STATE SOVEREIGNTY AND GLOBALIZATION: ARE SOME STATES MORE EQUAL?

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I. INTRODUCTION

The world has always been changing, but never so rapidly and so dramatically as today. The surface of the Earth is changing daily as new buildings, new cities, and new roads emerge. Never before have there been so many newborns with life expectancies so high. But the threat to human life on planet Earth has also never been so serious. The future, be it for better or worse, has never been so dependent on human activity. It took many years for the conditions for life to develop on Earth. They could be destroyed in a moment by the use of nuclear weapons or in a couple of generations by careless treatment of the environment.

The density of population, development of communications and information technology, and the previously unimaginable impact of human behavior on the global future has made all of us citizens of the world and extremely mutually interdependent. At the same time, “the consciousness of the right of every individual to control his or her destiny” is growing worldwide.¹ It is a serious challenge to reflect these changes in transforming old or creating new social institutions.

For centuries, states have been both the key instruments for the regulation of social life on their territory and the exclusive subjects of international relations. National sovereignty was perceived as the highest authority within the state and a prerequisite for granting equal status with other states in

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¹ See Kofi Annan, Annual Report to the General Assembly 1999, Press Release SG/SM 7136 GA/9596. Secretary General relates “individual sovereignty” to the spreading of the “consciousness of the right of every individual to control his or her destiny.” Id.
Today, state sovereignty is also subject to change. As a consequence of the need for global coordination in the increasingly interdependent world and the demands that the most important individual rights be protected globally, the number and competencies of international organizations are increasing, and international law is developing quickly.

States are faced with the dilemma of whether to try to preserve their traditional competencies or to accept international authority in various areas from environmental protection to human rights. This dilemma is defining national positions on the establishment of ad hoc and permanent international criminal courts. If we accept the universality of core human rights and the need for universal rule of law, why not accept international mechanisms that can efficiently protect them? But are states really willing to submit their own citizens to international courts over which they have no influence? Finally, because it is obvious that for better or worse, the process of globalization will continue, what does this prospect mean for state sovereignty?

II. SOVEREIGNTY

Sovereignty is a legal and political concept that has been formed—and transformed—depending on the specific circumstances of the particular time and place. It has its origin in constitutional law as an answer to the basic question: who is entitled to the supreme authority within the state? More recently, sovereignty has also become an important concept in international law, designating the characteristics of a state that qualify it to be treated as equal to the other states.

Although some earlier interpretations of sovereignty were different, the concept of sovereignty as an attribute of the "ultimate territorial organ which knows no superior" dates from the 16th century. Jean Bodin articulated the first modern view on sovereignty in his famous book Les Six Livres de la Republique, published in 1576. Sovereignty is interpreted as the supreme power over the citizens and subordinates that is not subject to the limitations of the law. Sovereignty can neither be delegated nor divided. The sovereign

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3 Ronald A. Brand, Essay: The Role of International Law in the Twenty-First Century: External Sovereignty and International Law, 18 Fordham Int’l L. J. 1685, 1687-88 (1995). According to Harold Laski this interpretation was still unthinkable in the middle ages because "[t]he 'oneness' of humanity was to be found through the pervasive unity of God. . . ." Id. at 1687.
4 See Bodin, supra note 2, at 28.
cannot be subject to the command of another, "for it is he who makes law for
the subject, abrogates law already made, and amends obsolete law."5

Bodin's ideas certainly were not previously unheard of. The notion of the
ruler not being subject to positive law is clearly contained in Ulpian's
statement: "Princeps legibus solutus est." However, at the dawn of the
formation of nation states, conditions were favorable for the concept of
sovereignty to develop and produce far reaching effects on legal and political
reasoning.

Sovereignty became the cornerstone for the development of the modern
nation state. Not surprisingly, it has occupied the minds of numerous legal
scholars and political scientists for the past few centuries.6 However, it seems
that Bodin's ideas tended to be—and to quite an extent still are—interpreted
in a one-sided manner. It is true that, according to Bodin, from the view point
of positive law the sovereign is above the law. However, this does not relieve
him "from the obligation of upholding the dictates of justice or of the moral
duty to obey the law."7 Although not subject to positive law, the sovereign has
to comply with the rules of the natural law.

The idea of placing limits upon sovereignty has been specially elaborated
in the Dutch political and legal doctrine of souvereiniteit in eigen sfeer.8
According to this doctrine, different social structures have different identities
and each should be sovereign in its own sphere.9 The competencies of
different social entities cannot be derived from one another but are inverted in
the typical structure of the social entity concerned. There is one sovereignty
but only within the limits of that entity's own sphere. In fact, there are
"sovereignties" in the sense of the highest authorities in different social

5 Id.
6 For an extensive historical review, see Johan D. van der Vyver, Sovereignty and Human
Variations and elaborations of Bodin's ideas could easily be traced in the doctrines of Samuel
Pufendorf. See id. at 330 (finding the sovereign as "the only original source of positive law and
as such is not subject to the laws enacted by himself"). These ideas can also be found in the
works of Christian Wolff ("sovereignty belongs to him who possesses the supreme and
indivisible power within the state") and John Austin ("[S]overeignty, which must have the
attributes of continuity, indivisibility, and illimitability is an essential prerequisite of the power
to set positive law. . . ."). Id. at 330-31.
7 Id. at 326-27.
8 Elements of the doctrine were set by Johan Althusius at the brink of the 16th and 17th
century, but the expression dates from 1862 when Guillaumme Groen van Princterer used it to
distinguish the scope and the origin of competencies of the church as compared to those of the
state. See id. at 343.
9 Examples of such structures are the state, church, family, school, and corporation.
entities, which are autonomous in their own sphere. The basic intent of _souvereiniteit in eigen sfeer_ is to avoid concentration of power in the state and to preserve the autonomy of different social structures. Each entity should be concerned with its own business and, in its relationships towards other social entities, should strictly adhere to a hands-off policy.\(^{10}\)

International law recognized the importance of sovereignty as well and adopted this principle as one of its cornerstones. The constitutional aspect of sovereignty is therefore often referred to as "internal" and the international aspect as "external." The essence of the concept of external sovereignty is that only a sovereign state could be considered independent from other states and hence an equal member of the exclusive international club.\(^{11}\) Sovereignty in this regard reflects certain characteristics or acts as a fulfillment of necessary criteria, which makes a state eligible for such a status.

In the traditional concept of sovereignty we can identify several assumptions relevant to international law: that only states are in charge of creation and implementation of international law, that international law is made exclusively with the consent of states, and that no one is allowed to interfere with the way in which a state treats its own inhabitants.\(^{12}\)

Whether one speaks of the internal or external aspects of sovereignty, time has brought about significant changes. While it was quite consistent to speak of the highest authority as that of the monarch over his subjects, now that sovereignty belongs to the people, what does sovereignty really mean? Does it mean that people are the highest authority over themselves? What does sovereignty mean in the sense of unrestricted behavior of a state within its own territory in light of the development of internationally protected human rights and humanitarian law? How does the supposedly consensual character of international law cohabitate with the United Nations Security Council’s decision to impose war crimes tribunal in certain states or with humanitarian intervention?

It is obvious that states are no longer free to simply pursue whatever policy they wish within their borders. They are limited by the powers of international organizations, emerging humanitarian and human rights law, and rights granted to each and every individual. The changing concept of sovereignty is related to some broader processes of change, so in order to understand the

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\(^{10}\) See van der Vyver, _supra_ note 6, at 348.

\(^{11}\) See Jean Bethke Elshtain, _Sovereign God, Sovereign State, Sovereign Self_, 66 _NOTRE DAME L. REV._ 1355, 1370 (1991). Less exclusive than it used to be, the club now encompasses the greatest majority of countries. Historically, this was not the case.

changes regarding sovereignty, we have to take these changes into account and identify the relevant trends.

III. DEVELOPING TRENDS: GLOBALIZATION

If there is a single phenomenon most relevant for the various developmental trends and relevant for sovereignty of the state and its future, it is globalization. Globalization itself is not an entirely new phenomenon. There have always been some global travelers, global exchange, and global aspirations. There have also always been global problems, but the human capacity to create them, or to solve them, was lacking. There was a certain awareness of globality and global concerns, but there was no real possibility to influence them. Therefore, the problems were simply registered and accepted as a part of our destiny.

Historically, we have experienced some aspects of globalization, but what is going on at present is unprecedented. Shrinking space, shrinking time, and disappearing borders are linking people’s lives more deeply, more intensively, and more immediately than ever before.

The technological base of globalization is provided by breakthroughs in communication and information technologies. People, goods, services, and especially information are circling the globe in a previously unimaginable way. “More than $1.5 trillion is now exchanged in the world’s currency markets each day, and nearly a fifth of the goods and services produced each year are traded.”

At the push of a button, we can obtain information from any corner of the world regarding what is going on in any other corner of the world. Through technological advances, it has become quite possible to transact business in several places around the globe at the same time; in fact, doing so is becoming a daily requirement for more and more professions. Different nations and their

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13 There were certain spheres of social life and some times in history where and when globalization has been clearly visible. For example, when Alexander the Great was merging East and West, not only politically but also intellectually and culturally through the practice of Hellenism, joining Asia, Europe, and Africa, it might not have been fully global, but it was not very far from it either. The same could be said about the political and legal influence of the Roman Empire a couple of centuries later. Also, commerce and art have always had a tendency to cross state borders and become global. The same could be said of most religions that, in general, have global aspirations and that, as a side effect, have led to conflicts through their spread and domination.

14 See UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1999 1 (1999).

15 Id.
problems, beliefs, and perspectives enter our homes through the internet and through the global coverage of the media. The world is no longer a collection of relatively autonomous neighborhoods that are only marginally connected and generally immune to events occurring elsewhere; rather, it has become a "global village."

It is an unprecedented and challenging situation, offering new opportunities but also exposing us to new risks. Globalization makes new technologies known and available worldwide. It facilitates the exchange of knowledge and ideas, which leads to their rapid advancement. Markets are expanding, enabling the full use of national comparative advantages and economies of scale. All this carries a promise of increasing productivity and hence a better quality of life.

However, there is a dark side to globalization as well. AIDS existed before, but increased travel and migration has made it global.16 Terrorists are spreading their networks globally: they often originate from one country, are financed from another, and act in a third, using weapons provided in a fourth, against citizens of a fifth country. Other criminals are also using the benefits of expanding markets. Money laundering operations are by and large transnational. In 1995 the illegal drug trade was estimated at 8 percent of the world's trade, more than the trade in motor vehicles or in iron and steel.17

Globalization exposes national economies not only to the benefits but also to the instabilities related to the changes of the global market. The financial crises in Asia and the Russian Federation impacted economies all over the world. A number of the developing countries have become victims of the world market—perhaps due to their inability to adapt to it—and are now even worse off.

Globalization also creates a threat of cultural domination. Although only 10 percent of people speak English worldwide, almost 80 percent of all websites are in English.18 Further, "[t]he single largest export industry for the United States is not aircraft or automobiles, it is entertainment—Hollywood films grossed more than $30 billion worldwide in 1997."19 Therefore, it is not surprising that in negotiations on the accession of new members to the World

16 See A Turning-Point for AIDS, ECONOMIST, July 15, 2000 (noting that some 34 million people are infected with the AIDS virus).
17 For examples of the dark side of globalization, see HUMAN DEVELOPMENT REPORT 1999, supra note 14, at 4-5.
19 See id. at 4. The use of English and the ability to use information technology represents the literacy of the 21st century.
Trade Organization (WTO), the issues of telecommunications and the entertainment industry have become critical.

We have identified that the technological basis of globalization is the development of communication and information technology. The main social effect of globalization is growing interdependence. People are becoming more and more aware that we are all in the same boat. We share the same natural resources, the same nuclear risks, and the same economic and financial flows. Increased interdependence requires coordination of policies that should reflect a more globally oriented attitude. Isolationism is unreasonable and unacceptable because activities in one country affect other countries and impinge on the rights of their citizens as well.

The only way to fight AIDS is to fight it globally, pooling knowledge and resources. The key to fighting terrorism is to fight its manifestations internationally and to address its root causes. The United Nations Convention Against Transnational Organized Crime is an important effort to confront the global criminal threat. If we all suffer from the instabilities of the global market and the emerging economic system, we should logically coordinate global measures and mechanisms to keep them stable. International cultural exchange is a part of globalization, but international mechanisms to protect and promote cultural diversity should also be developed.

It seems clear that we have become more interdependent in many ways. Events taking place in other countries affect our interest directly and indirectly. Both international and internal conflicts create refugees fleeing from their homes and looking for safety and prosperity outside the borders of their own states, quite often in countries on a different side of the globe. The wars and armed conflicts are not only creating refugees but they are also cutting lines of communication, impeding trade, blocking the use of natural resources, and leading to their wanton waste and destruction. Finally, the

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20 Croatia and two other countries, in spite of the conclusion of all bilateral agreements have been stymied in their goal of accession to the WTO due to a dispute between France and the United States on audio-visual services. Namely, a liberal agreement on audio visual services with the United States by countries negotiating accession was objected to by the French authorities thereby placing the applicant countries, the United States, the European Union, and France in a new negotiating environment involving the protection of French cultural interests balanced against the free flow of audio-visual services.


22 A resolution was adopted at the 54th Session of the General Assembly deciding to convene a conference of plenipotentiaries in 2000, with a view to finalizing and adopting the Convention and opening it up for signature at the Millennium Assembly. See The Millennium Assembly of the United Nations (visited May 17, 2000) <http://www.un.org/millenium/>. 
development of arms technology is jeopardizing not only neighboring states but also the future of human life on Earth.

Environmental protection, a key to the maintenance of conditions for human life on Earth, represents a special case of human interdependence, requiring coordination and cooperative action. For centuries, the Earth and environment were predominantly treated as if they were indestructible. The environment was regarded as a mere reservoir to be exploited for economic gains. Although the environment may be indestructible, "conditions favorable to human life" on Earth are not. If the environment is not protected, these conditions will continue to deteriorate.

Environmental issues are therefore increasingly becoming a national and international security issue. The emerging concept of "environmental security" is important because it reflects the growing potential for internal and international conflict over scarce resources. The concept is indicative of the importance of "maintaining an ecological balance" and in demonstrating the need for "prevention and management of conflicts precipitated by environmental decline." The potential for conflict will be reduced only if an ecological balance is maintained and resources protected.

Acid rain, global warming, and ozone depletion are typical environmental threats that have transboundary consequences. The way to overcome them is not to stop development but to cooperate, taking care to balance between environmental protection, social development, and economic growth. Global cooperation is a prerequisite in this respect.

The interdependence of peoples' lives and the need for cooperation calls for a certain level of shared values, beliefs, and commitments. Information and communication technology, especially global media, helps to develop them. The Conference on Security and Cooperation in Europe in its document of the Moscow meeting on the Humanitarian Dimension in 1991 explicitly stated that issues relating to human rights, democracy, and the rule of law are of

23 It is interesting to note that this is not true for all cultures. For example, Australian Aborigines or North American Indians demonstrate a high respect for nature and nonrenewable resources.
24 Eshbach, supra note 21, at 271.
26 Id. at 1742.
27 Id.
international concern because the respect for these rights and freedoms constitutes one of the foundations of the international order. 28

When the Universal Declaration on Human Rights (UDHR) was accepted fifty years ago, it was perceived by many as merely a list of good wishes. It has since proved to be an efficient program of action that has inspired different nations, international and national organizations, non-governmental organizations (NGOs), and many individuals to fight for recognition and protection of the human rights contained in the UDHR.

The scope of the benefits and influence of human rights defenders have all evolved significantly from what they were half a century ago. 29 Especially since the World Conference on Human Rights in Vienna 1993, there is an ever growing acceptance that the promotion and protection of human rights is a legitimate concern of the international community. An increasing number of states have recognized the value of working for international cooperation in the area of human rights and have accepted various forms of human rights assistance, monitoring, and field presence as supplementary to national mechanisms.

In spite of these clearly positive developments in the international protection of human rights, some serious obstacles still remain. Two main obstacles are the isolationism of some states and the misuse of human rights for specific political ends. Some states demonstrate their isolationism by rebuffing international concern for human rights in order to protect national sovereignty or preserve certain traditional customs, both of which are used as a shield for violating human rights. Further, violations of human rights occur in the application of double standards to evaluate human rights in accordance with specific political interests. 30

Globalization is a fact. It has a technological basis (the development of communication and information technologies) and an economic (integrated trade and finance), social (interdependence), and ideological content (universal acceptance of core value and beliefs, including human rights). Globalization requires the introduction of some sort of international coordination that is impossible without the development of suitable regulatory structures and mechanisms. In this process, international organizations and international law have a special role.

30 See id. at 144.
IV. INTERNATIONAL ORGANIZATIONS AND ASSOCIATIONS

Whether globalization brings more benefits or difficulties is still uncertain. In a speech delivered to the UN General Assembly, President Clinton, certainly not an enemy of globalization, expressed concerns about the possible ambiguity of its effects:

Will globalism bring shared prosperity, or make the desperate of the world even more desperate? Will we use science and technology to grow the economy and protect the environment, or put it to risk—put it all at risk in a world dominated by a struggle over natural resources?31

The answer to these questions depends on whether we will be able to develop efficient mechanisms of global regulation or not. What sort of regulation could that be? In an interdependent world, domination is becoming an unacceptable way to resolve conflicts of interests. The free-will acceptance of some common guidelines by those concerned seems to be the only plausible solution. Therefore, it is no surprise that more and more people are beginning to accept and respect the interests of others and are willing to cooperate for the benefit of all.

It is interesting to compare the process of urbanization and the regulatory structures and mechanisms that were developed as a part of it with the characteristics of the process of globalization and the global regulation requirements. Urbanization refers to the sharp increase in the population density of a given territory, leading to higher degree of interaction and mutual interdependence. Certain, typically urban, values develop that facilitate cooperation. Among these values are openness and tolerance. There is a pressing need for coordination and regulation that is not based on domination but is based on the need to develop a reliable framework of expectations and providing some generally useful services. Public services are specifically developed for these purposes, and they do not operate in favor of anyone or on the basis of any particular ideology but rather provide services to everyone and rely on technical rationality.

Some features of the process of globalization are strikingly similar. The world population is growing, and the degree of interaction is increasing exponentially due to the development of information and communication

31 President Clinton’s address to the 54th Session of the United Nations General Assembly, September 21, 1999.
technologies. Mutual interdependence is increasing as a consequence of trade financial integration, and common environmental and security concerns. A set of core values—including openness, tolerance, and universal acceptance of human rights—is being accepted globally. Finally, there is also a pressing need for coordination and regulation, and, as a result, international organizations and international treaties are growing in number and importance. These organizations and treaties are not intended to favor any one and are not based on any particular ideology. To say that the world is a global village is perhaps poetic. To state that the world is becoming similar to a “global city” might be more accurate.

The old paradigm of international relations, based on the assumption of sovereign states that act independently and take into account only their own interest, does not reflect the present reality of international relations. States are not the only actors of international relations any more, and they are far from being independent in both their international and internal actions.

Globalization is far too important to be left unmanaged, and adequate processes and structures are emerging. The governments and their partners in civil society are forming functional coalitions across geographic borders and traditional political lines in an attempt to influence decisions with global implications. International organizations and various associations of states are new and important actors in the international arena. Whether governmental or non-governmental, global or regional, international organizations are gaining importance. In recent years, their number, diversity of forms, and influence have increased rapidly.

Designating certain competencies to international organizations necessarily reduces the competencies of states. However reluctant, states are forced to accept it, all the while trying to maintain some sort of control over important decisions. The way the decisions are made by international organizations defines the way in which states try to retain their influence despite the relegation of competencies.

Certainly, we are still very far from a “world order.” However, little doubt exists that there is sufficient interaction between states to make the behavior of each a necessary element in the calculation of the other. Furthermore, groups of states share common interests and values and concede to be bound

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32 An example of issues which have led to shifts in global policy are the anti-land mine campaign and the campaign for Millennium Debt Relief. Another very important campaign of the same type concerns the establishment of the International Criminal Court.

by a common set of rules in their relations with one another. More and more often such states enter into some sort of institutional relationship or association.

Professor Gunning pointed out: "[O]n both the military and economic fronts, international relationships demonstrate an unparalleled level of interaction." Nations are forced to limit their ability to make unconstrained decisions for the benefit of coordination, predictability, and stability. In a hypothetical sense, we can speak about a new international "social contract" which is emerging. Only this time, the individuals are not the ones who give up some of their powers and sovereign rights and transfer them to a state for the benefit of safeguarding their interests (like in Lock's or Hobbes's writing). It is the states, upon the demand of their citizens and pressed by nongovernment organizations, that transfer some powers and rights to international organizations. Or better, it is individuals—the citizens—who remind the state that they are the ultimate source of sovereignty and who think that their interests are best protected if some of their powers and sovereign rights are transferred from states to international organizations. Individuals—the citizens—are the ones who decide to protect their interests best through transferring some powers to states and some to international organizations.

"Now, even where 'internal' affairs are involved, each nation is increasingly required to take into account the interests not only of neighboring countries but nations across the globe." The World Trade Organization (WTO), the Basel Accords, and the Montreal Protocol, which in fact regulate trade, banking, and the release of ozone-depleting chemical agents worldwide, represent the new global regulatory mechanisms.

It is hard to imagine global governance without a minimum of shared core values, standards, and attitudes, encompassing a broad spectrum of individuals, civil society, organizations, corporations, and governments. Particularly important is the protection of human rights contained in the UN Charter and UDHR. The world cannot stand aside when gross and systematic violations of human rights are taking place, as happened in Kosovo. However, it is also clear that intervention to stop violations—if it is to be approved by the majority of states—has to be accepted in a defined, mutually agreed, and transparent procedure made by a competent body. The Secretary General of the UN addressed this dilemma concerning intervention in his address to the fifty-fourth Session of the General Assembly: "[D]eveloping international

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35 See id. at 220.
norms in favour of intervention to protect civilians from wholesale slaughter will no doubt continue to pose profound challenges to the international community.  

V. INTERNATIONAL LAW

The international legal order was traditionally based on the sovereignty of states. According to the traditional view, the rules of international law are developed through explicit (treaties) or the implicit (customary law) consent of states. With the exception of *jus cogens*, "no state can be held bound to a rule of international law" if it has not consented to it.  

Increased global interdependence has lead to important changes in international law. It should not be surprising that if sharing a common destiny has become "a historical fact, a political fact, an economic fact, [and] a sociological fact," that this evolution should be reflected in international law as well. The process of transformation has been described as the "internationalization of the internal" law. "In some contexts, that development can be seen" as a part of a broader movement—"from private concern to public concern within a state, from national concern to transnational and international concern, from international concern to international law." 

A good example of such a process is the development of international environmental law and the penetration of international humanitarian and human rights law into what were traditionally matters of internal concern. The establishment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of Former Yugoslavia (ICTY) by a resolution of the Security Council and the imposition of its jurisdiction over the countries concerned, is a clear

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36 *See* Annan, *supra* note 1.  
37 *Brand, supra* note 3, at 1685.  
40 *Id.*  
proof that states and high state officials are no longer immune from international scrutiny, including international sanctions.

From a technical point of view, multilateral treaties represent an especially powerful instrument of transformation of international law. Their drafting sometimes takes a long time because the states feel uncomfortable with formulations that they consider inconvenient or a potential threat to their sovereignty. However, the state authorities are often pressured by other countries, civil society, and national and international non-governmental organizations to accept the treaties. Once the treaty is adopted, its impact is great due to its reach. Each multilateral treaty is equivalent to a great number of bilateral treaties that would be necessary to regulate the same issues. Some of them provide for mechanisms ensuring compliance with the obligations undertaken, such as monitoring by human rights treaty bodies, that add to their importance.

According to Brunnée, “As a legal order built upon the sovereignty of states, international law does not readily accommodate the development of rules and regimes premised upon ecological unity.” The process of adaptation, however, is still going on. “[S]tates’ rights to exploit their resources or pollute the environment” were initially limited if “their exercise caused significant environmental harm in the territory of another state.” However, “global implications” are now being taken into account as well, and “resources, such as the high seas, situated beyond the jurisdiction of any particular state,” are being protected as well. The environmental obligation of the newest generation also includes restrictions on behavior not linked to interference with the sovereign rights of any state, such as the regulation of global climate change and the preservation of biological diversity.

\[ \text{The formula which indicates how many mutual bilateral treaties are "covered" by a single multilateral treaty is } \frac{(n-1)x+1}{2}. \text{ This means that if 187 UN members are signatories to a treaty (} n \text{ in our formula), it is the equivalent of 17,391 bilateral agreements mutually concluded between the 187 states.} \]

Six committees have been established pursuant to the six core UN human right treaties to monitor their implementation: Human Rights Committee, Committee on Economic, Social and Cultural Rights, Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee on the Elimination of Discrimination Against Women, Committee on the Elimination of Racial Discriminations and Committee on the Rights of the Child.

Brunnée, supra note 25, at 1744.

Id.

Id.

Id.
Stockholm Declaration of 1972 represents a guideline of the development of international law in this respect. Among other things, it proclaims that man has the fundamental right to an environment of quality that permits a life of dignity and well being, and that he bears the sole responsibility to protect and improve the environment for present and future generations.

Although accepting the need for international mechanisms and legal regulation protecting common environmental interests is an important step, it does not solve the problem of their impact on national interests or facilitate the interests of certain groups of states. The Rio Declaration, for example, defined emissions levels for countries relative to their past record. As a result, countries that polluted more were allowed to continue to do so. The dissatisfaction of developing countries with the right of developed countries to allow much higher levels of emissions per capita (albeit lower levels of emission per head) has led to some creative solutions in the Kyoto Protocol and the Clean Development Mechanism. To encourage developed countries to help the developing countries lower their emissions through granting the developed countries some credit for their help is an example of the emerging awareness that in future environmental agreements the plurality of equally legitimate interests should be taken into account.

The development of the international protection of human rights is often hindered by the opposition of state authorities who fear that their sovereignty is being limited and that their internal affairs will be subject to international—and possibly hostile—interference. Taking into account that abuses of state power are the primary human rights problem, this fear is quite understandable. Therefore, international human rights protection is needed. While “international law has traditionally focused on the rights of those same nations in relation to each other,” international human rights instruments

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49 For example, the interests of the developing and the industrialized countries are often polarized in this respect.


52 See WORLD BANK, ENTERING THE 21ST CENTURY, WORLD DEVELOPMENT REPORT 1999/2000 42. We are not interested so much in the discussions at Kyoto and relating to the Clean Development Mechanism being fully fair to developing countries, but wish to point to the trends.
committed by states (which no longer are regarded as "domestic or internal matters").\textsuperscript{53} Therefore, states are often reluctant to adhere to international human rights instruments, especially to ones that provide for efficient monitoring mechanisms. On the other hand, pressure to protect human rights internationally is increasing. Therefore, if the acceptance of adequate human rights instruments is too slow, it is often preceded by the development of corresponding customary law.\textsuperscript{54} The UDHR, for example, was followed by some important human rights treaties, but it is itself also now often regarded as "‘an authoritative interpretation’" of the human rights provisions of the UN Charter, and as established customary law, "‘constituting the heart of a "global bill of rights.""\textsuperscript{55}

The legal protection of human rights develops through the following different channels: through multilateral treaties, the influence of the UDHR on national legislation, the interpretation of existing national and international legal provisions, and the unusually fast development of customary law under the influence of legal science, media, and the pressures of the civil society especially NGOs.

It seems that we have already reached the stage when "[g]overnments are not the sole and supreme masters within their own domain but are required to conduct their ‘own affairs’ subject to a public order of the international community of states," which takes into account global concerns.\textsuperscript{56} As stated by UN Secretary General Kofi Annan:

\begin{quote}
For in a world where globalization has limited the ability of States to control their economies, regulate their financial policies, and isolate themselves from environmental damage and human migration, the last right of States cannot and must not be the right to enslave, persecute or torture their own citizens.\textsuperscript{57}
\end{quote}

The state remains the organ through which the individual is represented in the development of international norms and mechanisms, but the state sometimes may not interfere when those norms are applied and those mechanisms are

\textsuperscript{53} Gunning, \textit{supra} note 34, at 211.
\textsuperscript{55} Id. at 3 (quoting Professor Sohn).
\textsuperscript{56} See van der Vyver, \textit{supra} note 6, at 442.
\textsuperscript{57} See Annan, \textit{supra} note 1, at 33.
implemented. As the world shrinks through the development of information and communication technology, so does the distance between the individual and international law. The human rights of an individual can be represented as a sum of his “national” and “international” rights. In this respect, occasional overlapping of those two does not represent a problem but rather represents an advanced “double protection.”

It is obvious that changes in international law concerning human rights in the last fifty years have been substantial. What has changed? Almost everything. The subjects of international law have changed, and states are no longer the only subjects. The objects of protection have changed as well, taking into account the recognition of new, internationally protected human rights. Finally, the prevailing method of creating international law has changed. The role of multilateral treaties has tremendously increased, and as for the development of custom in the field of human rights, long and universal acceptance appears to no longer be a prerequisite. Instead, general acceptance is sufficient.

There are many human rights monitoring mechanisms, including the UN High Commissioner for Human Rights and special reporters for individual country situations. The Security Council has in its practice linked human rights closely to the protection of peace and security. It has used its chapter VII enforcement powers under the UN Charter to create ad hoc war crimes tribunals for former Yugoslavia and Rwanda. Humanitarian intervention has been practiced and its legal and political dimensions thoroughly discussed.

It might be time to commence speaking about an emerging world law. It has been almost half a century since Philip Jessup warned that “‘[t]he term “international” is misleading... since it suggests that one is concerned only with the relations of one nation (or state) to other nations (or states).’” He indicated that the term “transnational law” would better reflect the complex interrelated world community, beginning with the individual and reaching up to the “family of nations.” The concept of “transnational law” identifies the

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58 See Brunée, supra note 25, at 1744.
60 See Henkin, supra note 12, at 31.
61 See Brand, supra note 3, at 1692-93.
62 See Henkin, supra note 12, at 38.
63 See id. at 43.
64 See Brand, supra note 3, at 1694.
66 See Berman, supra note 38, at 1617-22.
problem, but refers back to an era of sovereign national states, indicating that they should in some respect be transcended. On the other hand, Berman’s concept of “world law” represents a step further. It represents a new paradigm in which an emerging “world society” is governed by the “world law.”67

V. SOVEREIGNTY VERSUS INTERVENTIONALISM AND EQUALITY VERSUS SELECTIVITY

States and their administrations are faced with the process of change of international relations related to globalization. They have to make a choice, whether to maintain the old version of sovereignty, trying to protect all their traditional rights, or to accept international authority to interfere into some areas that were previously in their exclusive competence. This choice—let us call it: “sovereignty vs. interventionism”—has to be made in various areas, from environmental protection to human rights.

The choice is often not easy. Although it is not that difficult to accept that an increasingly interdependent world requires international coordination and regulation, it may be quite difficult to accept international competencies with regard to one’s own country and its citizens. These ambivalent feelings are often reflected in attempts to try to get the best out of both worlds: to support interventionism in general, when others are concerned, while trying to retain one’s own sovereignty. This could be labeled “equality vs. selectivity” dilemma.

A good example of deciding upon a national position in the question of sovereignty vs. interventionism and equality vs. selectivity is the attitude towards the international prosecution of crimes. If, for the sake of a better overview we include choices concerning both options, we can create a framework within which we can identify four model situations corresponding to the possible attitudes of individual states.

For the purpose of creating such a framework the following definitions shall apply:

1. Equality - same treatment of all states in applying international criminal justice
2. Selectivity - different treatment of one’s own State vis-à-vis other States in applying international criminal justice

67 See id. at 1617. The consequences of this could represent a paradigm shift from “law of nations” (Jus gentium) to “international law.”
3. Sovereignty - the exclusive authority of the State to apply criminal justice,
4. Interventionism - the authority of an international bodies to apply international criminal justice.

**EQUALITY**

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**SELECTIVITY**

Let us briefly comment on the four model situations. The first model situation is equality in sovereignty. It reflects the traditional view on state sovereignty and international relations. It implies the rejection of any international authority to prosecute crimes and hence the establishment of any sort of ad hoc or permanent international courts for that purpose. Countries are predominantly reluctant to publicly defend this hard line position to the extreme.

The second model situation is just the opposite: equality in interventionism. It reflects the acceptance that increased interdependence should strengthen international competencies and the development of adequate structures. It implies the acceptance of international authority to intervene and to prosecute crimes as a limitation on state sovereignty. In practical terms, it implies support for the establishment of the International Criminal Court (ICC) with universal jurisdiction. This is clearly the position of many NGOs engaged in the campaign to support the establishment of the ICC. To quite an extent it is also the position of the so-called “Like Minded Group”—an informal group of states who support the establishment of the ICC.
The third and fourth model situations: selective sovereignty and selective interventionism are mutually complementary. Interventionism is supported in states other than one's own, with which the preservation of its sovereignty is deserved. It implies support for international authority to intervene and prosecute crimes in other states, but not in one's own. In practical terms, it means support for the creation of ad hoc tribunals (as long as one's own country is not concerned), and hesitation or rejection for the establishment of the ICC in so far as its extend to one's own country and citizens.

Due to moral reasons and the principle of equality of states, it is not easy to defend such a position explicitly. How does one justify that some states, but not all, are sovereign over international law? Some theoretical attempts to justify these, or similar views seem cumbersome.68

In practice, this position of selective sovereignty / selective interventionism is implicitly advocated quite often. Even the last remaining super power is not immune to temptation. Irrespective of the principle of the separation powers, it still seems an inconsistent practice for the United States Congress to, when deciding about the payment of contributions to the UN, to regard itself above international law.69 Another example is when a judge in Laredo, Texas, gives priority to domestic over international law when deciding about the extradition of a person indicted by the international criminal tribunal for Rwanda.70 This position is difficult to reconcile with the demand of the United States government that countries emerging from the former Yugoslavia are to be penalized if they do not accept the supremacy of international over their national law with regard to the extradition of those indicted by ICTY. The same observation applies to the members of the UN Security Council who had no difficulties in imposing the statute of ICTY on countries emerged from the former Yugoslavia, but were very firm in rejecting the inclusion of the same rules in the ICC statute, regarding that as an unacceptable intrusion upon their sovereign rights.71

68 Charles Vesscher defended the view that the major powers carry more weight in the formation of international customs while Myres McDougle argued that General Assembly resolutions are binding if accepted by major powers and that major powers are exempt from some international rules. See D'Amato, supra note 59, at 62.

69 See Henkin, supra note 12, at 45.


71 At the Conference in Rome representatives of the Republic of Croatia proposed that some articles of ICC statute use the same language already contained in the ICTY statute. There was very little support for this proposal.
The process of globalization will continue and intensify. Integration of the world’s economy, trade, and financial flows will progress. International and transnational interaction will increase, requiring improved coordination and further development of international regulatory mechanisms. National governments—under the pressure of their citizens—will seek agreements and partnership relation with other national governments, international organizations, non-governmental organizations, and multilateral corporations.72

The role of states will continue to change. Their role as a security and economic framework is decreasing. Global or regional organizations such as the United Nations (Security Council), the OSCE, and NATO are taking over quite a number of international peace and security tasks. Global trade and economy are being increasingly influenced by World Trade Organization, international business practices leading to development of international law, and arrangements by various associations of states, such as European Union, MERCOSUR, or the North American Free Trade Act.

Instead, the state is shifting its role towards a framework for the protection and promotion of traditions, culture, language, and specific values and interests. Perhaps this is the explanation of the seemingly contradictory processes of the decrease of the role of the state, and, at the same time, the increase of the number of states, and the pressure to create new national states.73 Czechs and Slovaks, Slovenes and Croats, Georgians and Armenians have rejected Czechoslovakia, Socialist Federal Republic of Yugoslavia, and the Soviet Union as a security and economic framework and have established their states in which they could protect and promote their national culture, traditions, and specific values and interests.

The state is also becoming an intermediary between its citizens and the international community. It is through state representatives that interests of citizens are represented in international organizations, during deliberations in various associations or while participating in the creation of international treaties. As Brand puts it:

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 international rule of law. If this is to be

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72 See WORLD BANK, supra note 52, at 3.
73 There were 51 initial members of UN in 1945. Now, there are 187 members.
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.\(^7\)

The role of international organizations and international law is becoming essential in meeting challenges such as environmental degradation, international crime, terrorism, AIDS, and human rights violations. These are not only common problems that require cooperation but also these issues represent a threat to global security. Therefore, it is a significant step that the major body in charge of global security—the UN Security Council—recently devoted an open meeting on the implications of AIDS on security in Africa,\(^7\) that the concept of environmental security as a matter of national and international security has been developed,\(^7\) and that humanitarian intervention as a way to stop grave breaches of humanitarian law and human rights violations has been thoroughly discussed\(^7\) in the Security Council.

It is obvious that sovereignty is no longer what it used to be. It has been reduced through two parallel processes: the increase of competencies of international organizations and associations and through the development of individual, internationally guaranteed rights (something that Kofi Annan has called "individual sovereignty").\(^7\) Citizens all over the world are seeking to reclaim their individual sovereign rights and want some of those rights to be protected globally through international mechanisms.

It is not so important whether we replace sovereignty with another concept or whether we speak about changes of its content, as long as we are aware of the trends of development. In my opinion the concept of sovereignty can still be useful. Historically, it has proved to be very elastic, reflecting the position of a monarch as well as popular sovereignty. Perhaps it could be successfully adapted to the new changes resulting from globalization as well.

\(^7\) Brand, supra note 3, at 1696-97.


\(^7\) See Eshbach, supra note 21, at 271-305.

\(^7\) See id. at 280-81.

\(^7\) See Annan, supra note 1, at 37.
It seems that the Dutch concept of *souvereniteit in eigen sfeer* might be particularly helpful in reflecting the redistribution of competencies between international organizations and states and the redistribution of sovereignty between states and individuals. The idea of sovereignty in particular spheres, originally related to social structures with a distinct identity such as the state, church, family, school, or corporations, can be expanded to the coexistence—and mutual limitation—of different spheres of sovereignty between individual, state, and international organizations or associations.

We may well be witnessing the formation of a new "social contract," one that not only regulates relations between individuals and a state but also between individuals, states, and international organizations.

The maintenance of the concept of sovereignty might be particularly helpful with respect to the protection of the principle of equality of states. Traditionally, international relations and international law are based on the principle of sovereign equality of states. As this paper has noted, globalization imposes various limitations on sovereignty related to the increased competence of international organizations and associations and the spreading of internationally protected individual rights. However, it is vitally important that all states are equally affected by such a reduction of sovereignty. If they are not, or if there is a strong feeling they are not, there would be a heavy resistance to any transfer of powers to international or supranational bodies, and the whole process of transformation of international relations will be hindered.

Therefore, in the evolution of the concept of sovereignty, the principle of the "sovereign equality of states," should be transformed into the principle of "equally reduced sovereignty."

On the issue of the "equality in reducing sovereignty," the United States, as the only remaining superpower, has a special role. The ambiguous position of United States on the issue of the protection and promotion of human rights is a good illustration of the dilemma that the United States government faces in other areas as well. The concept of human rights, especially individual and

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79 According to Brand, "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." Brand, *supra* note 3, at 1686.

80 The discussion on the establishment of the ICC represented a good illustration of the problem of accepting "equality in reducing sovereignty" by a number of states. Considerations of international sovereignty, hardly voiced when the *ad hoc* tribunals (for former Yugoslavia and Rwanda) were set up, proved to be a huge implicit if not always explicit obstacle to the establishment of the international criminal court. See Šimonović, *supra* note 41, at 1401-21.
political rights, corresponds to its national values, so it is plausible that the United States stands for its protection internationally and uses various means to press countries who violate human rights. On the other hand, the United States is quite hesitant when deciding about adhering to international treaties on human rights. As D'Amato puts it:

Our governmental and ex-governmental lawyers fear international law more than they use it; they fear its use by other nations against us, and they don’t use it too much themselves because they have other ways—withholding aid, using economic muscle, threat the use of force—to get what they want.

This should change. If the United States accepts the challenge of the “equal reduction of sovereignty,” the payoffs will be great. It would tremendously speed up the process, and encourage other countries to follow. The leverage of the United States in international organizations is, and will continue to be, such that United States national interest, or better—the interests of United States citizens—will be well protected, and international respect for United States will be accompanied by admiration.

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81 For example, it is one of only two UN member states that are yet to ratify the Convention on the Rights of the Child.
82 See D'Amato, supra note 59, at 66.