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External Sovereignty and International Law

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EXTERNAL SOVEREIGNTY AND INTERNATIONAL LAW

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International law has to be as contemporary as the changed world it reflects if it is to be taken seriously in the coming century.[1]

INTRODUCTION

It is trite doctrine that international law is built on the notion of consent. No state can be held bound to a rule of international law (other than *jus cogens*) unless that state has consented to the rule, either in a treaty or in the recognition of a customary norm through public pronouncements and state conduct. We refer to the relationships through which consent is expressed as relations of sovereign parties. The sovereign must consent to be bound to a particular norm of international law.

Sovereignty is a popular topic for current discussion, and it may be that one can add little that is new to the already imposing quantity of recent commentary. That commentary, however, generally approaches relations between sovereigns in terms of a Lockean, second-tier social contract.[2] This two-tiered notion of

* Professor of Law, University of Pittsburgh. I wish to express my thanks to Mary Brand, Karen Minehan, and Joan Wellman for their comments and criticisms on an earlier draft of this Essay.

1. Louis Henkin, *International Law After the Cold War*, ASIL NEWSL., Nov.-Dec. 1993, at 1.

2. It is, of course, presumptuous to generalize about current notions of sovereignty. Many commentators much more able than I have delved into the topic in recent years, and they certainly do not express a singular opinion on either the term or its use as applied in international law. *See, e.g.*, Richard B. Bilder, *Perspectives on Sovereignty in the Current Context: An American Viewpoint*, 20 CANADA-UNITED STATES L.J. 9 (1994); Richard Falk, *Evasions of Sovereignty*, *in* CONTENDING SOVEREIGNTIES: REDEFINING POLITICAL COMMUNITY (R.B.J. Walker & S.H. Mendlovitz eds., 1990); Louis Henkin, *The Mythology of Sovereignty, reprinted in Notes from the President*, ASIL NEWSL., Mar.-May 1993, at 1; Donat Pharand, *Perspectives on Sovereignty in the Current Context: A Canadian Viewpoint*, 20 CANADA-UNITED STATES L.J. 19 (1994); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990); Oscar Schachter, *Sovereignty - Then and Now*, *in* ESSAYS IN HONOUR OF WANG TIEYA ch. 45 (Ronald St. John Macdonald ed., 1993); *Conference on Changing Notions of Sovereignty and the Role of Private Actors in International Law*, 9 AM. U. J. INT'L L. & POL'Y 1 (Fall 1993); THE TRANSFORMATION OF SOVEREIGNTY: PROCEEDINGS OF THE EIGHTY-EIGHTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (1995). Yet the fact remains that certain gen-

sovereignty treats the relationship among states in forming the international order as parallel to the relationship among citizens in forming the order that is the state. In this way, it obscures important aspects of the relationship between the citizen and the state, and obstructs the proper functioning of that relationship on the international plane. If international law is to "be contemporary" in the twenty-first century, it must acknowledge the principal social contract focus on the relationship between the citizen and the state for purposes of defining sovereignty in both national (internal) and international (external) relations.

The development of international law in the twenty-first century will be determined by the continuing evolution of the concept of sovereignty. A return to, and re-examination of, fundamental historical and philosophical underpinnings of the concept of sovereignty in western thought will be required if this evolution is to have a constructive effect on international law.[3] In order to analyze the reasons for this reconsideration of earlier concepts, it is worth reviewing those concepts and our deviation from them over time.

Through this review, and through a discussion of important developments in twentieth century international law, the need for a redefinition of current notions of sovereignty emerges. In this essay, that effort at redefinition returns to earlier concepts of subjects joining to receive the benefits of peace and security provided by the sovereign. It diverges from most contemporary commentary by avoiding what has become traditional second-tier social contract analysis. In place of a social contract of states, this redefinition of sovereignty recognizes that international law in the twentieth century has developed direct links between the individual and international law. The trend toward democracy as an international law norm further supports discarding notions of a two-tiered social contract relationship between the individual and international law.

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eralizations about sovereignty are at the core of current understandings of international law, and in order to develop any projections about the course of international law such generalizations must be addressed.

3. It is, after all, out of western thought that the concept of sovereignty arose and became so central to the development of international law as we now know it.

I. *HISTORICAL UNDERPINNINGS OF CURRENT CONCEPTS OF SOVEREIGNTY*

In his *Leviathan*, Hobbes saw a world where goods are scarce and desires unbounded, with each person focused on getting as much as possible and preventing others from getting anything that might contribute to that person's preservation and well-being.[4] In order to escape from the resulting "miserable condition of war,"[5] a sovereign is established through our mutual covenant; and we 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."[6] To Hobbes, the sovereign's role in international relations is an extension of the sovereign's role at home. 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 beforehand (for preserving of peace and security, by prevention of discord at home and from abroad) and, when peace and security are lost, for the recovery of the same.[7]

In sum, the sovereign is to provide security through peace and common defense of the individuals who have covenanted for that purpose.

Harold Laski tells us that, "[s]overeignty, in the sense of an ultimate territorial organ which knows no superior, was to the middle ages an unthinkable thing."[8] The "oneness" of humanity was to be found through the pervasive unity of God (*jus divinum*) in the *Respublica Christiana*.[9] Like Hobbes' later focus on the delegation of individual authority to the state, medieval notions of sovereign power included limitations — based on ab-

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4. THOMAS HOBBES, LEVIATHAN xiii [3]-[4] (E. Curley ed., 1994); *see* Joan Wellman, Prudence, Science, and the Sovereign (unpublished manuscript on file with the Author).

5. HOBBES, *supra* note 4, at xvii [1].

6. *Id.* at xvii [13].

7. *Id.* at xviii [8].

8. HAROLD J. LASKI, THE FOUNDATIONS OF SOVEREIGNTY AND OTHER ESSAYS 1 (1921).

9. *Id.* at 2; *see* Helmut Steinberger, *Sovereignty*, 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 397, 398-400 (1987) (discussing *Universitas Christiana*).

stract moral rights.[10] Thus, there were bounds beyond which the sovereign could not pass in its relations with the individual, and individual rights which were not alienable to the sovereign.

The Reformation destroyed any concept of a singular *Respublica Christiana*, replacing it with the notion of state supremacy, in which the sovereign "ceases to think of superiority as existent outside itself."[11] A new era of equal sovereigns began with the 1555 Peace of Augsburg and became more formalized in the 1648 Peace of Westphalia. Concepts of territorial limitation of sovereignty brought with them notions of supremacy within that territory:

> The state is that which has no superior, wherefore all other forms of social organization, as guilds for example, are subject to its control. The dawning sense of nationalism was at hand to give that concept an enviable sharpness of definition. There was thenceforth to be no lord of the world, imperial or otherwise, for the simple reason that there was no single world. There were England, France, and Spain. The life of each was to be centralized within its ultimate sovereign. . . . . The group was not destroyed, but put in fetters. The state emerges, as the middle ages pass, as the institution to which has been transferred the ideal of unity.[12]

With the replacement of the *Respublica Christiana* by the state, "the significance of nationality became apparent, for it gave to the glorification of the state an emotional penumbra it could have secured in no other fashion."[13]

The evolution of sovereignty replaced concepts of a "universal ethical right," with the idea that the state makes, interprets and applies its own laws. Jean Bodin's *De la Republique* reflected this evolution, with its sanction of absolute sovereignty resting in

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10. *See* HOBBES, *supra* note 4, at xiv [8].

> Whensoever a man transferreth his right or renounceth it, it is either in consideration of some right reciprocally transferred to himself or for some other good he hopeth for thereby. For it is a voluntary act, and of the voluntary acts of every man the object is some *good* to himself. And therefore there be some rights which no man can be understood by any words or other signs to have abandoned or transferred.

Id. "It was, for instance, general medieval doctrine that all princely acts which go beyond the moral purpose of the state were null and void." LASKI, *supra* note 8, at 9.

11. LASKI, *supra* note 8 at 12.

12. *Id.* at 12-13.

13. *Id.* at 15.

the state. "*Jus est quod jussum est*" became the "essence of the state."[14] This did not, however, remove the tension between state power and religious (primarily Papal) power, as philosophers (including Bodin) continued to seek ways to limit the absolute power of the state in order to provide for religious domination of, exceptions to, or freedom from, the power of the state.

Laski describes works of the post-Reformation in terms reminiscent of Aristotle's *Politics*. Thus, the state "differs from every other form of organization in that it defines a common ground upon which the interests of men may be held identical."[15]

> In any conflict, the state is *a priori*, bound to triumph because the aspect of man that it expresses is common to us all. For the state as a philosophic conception, there is neither Jew nor Greek, neither bond nor free. We meet there upon the common ground of identical citizenship. That is why the state is held to be the ultimate expression of the social bond. All other forms of organization have a certain partial character about them. The state embraces all men by its territorial nature. It is universal because it is the one compulsory form of association.[16]

Throughout history, sovereignty has had both an internal and an external component. In terms of providing security for the individual within the state, the latter of these components has both formed the source of consent to the second-tier social contract and provided unity internally through the fear of external aggression. Laski believed that "to move from that unified sovereignty which is a protective against external attack to the more complex problems of internal arrangement has no necessary validity."[17] Thus, the internal aspects of sovereignty carry with them the problems of submission of subjects to the sovereign, limits on the authority of the sovereign, and the need to determine a sovereign representative.

It is the external nature of sovereignty that has provided the grist for international legal scholars. Louis Henkin demon-

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14. *Id.* at 17.

15. *Id.* at 26.

16. *Id.* at 26-27. Aristotle, of course, would not have made the same "neither bond nor free" statement, with *The Politics* providing substantial discussion of the "necessary" relationship between slave and master.

17. *Id.* at 27.

strates the problem of moving from concepts of internal sovereignty to the external realm as follows:

> As applied to states in their relations with other states, "sovereignty" is a mistake. Sovereignty is essentially an internal concept, the locus of ultimate authority in a society, rooted in its origins in the authority of sovereign princes. Later it was democratized from Crown to people ("popular sovereignty"), but that too is a strictly domestic notion. Surely, as applied to the modern secular state in relation to other states, it is not meaningful to speak of the state as sovereign.[18]

Like others, however, Henkin describes international relations much like a second-tier Lockean social contract. For Henkin, this social contract is found in the U.N. Charter, with the Article 2(4) prohibition on the use of force as its "basic norm."[19] In order to avoid "citizen's actions" that would constitute improper intervention by one state into the affairs of another, humanitarian and other violations of international law require that a concerned state, "call the police, the Security Council, now rehabilitated."[20]

While I share Henkin's opinion that current concepts of sovereignty applied in the international realm are both outmoded and misguided, this does not lead me to the same conclusions. I believe important twentieth century developments in international law set the stage for something more than a second-tier social contract of states coalescing in a high-minded but often impotent vehicle for real cooperation. The United Nations is a uniquely important development in international law and relations, but we can neither be satisfied with its operation to date nor be assured that its current weaknesses will not remain evident in the future. International law must "remain contemporary" in all its realms, not just in the United Nations structure, nor merely in military peacekeeping functions.

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18. Louis Henkin, *The Mythology of Sovereignty, in Notes from the President*, ASIL NEWSL., Mar.-May 1993, at 1.

19. *Id.*

20. *Id.*

II. *TWENTIETH CENTURY EVOLUTION OF INTERNATIONAL LAW AS THE FOUNDATION FOR A TWENTY-FIRST CENTURY EVOLUTION OF SOVEREIGNTY*

The development of international law in the twentieth century already has tested current definitions of sovereignty and set the stage for an evolution in our approach to international relations generally, and international law in particular. Several aspects of this development are important to considerations of the concept of sovereignty.

A. *Democracy as a Developing International Norm*

Henkin finds it amusing to speculate "on what international law would look like today had there been no Russian Revolution, no world Communism, no Cold War."[21] He finds it more fruitful to study what did happen during that period and seek to overcome whatever frustrations or distortions attributable to conflicting ideology might now be overcome. This exercise suggests two subjects of study. The first is the bipolar power structure that led to a "third world" in which the conflicts of the other two were often carried on. Henkin uses this subject to address problems with the concept of nationality as the tie between the individual (whether natural or juristic) and the state, ultimately suggesting a reevaluation of both nationality and sovereignty.[22]

Henkin's reflections on the end of the Cold War also suggest that we consider the relevance of the rising tide of democracy throughout the globe. Some have even gone so far as to suggest that democracy can be considered in normative terms in the international legal structure, and that people now have a "right" to a democratic form of government. Whether or not such a norm has been established, massive shifts toward democratic government bring with them new considerations for the concept of sovereignty. The sovereign "prince" gives way to the sovereign "we," as the people *are* the government. The representative nature of existing democracies limits the completeness of this translation, but its importance cannot be ignored. If "we" are the sovereign, then "we" are the subjects to be addressed in

21. Henkin, *supra* note 1, at 1.

22. *Id.*

constructing order and providing security in international as well as domestic relations.

B. *Developments in Relations Between Private and Sovereign Parties in International Law*

One of the most striking developments of international law in the twentieth century is the extent to which the private party (i.e., the non-sovereign) has become the subject of rules of international law. This was reflected in the Libyan oil arbitrations of the 1970's, with the determination that private parties who enter into relationships with sovereigns can choose to have those relationships governed by international law (in place of or as a supplement to national law).[23] This concept was extended in other arbitrations applying international law to private/sovereign long-term development agreements — even where no choice of law was expressed.[24] It further evolved and found formal recognition in the establishment of the International Centre for the Settlement of Investment Disputes ("ICSID"), and in subsequent investment treaties providing for referral of private/sovereign disputes to ICSID. Thus, the application of international law clearly has expanded beyond sovereign/sovereign relations to cover private/sovereign relations.

During the same period, sovereigns have become more often subject to municipal law. Nowhere is this development as apparent as in the evolution of the restrictive theory of sovereign immunity. The idea that a foreign sovereign is absolutely immune from suit in a national court has given way not only to suit on waiver of immunity, but suit for violations of international law, for personal injury claims, and — perhaps most notably — for claims based on "commercial activity" of the sovereign. Thus, just as private parties who deal with sovereigns may now have their conduct judged according to international law, sovereign parties dealing with private parties are more likely to have their conduct considered in national legal systems.

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23. *See, e.g.*, Award on the Merits in Dispute Between Texaco Overseas Petroleum Company and the Government of the Libyan Arab Republic, 17 I.L.M. 1 (1978).

24. *See, e.g.*, Arbitration of Dispute in the Matter of Revere Copper and Brass, Inc. and Overseas Private Investment Corp., *reprinted* in 17 I.L.M. 1321 (1978). One cannot help but acknowledge the role of arbitration — in which the parties select the decision-maker rather than submit to a national judiciary or even to an international judicial mechanism — as a facilitator of these changes.

The extension of international law to the conduct of private parties is a divergence from the notion that international law could apply only to states. It thus fractures the second-tier social contract structure by bringing first-tier social contract subjects directly into second-tier relationships. In doing so, it coalesces with the rising tide of democracy to bring the individual "into" the international legal framework.

C. *Development of Multilateral Mechanisms for Dispute Settlement*

The twentieth century has seen history's most successful efforts to set up arrangements for the peaceful settlement of disputes involving states. The PCIJ and ICJ have provided over seventy years of continuity for a World Court that, while seldom as busy as international lawyers would like, has provided its share of successful dispute resolution. The completion of the Uruguay Round trade negotiations takes dispute resolution in the GATT framework to a new level, enhancing and improving what has been an extremely effective forum for the settlement of economic differences. As noted above, ICSID has seen success in establishing a forum for disputes between states and private investors.[25] On a regional level, the European Court of Justice has become so busy interpreting the European Union's set of treaties and subsidiary legislation that a new Court of First Instance has been established.

Notable in these dispute resolution developments is the focus on economic activity involving private parties. With the exception of some of the World Court cases — and a few fundamental EC and EU structural cases before the European Court of Justice — most of the disputes addressed by these institutions are tied in some manner to private economic conduct. Thus, twentieth century successes in international dispute resolution necessarily have touched on the relationship of the individual (whether natural or juristic) to international law.

D. *Development of Binding International Protections for Individuals*

Hobbes' concept of sovereignty carries with it the right of the sovereign to punish the subject's refusal to obey. The subject may refuse to obey, however, when the right of self-preserva-

25. Here one must acknowledge that many would limit kudos for ICSID in light of failures to obtain enforcement of decisions once rendered.

tion overrides the obligation to keep the covenant and obey the sovereign. As the sovereign retains the right to punish any refusal, such a subject can "have the liberty to do the action for which he is nevertheless without injury put to death."[26]

The twentieth century has seen the development of multilateral frameworks for protection of fundamental rights of the individual against the state. Through the European and Inter-American Courts of Human Rights we have seen steps toward limits on the state enforced through international legal mechanisms. Current efforts before the war crimes tribunal established to consider conduct in the former Yugoslavia and the International Law Commission's draft Convention for an International Criminal Court demonstrate promise of addressing such protections by holding accountable the persons who claim to exercise power on behalf of a sovereign. Once again, the century has seen the individual's rights and role elevated in international law.

E. *Regional Frameworks as Global Models*

Subjects and states both are involved in the quest for peace and security. These goals are the purpose of the fundamental social contract, and the resulting obligation of the state. The European Union provides a successful example of a multilateral system of laws affecting both states and individuals directly. Donat Pharand has described the European success effectively (although his words retain the implications of a second-tier social contract):

> The fact remains that there is a need in the international community for the system of sovereign states to evolve in such a way that a greater degree of peace and security in the world becomes possible. After the two world wars, Europe has understood that need and has evolved accordingly. It began with economic integration and is gradually developing a regional political system which might eventually serve as a model for the rest of the world. States of the European Community have exchanged a lesser sovereignty for a greater security and prosperity. Even in the delicate field of human rights, the twenty-one member states of the Council of Europe are now parties to the most highly developed instrument in the world. Since 1991, an individual may take a complaint

26. HOBBES, *supra* note 4, at xxi [17].

> personally to the European Court on Human Rights, providing the petition has been declared receivable by the Human Rights Commission.[27]

Such a model bodes well for the possibility of wider multilateral adoption of a broader rule of law. In some instances, the World Trade Organization (as successor to the GATT system) provides the opportunity to do so in the economic realm. At any rate, the European example represents another important twentieth century development of international law by providing rights of peace, security, and economic benefit directly to individuals.

F. *The Elimination of the Liberté de Guerre*

One of the classic elements of sovereignty retained in international law through the nineteenth century was the state's right to go to war to settle disputes, the *liberté de guerre*.[28] The post-World War I recognition of a general obligation to seek peaceful settlement of disputes has matured into the prohibition on the threat or use of force found in Article 2(4) of the U.N. Charter. This is no minor achievement. While it may provide no direct implications for the individual in international law, it has major implications for the ability of the state as sovereign to provide peace and security. By removing a principal impediment to peaceful international relations, it facilitates endeavors to pursue the ultimate goals of sovereignty on behalf of citizen-sovereigns.

III. *TWENTY-FIRST CENTURY EXTERNAL SOVEREIGNTY*

Each of these developments represents significant change in concepts of international law. No longer is state conduct immune from international scrutiny, or even from sanction. Mechanisms are being created through which "sovereign" conduct is held accountable to international norms — without the ability simply to claim lack of continuing consent to those norms. These mechanisms demonstrate that the nineteenth century notion of a second-tier social contract is no longer appropriate to the conduct of international relations. International law has begun to run directly to the individual. The state remains the organ through which the individual is represented in the development of international norms and mechanisms; but it may not

27. Pharand, *supra* note 2, at 33.

28. *See* Steinberger, *supra* note 9, at 407-08, 410-11 (1987).

always interfere when those norms are applied and those mechanisms are implemented.

As the world shrinks through developments of transportation and technology, so does the distance between the individual and international law. Some in government are threatened by these developments and what they see as "giving up sovereignty." In the United States, this debate played out recently in the decision to implement the Uruguay Round agreements.[29] Yet, if the role of the sovereign is to provide security for its subjects, and effective means present themselves for increasing security through international law, then the role of the sovereign must be to participate in the development of that law. It is not an abdication of sovereign authority to delegate functions and authority to a global system of law; it is in many cases an abdication of that authority not to do so. This realization may prove a difficult adjustment for political processes still entrenched in dual social contract relationships of the nineteenth century. It should not prove difficult, however, if international legal developments of the twentieth century are properly recognized as creating the bridge to a new international legal order.

CONCLUSION

If the role of the sovereign is to provide security, and strengthening the international rule of law results in increased security, then the role of the sovereign must be to strengthen the

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29. Compare, for example, the statements of Senators Helms, Thurmond and Byrd discussing Helms' proposed "Sense of the Senate regarding the need to protect the constitutional role of the Senate," at 140 CONG. REC. S10,582-591 (daily ed. Aug. 4, 1994), with those of Senator Dole, "Dole Cites Benefits of World Trade Agreement," in a press release of Dec. 1, 1994.

The core of the external sovereignty problem in this context is nicely addressed in the following statement:

> [I]n one real meaning of the word, sovereignty is not something an individual can give up: individuals give up their *rights* (which they have by nature) to act exclusively out of short-term self-interest when they establish a sovereign, but they do it because cooperation and mutual protection is ultimately in their long-term self-interest. By the same reasoning, and even on the two-tier picture, sovereignty is not something a state can give up to other *states*: particular commonwealths can institute a mutual authority out of long-term self-interest; they can agree not to exercise some of the rights conferred on them by their own subjects. Some of the "relinquishing sovereignty" business is just a conceptual confusion: sovereignty is a relationship between governed and governor, not a feature of individual people or states.

Memorandum from Joan Wellman to Ronald Brand (Mar. 8, 1995).

international rule of law. If this is to be accomplished by delegating traditionally "sovereign" functions to an international body, then so be it. In a democracy-oriented world, the representative of the citizen-sovereign should in fact take every opportunity to enter into legal arrangements, whether national, regional, or global, that will increase security for the citizens. That is the sovereign function.