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Sovereignty: The State, the Individual, and the International Legal System in the Twenty First Century

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> Sovereignty denotes independence. A sovereign state is one that acknowledges no superior power over its own government.[1]
>
> The word sovereignty is ambiguous.... We propose to waste no time in chasing shadows, and will therefore discard the word entirely.[2]
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> [P]olitical philosophy must eliminate Sovereignty both as a word and as a concept....[3]
>
> Away with the "S" word![4]

Introduction

The concept of sovereignty has come to mean different things to different persons. The inextricable link between sovereignty and international law means that the existing multiple definitions of sovereignty affect both the role of the state and the rights of the individual in international law. Conversely, developments in international law necessarily require the reassessment of our

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[1]JEREMY RABKIN, WHY SOVEREIGNTY MATTERS 2 (1998).

[2]ROLAND R. FOULKE, A TREATISE ON INTERNATIONAL LAW 69 (1920).

[3]Jacques Maritain, *The Concept of Sovereignty*, 44 AM. POL. SCI. REV. 343, 343 (1950).

[4]Louis Henkin, *Notes from the President*, AM. SOC'Y INT'L L. NEWSL. (ASIL, Washington, D.C.), Mar. 1993, at 1.

understanding of sovereignty and the definitions we apply to that term.

In its origins, the concept of sovereignty dealt with the relationship between the individual and the "sovereign." Its application to the role of the state in international law developed as a secondary matter, bringing with it discussions of relationships between "sovereign" states. In the twenty-first century, it is time to return to the concept's original focus on the individual. The development of international law in this century is likely to be framed and judged not so much by the way international law defines relationships between states as by the way it deals with relationships between persons and states.

The thesis of this essay is that an understanding of original concepts of sovereignty both helps explain twentieth century developments in international law and provides a proper context for coming changes in the ways in which persons relate to states, states relate to states within the international legal system, and ultimately—and most importantly—the way international law affects and applies to persons. A corollary to this need to properly understand concepts of sovereignty is the belief that the most important developments in international law in the new century will not be in state-state relationships but rather in the status and rights of the person in international law. In the twentieth century, the process of globalization in many ways brought us back to the importance of the individual in determining both what sovereignty is and its proper exercise by those acting on behalf of states.

In this essay, I propose first to review the original meaning of the term "sovereignty." I will then provide examples of twentieth century developments in the application of international law to individuals and the application of municipal law to states. These examples demonstrate that international law has moved beyond contemporary notions of sovereignty, that concerns about "giving up sovereignty" through participation in multilateral organizations often are misplaced, and that the ultimate propriety of new international norms will in many cases be determined by the manner in which they deal with relationships between individuals and the state—which is the relationship addressed by the original concept of sovereignty.

I. Original Concepts of Sovereignty

Sovereignty is a concept of Western political and philosophical

thought. While one may question whether in today's world it is appropriate to consider such a concept without recognition of the influence of other parts of the world, it is nonetheless a fact that international law as we know it is also a product of Western thought. Thus, when we discuss sovereignty, and when we discuss international law, we begin with an inherent connection to Western philosophies and the development of Western culture, even though today no single culture or group of cultures can be considered without attention to the broader global context.

In the middle ages, Western concepts of sovereignty had no relationship to territory. Humanity found its "oneness" not in human rulers or the geographic reaches of their power but rather in the *Respublica Christiana*, the pervasive unity of God (*jus divinum*).[5] "Sovereignty, in the sense of an ultimate territorial organ which knows no superior, was to the middle ages an unthinkable thing."[6] The sovereignty of God (in the Western context of the Christian—Roman Catholic—faith) took earthly form in the person of the Pope. Thus it could be said that "*[i]nfallibility* in the spiritual order and *sovereignty* in the temporal order are two perfectly synonymous words."[7]

The concept of a singular *Respublica Christiana* was destroyed by the Reformation and replaced by the notion of state supremacy, in which the sovereign "ceases to think of superiority as existent outside itself."[8] Jean Bodin, the "father of the modern theory of

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[5]HAROLD J. LASKI, THE FOUNDATIONS OF SOVEREIGNTY AND OTHER ESSAYS 2 (1921). *See also* Helmut Steinberger, *Sovereignty*, *in* 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 397, 398-400 (1987) (discussing *Universitas Christiana*).

[6]LASKI, *supra* note 5, at 1.

[7]BRIAN TIERNEY, ORIGINS OF PAPAL INFALLIBILITY 1 (1972) (translation of quotation from JOSEPH DE MAISTRE, DU PAPE 27 (1817) ("L'*infaillibilité* dans l'ordre spirituel et la *souveraineté* dans l'ordre temporel, sont deux mots parfaitement synonymes.")). Tierney goes on to contest this statement by de Maistre:

> The words "infallibility" and "sovereignty" do not have the same meaning. It would be more true to suggest that the ideas they express are intrinsically incompatible with one another. It is of the essence of sovereignty (as the concept was understood both in the nineteenth century and in the Middle Ages) that a sovereign ruler cannot be bound by the acts of his predecessors. It is of the essence of infallibility (as the doctrine was formulated at Vatican Council I) that the infallible decrees of one pope are binding on all his successors since they are, by definition irreformable.

Id. at 2. Tierney then goes on to discuss the problems that subsequent Popes had in dealing with the "infallible" pronouncements of their predecessors.

[8]LASKI, *supra* note 5, at 12.

sovereignty,"[9] wrote that "Majestie or Soveraigntie is the most high, absolute, and perpétuall power over the citisens and subjects in a Commonweale."[10] But for Bodin, the sovereignty of the king over his subjects remained submissive to "the law of God and nature."[11] "Bodin's sovereign was subject only to Natural Law, and to no human law whatsoever, as distinct from Natural Law, and that [was] the core of political absolutism."[12] Thus, notions of sovereignty incorporated concepts of abstract moral rights that placed limits on sovereign power.

In later theory, the sovereignty of the king became absolute, and this sovereignty became equated with the sovereignty of the state.[13] This transition, however, did not always provide perfect parallelism of thought. While in the *Respublica Christiana* there had been room for only one universal power, the territorial concept of kings and states required compartmentalization of sovereignty. Sovereignty existed within a given territory and resulted in the need to express the concept of multiple sovereigns, which was intellectually inconsistent with the sacred origins of the term.

While the word "sovereign" had at times been employed to mean "any official endowed with superior authority,"[14] the king's right to supreme power, unlimited by any other earthly authority, took hold:

> [T]he idea prevailed that the king as a person possessed a natural and inalienable right to rule his subjects from above. Once the

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[9]Maritain, *supra* note 3, at 344.

[10]*Id.* at 345 n.13 (translation of quotation from JEAN BODIN, DE LA RÉPUBLIQUE Bk. 1, ch. 8 (Richard Knolles trans., London, Impensis G. Bishop 1606) (1583)). Bodin was born in 1530 and died in 1596.

[11]*Id.* at 344 (translation of quotation from BODIN, *supra* note 10, at Bk. 1, ch. 8).

[12]*Id.* at 344 n.11a.

> Bodin remained to some extent tributary to the Middle Ages, and did not go the full distance of the road later traversed by Hobbes and Austin. But if he made the Sovereign bound to respect the *jus gentium* and the constitutional law of monarchy (*leges imperii*), this was because (when it came to such things as the inviolability of private property, or the precepts of *jus gentium*, or the "laws of the realm" such as the Salic law, expressing the basic agreement in which the power of the Prince originates) human laws and tribunals were *only enforcing Natural Law itself*, so that, as a result, their pronouncements were valid even with regard to the Sovereign.

Id.

[13]"The concept of Sovereignty took definite form at the moment when absolute monarchy was budding in Europe. No corresponding notion had been used in the Middle Ages with regard to political authority." *Id.* at 348.

[14]*Id.* at 348 n.29.

> people had agreed upon the fundamental law of the kingdom, and given the king and his descendants power over them, they were deprived of any right to govern themselves, and the natural right to govern the body politic resided henceforth in full only in the person of the king. Thus the king had a right of supreme power which was *natural and inalienable* . . . .[15]

The king, originally as the vicar of God, was not only the highest earthly power, but also above the highest power, existing separately from the body politic.

The idea that states inherited this notion of sovereignty that existed between the divine king and his subjects took form in the work of Hobbes, who wrote of "he that carryeth this Person, [who] is called Soveraigne, and said to have *Soveraigne Power*: and every one besides, his Subject."[16] Hobbes saw the sovereign king as the means by which society escapes from the "miserable condition of war" that otherwise results from each person's focus on getting as large a share of scarce resources as possible while preventing others from doing so.[17] Thus citizens enter a mutual covenant to confer upon the sovereign "all our power and strength," and "submit [our] wills, every one to his will and [our] judgments, to his judgments," so that "he may use the strength and means of [us] all as he shall think expedient, for [our] peace and common defence."[18] The sovereign's role in international relations was a natural extension of this arrangement for peace and security at home. The sovereign must:

> be Judge both of the meanes of Peace and Defence, and also of the hindrances, and disturbances of the same; and . . . do whatsoever he shall think necessary to be done, both before-hand, (for preserving of peace and security, by prevention of Discord at home, and Hostility from abroad); and, when Peace and Security are lost, for the recovery of the same.[19]

Thus, the sovereign's role is to provide security through peace and common defense.

It has become routine to hear of the "sovereignty of states," but this clearly is a comparatively recent development in the use of a term

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[15]*Id.* at 348.

[16]THOMAS HOBBES, LEVIATHAN, Pt. II, ch. xvii, ¶ [14]. Hobbes was born in 1588 and died in 1679, publishing *Leviathan* in 1651.

[17]*Id.* at Pt. II, ch. xvii, ¶ [1].

[18]*Id.* at Pt. II, ch. xvii, ¶ [13].

[19]*Id.* at Pt. II, ch. xviii, ¶ [8].

that dealt first with absolute religious authority and then with the power and obligations of kings. When the church was synonymous with any idea of state or sovereign and when the king later occupied a similar role, the connection had clear ties to the origin of the term. Those ties have diminished, however, as the distance between original concepts and current usage has grown. Nonetheless,

> Since the seventeenth century the state has been recognized as the supreme power within a defined juridical border. This ended both the Church's transnational claims to political authority and the overlapping jurisdictions of nobles, kings, and clerics that characterized the late medieval system.... State sovereignty—institutional authority within a set of clearly demarcated boundaries—is self-justifying; historical possession legitimates continued jurisdiction. In much of Europe, its origins can be traced to the legal titles and dynastic ties that provided monarchs with a claim to the territory that eventually provided the basis for the modern state.[20]

This concept of the state as supreme power (i.e., the "sovereign") within its territory[21] brought with it an understanding that within the international order states are co-equal in their authority,[22] and that states must consent to rules that will bind them in their conduct.[23]

Thus the concept of state sovereignty has become embedded in the international legal system. In this process, we have continued to use the term to refer to authority, but this authority is no longer absolute in its breadth (it exists only within the territory of the state),

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[20]J. Samuel Barkin & Bruce Cronin, *The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations*, 48 INT'L ORG. 107, 111 (1994).

[21]*See* 2 RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 511 cmt. b (1987) (noting the territorial element of sovereignty on land as well as over territorial seas).

[22]The era of equal sovereigns in the form of states dates from the 1555 Peace of Augsburg, becoming more formalized with the 1648 Peace of Westphalia. Some commentators have distinguished different "types" of sovereignty, referring to one type as "Westphalian sovereignty," and defining it as "an institutional arrangement for organizing political life that is based on two principles: territoriality and the exclusion of external actors from domestic authority structures.... Westphalian sovereignty is violated when external actors influence or determine domestic authority structures." STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 20 (1999).

[23]"Specific rules of law ... depend on state acceptance. Particular agreements create binding obligations for the particular parties, but general law depends on general acceptance." 1 RESTATEMENT (THIRD) FOREIGN RELATIONS LAW 18 (1987) (pt. I, ch. 1, Intro. note). The concept of state consent is fundamental to the sources of law as stated in Article 38 of the Statute of the International Court of Justice.

nor is it absolute in its depth (it has limits created both by consent and by *jus cogens* norms). A concept originally used to describe the relationship between mankind and the creator, evolved through the Middle Ages and the Reformation along with the development of the nation-state to describe the relationship between the king and the citizen, and now is used to describe a state's attributes in its relationships with other states in the international legal order. "Sovereign" states relate to one another within the framework of international law, developing binding norms through written agreement and unwritten but consistent and intended conduct. The word "sovereignty" still connotes a strong sense of authority. However, this notion of authority no longer is limited simply to authority over persons within the sovereign's realm of power, it is also authority to deal with other states.

II. Twentieth Century Evolution of the "Sovereign" Actor

A. Sovereignty and the Relationship of the Individual to International Law

We begin the twenty-first century with discussions of the "changing face" of sovereignty. Indeed, in the realm of international law, the face of sovereignty (in the sense of both the relationship of the state to the individual and the state to the international order) saw a number of important changes over the course of the twentieth century. These changes have important implications not only for the nature of international law at the dawn of the twenty-first century, but also for the more general relationships we discuss under the rubric of sovereignty.

As noted above, the origins of the term "sovereignty" dealt with relationships involving individuals. It was first used to explain the relationship between the individual and God and then the individual and the state, providing context for understanding the social order of Western civilization. It developed to include a context for understanding relationships between and among states within the international order, having particular influence on the development and discussion of the rules governing those relationships. One of the problems with discussions of sovereignty is that a concept that developed in response to the need to understand the role of the individual (the citizen) in society has come to be used to define the relationship between and among states in international law. Yet even

when discussing relationships between states, a continued understanding of the role of the individual deserves full recognition.

Sovereignty is a concept fundamental to Western understanding of both domestic and international law. The king—as sovereign—made, executed, and applied the law in his relationship with his subjects. When states make law, even law that governs their relationships with one another, that law has implications for individuals within those states and for individuals outside those states who may be affected by those relationships. Thus, any complete discussion of sovereignty—whether in the domestic or international context—must continue to deal with the rights and obligations of individuals as well as with rights and obligations of states.

The twentieth century developments in the relationship between the individual and international law must both inform and be reflected in our understanding of sovereignty within the international legal order. That understanding requires that the term "sovereignty" be used only when it provides clear meaning of the relationship between the state and the citizen (domestic law), the relationship between and among states in the international order (international law), and the relationship between the individual and international law. Ignoring any one of these relationships will leave our understanding of sovereignty incomplete. Most discussions of sovereignty include the first two of these relationships, even where those discussions make distinctions between "types" of sovereignty.[24] Thus, it is to the third relationship that we now turn, considering twentieth century developments that have changed the relationship between states and individuals under international law, and that must be reflected in our understanding of sovereignty.

Discussing the relationship between the individual and international law should help demonstrate just when the term "sovereignty" is properly used in legal and political discussions. It became common at the end of the twentieth century, for example, to hear of states "giving up sovereignty" to international organs or to the "faceless bureaucrats" that might be involved in dispute resolution systems developed by treaty.[25] This assumes a two-tiered

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[24]*See, e.g.*, KRASNER, *supra* note 22.

[25]*See* 140 CONG. REC. S10,582-S10,591 (daily ed. Aug. 4, 1994) (statements of Sen. Helms, Sen. Thurmond, & Sen. Byrd regarding the Uruguay Round of Multilateral Trade Negotiations, made during discussion of Helms' proposed "Sense of the Senate regarding the need to protect the constitutional role of the Senate").

social contract approach to international law, under which the individual relates to the state in domestic law, and only the state relates to the international legal order in international law. But this breaks down because there is no "international sovereign," and because it ignores the fact that individuals also can derive rights and be the subjects of limitations under international law. Nonetheless, the international tier of relationships often is described as some kind of social contract between states similar to traditional Lockean understandings of the first tier relationship in which individuals agree to be subjects of the state.[26] Developments in the twentieth century indicate that this approach no longer is appropriate (and perhaps never was).

B. Changes in Relationships Affecting Sovereignty and International Law

1. Changes in Relationships Between and Among States

At least two types of changes are reflected in twentieth century developments in international law affecting the relationship between the individual and international law. The first set includes developments in relationships between and among states that have an impact on rights and obligations of individuals. The second set includes situations directly involving the individual in international legal relationships.

a. The Elimination of the Liberté de Guerre

The right of a state to settle disputes with other states by going to war—the *liberté de guerre*—was a classic element of sovereignty in nineteenth century concepts of international law.[27] Article 2(4) of the United Nations Charter, in its prohibitions on the use of force, formally codifies the rejection of this right in the post-World War II world.[28] This development, while not directly implicating the

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[26]*See, e.g.*, Henkin, *supra* note 4, at 1 ("[S]tates are subject to the International Social Contract, and the end of World War II saw a new social contract in the UN Charter.").

[27]*See* Steinberger, *supra* note 5, at 407-08, 410-11.

[28]U.N. CHARTER, art. 2, para. 4. The text of this provision reads as follows:

> All Members shall 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. *Id.*

individual, has done much to provide peace and security (the principal role of the sovereign under traditional political theory). It thus removes a significant impediment to the sovereign's ability to seek peace and security on behalf of its citizens, while at the same time implying limits on the sovereign's ability to engage citizens in war.

b. Democracy as a Developing International Norm

The last two decades of the twentieth century saw massive shifts by states to capitalism in the economic realm and democracy in the political realm. While the first of these shifts presents particular difficulties in the discussion of international law, it can be argued that the second has led to normative changes in international law and the elevation of democracy as a right.[29] While this may be more *de lege ferenda* than *de lege lata* at this point, it raises important questions in any discussion of sovereignty. If democracy is becoming a norm of international law, then that process must create corresponding rights for individuals within the international legal system. It is the individual, not the state, that can claim the right to a democratic form of government, because that is where the presumed benefits ultimately lie.

Any shift to democracy as an international legal norm also brings with it a shift from the sovereign king to the sovereign "we." In the United States this concept is enshrined in the preamble to the Constitution, which states that "We the People" have come together to form a "more perfect union."[30] Contemporary democracies are representative in nature and thus make difficult any discussion of pure sovereignty in individuals. However, democracy does require that we think in terms of both a state's relationships with other states and a state's relationships with individuals.

c. Regional Frameworks as Global Models

International organizations that began primarily for purposes of

[29]*See, e.g.*, Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992) ("Increasingly, governments recognize that their legitimacy depends on meeting a normative expectation of the community of states. This recognition has led to the emergence of a community expectation: that those who seek the validation of their empowerment patently govern with the consent of the governed. Democracy, thus, is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes.").
[30]U.S. CONST. pmbl.

economic cooperation have an impact on sovereignty because they have evolved to levels of cooperation that affect political relationships. The best example is the European Union, which has grown from the original European Economic Communities' focus on trade relationships and tariffs to monetary, political, and security cooperation.[31] The creation of a new layer of law above that of the Member States, particularly when that law has a "direct effect" on individuals within each Member State,[32] changes both the relationships among the Member States and their relationships with individuals (both citizen and alien). The result is new rights for individuals arising not from national but from supranational legal orders. These rights imply corresponding limitations on the conduct of states in their relations with individuals. Whether we discuss them in terms of power shifts, federalism, or any other specific rubric, they have clear implications for any discussion of sovereignty.

d. New Multilateral Mechanisms for Dispute Settlement

Consistent with Article 2(4) of the United Nations Charter, states have turned their dispute resolution efforts to more formal systems involving legal rules rather than military engagement. The Permanent Court of International Justice and its successor, the International Court of Justice, have provided a forum for states to address conflicts and to seek peaceful settlement of disputes directly.[33] The World Trade Organization ("WTO") formalized the GATT organization that, since the late 1940s, has provided perhaps the most successful forum for the peaceful settlement of disputes between states in human history.[34] The economic disputes settled in the WTO framework often directly involve the interests of private parties, and thus have implications for the relationships between states and individuals as well.[35]

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[31]*See, e.g.*, Donato F. Navarrete & Rosa María F. Egea, *The Common Foreign and Security Policy of the European Union: A Historical Perspective*, 7 COLUM. J. EUR. L. 41 (2001).

[32]*See* Ronald A. Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 NW. J. INT'L L. & BUS. 556-608 (1997).

[33]For information on the International Court of Justice, see http://www.icj-cij.org (last visited Aug. 5, 2002).

[34]A review of the disputes submitted to the World Trade Organization (WTO) since its creation in 1995 shows over 240 state versus state conflicts submitted to the WTO dispute resolution system. *See* http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited Aug. 5, 2002).

[35]There are many examples of GATT and WTO disputes that involve important

The International Centre for the Settlement of Investment Disputes ("ICSID")[36] is perhaps the most striking example of an international organization set up to provide peaceful settlement of disputes arising directly between states and individuals. This formalization of dispute settlement in which individuals may directly challenge the legality of the conduct of states in their relationships with individuals provides a good example of how international law grew in the twentieth century to deal with relationships between individuals and states.

2. Changes in Relationships Between Persons and States

The second set of relationships reflected in twentieth century international law developments affecting the relationship between individuals and international law are those that deal directly with the relationship between the individual and the state.

a. Applying International Law to Economic Relationships between States and Persons

The twentieth century has seen new recognition of the direct application of international law to relationships between individuals and states. The law of economic relations is one area in which international law (traditionally considered only applicable between and among "sovereign" states) has grown to encompass rules that provide rights for individuals in their relationships with states.

Persons and states entering into commercial relationships have been allowed to provide explicitly that those relationships will be governed by international law. Private parties may use the negotiation process to enter agreements that limit the ability of states to exercise law-making powers to change the nature of the contractual relationship. Stabilization clauses in long-term economic development agreements and other types of contracts are commonplace provisions. These provisions require that the resulting

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interests of specific persons (especially legal persons). *See, e.g.*, Ronald A. Brand, *Private Parties and GATT Dispute Resolution: Implications of the Panel Report on Section 337 of the US Tariff Act of 1930*, 24 J. WORLD TRADE 5 (1990) (discussing the patent dispute between Akzo and Dupont ultimately taken to GATT dispute settlement).

[36]Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *adopted* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, *reprinted in* 4 I.L.M. 532 (1965) (creating the International Centre for the Settlement of Investment Disputes (ICSID)).

relationships be considered in light of international law, and place specific limitations on the conduct of the "sovereign" state, even within its own territory.[37]

The idea that private parties and states may explicitly choose to have their relationships governed by international law further evolved to a recognition that, even if such a choice is not expressly made, international law is nonetheless applicable to those relationships.[38] This has been recognized by states in their treaty obligations, in the creation of ICSID, and in numerous bilateral investment treaties that apply international law standards and provide for direct dispute resolution between states and private parties.[39]

b. Applying Municipal Law to Foreign States in National Courts

The dissipation of the absolute theory of sovereign immunity over the course of the twentieth century means that states have become increasingly subject to the application of municipal law in municipal courts. Not only may states explicitly (or implicitly) waive immunity from suit in national courts, but their involvement in commercial activity also sheds the cloak of immunity otherwise available in relationships with individuals.[40] Thus, just as private parties at the end of the twentieth century are more likely to enter into relationships with states that will be governed by international law, so are states more likely to enter into relationships with private parties that will subject them to the application of the municipal laws of other states.[41] In this way, some of the developments of the

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[37]For a good example of this development of the relationship between the individual and the state, and a decision upholding a clause choosing international law to apply to that relationship, see Professor Dupuy's arbitral decision in *Award on the Merits in Dispute Between Texaco Overseas Petroleum Company and the Government of the Libyan Arab Republic*, *reprinted in* 17 I.L.M. 1 (1978).

[38]*See, e.g.*, Arbitration in the Matter of Revere Copper and Brass, Inc. and Overseas Private Investment Corp., *reprinted in* 17 I.L.M. 1321 (1978) (arbitrators determined that a long-term economic development agreement between a private party and a state was governed by principles of international law even in the absence of a choice of law clause in the agreement).

[39]*See, e.g.*, United States 1994 Model Bilateral Investment Treaty art. IX, *reprinted in* RONALD A. BRAND, FUNDAMENTALS OF INTERNATIONAL BUSINESS TRANSACTIONS: DOCUMENTS 124 (2000).

[40]*See, e.g.*, Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2892 (1976) (codified as amended at 28 U.S.C. § 1605) (setting forth the exceptions to sovereign immunity for states in U.S. courts).

[41]For a classic example of the application of the commercial activity exception to sovereign immunity in U.S. courts, see Texas Trading v. Federal Republic of Nigeria,

twentieth century have actually diminished the distinction between individual and state in the application of law to their relationships.

c. The Development of Human Rights Norms

This essay focuses primarily on developments in the economic realm, but it cannot ignore the very significant developments in international human rights law over the course of the twentieth century. These developments place significant limitations on the conduct of states and provide specific consequences if that conduct should result in the breach of international norms.[42]

Hobbes considered it a right of the sovereign to punish a subject who refuses to obey the king. The subject could refuse to obey when the right of self-preservation outweighed the obligation to keep the covenant with the king. At the same time, however, the sovereign retained the right to punish the subject for such refusal. The subject had "the liberty to do the action for which he is nevertheless without injury put to death."[43] States today are limited by international law in their treatment even of their own citizens.

Multilateral frameworks for the protection of fundamental human rights became an important part of international law in the twentieth century. The European and Inter-American Courts of Human Rights now apply their relevant conventions in ways that place clear limitations on the conduct of states toward individuals. The movement from Nuremberg to the International Criminal Court demonstrates the international community's willingness to hold individuals accountable for their conduct when their acts, under color of state authority, go beyond contemporary legal limits.[44] These developments represent substantial crystallization of the rights of individuals in international law found both in treaties and in customary international law.[45]

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647 F.2d 300 (2d Cir. 1981).

[42]These issues are more fully developed in other articles in this symposium.

[43]HOBBES, *supra* note 16, at pt. II, ch. xxi, ¶ [17].

[44]Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, *reprinted in* 37 I.L.M. 999 (1998). Entered into force July 1, 2002. *See* http://www.un.org/law/icc/statute/romefra.htm (last visited Aug. 5, 2002).

[45]*See, e.g.*, 2 RESTATEMENT (THIRD) FOREIGN RELATIONS LAW §§ 701-703 (1987).

d. The Re-Emergence of the Lex Mercatoria *in New Clothes: International Law as National Law*

The "law of nations" originated in large part from the conduct of parties engaged in economic transactions across national borders.[46] Its evolution then moved from "law" determined and applied by societies of merchants based upon their own customs, to law determined by juries of merchants in national courts, to law determined by national legislatures and judges and applied to merchants.[47] The twentieth century witnessed the return of the merchant to a significant role in determining the rules applicable to commercial conduct. National codes have been accompanied by rules established directly by merchant groups,[48] and ultimately by the movement to treaties through which the rules once again become truly international in nature and context.[49] In the process, "international law" rules are developed specifically for the purpose of measuring the conduct of private parties. While these rules in most cases must be brought into the domestic legal system through either monist analysis or implementing legislation in a dualist system, they nonetheless reflect a strong movement toward uniform rules and efforts at uniform application of those rules to economic transactions that have impact in more than one national legal system. Thus, private parties participate in the creation and become the subjects of international legal rules.

3. Implications for the Future

All of these developments indicate the increasing need to apply rules of the international legal order to relationships between states and private parties. Thus, to the extent we think of law as the expression of authority by the sovereign, we must deal with those relationships in that context. This means that international law must

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[46]*See* RONALD A. BRAND, FUNDAMENTALS OF INTERNATIONAL BUSINESS TRANSACTIONS 8-17 (2000).

[47]*Id.*

[48]For example, the International Chamber of Commerce created the Uniform Customs and Practice for Documentary Credits (UCP) and INCOTERMS. *See* INT'L CHAMBER OF COMMERCE, PUB. NO. 500, UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1993); INT'L CHAMBER OF COMMERCE, PUB. NO. 560a, INCOTERMS 2000 (1999).

[49]Perhaps the best example is the United Nations Convention on Contracts for the International Sale of Goods, Annex I, U.N. Doc. A/CONF.97/18 (1980), *reprinted in* 52 Fed. Reg. 6262 (Mar. 2, 1987) *and in* 19 I.L.M. 668 (1980).

deal directly with relationships between states and private parties.

III. Conclusion: Sovereignty in the Twenty First Century

Changes in international law, particularly in its application to relationships between states and individuals, require that we take great care in the manner in which we use the term "sovereignty." They also require that we give careful consideration to the origins of that term, and to the importance of the individual in the term's development and purpose. We must recognize that the term now used most commonly to describe relationships between and among states originated as a concept describing the relationship between the individual and the state. Any proper discussion of the term must take into account this relationship. Thus, we cannot discuss the rights and obligations of "sovereign" states without recognition of the impact those rights and obligations have on private persons. That impact has grown substantially over the twentieth century to include the application of international law directly to relationships between individuals and states.

Developments in the law governing relationships between states and private parties have brought private parties into the realm of international law and states under the authority of national legal systems. The very significant development of institutional dispute settlement mechanisms to deal with state-to-state economic and political disputes, and even with private party-to-state disputes, further colors contemporary concepts of sovereignty. The development of binding international protections for individuals, even against their own states and those representing states, makes some explanations of sovereignty difficult to apply. The growth of regional economic organizations into full-fledged political and legal units has raised questions of who holds what aspects of sovereignty as it has been traditionally defined.

An improper analysis of such developments carries the risk of leaving the concept of sovereignty in a state of suspended ambiguity as we enter a new century. Recognition that international law now limits the conduct of states in their relationships with individuals is not a bad thing, nor does it necessarily represent a diminution of the "sovereignty" of states.[50] It does, however, require a more complete

[50] *But see, e.g.*, RABKIN, *supra* note 1, at 34 ("Global governance, then, does not threaten to replace the American government, but it does threaten to distract and confuse and, ultimately, to weaken it.").

understanding of a state's exercise of sovereign power. Hobbes justified absolute authority in the sovereign king by the extent to which that authority was used to enhance peace and security for his subjects. This remains an appropriate test of the exercise of sovereign authority today. Thus, if peace and security are enhanced through relationships that place limitations on the conduct of states, that is not an emasculation of sovereignty, nor does it involve states "giving up" sovereignty. It may well be a proper exercise of sovereignty in the role of the government to provide peace and security for its citizens. Such developments simply require that we apply more careful analysis in our considerations of such conduct.