

State sovereignty and the protection of fundamental human rights: an international law perspective

Alain Pellet

The purpose of this very brief paper is to show that sovereignty, properly defined, is not a defence for breaches of gross violations of fundamental human rights. It has never been such, and today it is less a defence than ever.

For a long time (certainly until World War I, in fact up to 1945), human rights were part of the “reserved domain” of States, that is a matter which was “not, in principle, regulated by international law”. However, even “[i]n such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law”. And the Permanent Court of International Justice recalled in this respect that “the jurisdiction of a State is *exclusive within the limits fixed by international law* – using this expression in its wider sense, that is to say, embracing both customary law and general as well as particular treaty law”¹. Therefore, State sovereignty must be interpreted in view of, and combined with, general principles of international law such as the general prohibition of abuses of rights, proportionality, respect of other States’ sovereignty, due diligence, “minimum standards of civilisation”, etc.

In other words, sovereignty is not – and has never been – an unlimited power to do all that is not expressly forbidden by international law². It can only be defined as the very criterion of States, by virtue of which such an entity “possesses the totality of international rights and duties *recognized by international law*”³ as long as it has not limited them in particular terms by concluding a treaty.

It goes without saying that, in modern times (say, since 1945), the large (but not unlimited) freedom of action traditionally belonging to States when dealing with human rights has been restricted in many respects:

- the Charter of the United Nations, even though it focuses mainly on “keeping the peace” and not on human rights, nonetheless abounds in allusions to “fundamental human rights”⁴;
- at the regional as well as the global level, a great number of Conventions have been adopted for the protection of human rights, either in general or focusing on specific rights (against genocide, *apartheid*, torture, etc.) or on particular categories of human beings (women, children, workers, etc.); and
- many of these rules protecting human rights have consolidated into customary rules of international law, binding States whether they have ratified those Conventions or not.

Another striking feature of this evolution is that this tight normative net is made up of legal rules of quite diverse binding nature:

- some are purely optional and bind only those States which have accepted them by ratifying the relevant treaties (for example, rules protecting workers, such as those at stake in the framework of the – now dead? – “Millennium round”);
- some are binding in a region or some regions, but clearly not at the universal level (I would suggest that this is so concerning freedom of speech, whether we like it or not);
- or they are binding for all States, but they may be waived by an express contrary treaty (this is probably so concerning some judicial rights – this category does not strongly differ from the previous one); but
- others must be seen as “peremptory norms of general public international law”⁵ and these form the main part of the famous (among international lawyers) *jus cogens*.

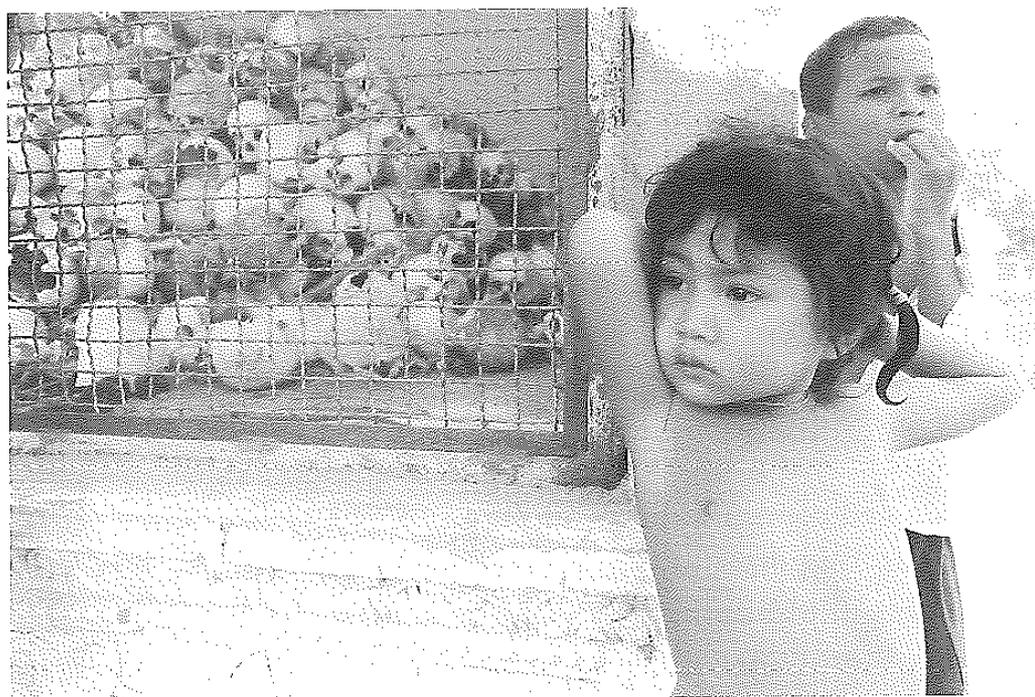
This makes of course quite a difference when a State violates a rule of human rights. Since there exists a hierarchy among international legal rules protecting human rights, their violation does not call for one uniform response; the kind of reaction expected from other States will vary according to the degree of “bindingness” of the violated rules.

Two things are crystal clear. First, when a State is not bound by a

rule, its international responsibility is not “entailed” when it does not comply with the requirement of said rule. Second, human rights rules are, in this respect, of a particular nature since they are not “reciprocal”. As the World Court put it in a celebrated *dictum* (relating to the 1948 Genocide Convention, but which, indeed, holds true for any other human rights treaty): “In such a convention, the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the convention”⁶. Consequently, many of these human rights instruments provide for an international mechanism of implementation and control which can be used either by other States, acting as surrogate “international prosecutors” or, and this was the great revolution of the 1950 European Convention on Human Rights even if it may seem “banal” nowadays, by individuals, whether they are nationals of the wrongdoing State or foreigners.

If such a mechanism does not exist – or if a State does not comply with the requirements of such a mechanism when it does exist – we are, nevertheless, sent back to general international law⁷. In other words, what if there is no international mechanism or if it exists but is impotent? Here, the hierarchy existing among human rights rules does matter.

If we are facing a violation of a “simply binding” human right (e.g.: the freedom of speech, the right to a fair trial, the right to privacy, etc.), not much can be done, according to existing international law, if the victim is a national of the wrongdoing State – except that other States, or international organisations (including NGOs) are entitled to make remonstrations and recommendations without being accused of “intervention in internal affairs”. Human rights are no longer “internal affairs”; as explained above, they are not “essentially within the domestic jurisdiction of any State” in the terms used by Article 2, paragraph 7 of the Charter of the United Nations. And the situation is not that much better if the victim is a foreigner, except that, besides the same possibilities, his or her national State may offer him or her its “diplomatic protection” and act on his or her behalf at the international level (including by lodging an application before an international court, if such a court has jurisdiction concerning disputes between the two States; but it will be rarely so...).



The "Killing Fields" memorial on the outskirts of Phnom Penh (UN Photo #159733C)

Now, things are different if the violated human rights rule is not only merely "binding" upon the State, but also is of a "peremptory" nature. As a matter of definition, a peremptory rule is "a norm accepted and recognised by the international community of States as a whole as a norm for which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"⁸. This is important: as a matter of definition, these rules (and respect for these rules) are of concern for "the international community of States as a whole". As a consequence, the International Law Commission (ILC) of the UN, in its draft Articles concerning the international responsibility of States, has specified that, in such a case, "all other States" (not only the State whose national directly endures a prejudice) are "injured" by the internationally wrongful act thus committed, and it has called such a violation a "crime" under international law⁹.

In Article 19 of its draft, the ILC has defined a crime as being "[a]n internationally wrongful act which results from the breach of an obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole". Among the examples of such State crimes, the ILC

cites, e.g.: "a serious breach on a widespread scale of an obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid"¹⁰.

This notion of crime is fruitful only if it has concrete consequences. And indeed it does. This is not the proper place to detail these consequences¹¹; suffice it to enumerate the most important among them and to elaborate shortly about those which are of direct relevance for the present topic. In cases when a "crime" is committed by a State:

(i) all other States are under a double duty (a) "not to recognise as lawful the situation created by the crime" and (b) "to cooperate with other States in the application of measures designed to eliminate the consequences of the crime"¹²;

(ii) all States may claim to have an interest to lodge claims before any international available mechanism; a crime creates a possibility of an *actio popularis* which normally does not exist under international law¹³;

(iii) contrary to the usual fundamental principle prevailing in international law, the "veil" constituted by the State can be pierced and the international penal responsibility of the officials, including the Head of the State, is entailed (this is not so for all other international wrongful acts committed by a State: in these cases officials enjoy "jurisdictional immunities" – the ongoing *Pinochet* case is a striking example of what is at stake here¹⁴); and

(iv) "counter-measures" (this is the new terminology for reprisals) can be taken by all other States against the wrongdoer, and the conditions for these counter-measures are considerably softened.

Is that to say that *any* kind of riposte is acceptable in such a case? My answer is clearly in the negative: a crime (i.e., a gross violation of a peremptory international norm) cannot be answered with the violation of another peremptory norm, that is another crime. And it happens that, in the modern world, the use of armed force is forbidden by such a norm, with two exceptions. Recourse to armed force is permissible:

(a) in the framework of "the inherent right of individual or collective self-defence" in case of an "armed attack"¹⁵ (an aggression); or

(b) in compliance with a decision (or an authorisation) of the Security Council of the United Nations acting in conformity with Chapter VII.

In short, and to put it into the terms of the well-known "Franco-

French” debate popularised by Dr. Kouchner on the “*devoir ou droit d’ingérence*”¹⁶, there is, in the case of State crime (including gross violations of human rights) a right (and a duty) of intervention or, perhaps more properly said, a right (and a duty) of assistance to the victims; but this duty ends when unlawful use of armed force begins.

Now, let us apply this to the Kosovo case¹⁷ in the form of brief conclusions:

(i) a crime (that is, gross violations of human rights—maybe a genocide, certainly an *apartheid*) was being committed by the Government of Yugoslavia against the Kosovar Albanian population;

(ii) all other States of the international community had a right and a duty to react;

(iii) neither “sovereignty” nor the “principle of non-intervention” constitute a defence;

(iv) on the other hand, NATO did not act out of self-defence, nor had the Security Council authorised recourse to armed force by virtue of Chapter VII;

(v) neither the fact that it declared the Kosovo situation as a “threat to the peace”¹⁸, nor the rejection of the Russian resolution condemning the NATO action are, by themselves, sufficient legal grounds justifying this unilateral (or “plurilateral”) recourse to armed force;

(vi) however, it can be sustained that the addition of all these arguments constitute quite an impressive pattern to exclude, at the end of the day, the unlawfulness of the NATO action;

(vii) and, in any case, Resolution 1244 (1999) of the Security Council excludes any doubt: indeed, it does not expressly give its blessing to the NATO action, but it is inconceivable that the UN organ entailed with “the primary responsibility for the maintenance of international peace and security”¹⁹ could have “recognised as lawful the situation created by [a] crime”²⁰, since, if unlawful, the NATO action could only be described as a crime of aggression.

This, indeed, opens new horizons and could lead to the conclusion that armed reactions to a State crime are permitted under international law. I would, however, not go as far as that: the Kosovo case remains an isolated precedent (and the East Timor or Chechenya dramas contradict it in a rather obvious way). However, it shows that the interna-

tional community can at least tolerate an armed reaction against gross violations of human rights. The real problem now is to find a median solution between the morally untenable "Munich principle" and the legally embarrassing "Zorro principle", as practised by NATO in Kosovo.

At any rate, and I will conclude with this, since it answers, I think, the very question raised in the title of this paper: in cases of human rights violations, sovereignty is never a defence; in cases of gross violations of human rights, it has no role to play; it does not impede the Security Council from concluding that such violations create a threat to the peace and to draw the appropriate consequences in accordance with Chapter VII of the Charter; and it cannot even protect Heads of States from international prosecution.

The real problem now is to find a median solution between the morally untenable "Munich principle" and the legally embarrassing "Zorro principle."

Notes

- ¹ PCIJ, Advisory Opinion, *Nationality Decrees Issued in Tunis and Morocco*, Series B, N° 4, p. 24; italics in the original text, underlining added.
- ² See however PCIJ, Judgment, *Lotus case*, Series A, N° 10, p. 18.
- ³ ICJ, Advisory Opinion, *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Rep. 1949, p. 180; italics added.
- ⁴ See e.g.: Preamble and Articles 1, para. 3, 13, para. 1.(b), 55, etc. These provisions are drafted in slightly different ways.
- ⁵ See Article 53 of the Vienna Convention on the Law of Treaties of 1969.
- ⁶ Advisory Opinion, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Rep. 1951, p. 23.
- ⁷ I do not deal with the exceptional circumstance of an international organization, such as the Council of Europe, having jurisdiction to deal with such situations; such bodies will react according to their own rules.
- ⁸ Article 53 of the 1969 Vienna Convention, prec.
- ⁹ This notion of "State crime" is strongly criticised by some States (including the United States and France) and many writers. I am among its most ardent supporters since I think it constitutes substantial progress towards recognizing community interest at the universal level, superseding national egos (see fn. 11, below). There is, however, a strong risk that, during the second reading of its draft on State responsibility, the ILC will drop this fruitful idea.

¹⁰ Article 19, para. 3.(c).

¹¹ See Alain Pellet, "Can a State Commit a Crime? Definitely, yes!", *European Journal of International Law*, 1999, vol. 10, n° 2, pp. 425-434 and "Vive le crime! Remarques sur les degrés de l'illicite en droit international" in I.L.C., A. Pellet ed., *International Law at the Dawn of the Twenty-First Century - Views from the I.L.C.*, United Nations, New York, pp. 287-315.

¹² See ILC Draft on State Responsibility, Article 53.(a) and (d).

¹³ See ICJ, Judgment, *Barcelona Traction*, *ICJ Rep.* 1970, p. 32.

¹⁴ See also Article 27 of the 1998 Rome Statute of the International Criminal Court.

¹⁵ See Article 51 of the Charter of the United Nations.

¹⁶ The "*devoir d'ingérence*" (duty to intervene) is but a new avatar of the old "humanitarian intervention". However, its defenders stress the right for the NGOs to have access to the victims of a humanitarian catastrophe, whatever its causes, without having to request the consent of the territorial State. On this debate, see e.g. Mario Bettati and Bernard Kouchner (eds.), *Le devoir d'ingérence*, Denoël, Paris, 1987, 300 p.; Olivier Corten et Pierre Klein, *Droit d'ingérence ou obligation de réaction?*, Bruylant, Bruxelles, 1992, XIII-283 p.; Alain Pellet ed., *Droit d'ingérence ou devoir d'assistance humanitaire?*, *Problèmes politiques et sociaux*, no. 758-759, 1-22 déc. 1995, Doc. française, 133 p. or Mario Bettati, *Le droit d'ingérence—Mutation de l'ordre international*, Odile Jacob, Paris, 1996, 384 p.;

¹⁷ See e.g.: Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects", *EJIL* 1999-1, pp. 1-22; Antonio Cassese, "*Ex injuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Counter-measures in the World Community?", *E.J.I.L.* 1999, pp. 23-30; Alain Pellet, "La guerre du Kosovo' – Le fait rattrapé par le droit", *Forum international*, 1999, pp. 160-165.

¹⁸ See Resolutions 1160, 1199, 1203 (1998) and 1239 (1999).

¹⁹ Article 24 of the Charter of the United Nations.

²⁰ See above, para. 12 (i).

*Alain Pellet is a Professor at the University of Paris X-Nanterre and a Member and former Chairman of the International Law Commission of the United Nations. He has written extensively in public international law and is the co-author (with Prof. P. Dailler) of the widely known *Droit international public* (6th edition, 1999, 1,451 pp.) and (with Prof. J.P. Cot) of a systematic commentary of the UN Charter. He has been Counsel in some twenty cases before the International Court of Justice.*

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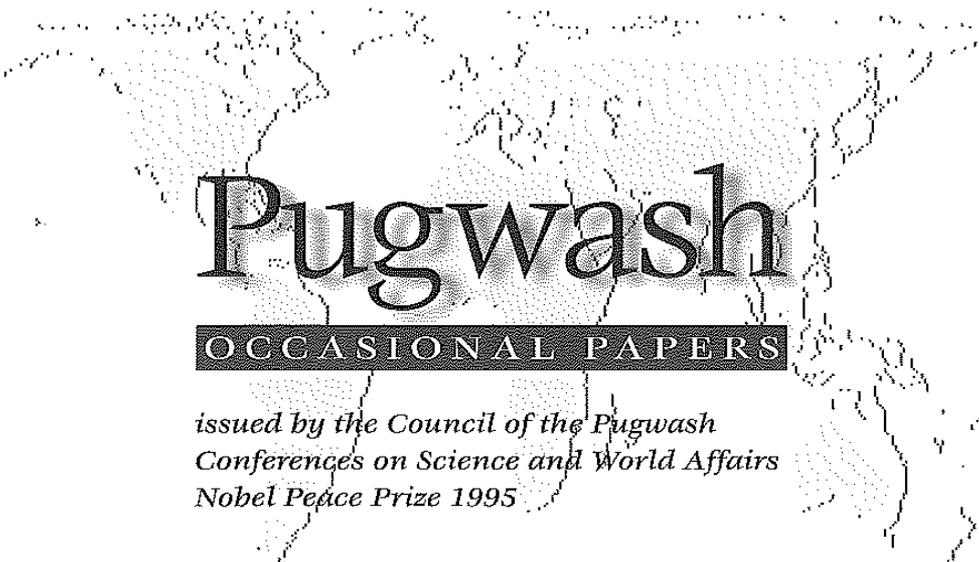
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