedoms for all."<sup>65</sup>

The commitment of the United Nations to the promotion and protection of human rights is further reflected in the 1948 Universal Declaration of Human Rights,<sup>66</sup> the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,<sup>67</sup> the 1966 International Covenants on Civil and Political Rights<sup>68</sup> and on Economic, Social and Cultural Rights.<sup>69</sup> There are many other treaties and agreements dealing with specific aspects or regional issues of human rights, within or without the UN framework. The international community, mainly through the United Nations and its organs, increasingly has to address humanitarian catastrophes and other massive, flagrant and systematic violations of human rights. Ostensibly, the significance of world-wide human rights promotion and protection and the effects of a growing international human rights law on national sovereignty cannot be underrated. To a certain extent, States have voluntarily, or involuntarily by compromise, restricted part of their national sovereignty in the treatment of nationals and other individuals by participating in various human-rights-related treaties and practices.

Notwithstanding, the importance of human rights is a matter of relativity. Before us is a world of various actors with nation-States at its core. National rights and societal interests still matter. Just as sovereignty is not absolute, nor are human rights. Although some aspects of human rights, such as the

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64. *Id.* at art. 68.

65. *Id.* at art. 76(c).

66. See G.A. Res. 217, U.N. GAOR, 3rd Sess., Annex, U.N. Doc. GA/RES/217/Annex (1948).

67. See Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

68. See International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, reprinted in 6 I.L.M. 368 (1967) [hereinafter "Civil and Political Rights Covenant"].

69. See International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3, art. 2(2), reprinted in 6 I.L.M. 360 (1967) [hereinafter "Economic, Social and Cultural Rights Covenant"].

right to be free from genocide, slavery and torture, may be said to be inflexible or nearly inflexible, most aspects of human rights are inherently subject to some degree of limitation. The exercise of individual rights may not interfere with the interests and rights of other individuals and those of the society as a whole. "The state is . . . the entity accorded the obligation under international law to represent the interests of all its inhabitants . . . , [and] this responsibility is manifested in limitations on human rights for the purpose of upholding fundamental general interests of society."<sup>70</sup> Under the Civil and Political Rights Covenant, for instance, the freedom of expression may be subject, where necessary, to domestic law restrictions for the purpose of (1) respecting the rights or reputations of others or (2) protecting national security, *ordre public*, or public health or morals.<sup>71</sup> Even the Convention against Torture contains some loopholes by allowing a contracting party to make reservations with respect to certain provisions<sup>72</sup> and even to denounce the entire Convention.<sup>73</sup> These limitations of human rights illustrate that States' willingness and agreement to participate in the international protection of individual rights have not placed individual rights above national sovereignty and societal interests. The States remain the cornerstone of international law, including international human rights law, irrespective of whether one regards that law to be perfect and effective or not.

The relativity of human rights is also evident in the present status of human rights regimes in international law. The relevant provisions of the United Nations Charter on human rights merely require Members of the organization to cooperate with one another for the promotion and respect of human rights and fundamental freedoms without laying out specific rights of individuals and specific duties of States.<sup>74</sup> The importance of realizing human rights notwithstanding, nothing in

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70. Roy E. Thoman, *The New World Order: Sovereignty, Human Rights and the Self-Determination of Peoples*, 16 WIS. INT'L L.J. 271, 271-272 (1997).

71. See Civil and Political Rights Covenant, *supra* note 68, at art. 19(3).

72. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, GA/Res/39/46/Annex (1984), art. 28(1) (respecting the competence of the U.N. Committee against Torture) & art. 30(2).

73. See *Id.* at art. 31.

74. See U.N. CHARTER preamble and art. 1.



the Charter suggests that human rights are higher than national sovereign rights. The Universal Declaration of Human Rights, one has to admit, is not in itself law-making in international law. It is a non-binding and unenforceable instrument<sup>75</sup> although some of its provisions may have entered into the realm of customary international law. The Declaration simply establishes certain common goals and standards of human rights protection which "all peoples and all nations" should strive to achieve.<sup>76</sup>

The Genocide Convention does define genocide,<sup>77</sup> but in no sense was it designed to undermine the principle of State sovereignty. In fact, the Convention's implementation relies upon national measures of the parties. It requires the parties to enact necessary legislation in order to give effect to its provisions and, in particular, to effectively punish individuals who commit genocide.<sup>78</sup> The parties' obligation to extradite genocide offenders is subject to their own municipal laws or treaties.<sup>79</sup> National courts still have primary jurisdiction and responsibility to punish those charged with genocide, who "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted this jurisdiction."<sup>80</sup> Although an international criminal court may be available for the trial and punishment of genocidal crimes, the Convention contains no requirement that a party submit to the jurisdiction of such a court.<sup>81</sup>

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75. On the effects of General Assembly resolutions and declarations, see Jianming Shen, *The Role of the United Nations in the Determination and Development of International Law*, CH. Y.B. INT'L. L. 13-44 (1996).

76. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3rd Sess., Annex, para. 8, U.N. Doc A/810 (1948), preamble.

77. See Genocide Convention, *supra* note 67, at art. 1.

78. See *id.* at art. 5.

79. See *id.* at art. 7.

80. *Id.* at art. 6.

81. See S. Res. 347 (giving the Senate's consent and advice to ratify the Genocide Convention), 132 CONG. REC. 1378 (1986) (stating that "with regard to the reference to an international penal tribunal in Article VI of the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate"). See also STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 81st Cong., 1st Sess., REPORT ON THE INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE at 108 (by Richard

Similarly, the two International Covenants depend for their effectiveness and implementation on the contracting parties' enforcement measures, including in particular the adoption of domestic legislation.<sup>82</sup> The Covenants not only recognize the jurisdiction, and therefore sovereignty of the contracting parties,<sup>83</sup> but also allow the parties to retain the sovereign right to subject some of the protected individual rights to certain limitations imposed by their domestic law. Thus, the Civil and Political Rights Covenant permits a contracting party, for the purpose of public safety, health, morals and order, or for protecting the fundamental rights of others, to impose by national legislation such restrictions as necessary on the freedom of movement within its territory,<sup>84</sup> the right to manifest one's religion or beliefs,<sup>85</sup> the right of expression,<sup>86</sup> the right of peaceful assembly,<sup>87</sup> and the right to freedom of association.<sup>88</sup> The Economic, Social and Cultural Rights Covenant likewise allows the parties to subject the protected rights "to such limitations as are determined by law" if such limitations are not incompatible with the nature of these rights and are "solely for the purpose of promoting the general welfare in a democratic society."<sup>89</sup> In particular, national law may impose restrictions on the right of individuals to form or join trade unions,<sup>90</sup> the right of trade unions to function freely,<sup>91</sup> and the right to strike,<sup>92</sup> restrictions on the exercise "by members of the armed forces or of the police or of the administration of the State" of the right to form or join trade unions, the right of trade unions to function independently and to form federations or join international trade-union organizations.<sup>93</sup>

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G. Lugar, Chairman, Washington, D.C.: Government Printing Office 1985).

82. See Civil and Political Rights Covenant, *supra* note 68, at art. 2(2); Economic, Social and Cultural Rights Covenant, *supra* note 69, at art. 2(1).

83. See Civil and Political Rights Covenant, *supra* note 68, at art. 2(1); Economic, Social and Cultural Rights Covenant, *supra* note 69, at art. 14.

84. See Civil and Political Rights Covenant, *supra* note 68, at art. 12(3).

85. See *id.* at art. 18(3).

86. See *id.* at art. 19(3).

87. See *id.* at art. 21.

88. See *id.* at art. 22(2).

89. Economic, Social and Cultural Rights Covenant, *supra* note 69, at art. 4.

90. See *id.* at art. 8(1)(a).

91. See *id.* at art. 8(1)(c).

92. See *id.* at art. 8(1)(d).

93. *Id.* at art. 8(2).

The importance and relativity of human rights indicate that human rights issues can neither be overlooked and avoided, nor exaggerated and "abused." On one hand, massive and flagrant violations of human rights, particularly of fundamental human rights, are no longer the exclusive concerns of domestic jurisdiction.<sup>94</sup> Through relevant human rights enforcement mechanisms established under treaties, the international community at large has the right to hold the gross violators answerable and responsible on the international plane. On the other hand, the achievement of promotion and protection of human rights must be made within the confines of positive law principles and norms, including the principle of State sovereignty. Not every aspect of human rights issues is appropriate for international action, and, more importantly, not every alleged human rights issue is really a human rights issue at all.

#### IV. HARMONIZING SOVEREIGNTY AND HUMAN RIGHTS UNDER POSITIVE LAW

Respect for State sovereignty and protection of individual rights are both essential to the existing international legal system. Then, under current positive law, can human rights be protected and enhanced without serious damage to State sovereignty? Do human rights take precedence over national sovereign rights in case of conflict? Or, can the principle of State sovereignty be used as a veil to protect a State completely from international responses to its gross violations of obligations under positive human rights law?

The prevalent view in the West is that human rights violations provide legal and moral grounds for disregarding the sovereign rights of States.<sup>95</sup> Henkin, reluctant to use the word "sovereignty," considers this concept as a mistake upon mistakes, stating that "sovereignty' has been transmuted into an

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94. See, e.g., *In Re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000); *In Re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164 (S.D.N.Y. 2000).

95. See, e.g., Jarat Chopra & Thomas G. Weiss, *Sovereignty Is No Longer Sacrosanct: Codifying Humanitarian Intervention*, 6 ETHICS & INT'L AFF. 95 (1992); Anne Bodley, *Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia*, 31 N.Y.U. J. INT'L L. & POL. 417 (1999).

axiom of the inter-state system, which has become a barrier to international governance, to the growth of international law, and to the realization of human values.<sup>96</sup> Propositions such as the one that "basic needs and human rights are . . . more important than claims of inviolable national sovereignty"<sup>97</sup> are not unfamiliar. Indeed, to British Prime Minister Tony Blair and his supporters, "some important aspects of the principle of non-interference in internal affairs should be limited" because "a country's sovereignty is not as important as human rights."<sup>98</sup> Third world countries, on the other hand, tend to stress the importance of the inviolability of national sovereignty, political independence and territorial integrity while also recognizing the need for international cooperation to address problems of massive and systematic violations of human rights.<sup>99</sup>

The extreme view that human rights are more important than national sovereignty is contrary to the reality under positive law, and is in particular incompatible with the principles of sovereign equality, non-intervention, and prohibitions on the use of force. Despite the importance of international promotion and protection of human rights, it would be misleading simply to maintain preeminence of individual rights over national sovereignty. These two categories of rights, though somewhat contradictory to one another, do not have to be viewed as "enemies" with one "conquering" the other. In my opinion, neither should national sovereignty and the principle of non-intervention be used as a shield behind which a State can act in wanton and unrestrained disregard for its international obligations

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96. Louis Henkin, *Sibley Lecture, March 1994: Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31, (1995/1996).

97. William B. Wood, *Geography: A Lesson for Diplomats*, 23 FLETCHER F. WORLD AFF. 5, 14 (Fall 1999).

98. See *China: Hegemony Doomed to Fail*, CHINA DAILY, May 18, 1999, at 4, available in 1999 WL 17779541 (criticizing the ideas of limited sovereignty and preeminence of human rights over national sovereignty).

99. For the positions of some third world countries on sovereignty and human rights, see, for example, Press Release, U.N. GA/9606, *Questions of Sovereignty, the State System, the Future of the Organization Raised by General Debate Speakers*, (Sept. 24, 1999) (including Singapore, Iraq, Dominican Republic, Kazakhstan, and Iran); Press Release, U.N. GA/9627, *supra* note 1 (including Colombia, Kuwait, Mongolia, China, Bangladesh, India, Venezuela); Press Release, U.N. GA/9633, *supra* note 1 (including Cuba, Algeria, Oman, Pakistan, Peru, the Philippines, Senegal, and Sudan).

relating to fundamental rights and freedoms of individuals or groups of people, nor should the need for respect and protection of human rights be used and indeed abused to disrespect and undermine the sovereignty, inviolability and dignity of States. Instead, the relationship between national sovereignty and individual rights should and can be *complementary*. When one deals with the legal relationship between national sovereignty and human rights, both categories of rights should be viewed *in the context of positive international law* rather than from perspectives of value, religion, culture and ideology.

The fundamental interests of a State do not necessarily contradict with those of its citizens. The preservation of and respect for State sovereignty can, in fact, better realize and protect the fundamental interests and rights of individuals within the domestic legal order. A jungle-like international system under which one State could freely interfere with the affairs of another in the name of human rights protection would tend to result in the very denial of the fundamental interests and rights of weaker States *and their people*. As Qin Huasun, the former Chinese Ambassador to the United Nations points out, sovereignty is the last "defense screen" of small and weak countries against foreign bullying, and there would be no peace if that screen were broken.<sup>100</sup>

In the modern history of China, western powers intervened in China's internal and external affairs time and again, not infrequently on "humanitarian" grounds. As part of the consequences of such interventions, China lost much of its territory to Russia, ceded Hong Kong to Great Britain, transferred Taiwan to Japan, relinquished its control or influence over outer Mongolia, Korea, Indochina and Burma.<sup>101</sup> Additionally, most of the remaining Chinese territory was divided into Spheres of Influence of the British, French, German, Japanese, Russian and the like. The lack of basic human rights largely due to the insecurity of national sovereignty can be seen from the fact that, until the middle of the 20th century, the Chinese people were in essence deprived of their complete sovereign rights to run their own country, to engage in

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100. See Press Release, U.N. GA/9627, *supra* note 1.

101. See Wang Tiewa, *China and International Law - Historical and Contemporary*, CH. Y.B. INT'L. L. 5-115, 34-35 (1991).

their economic development, and to lead their way of life free from foreign interference. In concessions "granted" under duress by the Chinese government to foreign powers, the Chinese people suffered significant indignities in violation of putative human rights concepts allegedly adhered to by such powers. Under a series of unequal treaties recognizing the "extraterritorial jurisdiction" of foreign powers, where the interests and rights of foreigners were offended by Chinese citizens, the Chinese authorities were required to "arrest and punish" the offenders (because of harsher punishment under the Chinese criminal system); where the interests and rights of the Chinese were offended by a foreigner, he or she would be subject to the exclusive consular jurisdiction of his or her own country and to a penalty, if any, to be determined under its own law.<sup>102</sup> History has proven that if a State cannot enjoy the inviolability of its sovereignty, its ability to protect its people and to promote their interests, "rights" and welfare will be greatly impaired.

Effective promotion and protection of human rights must thus be founded upon respect for the inviolability of States' national sovereignty, political independence, and territorial integrity. We do not need to and should not view States with hostility. They and their governments are not necessarily rights deniers as sometimes perceived. Rather, they are generally the best promoters and protectors of the rights and interests of their nationals. Generally speaking, it is the States that truly care about their own people more than any other government or organization. Most States are reasonable and ready to cooperate with one another in carrying out their obligations under positive international law in the field of human rights. As the Colombian representative to the UN observes, States "would be interested and willing to participate in the prevention of crises, as well as in their solution."<sup>103</sup> A peacefully coexistent and virtually non-interventionist international community would work better toward reducing ethnic, cultural, religious and even ideological distrust, hatred and conflicts, and therefore curtailing chances of massive and systematic violations of fundamental human rights and freedoms. On the contrary, disrespect for a State's sovereignty, political independence, and

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102. *Id.* at 42.

103. Press Release, U.N. GA/9627, *supra* note 1.

territorial integrity would not only affect its general ability to protect the fundamental rights and interests of its people, but also tend within its borders to create instability, invite terrorist activities, generate breach of peace, enlarge differences between ethnic, cultural, religious and political groups, encourage extremist sub-nationalism, promote secessionist movements, and result in civil war and human atrocities.

It is obvious, but often neglected, that we are living in a community of equal members which is sometimes said to be a "state of nature."<sup>104</sup> There does not exist a general supranational legislature, nor a world government, nor a world police force, nor a body of "world law," despite increasingly clamorous academic and non-academic grandiloquence aimed at softening or derogating national sovereignty and replacing international law with a "supranational" law. The creation, maintenance, perfection and effectiveness of the existing international legal system rely on the sovereign wills and compromises of nation-States as the key actors. International human rights law is no exception. Unless and until nation-States have submitted by consent to international arrangements, human rights protections are essentially a matter of domestic law and domestic jurisdiction. Even where international human rights regimes exist due to States' agreements, such regimes can be best enforced by the States themselves rather than through external or international implementation mechanisms. The 1981 Declaration on the Inadmissibility of Intervention makes this clear by providing that States have "[t]he right and duty . . . to observe, promote and defend all human rights and fundamental freedoms within their own national territories and to work [towards] the elimination of massive and flagrant violations of the rights of nations and peoples, and in particular, for the elimination of apartheid and all forms of racism and racial discrimination."<sup>105</sup> The same instrument also reaffirms the duty of States to refrain from exploiting and distorting human rights as an instrument of "interference in the internal affairs of States, of exerting pressure on other States or creating distrust and disorder within and among States or groups of

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104. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 269-71 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

105. Declaration on the Inadmissibility of Intervention, *supra* note 41, at para. 2(III)(c).

States.<sup>106</sup>

The proliferation of international human rights instruments and enforcement regimes by no means envisages the end or near-disappearance of nation-States. The *realpolitik* of the international system remains to be founded upon the compromise and cooperation of individual sovereign nations. State sovereignty and its corollaries are still the most important and most fundamental principles of international law. The fact that States have agreed to establish certain international human rights regimes does not avail itself to be construed as diminishing the sovereign rights of States that have given their consent or compromise. According to Vattel, States do not abandon their sovereignty by agreeing to their subjection to international law.<sup>107</sup> While Vattel must have been referring to peremptory norms of natural law, the principle still holds true whether one views international law as a set of positive or natural norms. The Permanent Court of International Justice, in *S.S. Wimbledon*, declined to hold that a State, in concluding a treaty by which it undertakes to perform or refrain from performing a particular act, abandons its sovereignty, since "the right of entering into international engagements is an attribute of State sovereignty."<sup>108</sup> The principle recognized by the *Wimbledon* court would also apply to States' voluntary and involuntary (compromised) subjection to the rules of customary international law in general and of international *jus cogens* norms in particular. The late Judge Schwarzenberger was correct in writing that,

doctrinal attempts at spiriting away sovereignty must remain meaningless. Actually, such efforts appear to minimise unduly the fundamental character of the principle of legal sovereignty within the realm of international law. The rules underlying this principle derive their importance from the basic fact that "almost all international relations are bound up" with the independence of States. Thus, the principle of sovereignty in general, and that of territorial sovereignty in particular, remains of necessity the "point of departure" in settling most questions that concern international relations.<sup>109</sup>

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106. *Id.* at para. 2(II)(I).

107. VATTEL, *supra* note 18, at 2.

108. See S.S. "Wimbledon", 1923 P.C.I.J. (Ser. A) No. 1, at 25.

109. 1 G. SCHWARZENBERGER, INTERNATIONAL LAW 115 (3rd ed., 1957).



There are, and must be, ways to harmonize national sovereignty and individual rights. The 1975 Helsinki Declaration stressed the respect for human rights and fundamental freedoms, and equal rights and self-determination of peoples.<sup>110</sup> At the same time, it also attached at least equal importance to the principles of State sovereignty, non-intervention, non-use of force, and territorial integrity.<sup>111</sup> All of these principles were of "primary significance," and would be "equally and unreservedly applied, each of them being interpreted taking into account the others."<sup>112</sup> Boutros Boutros-Ghali, former Secretary-General of the UN, stated that although "[t]he time of absolute and exclusive sovereignty . . . has passed," the "foundation-stone" of the work to achieve international security "is and must remain the State," and "respect for [the State's] fundamental sovereignty and integrity are crucial to any common international progress."<sup>113</sup> As long as we continue to regard the principle of State sovereignty as the "foundation stone of international law - the rule of the independence of states,"<sup>114</sup> the alleged conflicts between sovereign rights and human rights would not be difficult to solve.

Simply put, States have the general desire and willingness to protect their citizens' rights and interests and to cooperate among themselves to achieve greater protection on the international plane. In that sense, national sovereignty and independence, in general terms, serve more as a guarantee of, than a hurdle to, the realization of basic human rights. Where conflicts do exist, we cannot simplistically conclude that individual human rights are higher than national sovereign rights, since human rights are not absolute, and as such are dependent on the willingness, power and cooperation of the nation-States for their recognition, enforcement and perfection. Nor can we simplistically maintain a State, because of its national sovereignty, can ignore the obligations it has undertaken under positive international law in the area of human rights. A State's national sovereignty would ordinarily take precedence, for human

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110. See Helsinki Declaration, *supra* note 31, at Principles VII & VIII.

111. See *supra* note 31 and accompanying text.

112. 14 I.L.M. 1292, 1296 (1975).

113. Boutros Boutros-Ghali, Report of the Secretary General to the Security Council (1992) (on file with author).

114. THOMAS & THOMAS, *supra* note 12.

rights issues are primarily a matter of domestic law and domestic jurisdiction. Yet, to the extent human rights issues have entered the domain of positive international customary and conventional law following States' consent and compromise, they are no longer exclusively domestic concerns.

Accordingly, Nation-States need to maintain a balance between national sovereignty and individual rights when they are in conflict. Certainly, a State which, by exercising its sovereign power, has consented to an international or regional human rights regime may not use its national sovereignty as a shield to evade or violate its international obligations to refrain from massive and systematic human rights abuses. Failure to observe such obligations would entail international responsibility, including international criminal liability for which the violator would be made answerable in an orderly and civilized manner. By the same token, no State or other actor may exploit or abuse human rights issues as an excuse to undermine the national sovereignty of another, interfere in its domestic affairs, and violate its political independence and territorial integrity. International responses to, including permissible institutionalized interventions in, alleged or possible human rights violations must be in strict conformity with treaty regimes and other positive law.

#### V. CONCLUSION: WHERE TO GO?

That all individuals under positive international and national law deserve certain basic human rights is beyond doubt. Promoting respect for, and protection of, human rights and fundamental freedoms is one of the purposes of the United Nations and may have become a fundamental principle of international law despite disagreements with regard to the content and extent of individual rights. Much more fundamental, however, is the constitutive principle that States that create international law are sovereign, having the inherent right of political independence and territorial integrity, and more particularly, the right to manage its domestic affairs free from external interference. It is through the operation of this fundamental principle that the international community has largely maintained and enhanced peace and security of States by promoting their general interests in keeping the *status quo*

against not only external subjugation and interference, but also against internal disturbances having the potential to dismember the State and leading to greater human rights violations. It is true that national sovereignty is not absolute,<sup>115</sup> but it is equally true that "human rights" are not unrestricted either. A State's sovereignty is certainly subject to its international obligations to respect and protect human rights under treaties and custom; the breach of which will incur liability not simply to the victims but also other members of the international community. On the other hand, existing positive *lex lata* does not go so far as to allow a State or a group of States to employ human rights as a tool to disregard the national sovereignty of another State and intervene in its domestic affairs. After all, the international system remains essentially a collection of nation-States with fixed borders within which they expect freedom from external interference.

The remaining questions relate to the trend of developing international law. As we enter the 21st century, should we espouse major changes to existing *lex lata*? How much? In what direction? By and through whom? Should the international community work toward further limiting or even relinquishing national sovereignty by, for example, allowing interventions in the name of protecting individual rights? Is it ready or will it be ready to replace the nation-States with a "world government" in the new centennial?

In a new century of further globalization, integration and interdependence, the concepts of nation-States and sovereignty will almost certainly face greater tests and challenges. Some have characterized the proliferation of international law norms and public international organizations in the latter part of the 20th century as a trend toward "multilateralization," and even conjectured that this alleged trend "has so fundamentally transformed the character of international law that even the term 'international law' is an anachronism."<sup>116</sup> However, it is doubtful nation-States will ever be ready in a considerable

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115. See OPPENHEIM, *supra* note 6 (stating that intervention, as a rule, is forbidden by international law, albeit with exceptions). See also U.N. CHARTER art. 3, para. 7.

116. John W. Head, *Supranational Law: How the Move Toward Multilateral Solutions Is Changing the Character of "International" Law*, 42 U. KAN. L. REV. 605, 606 (1994).

period of time to dissolve themselves and reform into, or subject themselves to, a world government. National identity and national interests will continue to matter. Existing cultural, ethnic, religious, philosophical and other differences between nation-States are such that they will not easily die off. Recent decades have seen not only the willingness of certain States to compromise part of their national identity and sovereignty in exchange for greater benefits for their nations, but also the tendency toward proliferation of more States and the rising of neo-nationalism. The principles of State sovereignty, political independence, territorial integrity, non-interference and non-use of force are as clear and essential as  $1 + 1 = 2$ . These principles unequivocally set boundaries limiting interventions, territorial ambitions and the use of force, thus requiring few vague value judgments in the determination of illegalities. Nation-States have largely benefited from these principles and would have no rational basis for discarding such principles and for denying their own identity and existence in the 21st century. If we ever need to change or modify the edifice of international law at all, its foundation stones should be the last to alter.

Meanwhile, it is also important to realize that international law has never been static. In that sense, we are certain that it is going to experience changes, including major changes, in the 21st century. States are willing and ready to work together toward finding new solutions to new problems. The changes will include not only additions to, but also modifications and reforms of, existing law. "The existing international legal system . . . contains many unjust and unfair elements and institutions that certainly need to be improved and reformed towards greater fairness, justice, equality and democracy for the interests of the entire international community, especially third world States and their people."<sup>117</sup> These desired changes or *lex ferenda* can be brought about by the formation by States of new rules in the forms of treaties and/or customs. Since treaties do not bind upon third parties, any major change to existing law by treaty provisions would require the explicit consent of States. Amending the Charter of the United Nations would be especially uneasy given the procedural complexity and the

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117. Shen, *Intervention*, *supra* note 3, at Conclusion.

veto power of the permanent members of the Security Council. However, changes may be "sneaked" into existing positive law by way of custom - even before we realize them.

The formation of rules of customary international law depends on two elements: (1) the general practice of States and (2) their general *opinio juris*. If some States (especially those with more influential power) uninterruptedly adopt a certain practice on a given issue, other States may be drawn to follow suit. The more States to follow, the more likely these practices may become binding customary rules. The main factor that upgrades a practice into a customary rule with binding force is the *opinio juris* of States. A given practice will gradually become a principle of customary international law - at least among those States that believe such practice has already attained legally binding force. It does not have to take every State to put to use a given practice and to give its *opinio juris* in order to make the practice a custom. So long as those States that have not followed the practice do not resort to a different and conflicting practice, the element of "general State practice" would be deemed satisfied. And as long as these non-active States have raised no objections to the practice in question, or have acquiesced to it within a considerable period of time, the element of *opinio juris* would be deemed met, and the practice would become a customary rule with binding force. This is where we may see hope for sound international rule of law and human rights protections; it is also where the greatest danger exists.

The hope is that States - particularly developing States - may act in coordination and concert to actively participate in the formation of fairer, more just and more progressive practices and norms, including those in the field of human rights, and prevent the creation of unfair, unjust and retroactive practice and norms. The danger lies in that there may, not necessarily will, emerge some customary norms, such as one that would legalize armed intervention without the Security Council's authorization. These would be detrimental to the long term interests of States at large, and in particular, of small and weak nations. The NATO bombing of Yugoslavia is one example. In justifying the bombing, except for some degree of deviations in Greece, Italy and perhaps France, there appeared to be a consensus among NATO States, the total num-

ber of which - currently 19 - is by no means insignificant.<sup>118</sup> These States are generally rich, powerful and influential. Countries which are not NATO members might either share the same tradition, culture, custom and interests as NATO States, or might be in need of aid from, or in fear of, NATO countries. These countries might be unwilling, or dare not, to go publicly against NATO for violating positive international law and the Charter of the United Nations. They might even openly stand on NATO's side. The more States that approved or supported the NATO bombing or gave acquiescence to the action, the more likely that NATO's attempt to change international law in NATO's favor would succeed. The less States that openly opposed and protested against NATO's action, the less likely for the international community to maintain and preserve existing fundamental principles of international law on State sovereignty, non-intervention and prohibition of use of force in the new century. In time, it would become legal for NATO and other powers to intervene in the internal affairs of other States and to use force at their will. On the contrary, the more States to oppose and protest against unauthorized intervention and use of force and the less States to go along with NATO's move, the less chance of success for there to emerge a customary norm legalizing unilateral intervention and use of force.

While States should recognize the need to find better ways to cure many humanitarian problems they face, this cannot be accomplished at the total expense of national dignity and sovereignty. Changing the contents of international law regarding State sovereignty and its corollaries is certainly not in the interests of the international community at large; especially of third world countries. Preserving and respecting the national sovereignty, political independence and territorial integrity of States can, on balance, more effectively reduce and eliminate the root causes to a great portion of atrocities and other humanitarian disasters. To a certain extent, the principle of State sovereignty should be strengthened instead of further weakened in the era to come. It is, therefore, of paramount impor-

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118. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (establishing the North Atlantic Treaty Organization [hereinafter NATO]). See also NATO: The 19 Member Countries, at <http://www.nato.int/structur/countries.htm> (last visited Oct. 12, 2000).

tance that States at large, especially third world States, for their own individual and collective interests as well as for world peace and stability, be at high alert against any attempt to divert the course of international law in this regard. They should make an unremitting effort to firmly and openly condemn any disregard of the principle of State sovereignty, reject any non-institutionalized intervention and interference, oppose any unilateral use or threat of force, and resolutely resist any attempt to legalize the illegality of such behavior. At the same time, it also might be in the interests of States at large to consider reforming the United Nations and amending its Charter by allowing the General Assembly, when the Security Council is unable to fulfil its functions, to adopt or authorize enforcement measures by a two-thirds majority vote in order to deter, prevent and respond to genuine massive and systematic human rights violations within or across borders that require international action.<sup>119</sup>

To conclude, neither sovereignty negates human rights, nor *vice-versa*. Potential conflicts between national sovereignty and individual rights best can be solved in accordance with positive international law. The fact that nation-States and their sovereignty (albeit restricted) function as the foundation stone of the international legal system, and the fact that it is unrealistic to get rid of the nation-State system in any foreseeable future, make it nothing but utopian to substitute the nation-State system with a global government. States will not be ready in the foreseeable future to completely surrender their sovereign rights. Any change to and reform of the existing international legal system still must be premised upon the consent and compromise of nation-States. Such change and reform, desirably in a fairer, more just, more orderly and more democratic direction, can be ultimately realized only by and through nation-States as the decisive actors for their own and common interests, as well as for the welfare of their people.

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119. By emphasizing the word "genuine," I intend to distinguish between massive, purposeful and systematic violations of a State's obligations under international human rights law from State actions in combating terrorists, separatists and criminals that may sometimes inevitably involve human sufferings or even unintentional and incidental departure from human rights obligations. Generally speaking, the former categories of violations would be appropriate for international actions, while the latter generally would not.