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The Vulnerable Sovereign

Ronald A. Brand

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Abstract

The connection between sovereignty and law is fundamental for both domestic (internal sovereignty) and the international (external sovereignty) purposes. As the dominant forms of government have evolved over time, so has the way in which we think about sovereignty. Consideration of the historical evolution of the concept of sovereignty offers insight into how we think of sovereignty today. A term that was born to represent the relationship between the governor and the governed has become a term that is used to represent the relationships between and among states in the global legal order. This article traces the history of the term “sovereignty”, and suggests how it might best be used in twenty-first century legal parlance, concluding with the concept of the “vulnerable sovereign,” a notion rather different from the omnipotent religious sovereign of the *Universitas Christiana*, and even of the post-Reformation absolutist approach to “sovereign” kings. The idea of the vulnerable sovereign suggests that we revisit the original role of sovereignty as describing the relationship between the governor and the governed, and consider how that relationship overlaps with, and necessarily influences, both relations among states in international law and relations between states and persons in international law.

Keywords: sovereignty, international law, government, democracy, lex mercatoria, international economic law, human rights law, sovereign immunity, comparative law

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The Vulnerable Sovereign

Ronald A. Brand*

I. Introduction

The term sovereignty has confounded philosophers, lawyers, and scholars over time. The connection between sovereignty and law is a fundamental one, both on the domestic level (internal sovereignty) and the international level (external sovereignty). My premise for this presentation is that, as the dominant forms of government have evolved over time, so has the way in which we must think about sovereignty. I propose to track the evolution of the concept of sovereignty through the historical development of governing systems, including international law, and to offer some thoughts about what that evolutionary process means as we think of sovereignty today.

From a legal perspective, a term that was born to represent the relationship between the governor and the governed has, in international law, become a term that is used to represent the relationships between and among states in the global legal order. Yet, its roots in the relationship between the governor and the governed remain fundamental.

The idea that “[a] sovereign state is one that acknowledges no superior power over its own government”¹ no longer holds in all situations in the twenty-first century.² Modern legal scholars and philosophers have suggested that the term should no longer be used in discussions

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

²See, e.g., the monist approach to international law found in the German Basic Law, art. 25:

Article 25 [Primacy of international law]

The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.

about states, their citizens, and the international legal order.³ Yet, it seems to find its way into discussions more often, rather than less.

I propose to trace the history of the term “sovereignty” (although that can be rather difficult and confusing in itself given differing uses of the term even in similar times), and to suggest how it might best be used in twenty-first century legal parlance. In doing so, I conclude with the concept of the “vulnerable sovereign,” a notion rather different from the omnipotent religious sovereign of the *Universitas Christiana*, and even of the post-Reformation absolutist approach to “sovereign” kings. I suggest that, in a twenty-first century global legal order, we need to revisit the original role of sovereignty as describing the relationship between the governor and the governed, and consider how that relationship overlaps with, and necessarily influences, both relations among states in international law and relations between states and persons in international law.

II. The *Universitas Christiana* - A Single Sovereign

Early concepts of sovereignty were a very Western development, focusing on a singular human society as a *Universitas Christiana*,⁴ or a *Respublica Christiana*, finding its “oneness” in the pervasive unity of God (*jus divinum*).⁵ This was an all-pervasive sovereign, not a territorial sovereign.⁶ The Christian–Roman Catholic–faith found representation of the sovereignty of God in the person of the Pope, thus making “[i]nfallibility in the spiritual order and *sovereignty* in the temporal order . . . two perfectly synonymous words.”⁷

³See, e.g., Louis Henkin, *Notes from the President*, AM. SOC’Y INT’L L. NEWSL. (ASIL, Washington, D.C.), March 1993, at 1 (“Away with the “S” word!”); Jacques Maritain, *The Concept of Sovereignty*, 44 AM. POL. SCI. REV. 343 (1950) (“political philosophy must eliminate Sovereignty both as a word and as a concept”); ROLAND R. FOULKE, A TREATISE ON INTERNATIONAL LAW 69 (1920) (“The word sovereignty is ambiguous We propose to waste no time in chasing shadows, and will therefore discard the word entirely”).

⁴Helmut Steinberger, *Sovereignty*, 10 ENCYCLOPEDIA OF PUB. INT’L L. 397, 398-400 (1987).

⁵HAROLD J. LASKI, THE FOUNDATIONS OF SOVEREIGNTY AND OTHER ESSAYS 2 (1921).
See also

⁶LASKI, *supra* note 5, at 1 (“Sovereignty, in the sense of an ultimate territorial organ which knows no superior, was to the middle ages an unthinkable thing”).

⁷J. DE MAISTRE, DU PAPE 27 (Geneva, 1966) (first published in 1817) (“L’*infaillibilité* dans l’ordre spirituel et la *souveraineté* dans l’ordre temporel, sont deux mots parfaitement synonymes.”) (translation found in BRIAN TIERNEY, ORIGINS OF PAPAL INFALLIBILITY 1 (1972)). 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

III. The Peace of Augsburg, Kings, and Multiple Territorial Sovereigns

With the Reformation, and its challenges to the authority of the Roman Catholic Church, the singularity of the *Universitas Christiana* gave way to the concept of equal sovereigns in the form of states. This process began with the 1555 Peace of Augsburg, and 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.”⁸

The concept of a singular *Respublica Christiana* was thus dismantled by the Reformation, and replaced by the notion of state supremacy, in which the sovereign “ceases to think of superiority as existent outside itself.”⁹ The full transition from natural law concepts of the *Respublica Christiana* was not immediate, however. For Jean Bodin, the “father of the modern theory of sovereignty,”¹⁰ the sovereignty of the king over his subjects remained submissive to “the law of God and nature.”¹¹ But, “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 For Bodin, “Majestie or Soveraigntie is the most high, absolute,

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.

⁸STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 20 (1999).

⁹LASKI, *supra* note 5, at 12.

¹⁰Maritain, *supra* note 3, at 344.

¹¹JEAN BODIN, DE LA RÉPUBLIQUE Bk. 1, Ch. 8 (1583) (English translation by Richard Knolles (1606).

¹²Maritain, *supra* note 3, at 344 n.10.

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

and perpetual power over the citizens and subjects in a Commonwealth.”¹³ Thus, even with the acknowledgment of separate territorial sovereignty in the king, notions of sovereignty incorporated concepts of abstract moral rights that placed limits on sovereign power.

While some tie early Roman Catholic authority of the Pope to concepts of sovereignty, for others, like Jacques Maritain, “[t]he 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.”¹⁴ Nonetheless, it is with Maritain and later scholars that the sovereignty of the king became absolute, and this sovereignty became equated with the sovereignty of the state.¹⁵

As political and military power became compartmentalized rather than unified for those developing the theory of sovereignty, territorial authority became a principal element of the discussion. As the concept was applied to the ability to rule over defined territory, it had to account for multiple sovereigns. This was, of course, intellectually inconsistent for those who saw sacred origins of the term. Either way, concepts of sovereignty came to focus on the king as holding territorially supreme power, unlimited by any other earthly authority.¹⁶ This approach assumed that “the people had agreed upon the fundamental law of the kingdom, and given the king and his descendants power over them,” such that “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.”¹⁷

While the king was originally seen as the vicar of God, and thus the highest earthly power, he was also seen as existing separate from the body politic. Hobbes wrote of “he that carryeth this Person, [who] is called Sovereign, and said to have Sovereign Power: and every one besides, his Subject.”¹⁸ To Hobbes, the sovereign king was the means by which society escapes from the “miserable condition of war” that would otherwise exist as a result of each person’s focus on getting as large a share of scarce resources as possible while preventing others from doing so.¹⁹

Sovereignty, for Hobbes, involved a social contract or mutual covenant by which the

to the Sovereign.

Id.

¹³JEAN BODIN, *DE LA RÉPUBLIQUE* Bk. 1, Ch. 8 (1583) (English translation by Richard Knolles (1606) at p. 84, quoted in Maritain, *supra* note 11, at 345 n.13). Bodin was born in 1530 and died in 1596.

¹⁴Maritain, *supra* note 3, at 348.

¹⁵*Id.*

¹⁶*Id.*

¹⁷*Id.*

¹⁸THOMAS HOBBS, *LEVIATHAN*, Part II, Ch. xvii, ¶ [14]. Hobbes was born in 1588 and died in 1679, publishing *LEVIATHAN* in 1651.

¹⁹*Id.* at Part II, Ch. xvii, ¶ [1].

people conferred 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.”²⁰ This concept of the sovereign as protector of peace and common defense involved both external and internal territorial aspects, giving the “sovereign” a role in international relations for purposes of providing peace and security. The sovereign must:

be judge both of the means 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 from abroad) and, when peace and security is lost, for the recovery of the same.²¹

IV. The Sovereign State: From Kings to Democratic Institutions

The rise of democratic republics in the late 18th Century brought with it further evolution of the concept of sovereignty, with the accompanying rising importance of the “sovereign state.” Thus, “sovereign” responsibility for providing peace and security moved from a *Universitas Christiana*, to sovereign kings, to sovereign institutions in the form of the state:

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.²²

The idea of sovereign (supreme) power over territory resting within the state has several consequences. First, the concept of sovereignty emanating from the Westphalian order presents each state as having co-equal authority with every other state.²³ The second concept is a result of the first: a state will not be bound by a rule unless it consents to that rule.²⁴ Third, and perhaps

²⁰*Id.* at Part II, Ch. xvii, ¶ [13].

²¹*Id.* at Part II, Ch. xviii, ¶ [8].

²²J. Samuel Barkin & Bruce Cronin, *The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations*, 48 INT’L ORG. 111 (1994).

²³See KRASNER, *supra* note 8, at 20.

²⁴“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 (Part I, Chapter 1, preamble) (1987). The concept of state consent is fundamental to the sources of law as stated in Article 38 of the Statute

more important for contemporary purposes, when the state is represented, not by a king but by democratic institutions and popularly-elected leaders, the line between the governor (formerly the king) and the governed is blurred. If pure democracy were possible, then the governed would be the governor. But it is a spectrum representative democracy that has thrived.

V. The Limited Sovereign

In the *Universitas Christiana*; and in the Peace of Augsburg and the Peace of Westphalia; the sovereign, whether singularly omnipotent or multiple in form, had an absolute nature. This allowed Hobbes to write of the sovereign, and “every one besides, [as] his Subject.”²⁵ When the sovereign was a uniform and singular representative of the society with which the social compact existed, the citizens owed allegiance to that one representative, to whom authority had been given for the purpose of providing peace and security.

The American Revolution brought with it the United States of America, an experiment in representative democracy. The United States Constitution is based on theories of a democratic republic with branches of government designed to share both power and responsibility in a way designed to avoid concentrating excessive power in the hands of a single person or even a single branch of government.²⁶ Moreover, the Revolution brought with it limitations on government in the form of the Bill of Rights—the first ten Amendments to the Constitution. But those “rights” are not in the form of grants to the citizens. They are rather limitations on the state, protecting citizens from the intrusion of the state into their private lives, and generally promising process rather than substantive benefits.

While the development of democratic forms of government have affected the concept of sovereignty as it addresses the internal matter of the relationship between the sovereign and the citizen, the development of international law has affected the concept of sovereignty as it addresses the external matter of relationships between and among states. In each case, one of the most important developments has been the way in which law, both internal and international, limits the state in its relations with persons, both natural and legal. In each, the role of individual rights has grown to limit governments and to move us further away from traditional notions of the sovereign as immune from the application of the law it makes.

of the International Court of Justice, which lists both treaties and customary international law as sources founded upon consent. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38.

²⁵Hobbes, *supra* note 18.

²⁶The United States Constitution was neither the first written constitution, nor the first to limit the governor. Nonetheless, it generally marks the transition toward both written constitutions and democratic forms of government. See Jill Lepore, *When Constitutions Took Over the World*, THE NEW YORKER, Mar. 22, 2021, available at <https://www.newyorker.com/magazine/2021/03/29/when-constitutions-took-over-the-world> (discussing the 1755 *costituzione* of Corsica and the 1765 and the Nakaz, or Grand Instruction begun by Catherine the Great in 1765 at the close of the Seven Years’ War, as well as the New Hampshire Constitution of 1776).

A. Internal Limitations on Sovereignty through Written Constitutions

By providing “rights” in the form of limitations on the state, the Amendments to the United States Constitution which we call the Bill of Rights, as well as further amendments, have an effect on the concept of sovereignty. When compared to the sovereign king, the sovereign governor created in the U.S. Constitution is an expressly limited sovereign. The result did not change the fact that the purpose of the sovereign (whether king or republic) is to provide peace and security, that purpose may in fact be achieved, in part, by limiting the government. The American Revolution was explicitly an event intended to react to and prevent aspects of the king’s authority over the citizens by some of those citizens. What resulted was a new expression of the governor not only as representative of the governed, and elected by the governed, but also as limited by the governed. “We the People” transferred less than full authority from the people to the government.²⁷ This moved the evolution from omnipotent sovereign, to territorial sovereign, to territorial representative, exercising sovereignty on behalf of the governed in order to provide peace and security for the governed, but limited by the effect of elections that allow the governed to change those who represent them in the sovereign unit. Similar limitations on the governor by the governed have been adopted in subsequent written constitutions throughout the world.

B. External Limitations on Sovereignty through International Law

While internal limitations on sovereignty developed through the advent of the written constitution in the late eighteenth century, those limitations have now been accompanied by external limitations through international law. In each case, the governor in the form of the state is limited in its authority to act in regard to individuals. Internal law places limitations on the government in its relations with its citizens and residents, and international law places limitations on the government in its relations with non-citizens and non-residents as well. In both instances, however, the important focus is on the relationship between the individual and the state. In international law, however, the resulting limitations have implications for both the state’s relationships with individuals (both natural and legal) and the state’s relations with other states.

The Westphalian concept of the international legal order necessarily required a lens for viewing the relationships between and among states. The idea that there was no longer the single omnipotent “sovereign” in the form of the *Universitas Christiana*, but rather equal “sovereign” states, meant that the term itself came to encompass not only the relationship between the governor and the governed, but also the relationships among multiple governors. Nonetheless, it is the relationship between the governed and the governor, and now the individual outside the governor’s territory as well, that remains fundamental to the concept of sovereignty in its

²⁷United States Constitution, preamble and Amendment IX (“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”).

function of providing peace and security.

Some have described international law as a new sort of social contract adding a second layer of relationships on top of that of the citizen to the states.²⁸ This tends to place the focus on relationships between and among states and emphasize the rules that govern the actions of one state towards other states. That analogy is problematic, however, because there is no truly international sovereign to enforce the rules governing those relationships, making it a social contract very unlike the one in which a sovereign, in contract with its citizens, can create and enforce rules governing its citizens. Still, that development of international law has affected rules regarding relationships among states, and those rules necessarily assume limitations on individual states (whether they are enforceable by force or by consensual process). Thus, it is useful to consider both limitations on states in their relationships with other states and limitations on states in their relationships with individuals.

1. Sovereignty and Relationships Between and Among States

When considering international law developments that limit states in their relationships with other states, it is important to note that these developments also affect the relationship of the state with individuals as well. This includes relationships with a state's own citizens and with citizens of other states.²⁹

a. The Elimination of the *Liberté de Guerre*

A classic element of sovereignty in nineteenth century concepts of international law was the right of a state to settle disputes with other states by going to war—the *liberté de guerre*.³⁰ Post World War II development of the United Nations Charter included Article 2(4), which codified the rejection of this right through a prohibition on the use of force against other states.³¹ This is a limitation on the “sovereign” state, but it demonstrates how the new legal order requires

²⁸See, 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.”).

²⁹As with earlier parts of this article, this section in particular, relies heavily on the author's earlier work found at Ronald A. Brand, *Sovereignty: The State, the Individual, and the International Legal System in the Twenty-First Century*, 25 HASTINGS INTERNATIONAL & COMPARATIVE LAW REVIEW 279 (2002).

³⁰See Helmut Steinberger, *Sovereignty*, 10 ENCYCLOPEDIA OF PUB. INT'L L. 397, 407-408 and 410-411 (1987).

³¹United Nations Charter, art. 2, para. 4. The text of this provision reads as follows:

4. 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.

a more nuanced understanding of the term sovereignty. The purpose of the prohibition on the use of force is precisely to add to individual peace and security throughout the world. Thus, rather than a *limitation* on sovereignty, it is a positive and proper *exercise* of sovereignty.

b. Democratic Governance, International Law, and Sovereignty

With the fall of the Berlin Wall in 1990, and the opening of Eastern Europe to the West, there appeared at first to be very significant shifts from socialist to capitalist economies and from single-party communist to multi-party democratic political systems.³² Some even saw democracy as a developing norm of international law.³³ More recent developments raise questions about the extent and stability of either of these shifts. To the extent democracy has become more widely-adopted as the accepted political model, it raises questions about the relationship between the governor and the governed already discussed. It is, after all, the individual, not the state, that can claim the right to a democratic form of government, since that is where the presumed benefits ultimately lie. Any such development also requires 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.”³⁴ 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 Integration, International Law, and Sovereignty

Organizations of states such as the European Union have been labeled “Regional Economic Integration Organizations” in international Law.³⁵ Such organizations of states have evolved from having a primary purpose of economic cooperation to become more in the nature of federal states themselves in many ways.³⁶ The creation of a new layer of law above that of the

³²See, 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.”).

³³*Id.*

³⁴U.S. CONST. pmbi.

³⁵See, e.g., the Statute of the Hague Conference on Private International Law, art. 3, which was amended in 2005 to allow membership not only by states but also by Regional Economic Integration Organizations, *available at* <https://assets.hcch.net/docs/d7d051ae-6dd1-4881-a3b5-f7dbcaad02ea.pdf>.

³⁶The European Union has grown from the original European Economic Community, focused on trade relationships and tariffs, to monetary, political, and security cooperation. *See,*

Member States, particularly when that law has “direct effect” on individuals within each Member State,³⁷ changes both the relationships among the Member States and their relationships with individuals (both citizen and alien). The result is new rights for individuals resulting 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 Settlement³⁸

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 directly to address conflicts and to seek peaceful settlement of disputes.³⁹ The World Trade Organization (WTO) formalized the GATT organization that, since the late 1940’s, has provided perhaps the most successful forum for the peaceful settlement of disputes between states in human history.⁴⁰ 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.⁴¹

The International Centre for the Settlement of Investment Disputes (ICSID)⁴² 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

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).

³⁷See 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).

³⁸Note: this and following sections borrows more heavily from past writings, and will be substantially edited for the final conference publication.

³⁹For information on the International Court of Justice, see: <https://www.icj-cij.org/en>.

⁴⁰A review of the disputes submitted to the World Trade Organization since its creation in 1995 lists over 240 state v. state conflicts submitted to the WTO dispute resolution system. See <http://www.wto.org>.

⁴¹There are many examples of GATT and WTO disputes that involve important 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 (June 1990) (discussing the patent dispute between Akzo and Dupont ultimately taken to GATT dispute settlement).

⁴²Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (creating the International Centre for the Settlement of Investment Disputes—ICSID), Done at Washington, D.C., March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159, *reprinted in* 4 I.L.M. 532 (1965).

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.

More recently, challenges to states by foreign sovereign investors have brought about significant questions about whether states should consent in advance to dispute resolution (particularly arbitration) with foreign investors, and whether states should allow themselves only to be brought before their own courts.⁴³ Thus, the limitations on states brought about through the international legal systems that allow persons (largely corporate in form) to bring claims against states, are facing curtailment. Whether this is one step back after two steps forward, or a true reversal of the evolution of state responsibility to aliens, remains to be seen.

2. Sovereignty and Changes in International Law Rules Applied in Relationships Between Persons and States

A second evolution has come not in the institutions that administer international law, but in the rules applied when a dispute arises between persons and states that are subject to international law.

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

Just as the twentieth century saw a new recognition of fora for disputes between individuals and states, it also witnessed the development 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 and other types of contracts are common-place provisions, and require that the resulting relationships be considered in light of international law and place specific limitations on the conduct of the “sovereign” state, even within its own territory.⁴⁴

⁴³See UNCTAD, Review of ISDS Decisions in 2019: Selected IIA Reform Issues, International Investment Agreements Issues Note, *available at* https://unctad.org/system/files/official-document/diaepcbinf2021d1_en.pdf.

⁴⁴For a good example of these developments in the relationship between the individual and the state, and a decision upholding a clause choosing international law to apply to such a 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,

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.⁴⁵ This has been recognized by states in their treaty obligations in the creation of the International Centre for the Settlement of Investment Disputes (ICSID) and in numerous bilateral investment treaties that apply international law standards and provide for direct dispute resolution between states and private parties.⁴⁶

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.⁴⁷ Not only may states explicitly (or implicitly) waive immunity from suit in national courts, but their involvement in commercial activity sheds the cloak of immunity otherwise available in relationships with individuals.⁴⁸ 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.⁴⁹ Thus, some of the developments of the 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 that place significant limitations on the conduct of states and provide specific

reprinted in 17 I.L.M. 1 (1978).

⁴⁵*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)*, in which the 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.

⁴⁶*See, e.g.,* United States 2012 Model Bilateral Investment Treaty arts. 5 and 30, *available at* <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

⁴⁷*See* [cross-reference to articles on FSIA by Curran, Weisberg, Klumpp, and Grabarsky]

⁴⁸*See, for example,* the exceptions to sovereign immunity for states in U.S. courts found in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605.

⁴⁹For 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*, 647 F.2d 300 (2d Cir. 1981).

consequences if that conduct should result in the breach of international norms.⁵⁰

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.”⁵¹ States today are limited by international law in their treatment even of their own citizens, through important human rights treaties and customary norms.

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.⁵² The movement from Nuremberg to the International Criminal Court demonstrated 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.⁵³ These developments represent substantial crystallization of the rights of individuals in international law found both in treaties and in customary international law.⁵⁴

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.⁵⁵ 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.⁵⁶ The twentieth century witnessed the return to a significant role of the merchant in determining the rules applicable to commercial conduct.

⁵⁰These issues are more fully developed in a set of articles in this symposium. [Provide citations to relevant articles on human rights and sovereignty.]

⁵¹HOBBS, *supra* note 16, at Part II, Ch. xxi, ¶ [17].

⁵²*See, e.g.*, European Court of Human Rights, <https://www.echr.coe.int/Pages/home.aspx?p=home>.

⁵³Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, *reprinted in* 37 I.L.M. 999 (1998). As of April 20, 2021, 123 states had become parties to the ICC Statute. https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

⁵⁴*See, e.g.*, 2 RESTATEMENT (THIRD) FOREIGN RELATIONS LAW §§ 701-703 (1987).

⁵⁵*See* RONALD A. BRAND, INTERNATIONAL BUSINESS TRANSACTIONS FUNDAMENTALS 7-12 (2019).

⁵⁶*Id.*

National codes have been accompanied by rules established directly by merchant groups,⁵⁷ and ultimately by the movement to treaties through which the rules once again become truly international in nature and context.⁵⁸ 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 deal directly with relationships between states and private parties.

VI. The Limited Sovereign in Context

Changes in international law, particularly in its application to relationships between states and individuals, require that we take care in the manner in which we use the term “sovereignty.” We must recognize that a term now commonly used to describe relationships between and among states originated as a concept describing the relationship between the individual and the state.

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 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 color contemporary concepts of sovereignty. The development of binding international protections for individuals, even against their own states and those representing states, makes outdated notions 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.

⁵⁷See, for example, the Incoterms and Uniform Customs and Practice for Documentary Credits (UCP) created by the International Chamber of Commerce.

⁵⁸Perhaps the best example is the United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, Annex I, *English version reprinted in 52 Fed. Reg. 6264 (1987) and in 19 I.L.M. 668 (1980), available at* https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg.

An improper analysis of such developments carries the risk of leaving the concept of sovereignty in a state of suspended ambiguity. 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.⁵⁹ It does, however, require a more complete 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.

VII. The Limited Sovereign as the Vulnerable Sovereign

Limitations on the governor as sovereign require that we continuously reconsider whether the term “sovereignty” provides a useful function in modern legal relationships. For this reason, I propose a different focus in the analysis of “sovereign” relationships. This change in focus requires that we view sovereignty as a *quality to be exercised*, not a *quantity of authority to be used to “rule over” others*. It requires that we view the sovereign relationship between the governor and the governed as a mutual relationship, not as a power hierarchy.

Once we focus on mutuality of relationship rather than hierarchy of authority, we then must consider the sovereign relationship in the way we consider other human relationships. Human relationships thrive when each party in the relationship opens themselves to the other. This requires that risks be taken in relationships. It is precisely those risks that make relationships worthwhile, valuable, and strong. In human experiences, it is when those on each side of the relationship have the ability to raise up or bring down those on the other side of the relationship that the relationship has real value to each party in the relationship. Each party’s acceptance of the other party’s ability to affect them in this way (that is, acceptance of risk) is precisely what provides the ability to build up the other party (that is, reward).

Both internally and externally, it really is not necessary for either the governor or the governed to agree to a focus on mutuality of relationship. Regardless of whether states consent to be guided by shared rules or treaties or standards of justice, all their citizens’ fates are interconnected and governed by the basic laws of cause and effect. The spread of Covid, rising tides of refugee migration, and the ongoing intensification of climate change are clear examples of this.

For too long we have considered states to be strong when they can exercise power over their citizens and over other states. But power in an individual, or even in a political party, does

⁵⁹*But see, e.g.,* JEREMY RABKIN, WHY SOVEREIGNTY MATTERS 34 (1998) (“Global governance, then, does not threaten to replace the American government, but it does threaten to distract and confuse and, ultimately, to weaken it.”).

not ensure peace and security for those whom that individual or party governs. It is the provision of peace and security that is the hallmark of sovereignty properly considered. Nor does power necessarily translate to strength in twenty-first century global relationships.

Article 38 of the ICJ Statute places “conventional law” (treaties) at the top of the international law source hierarchy for a reason. Treaties provide the clearest form of consent by a state to rules to be applied in its relationships with other states. But treaties are built on reciprocity. They are built on trade-offs designed to obtain a greater good. Some would say that treaties are built on “giving up sovereignty,”⁶⁰ because they limit the exercise of power and authority of the state entering into the treaty. But that is a mistake. If a treaty, by limiting each of the states party to the treaty, makes those governed in each state more likely to experience peace and security, then entering into the treaty is not giving up sovereignty, but rather a proper exercise of sovereignty.

Do treaties require risk? Yes. Do they allow one party to the treaty to breach a treaty commitment and thus cause harm to the other party, or to individual persons? Yes. Does that make treaties a bad move by a “sovereign” government. No.

Humankind may never find a perfect form of government or reach complete peace and security for every human being. The cruel irony of human existence is that if we would ever reach what could be conceived as perfect peace and security, the value of an existence built on improving the world would be lost. Without the ability to reach higher goals, we could only either atrophy or move backwards. As the concept of sovereignty has evolved from a *Universitas Christiana*, to sovereign kings, to sovereign institutions in the form of states, to governors who are limited in both relationships with other sovereigns and with individuals, a new focus is required. We need to ask: can it be that the vulnerable sovereign can in fact bring us closer to true peace and security in a globalized world?

⁶⁰This is a rather common argument when the United States Senate is asked to provide its advice and consent so that the United States may ratify a treaty. *See, e.g.*, the statements of Senators Helms, Thurmond, and Byrd regarding the Uruguay Round of Multilateral Trade Negotiations in the discussion of Helms’ proposed “Sense of the Senate regarding the need to protect the constitutional role of the Senate,” at 140 Cong. Rec. S10,582-10,591 (daily ed. Aug. 4, 1994).