*UDC 341.23*
DOI 10.32755/sjlaw.2023.01.125

**Rebkalo M.,**
PhD in Public Administration, Associate Professor,
Associate Professor of the Department of Theory and History
of State and Law, Constitutional Law,
Academy of the State Penitentiary Service, Chernihiv, Ukraine
ORCID: 0000-0002-9633-5811;
**Oliinyk V.,**
PhD in Law, Associate Professor, Associate Professor
of the Department of Theory and History
of State and Law, Constitutional Law,
Academy of the State Penitentiary Service, Chernihiv, Ukraine
ORCID: 0000-0001-5546-9613

# THE CONCEPT OF “DUTY TO PROTECT”: INTERNATIONAL LEGAL ANALYSIS AND PROBLEMS OF IMPLEMENTATION

*The article provides an international and legal description of the concept “Duty to protect”. The problems of implementing this concept are analyzed. It is noted that the latter problems arose due to the presence of conflicts between the content of the concept and some principles of international law, namely: inviolability of state sovereignty, non-use of force or threat of force, prohibition of interference in the internal affairs of other states.*

***Key words:*** *“Duty to protect”, principles of international law, state sovereignty, non-interference in internal affairs, non-use of force and threat of force, collective measures, military force.*

**Target setting.** “Duty to protect” is a relevant and discussed international concept in modern international law. Its appearance is dictated by radical changes in international relations and, unfortunately, the weakening of the role of international law as the only and recognized regulator of globalization processes in all spheres of international cooperation. In the 2009 report of the Secretary General of the United Nations (hereinafter – the UN) the following was stated: “... negative phenomena in the history of the 20th century were the Holocaust, the killing fields in Cambodia, the genocide in Rwanda (Africa) and the mass murders in Srebrenica (Bosnia and Herzegovina ), and the last two manifestations were in the presence of the United Nations Organization representatives. Such situations have become a cruel

legacy of the 20th century and are a bitter testimony to the catastrophic inability of individual states to fulfill their main duty, which is to ensure the realization of human rights to life, health, freedom, and personal security. The events that are taking place in the Middle East, especially the civil wars in Syria, Libya, Yemen, humanitarian disasters, the aggravation of rivalry between regional states, the further expansion of the zone of instability and the growing wave of terrorism and extremism, the strengthening of inter-ethnic conflicts require the UN to take political, legal and humanitarian measures to prevent or eliminate these disasters. All these factors demonstrated the urgent need to develop new criteria for external humanitarian intervention in order to counter crisis situations and led to the emergence of the international legal concept "Duty to protect".

**Actual scientific researches and issues analyses.** In Ukrainian legal science, the provisions of the concept "Duty to protect" are increasingly becoming the subject of discussion and scientific development. The scientists paid certain attention to such issues: Herasymenko D. S., Lukashuk I. I., Liubashenko V. I., Merezhko O. O., Nazarenko O. A., Hrystova H. O., Shumilenko A. P. and others. However, the mechanism of its implementation, as shown by modern international legal practice, faces certain problems that need to be solved.

**Goals setting.** On the basis of an international legal analysis of the concept "Duty to protect" problems need to be formulated which may negatively affect the mechanism of its implementation and ways to solve them also need to be determined.

**The statement of basic materials.** The Concept "Duty to protect" (hereinafter – the Concept) was first heard in the report (1999) of the International Commission on Intervention and State Sovereignty (hereinafter – the Commission). Famous scientists, political figures, diplomats and representatives of public organizations worked as part of the Commission. It is believed that the author of the Concept is Garrett Evans, who at that time was a special adviser to the UN Secretary General.

The Concept was first mentioned in the Report of the "High-level Group on Threats, Challenges and Changes" established by the UN Secretary General in 2004. And its principles were enshrined

in the Final Document of the 2005 UN Summit, which, in our opinion, should be considered a continuation of the Concept's content, which defines the obligation of each state to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity. Referring to paragraphs 138, 139 of the Final Document of the 2005 UN Summit, the following reasons can be tentatively identified regarding the use of force (armed) actions by the countries of the international community in crisis regions: 1) seriousness of the threat; 2) the intervention should be aimed at helping the population, and not at changing the existing state system; 3) the emergence of an emergency situation, which is caused by a massive violation of human rights; 4) military actions can be legitimized only if their use has a reasonable chance of achieving a successful result in preventing mass crimes against the civilian population; 5) reasonable means of force action; 6) the primary and main goal of the intervention should be to end the suffering of the civilian population. In addition, the countries of the international community are obliged to use diplomatic, humanitarian and other means in accordance with the UN Charter [1].

It is worth noting that the measures provided for in the Concept, which are quite appropriate, may cause certain problems in the process of their implementation. The latter are caused by the possibility of violating some principles of international law, which are formulated in the UN Charter and the Declaration on the Principles of International Law.

One of the key principles of international law is state sovereignty. This principle has an imperative character, and therefore doubts arise regarding the possibility of implementing the measures outlined in the Concept without a certain contradiction with the mentioned principle. Despite this, the Commission pointed out that sovereignty not only gives states the right to control their internal affairs, but also imposes a direct responsibility to protect the people living within their territories. The commission noted that when the state is unable to protect people due to a lack of capacity or will, the responsibility shifts to the international community [2]. In addition, in his annual report, the former UN Secretary General Kofi Annan, characterizing the crisis phenomena associated with the

massive violation of people's rights in Rwanda and the Balkans, put forward the idea of the need to cede state sovereignty for the sake of saving people, and he rightly noted that no legal principle , even the principle of sovereignty cannot be applied to cover up the commission of crimes against humanity [3].

However, the UN Charter and the Declaration on the Principles of International Law do not yet establish rules and conditions that would allow violations of the principles of international law, even in crisis situations for the population. The specified documents, on the contrary, confirm that violations of the principles of international law are not admissible in any case.

Therefore, since the Concept by its legal force has the status of an international initiative, according to the authors, a rational way to solve the existing problem would be to standardize its provisions, taking into account that its content should not contradict the principle of state sovereignty.

The next principle, which, in our opinion, is also in conflict with the Concept is non-interference in internal affairs. The UN Charter and the Declaration on Principles of International Law (1970) state that no state or group of states has the right to interfere directly or indirectly for any reason in the internal and external affairs of another state. As a result, armed and all other forms of intervention or any threats directed against the state or against its political, economic and cultural foundations are a violation of international law [4; 5]. The obligation of this principle is manifested in the fact that, firstly, it prohibits anyone from interfering in the internal affairs of the state, and secondly, it does not allow any coercive actions aimed at subordinating the state to the own interests of another state. However, in one of the annual reports of the UN Secretary General, the opinion is voiced that "...the principle of non-interference in internal affairs should not be considered as a protective barrier behind which human rights are systematically and impunity violated..." and this corresponds to the content of the Concept [6]. According to Art. 39 of the UN Charter, the United Nations can make decisions on the application of collective measures exclusively for the maintenance or restoration of international peace and security. But the last reason, according

to the authors, cannot legitimize the actions of countries to interfere in the internal affairs of other countries due to the massive violation of people's rights. Therefore, the provisions of the Concept, in case of their implementation, may conflict with this principle. In our opinion, the solution to such a problem can be assumed in the following ways: first, supplement the UN Charter and the Declaration on the Principles of International Law with the necessary changes, but this approach can be carried out for quite a long time; secondly, to provide regulatory framework for UN actions to stop or prevent crimes against humanity without violating the mentioned principle.

The concept, in terms of its implementation, is at odds with another principle of international law – the non-use of force or the threat of force. The Final Document of the World Summit (2005) defines the grounds by which countries and the regional and sub-regional international organizations created by them can counteract genocide, war crimes and crimes against humanity. It should be noted that international law provides that it is not a violation of the principle of use of force in the case of self-defense or to implement the relevant resolution of the UN Security Council. However, in Part 4 of Art. 2 of the Charter states "…all members of the United Nations shall refrain in their international relations from the threat or use of force, both against the territorial integrity or political independence of any state, and in any other way incompatible with the purposes of the United Nations" [4]. Therefore, the above points to a conflict regarding the grounds for the implementation of the mentioned principle, the resolution of which, in our opinion, is permissible with the help of regulatory measures. The position of the authors again leans toward the need to adopt a legal act that would normalize the existing discrepancy between the principle of non-use of force or the threat of force and the provisions of the Concept.

The use of military force by the UN during events related to the mass destruction of the population in a number of countries (Rwanda, Kosovo, South Sudan) was mentioned above. Unfortunately, modern international law does not have a single approach to the criteria for military intervention in such situations.

The concept assigns the duty of making such a decision in case of inaction of the Security Council to the UN General Assembly ("Unity for Peace" procedure). As stated in the Concept, military force can be justified only in the event that all non-military means of resolving the crisis have been exhausted and have not yielded results. The scale of military intervention should be proportional to the situation, and its duration and intensity should be the minimum necessary to achieve the set goal [6]. As a result, the question of the need to normalize the mechanism of the use of military force under the auspices of the UN, which would eliminate the existing conflicts generated by the adoption of the Concept, is again relevant.

In our opinion, certain attention is being paid to questions regarding the interpretation of the content of the application of collective measures of a non-military nature, which are provided for by the UN Charter and the Concept. According to Art. 52 (2) of the UN Charter, states must make every effort to achieve a peaceful resolution of disputes, especially at the local level, through the conclusion of regional agreements or other actions of regional bodies even before transferring disputes to the UN [4]. On the other hand, Art. 53 (1) of the UN Charter warns that no coercive action shall be taken without authorization from the Security Council. Further in Art. 54 of the UN Charter states that the Security Council must always be fully informed about actions taken by regional bodies to maintain international peace and security. The provisions of the above articles are not always strictly observed in practice, but they emphasize the great importance of maintaining permanent working relationships between global, regional and subregional organizations for the prevention of crimes against humanity and the protection of the population [3]. As for the Concept, it contains only grounds for the use of collective force (more often military) in case of mass violation of people's rights, while it does not give clear recommendations to the UN Security Council to prevent conflicts and eliminate their consequences.

In general, it is appropriate to note that the problems discussed above had a significant impact on the decision-making by the UN Security Council (lack of agreement during voting) in order to end

crisis situations in a number of regions of the planet associated with massive violations of human rights and even in cases where sovereign states were not able to counter such crimes on their own. It should be expected that current legal conflicts may inhibit the processes of international response to prevent massive disruption of life, health, and safety of the population in specific countries or entire regions.

**Conclusions.** Based on the above mentioned, it is advisable to formulate the following conclusions:

First, the emergence of the concept of "Duty to protect" is due to such negative manifestations as massive and gross violations of human rights, genocide, crimes against humanity, ethnic cleansing, and others.

Secondly, the Concept formulates a list of grounds that give the countries of the international community the right to: prevent the occurrence of war crimes and violations of the requirements of international humanitarian law; application of international legal measures against states that are unable or unwilling to counteract crisis manifestations on their own; restoration, if necessary, of state territories where a situation of mass extermination of people took place.

Thirdly, the provisions of the Concept in some cases conflict with such principles of international law as the observance of state sovereignty, non-interference in the internal affairs of other states, non-use of force or the threat of force, which prevents the full implementation of the requirements formulated in this initiative.

Fourthly, the ways of overcoming the conflicts that are taking place are mostly reflected only at the level of various international forums held under the auspices of the UN or the annual reports of the UN Secretary General and have not yet acquired a normative form.

Fifth, the optimal way to eliminate existing problems would be to give the Concept the status of an international legal act. In our opinion, in addition to the measures already formulated in it, it is advisable to: establish clear rules and procedures for collective countermeasures against dangerous manifestations that threaten people's lives and health; determine the criteria for the use

of military force and peaceful collective measures on the territory of states in which manifestations of genocide and other crimes against humanity occur; formulate recommendations for the UN Security Council to prevent conflicts and eliminate the causes of their occurrence in a timely manner.

Thus, the concept of "Duty to protect" is still a young international initiative that does not have universal and established practical implementation mechanisms, but international legal practice confirms its support by a large number of countries of the international community.

## References

1. United Nations (2005), *Final document of the world summit* : Resolution, General Assembly, New York, available at: https://regulation.gov.ua/documents/id101843 (accessed 22 January 2023).

2. United Nations (2002), *Report of the International Law Commission on Intervention and State Sovereignty* : Report, General Assembly, New York, available at: http://www.un.org/ru/ga/documents/ gakey.shtml (accessed 24 January 2023).

3. United Nations (2011), *The role of regional and subregional agreements in implementing the responsibility to protect* : Report, General Assembly, New York, available at: https://www.refworld.org.ru/ topic,51dc06d74,,4e7713ca2,0,,,.html (accessed 26 January 2023).

4. United Nations (1945), *United Nations Charter:* New York, available at: https//unic.un.org/aroundworld/unics/common/ documents/ publications/uncharter/UN%20Charter_Ukrainian.pdf (accessed 05 February 2023).

5. United Nations (1970), *Declaration on the principles of international law relating to friendly relations and cooperation between states in accordance with the Charter of the United Nations :* Resolution, General Assembly, New York, available at: https://zakononline.com.ua/ documents/show/140050_140050 (accessed 07 February 2023).

6. United Nations (2009), Fulfillment of duties to protect: Report, General Assembly, New York, available at: https://www.refworld.org.ru/ topic,51dc06d74,51dc104d21a,498992762,0,UNGA,,.html (accessed 09 Fe bruary 2023).

**Ребкало М. М.,**
кандидат наук з державного управління,
доцент, доцент кафедри теорії
та історії держави і права, конституційного права,
Академія Державної пенітенціарної служби, м. Чернігів, Україна
ORCID: 0000-0002-9633-5811;
**Олійник В. С.,**
кандидат юридичних наук,
доцент, доцент кафедри теорії
та історії держави і права, конституційного права,
Академія Державної пенітенціарної служби, м. Чернігів, Україна
ORCID: 0000-0001-5546-9613

# КОНЦЕПЦІЯ «ОБОВ'ЯЗОК ЗАХИЩАТИ»: МІЖНАРОДНО-ПРАВОВИЙ АНАЛІЗ ТА ПРОБЛЕМИ РЕАЛІЗАЦІЇ

*У статті проведено міжнародно-правовий аналіз концепції «Обов'язок захищати». Зауважено, що її поява обумовлена негативними проявами, які призвели до масового знищення людей та порушення норм міжнародного гуманітарного права. Ключовими серед підстав, які можуть надавати право на проведення силових заходів у кризових регіонах, є серйозність загрози, породженої масовим порушенням прав людини. Під час наукової розробки змісту концепції сформульовано авторське бачення проблем, які можуть виникнути протягом реалізації цього документа й обумовлені порушенням деяких принципів міжнародного права. Ці принципи, які мають імперативний характер, стосуються непорушності державного суверенітету, незастосування сили чи загрози силою, заборони втручання у внутрішні справи інших держав. Зміст концепції активно підтримують на різних міжнародних форумах, які проводять під егідою ООН, та у щорічних доповідях Генерального секретаря ООН. Іншими словами, механізм реалізації ініціативи «Обов'язок захищати» обговорюють виключно на концептуальному рівні, й ставиться під сумнів законність передбачених у ній деяких заходів, оскільки вони вступають у суперечність із принципами міжнародного права. У статті приділена увага механізму застосування ООН воєнної сили під час подій, пов'язаних з масовим знищенням населення, і зазначено, що сучасне міжнародне право не має єдиного підходу щодо критеріїв військового втручання в подібних ситуаціях. Розв'язання наявних колізій, на думку авторів, доцільно здійснити шляхом приведення змісту концепції у відповідність до вимог Статуту ООН і Декларації про принципи міжнародного права та надання їй статусу офіційного міжнародного акта.*

***Ключові слова:*** *«Обов'язок захищати», принципи міжнародного права, державний суверенітет, невтручання у внутрішні справи, незастосування сили та загрози силою, колективні заходи, військова сила.*