

# **The Fall of Westphalia?**

## **Sovereignty of States Post Globalisation**

*Alena Ingvarsdóttir*

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## **Abstract**

The fact that globalisation has had a far reaching and lasting impact on state sovereignty has sparked a controversy in academic discourse. There is a substantial body of research which argues that sovereignty in a global age has become a redundant notion and is no longer relevant for political and legal theory in the XXI century. This thesis is set to challenge this opinion. I will argue that the basic principles of classical Westphalian sovereignty model are viable and applicable to the contemporary pattern of international relations between states as well as in the domestic affairs. To substantiate my argument, I will review sovereignty from two perspectives. First, I will explore the notion of internal sovereignty which reflects patterns of relationship between the highest state authority vested with coercive power, and the people of the nation. Secondly, I will discuss external sovereignty as diplomatic, political and economic relations between states in the international arena, where states are understood as formal equals and do not have the power to intervene into other states' domestic policy issues. Although both of these 'sovereignties' have been challenged by democratic representation, subsidiarity, the European Union legal order, international human rights law and *ius cogens* norms, the basic tenet of Westphalian sovereignty, i.e. the existence of an authority(-ies) vested with the ultimate decision-making power, still stands, as this thesis hopes to show. I will argue that today this power has shifted from one single authority or monarch to a multiplicity of various authorities or actors both within states and in the international plane. This however does not jeopardise the basic idea of distribution of power expressed in writings of Bodin and Hobbes, which makes a strong case for Westphalian sovereignty in the age of globalisation.

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# Introduction to Sovereignty: Definitions, Problems and Perspectives

*The Hobbesian view of the state... still colours  
the modern understanding of sovereignty.<sup>1</sup>*

This thesis will examine a “complex amalgam of ideas and norms that constitute modern sovereignty.”<sup>2</sup> Sovereignty of states is an elaborate and multifaceted notion; a child of a long history of ideas about state, sovereigns and monarchs, and their relationship with the people they govern. In a way, it is a never ending discourse between autocracy and democracy which occupies a special place at the intersection of political science, international relations and law.

Answering the question “what is sovereignty?” is and has always been a challenge, largely depending on one’s perspective. As subsequent examination of the subject will show, each of the classical and contemporary thinkers who contemplated on the subject of state sovereignty had a unique understanding of its role, purpose and functions. Do we understand sovereignty as a single entity embodying several “levels,”<sup>3</sup> or is it more appropriate to discuss different types of sovereignty,<sup>4</sup> i.e. those which represent a complex relationship between the rulers and the ruled in the domestic domain; or relations and cooperation between sovereign states in the international domain? As we will see, the philosophical base for the notion of sovereignty is very complex and contains a great deal of discourse within itself.

Sovereignty is associated with power and authority; in fact MacCormick defines it as “power without restriction,”<sup>5</sup> although stipulating that it may be exercised without

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<sup>1</sup> JA Camilleri and J Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (Edward Edgar Publishing, Aldershot 1992) 238.

<sup>2</sup> C Rudolph, ‘Sovereignty and Territorial Borders in a Global Age’ (2005) 7 *International Studies Review* 1, 13.

<sup>3</sup> Neil MacCormick, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth* (OUP, Oxford 1999) 126.

<sup>4</sup> Stephen D Krasner, *Sovereignty: Organised Hypocrisy* (Princeton University Press, Princeton 1999) 9.

<sup>5</sup> MacCormick, *Questioning Sovereignty* 127.

restrictions only within a relatively narrow constitutional margin.<sup>6</sup> Others, such as Bodin and Hobbes, adopted a more authoritarian view of sovereignty referring to the unrestricted power of the sovereign, partially constrained by natural law. The reading of sovereignty depends to a certain extent on what definition the author has in mind, and what philosophy he or she resorts to in order to seek answers to the emerging questions, e.g. limitations of sovereignty, interstate relations, popular sovereignty (sovereignty of the people), sovereignty of the ruler, and others.

Nowhere else has the doctrine of sovereignty blossomed as much as in international law. International law has been preoccupied with it since its emergence in the works of Hugo Grotius.<sup>7</sup> In a way, it may be argued that many of its chapters either stem out of the doctrine of state sovereignty,<sup>8</sup> or are closely intertwined with it in one way or another.<sup>9</sup> The International Court of Justice has repeatedly reiterated the inviolability of state sovereignty and its fundamental character for the purpose of maintaining peaceful relations between states.<sup>10</sup> Further examples may be found in the United Nations Charter<sup>11</sup> and the UN Friendly Relations Declaration.<sup>12</sup> It is recognised that the system of international law does indeed lack a necessary structure or a hierarchy, as well as an appropriate law enforcement framework. It appears however that it is precisely state sovereignty combined with the doctrine of international comity, as well as with political and social pressure from the civil society groups and their “values

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<sup>6</sup> Ibid: “Sovereign power is that which is enjoyed, legally, by the holder of a constitutional power to make law, so long as the constitution places no restrictions on the exercise of that power.”

<sup>7</sup> C Brown, *Sovereignty, Rights and Justice*. International Political Theory Today (Polity Press, Cambridge 2002) 30

<sup>8</sup> Such as the notion of state immunities, see further T Buergerthal and SD Murphy, *Public International Law in the Nutshell* (3<sup>rd</sup> edn West Group, St. Paul 2002) 233 onwards. The authors argue that “[the] doctrine of “absolute immunity”... had its basis in principles of state sovereignty [and] was for centuries deemed to reflect customary international law.” (Ibid 234).

<sup>9</sup> Cf. the principle of territorial sovereignty in Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim’s International Law, Vol. 1 Peace. Introduction and Part I* (9<sup>th</sup> edn Longman, London 1996) 382. According to the principle *quidquid est in territorio est etiam de territorio*, states have absolute legislative power over all individuals and all property contained within their borders, regardless of their nationality and/or domicile of choice (ibid 384). This is the essence of the idea behind the territorial sovereignty.

<sup>10</sup> See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* [1986] ICJ Rep 14. See also *Island of Palmas Case (Netherlands v United States)* (1928) 2 RIAA 829.

<sup>11</sup> See Article 2(1) of the Charter which states that the Organisation is based on the principle of sovereign equality of all of its Members; and Article 2(4) which reiterates the inviolability of territorial integrity and political independence of the UN Member States.

<sup>12</sup> Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 Oct 1970) UN GAOR 25<sup>th</sup> Session Supp No 28 UN Doc A/5217.

and commitments,” which maintains international law in place and promotes change.<sup>13</sup>

This thesis is primarily concerned with the place sovereignty occupies in the modern world. It will argue that today we are passing through a comprehensive re-assessment of values and norms of traditional state sovereignty, which is also known as Westphalian sovereignty. Has it really been challenged and deconstructed by the forces of political and economic globalisation, emergence of supranational institutional structures such as the European Union (EU), international human rights instruments, *ius cogens* norms, increased possibility of humanitarian intervention, non-State actors in international law, and other forces?<sup>14</sup> Or does it experience a revival in a modern understanding? This thesis will explore whether the old philosophical perspectives apply to the complex and intricate pattern of relations between the wielders of decision-making power and those who bear the consequences of such decisions in the modern globalised world. To illustrate this, this thesis will discuss specifically *de jure* international law with an occasional reference to *de facto* politics; the latter is not the primary focus of this thesis and will be only briefly discussed in the context of the entire argument in the conclusions.

This thesis consists of three chapters. Chapter 1 portrays Westphalian sovereignty in its classical understanding. The multiplicity of modern definitions of sovereignty often challenge its traditional interpretation. We will nonetheless adhere to the conventional understanding of sovereignty as unlimited power and authority of its holder, and explore whether it is applicable to the political and legal order in the XXI century. Chapter 1 will also give a short historical account of the metamorphosis of the concept of sovereignty over times and ages. This is essentially a brief overview of ideas that ancient, classical and post-Renaissance thinkers had in mind when discussing the idea of sovereignty and its application in the relationship between the rulers and the ruled. We will specifically discuss the philosophy of Niccolò Machiavelli, Jean Bodin and Thomas Hobbes who influenced contemporary

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<sup>13</sup> Krasner, *Sovereignty: Organised Hypocrisy* 109.

<sup>14</sup> S Besson, ‘Sovereignty in Conflict’ in C Warbrick and S Tierney, *Towards an ‘International Legal Community’? The Sovereignty of States and the Sovereignty of International Law* (British Institute of International and Comparative Law, London 2006) 133.



understanding of sovereignty as inviolability of state integrity and the power the state has over its people. At the end of this chapter, we will make some preliminary suggestions about what the idea of sovereignty embodies for a modern legal or political scholar, and discuss it from two perspectives: that of internal sovereignty, and that of external one.

The position of states in international law and internal sovereignty will be the main issues of Chapter 2. Internal sovereignty is preoccupied with the relations between rulers and ruled in the domestic setting, i.e. within states. This chapter will challenge a common contention that internal sovereignty has ceased to exist by arguing that state governments make independent and voluntary decisions concerning the relinquishment of sovereignty. We will refer to the example of the distribution of competence in the European Union to illustrate this. We will also discuss whether the model of European integration is a restatement of the persisting importance of internal sovereignty, and whether it is legitimate to maintain that the Westphalian sovereignty of the EU Member States has fallen.

Chapter 3 will turn to the examination of external sovereignty which is sovereign immunity states possess when acting in the international arena. This chapter will test the validity of statement that “the days when it could have been asserted that international law is the subject with which Legal Officers of the Crown, State Department Counsel and their various equivalents throughout the world are concerned, and not very much more, are past.”<sup>15</sup> It will argue that today international law is fuelled by non-state actors to the same extent as state agencies, and that independent sovereign equal states are no longer the only participants in the international legal regime. Besides, since the mid-XX century, states have witnessed a massive increase in interest in the human rights agenda. Awareness of the atrocities of World War II combined with numerous human rights violations worldwide sparked a global concern about universality of human rights. The Bill of Rights was a great impetus on governments to incorporate human rights provisions into national constitutions. This was regarded as a direct intervention into the domestic policy of

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<sup>15</sup> C Harding & CL Lim, ‘The Significance of Westphalia: An Archaeology of the International Legal Order’ in C Harding and CL Lim (eds), *Renegotiating Westphalia: Essays and Commentary on the European and Conceptual Foundations of Modern International Law* (Brill, The Hague 1999) 2.

states and led some commentators to assert that the days of Westphalian sovereignty are numbered.

Chapter 3 challenges this statement. It argues that both internal and external 'sovereignties' are intertwined and, even though it may be possible for the latter to exist without the former, it is internal sovereignty which provides the basis for a recognition and subsequent treatment of a state as a sovereign one. Thus it stipulates the very existence of external sovereignty as understood and defined in textbooks on international law. At the same time, external sovereignty yields to the changes in the international legal and political order, which is essentially a good thing since it renders sovereignty as a dynamic and flexible concept, able to withstand challenges of international law and politics. It is therefore unjustified to declare the fall of Westphalia. In other words, the whole of the argument contained in three chapters seeks to endorse the position that classical Westphalian sovereignty still exists and is very much viable in the contemporary complex and globalised world, even though its component parts, i.e. internal and external sovereignty, keep changing to fit the newly emerging needs and concerns of sovereign states and international community at large.

Conclusion will present a summary of ideas and some final comments about a somewhat ambiguous nature of modern Westphalian sovereignty and its place in the system of international relations. It will bring together the evidence provided in three preceding chapters to substantiate the argument that the Renaissance ideas of sovereignty are still alive and relevant today, despite being a product of their own time. It will conclude that although Westphalian sovereignty has undergone notable changes to reflect the changes in the world order, it remains a basis for both domestic and international legal framework as well as an influential interpretation of the role of states in the XXI century.

# Chapter 1. Deconstructing the Westphalian Model

Today we face a multitude of definitions and interpretations of the notion of sovereignty. The academic discourse is centred around the idea of sovereignty but little is clear beyond that. It may be assumed, with a fair degree of certainty, that the kind of sovereignty the classicists (Bodin, Hobbes and Vattel) had in mind when they portrayed it as the ultimate authority of the absolute ruler, drawn against the background of civil wars and conquests, differs from the one we imply today when discussing it in a political, legal and social context. The latter nonetheless inherits many of its original features. Is sovereignty an attribute of individual legal and political entities, or an indispensable “condition of possible agency”, their *raison d’être*?<sup>16</sup> What is the background against which our contemporary understanding of sovereignty has been shaped? How can we best define sovereignty to satisfy interests of states in the domestic setting, and those of the international community which seeks to ensure that the norms of international law are not breached by individual states? These are only some of the questions this thesis attempts to uncover. It aims to draw a wide picture of the modern understanding of sovereignty and demonstrate the complexity of the topic and different sides of the ongoing debate.

This chapter deals with the historical origins of the concept of sovereignty. In the first section, we will look at three major legal and political philosophers who have launched the debate about sovereignty by defining it and highlighting its different angles. We will start with the ‘amoral ruler’ of Niccolò Machiavelli and explain the misreading of his major work *The Prince*. We shall also look at Jean Bodin and Thomas Hobbes, the fathers of the classical theory of sovereignty, and argue that their ideas have directed the development of sovereignty discourse over time and are still relevant to the contemporary model of sovereignty.

Section 2 introduces the theory of Neil MacCormick and his distinction between internal and external sovereignty which we will operate upon in the rest of the thesis. We will see that although both of them have been challenged in the modern world of

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<sup>16</sup> J Bartelson, ‘The Concept of Sovereignty Revisited’ (2006) 17 EJIL 463, 472.

multiethnic unitary and federal states, they continue to navigate contemporary sovereignty discourse by virtue of being building blocks of the modern Westphalian order. The second part will also enumerate a number of basic Westphalian norms and set a roadmap for the rest of the thesis.

## **1.1 Sovereignty: The Origins.**

The beginning of the modern understanding of sovereignty is usually associated with the 1648 Peace of Westphalia which marked the end of the Thirty Years War in Europe and “reorganized and consolidated the complex matrix of overlapping jurisdictions of political authority in feudal Europe into a system of sovereign states.”<sup>17</sup> Many scholars agree, however, that the concept of sovereignty was known to ancient and medieval sovereigns before the mid-XVII century.<sup>18</sup> According to Hinsley, “the term sovereignty originally and for a long time expressed the idea that there is a final and absolute authority in the political community.”<sup>19</sup> Nonetheless the expressions and interpretation of this idea varied from age to age and nation to nation.

### **1.1.1. Niccolò Machiavelli and *The Prince*.**

Starting from approximately XV century onwards, Roman law has experienced a revival in the continental Europe. Unlike the early medieval concept of state and divine power of kings founded on the tenets of Christianity and natural law, new Roman law was grounded on a premise that “a political community had the inherent power (or *imperium*) to exact unlimited obedience from its citizens.”<sup>20</sup> This idea, essentially a reflection of the Roman concept of property,<sup>21</sup> had evolved to mean that the state, its entire territory and subjects were from then on the sole domain of the sovereign monarch, which later became known as the notion of absolute sovereignty. For example, taxation meant a mere transaction of funds the king or queen had already owned from a person or place to the Crown; and wars and territorial

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<sup>17</sup> Rudolph, ‘Sovereignty and Territorial Borders in a Global Age’ 4.

<sup>18</sup> Ibid; see also Besson, ‘Sovereignty in Conflict’ 140; Camilleri & Falk, *The End of Sovereignty?* 12, for an opposite view that “[f]or most [early] civilisations sovereignty has not been a defining characteristic of political life”; and Brown, *Sovereignty, Rights and Justice* 27, who asserts that “with perhaps one important exception, the notion of sovereignty as absolute power does not feature in medieval thought.”

<sup>19</sup> FH Hinsley, *Sovereignty* (Alden Press, Oxford 1966) 1.

<sup>20</sup> Camilleri & Falk, *The End of Sovereignty?* 16.

<sup>21</sup> Brown, *Sovereignty, Rights and Justice* 28: “The point about the Roman notion of property – *dominium* – is that it provides a model of sovereignty for the new princes of the Westphalia era.”

annexation meant further expansion of the property.<sup>22</sup> This interpretation of Roman law has found its best expression in the writings of Niccolò Machiavelli, a Florentine political philosopher and one of the fathers of European political realism, who argued a powerful case for an absolutist state in his best known work *The Prince*.

Machiavelli saw the state as “an organisation of force,” which main task was to ensure homeland security and safety of the sovereign and his subjects.<sup>23</sup> To ensure this, the state and its people needed guidance of “a strong hand and a clear intelligence at helm.”<sup>24</sup> Essentially his philosophy was a major departure from the medieval teachings about divine authority and the law of God, where the Sovereign was believed to legislate according to His will, and it was His will which was deemed to be the supreme good, irrespective of human wishes and concerns.<sup>25</sup> The Machiavellian ‘Prince’ does not rule merely to execute the will of God; he must resort to his own intelligence, willpower and cunning to ensure stability and safety of *ordre public* (public order). At the same time, the sovereign power of the Prince does not have to be an end in itself; although the political, military and religious challenges to the public order coming from both within and without the state may constitute a severe threat to the power of the Prince. He must therefore deal with them swiftly and resolutely, not considering the moral side of his actions. In this case, famously, the ends justify the means.

The major misreading of Machiavelli is that it was taken to be the liberation of an amoral ruler, when in fact his deliberations were about the extraordinary powers of the ruler at the times of national emergency. His ideal form of government was, according to Hinsley, “republican and limited,” and he encouraged his Prince to rule in the interests of the body politic and take appropriate decisions irrespective of their moral weight.<sup>26</sup>

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<sup>22</sup> Camilleri & Falk, *The End of Sovereignty?* 14-15.

<sup>23</sup> Ibid 16.

<sup>24</sup> Ibid.

<sup>25</sup> Brown, *Sovereignty, Rights and Justice* 28.

<sup>26</sup> Hinsley, *Sovereignty* 111.

### 1.1.2. The classical theory of sovereignty: Jean Bodin.

Unlike Machiavelli, Bodin did not reject the philosophical basis of natural law but elegantly incorporated it into his theory. He however took a completely different approach to sovereignty and power: not by endowing the ruler with extraordinary powers but separating the ruler as a human being and the sovereign authority vested in him. In his *Six Livres de la République* (1576), he designed “the first coherent theory of state sovereignty”<sup>27</sup> against the background of bloody civil wars between the Catholics and Huguenots. The reason for his theory essentially did not differ from the one of Machiavelli: that is, to ensure stability and order and bring the long-awaited peace to war-torn France.<sup>28</sup>

Bodin built a hierarchy where God was above the sovereign monarch, who, in turn, was superior to any subject in his domain. Sovereign power, however, was an external function: unlimited and perpetual in time and space, and the monarch was to receive it from God to be able to exercise it. Hinsley suggests that the central premise of Bodin’s theory was that “sovereignty and mere absolutism were different things.”<sup>29</sup> sovereignty was limited whereas the limits to the absolute power were at the monarch’s discretion alone. Some researchers point out a possible contradiction Bodin enters into with himself: on the one hand, he argued that the sovereign authority was unlimited; on the other, he assumed that sovereignty did have two kinds of significant constraints against its arbitrary exercise. These were limitations imposed by natural law and divine power of God; and secondly, limitations imposed by the *Leges Imperii* – customary and constitutional laws of the body politic and property rights of the subjects.<sup>30</sup>

Hinsley explains this contradiction as resulting from Bodin’s ambition to terminate the inherent conflict between rulers and ruled. The philosopher argued the case against the arbitrary exercise of an absolutist power which was completely unrestricted and thus damaged the society, preventing its progressive development and pulling it back into the feudal system. He emphasised the need to distinguish between absolutist power and sovereignty which, albeit unrestricted per se, is subject

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<sup>27</sup> Besson, *Sovereignty in Conflict* 141.

<sup>28</sup> Hinsley, *Sovereignty* 121.

<sup>29</sup> Ibid 122.

<sup>30</sup> Ibid; Camilleri & Falk, *The End of Sovereignty?* 18.

to certain checks which ensure its wielder or holder exercises it in good faith and for the good and prosperity of his state and people.<sup>31</sup> Although the divide between the two remains equivocal, Bodin has earned a commendation for his insight into sovereignty as an external power, not subject to human arbitrary control.

### 1.1.3. Thomas Hobbes and the social contract theory.

The theory of the English philosopher Thomas Hobbes took the concept of sovereignty to the next level by isolating it even further from the wielder of sovereign power. Hobbes saw the rationale for the creation of a nation-state in the instinct of self-preservation which precluded humans from living in anarchy and chaos, and drew them into an organised society bound by the social contract:

The finall Cause, End or Designe of men, (who naturally love Liberty and Dominion over others,) in the introduction of that restraint upon themselves, (in which wee see them live in Common-Wealths,) is the foresight of their own preservation, and of a more contented life thereby; that is to say, of getting themselves out from that miserable condition of Warre, which is necessarily consequent... to the naturall Passions of men, when there is no visible Power to keep them in awe...<sup>32</sup>

Hobbes further emphasises the importance of a strict hierarchy for such a society: he believes that it is a precondition for a successful functioning of this society. This is true for both physical survival of humans and protection of private and Crown property. The sovereign monarch is endowed with unlimited powers. From now on he is able to decide right or wrong arbitrarily and his power and authority are truly unlimited: they are not subject even to natural law or custom.<sup>33</sup> Here the reading of Hobbes is similar to that of Machiavelli. There are however two significant distinctions: first, Hobbes' sovereign is but a holder of sovereignty, not a sovereignty in person (very unlike Louis XIV and his '*L'état, c'est moi*'). Secondly, Hobbes' sovereign is not amoral; however it is him, the wielder of sovereign authority and the ultimate representative of the state, who decides on the norms of morality for himself and his subjects.

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<sup>31</sup> Hinsley, *Sovereignty* 124-125.

<sup>32</sup> Thomas Hobbes, *Leviathan* (Penguin Classics, London 1985) 223.

<sup>33</sup> Camilleri & Falk, *The End of Sovereignty?* 20. See also MacCormick, *Questioning Sovereignty* 123.

The significance of the Bodin and Hobbes contribution to the discourse on sovereignty is immense. Whereas the former formulated and shaped the theory, the latter elaborated it and brought it into the limelight of European political thought. As subsequent chapters will show, their major premise – that of the supremacy of sovereign power as the essential characteristic of sovereignty – is relevant in the world of states post globalisation.

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As the development of legal thought on the nature of sovereignty progressed, its legal dimension, i.e. legitimacy of the ultimate authority of the ruler and the role of citizens in the political structure of the state, became more and more visible in the classical model of sovereignty. This positive law component was promoted at different times by John Locke, Jean-Jacques Rousseau and John Austin, to name but a few, who deliberated about the role of society and state, the infinity of sovereign power, its purpose as opposed to the needs of citizens and interests of the body politic, and other aspects of sovereignty.<sup>34</sup> All of these issues remain relevant for the internal aspect of sovereignty today: rulers, although democratically elected, still retain an interest in upholding legitimacy and avoiding misuse of power vested in them. The second part of this chapter discusses the modern Westphalian sovereignty model, the distinction between the internal and external aspects of sovereignty and some of the basic Westphalian norms which have provided a basis for the contemporary international legal order, as subsequent chapters will show.

## **1.2 The Modern Westphalian Sovereignty Model.**

As it is evident from the visions of Machiavelli, Bodin, Hobbes and later thinkers, the key idea behind the classical model of sovereignty is “power without restriction.”<sup>35</sup> Today, as globalisation progresses, the debate about sovereignty has entered into a different stage: it is no longer feasible to discuss sovereignty only in the context of sovereign states and perceive it as an unrestricted power a single ruler exercises over the ruled. The emergence of the international law theory in the writings of Hugo Grotius, Emeric de Vattel and Christian Wolff has brought a new dimension into the

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<sup>34</sup> Camilleri & Falk, *The End of Sovereignty?* 20-22.

<sup>35</sup> MacCormick, *Questioning Sovereignty* 127.



discussion of state sovereignty: that in the context of international relations between sovereign states. When placed into the international environment, states can no longer arbitrarily exercise the power vested in them by God or people. Whereas it is still possible to discuss sovereignty as the highest or ultimate power, states have realised the need to work out a new approach to sovereignty at the international level.

This is discernible in the writings of MacCormick, who defines power per se as “the ability within some determinable context to take decisions that affect [the others] interests regardless of their consent or dissent.”<sup>36</sup> Having made a distinction between political and legal sovereignty, he argues that the modern constitutional tradition imposes certain checks against arbitrary exercise of sovereign power.<sup>37</sup> In a way, democracy, public participation and subsidiarity can be considered significant restrictions of power vested in the Head of state or government. Also, it is important not to confuse sovereign power, which is essentially a reflection of sovereignty, with normative power or ‘authority’, the power to legislate, which is conferred upon the wielder by the law of the land.<sup>38</sup>

It follows that in a modern democratic state, the ultimate power the sovereign is allegedly endowed with, is not concentrated in one natural or legal person but spread across the three branches of power (executive, legislative and judicial) at the very least. Besides, the principle of subsidiarity, endorsed in the institutional structure of the European Union, encourages the decision makers to take and execute decisions at the lowest possible level where they can be most effectively implemented.<sup>39</sup> Apart from that, the right to self-determination embodied in Article 1 of the International Covenant on Civil and Political Rights<sup>40</sup> has given rise to a large number of autonomy claims by indigenous minorities in multinational and multiethnic states worldwide, who demand greater responsibility and degree of control over the local matters. It is clear therefore that today sovereign “power without restriction,” although still viable

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<sup>36</sup> Ibid.

<sup>37</sup> Ibid 128.

<sup>38</sup> Ibid 127.

<sup>39</sup> Europa Glossary, [http://europa.eu/scadplus/glossary/subsidiarity\\_en.htm](http://europa.eu/scadplus/glossary/subsidiarity_en.htm), accessed 5<sup>th</sup> May 2009. See also TC Hartley, *European Union Law in a Global Context: Text, Cases and Materials* (CUP, Cambridge 2004) 60-61.

<sup>40</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

and existing, has been spread over a large number of institutions within one state. This led MacCormick to declare that “sovereignty is neither necessary to the existence of law and state nor even desirable.”<sup>41</sup>

This however is only valid in a discussion of Westphalian sovereignty in its orthodox understanding, namely as unlimited power vested in a single monarch or institution. If one shifts this authority towards the people of the nation, it becomes clear that the basic principle of the Westphalian order – the existence of some ultimate authority or authorities with powers to decide and coerce – is still standing, albeit transformed. Today this authority has been conferred upon a multitude of institutions which comprise a complex framework of internal state governance. This transformation has occurred to fit the needs of popular sovereignty and democratic rule, and is a corollary of natural development. Westphalian sovereignty undergoes by virtue of being a flexible and accommodating concept, just like the political order itself.<sup>42</sup>

Such transformation is even more evident in the external dimension of Westphalian sovereignty, which deals with interstate relations in the international arena and stipulates conditional sovereign equality as one of the fundamental principles of the international legal order. External sovereignty has given birth to a particular set of international norms which, as this thesis argues, have created a solid foundation for the framework of modern international relations, from which their subsequent modification is possible. These norms are largely set out in Article 2 of the UN Charter and according to Chris Brown are as follows:<sup>43</sup>

- The actors in the Westphalian system are sovereign states, not individuals.
- The guiding principle in international relations is the principle of sovereign equality – states as equal actors in the international arena – which has found its reflection in Article 1(1) of the UN Charter.
- The principle of non-intervention is also central to the Westphalian system and essentially stems out of the previous principle of sovereign equality: states as

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<sup>41</sup> Ibid 129.

<sup>42</sup> See Chapter 2 for a more detailed discussion of the transformation of internal sovereignty, and Chapter 3 for that of external sovereignty.

<sup>43</sup> Brown, *Sovereignty, Rights and Justice* 35.

equal actors cannot exercise power arbitrarily over other states (Article 2(4) of the Charter).

- The same is true for the principle of self-defence: states are allowed to use force in case of aggression against their territorial integrity but such exercise has to be proportionate (Article 51 of the Charter).

The rest of the thesis will be dedicated to the examination of both the internal and external dimensions of sovereignty, and discuss their relevance in the modern globalised world. It will discuss them in the context of legal, political and social forces which forward their change, to support an argument that the classical understanding of sovereignty has not been made redundant in a globalised society; that it has transformed to meet its current and future needs but remains an influential interpretation of the power the rulers have over the ruled in the modern world.

## Chapter 2. Internal Sovereignty

As the previous chapter has shown, one way to classify different dimensions or aspects of sovereignty is to draw the distinction between internal and external sovereignty. This chapter concentrates *inter alia* on internal sovereignty and its associated aspects, viz. authority and power, territoriality and citizenship, legitimacy and autonomy, and others. We will start with the position of states in international law and then look at the preconditions for attainment of internal sovereignty; in other words, what it means to be a sovereign state in international law. Then we shall look at the critique of Westphalian sovereignty and explore whether it has been really invalidated by globalisation. We will refer to the theory of Stephen Krasner and trace certain aspects which point out that the concept of internal sovereignty has been effectively transformed to meet the legal, political, social and cultural needs of a globalised society.

This chapter tries to show that the alleged erosion of internal sovereignty by the forces of globalisation has little to do with associated claims of the redundancy of the Westphalian model. Whereas internal sovereignty in its classical understanding (supreme power of ruler over ruled) has indeed been compromised, to some extent, by globalisation, this chapter argues that this is a natural course of its development whereby it is adapting to the new institutional structures which emerge both inside the states and in the international arena. It will refer to the example of the European Union as a unique sovereign entity, and show that even this is not a challenge to internal sovereignty of the European states. Moreover, this can be interpreted as a reinforcement of classical state sovereignty: as Chapter 3 will argue, states engage in international relations by choice, and choose freely to relinquish certain aspects of internal sovereignty in pursuance of particular political or economic goals. Which is essentially an exercise of Westphalian sovereignty in its classical sense.<sup>44</sup>

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<sup>44</sup> Rudolph, 'Sovereignty and Territorial Borders in a Global Age' 2. Also Adrián Tokár, 'Something Happened. Sovereignty and European Integration' [2001] 11 Extraordinary Times, IWM Vienna, <http://www.iwm.at/publ-jvc/jc-11-02.pdf> accessed 3 May 2009, page 13.

## 2.1 States in International Law: The Legal Basis for Statehood.

International scholars agree that “[s]tates are the principal subjects of international law,”<sup>45</sup> and only those communities which are properly recognised as states can be part of the international legal system. Lack of internal sovereignty is usually not a bar to the international recognition of a state as such.<sup>46</sup>

A good illustration of this statement could be the recognition process for a newly formed state. The existing state practice points to the fact that although the act of recognition constitutes a unilateral decision by each state, it is rarely taken by states arbitrarily; in other words, states tend to consider the principles of international law when recognising new states.<sup>47</sup> This is especially relevant in cases of so-called precipitate recognition, i.e. when a new state is seceding from the mainland unilaterally and/or by force.<sup>48</sup> In case of a successful recognition by the majority of states, the new state usually assumes the UN membership which has come to be regarded unofficially as the final stage of recognition and a successful establishment of a new state.

There are several criteria a state-to-be must satisfy in order to become one. They are based on Article 1 of the Montevideo Convention,<sup>49</sup> and according to the Oppenheim are as follows:<sup>50</sup>

- A people: i.e. a permanent population. Ethnic or national diversity does not matter and in fact most states are unlikely to be homogenous.
- A defined territory. Once again, its boundaries do not have to be strictly delineated; in fact many states will have border disputes with neighbouring states. The size of the territory also does not matter: states as small as the

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<sup>45</sup> *Oppenheim's International Law* 9<sup>th</sup> edn, 16.

<sup>46</sup> JA Caporaso, ‘Changes in the Westphalian Order: Territory, Public Authority, and Sovereignty’ in JA Caporaso (ed), *Continuity and Change in the Westphalian Order* (Blackwell Publishes, Maiden 2000) 7: “many of Africa’s weak states persist not because of state capacity to rule internally and to control borders, but because of the stabilizing force conferred by international recognition”. See also McCormick, *Questioning Sovereignty* 129; *Oppenheim's International Law* 9<sup>th</sup> edn, 132, 123 para. 35 *States less than sovereign*.

<sup>47</sup> *Oppenheim's International Law* 9<sup>th</sup> edn, 132-133.

<sup>48</sup> More on precipitate recognition: *Oppenheim's International Law* 9<sup>th</sup> edn, 143.

<sup>49</sup> Convention on Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 49 Stat 3097; Treaty Series 881 (Montevideo Convention).

<sup>50</sup> *Oppenheim's International Law* 9<sup>th</sup> edn, 120-123.

Vatican have been recognised as subjects of international law. In some cases, arguably, even territory is unnecessary, as in the case of the Order of Malta which has also been recognised as a sovereign entity.<sup>51</sup>

- Oppenheim distinguishes between the government and the sovereign government.<sup>52</sup> This is referred to in Montevideo as ‘government’ and ‘capacity to enter into relations with other states.’ The latter is essentially the same as external state sovereignty: it is the capacity to engage in multilateral relations with other subjects of international law without being forced to hold account to any one of them, but also lacking power to interfere into the matters within the domestic jurisdiction of other actors.

The principle of autonomy of states as subjects of international law and an associated principle of non-intervention have both become part of the international custom. For example, in the *Island of Palmas* case, the arbitrator Max Huber famously stated that “[s]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”<sup>53</sup> This was later reiterated in *Military and Paramilitary Activities in and against Nicaragua*: “A State’s domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems.”<sup>54</sup> In the same case, the International Court of Justice explicitly recognised “the fundamental principle of State sovereignty, on which the whole of international law rests,”<sup>55</sup> and the principle of non-intervention into the matters essentially within the domestic jurisdiction of states as part of international customary law.<sup>56</sup> Similar references to the fundamental nature of state sovereignty and non-intervention can be found in numerous international soft law instruments, such as the Draft Declaration on Rights and Duties

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<sup>51</sup> Krasner, *Sovereignty: Organised Hypocrisy* 41.

<sup>52</sup> Oppenheim’s *International Law* 9<sup>th</sup> edn, 122.

<sup>53</sup> *Island of Palmas* case, PCIJ, 2 RIAA *Island of Palmas Case (Netherlands v United States)* (1928) 2 RIAA 829, 838, cited in Rebecca MM Wallace, *International Law* (4<sup>th</sup> edn, Sweet & Maxwell, London 2002) 89, and Oppenheim’s *International Law* 9<sup>th</sup> edn, 382, fn. 1.

<sup>54</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* [1986] ICJ Rep 14, para. 258.

<sup>55</sup> *Ibid*, para. 263.

<sup>56</sup> *Ibid*, para. 205-206.

of States,<sup>57</sup> the UN Friendly Relations Declaration, opinions of the Human Rights Committee, Security Council resolutions, and others.

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Thus, the four basic (but not exhaustive) conditions for a formation of a new state are a population, a territory, a functional government and a capacity to engage in international relations. The last two aspects are arguably representations of internal and external sovereignty respectively. Legitimate governments which exercise power vested in them by people through a process of democratic representation are able, by means of law, to coerce citizens to obey. This power is essentially contained within the territory the state occupies. Finally, the capacity to engage in a complex network of international relations with other states not only completes the list of the necessary preconditions for a state to emerge, but also means that it has been officially recognised by other states as a legitimate sovereign entity. Thus one could argue that sovereignty is an essential attribute of a properly functioning (as opposed to a failed) state, but is internal sovereignty necessary, or would only external one suffice?<sup>58</sup> The second part of this chapter discusses specifically internal sovereignty. In particular, we will look at the theory of Stephen Krasner who portrays sovereignty as a disaggregated concept and who distinguishes between internal and external aspects of sovereignty in an original manner.

## **2.2 Internal Sovereignty: Anachronism or Progress?**

### **2.2.1 Krasner's classification of 'sovereignties'.**

In his *Sovereignty: Organised Hypocrisy*, Krasner discusses sovereignty in four different ways. Domestic sovereignty is concerned with the organisation of political authority in the state (i.e. political hierarchy) and the ability of the authorities to exercise effective control over the citizens of that state. Westphalian sovereignty is the ability of the authority to exclude external actors from the political structures of the state and thus prevent them from exercising a certain degree of influence over the state's domestic politics. International legal sovereignty refers to the recognition of

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<sup>57</sup> Draft Declaration on Rights and Duties of States, UNGA Res 375 (IV) (6 Dec 1949).

<sup>58</sup> Krasner, *Sovereignty: Organised Hypocrisy*, 12: "A state with very limited effective domestic control could still have complete international legal sovereignty."

states in the international arena. Interdependence sovereignty is the ability of state authorities to exercise effective control over the cross-border flows of goods, financial capital, services, migration, etc.<sup>59</sup>

Internal sovereignty as understood and defined in this thesis is represented by the domestic and interdependence 'sovereignties' in Krasner terms. He has founded this classification upon the fundamental distinction between the authority and control, employing legitimacy as the distinguishing factor. Whereas authority is "a mutually recognised right for an actor to engage in specific kinds of activities," control can be acquired and exercised by means of force.<sup>60</sup> Krasner argues that Westphalian and international legal sovereignty are first and foremost about the effective exercise of authority; interdependence sovereignty is about control (whether state authorities can control the cross-border transactions), and domestic sovereignty is a matter of both.<sup>61</sup> This is how the transformation of internal sovereignty becomes visible: the classical Hobbesian model of sovereignty was built on the idea of a powerful sovereign who is able to exercise effective control regardless of the will of the people. Today, with the rise of popular sovereignty, authority has shifted from one single person or institution to the people of the state and from them on to a multitude of democratic institutions which represent the three branches of power, as well as to numerous non-state agencies, e.g. non-governmental organisations or the mass media which often support an alternative opinion on how a state should be run and participate in the policy debate. Thus it has become a challenge to apply strict control mechanisms to the civil society. The notion of coercive force has practically become redundant in modern liberal democracies (although it is still largely the case in the Third World). Contemporary democratic model implies legitimacy as an essential means of validation of the state government; such legitimacy comes first and foremost from the people. This is how the Westphalian state was transformed into the modern nation-state (Box 1).

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<sup>59</sup> Ibid 3-4.

<sup>60</sup> Ibid 10.

<sup>61</sup> Ibid.



**Box 1.*****The Westphalian state and the modern nation-state.***

According to Rudolph, “[w]hereas sovereignty in the Westphalian sense centered on the authority granted to the monarch within a delineated territory, the rise of popular sovereignty through the revolutions of the 18<sup>th</sup> century in America and France signaled the rise of the nation-state... Prior to the dawn of popular sovereignty, sovereignty was linked to the monarch, who was then linked to the territory.” (Rudolph, ‘Sovereignty and Territorial Borders in a Global Age’, 9) The nation-state was built on the idea that the people, not the sovereign monarch, were vested with the ultimate power and accordingly control over the decision and policy making in the state. Rudolph further argues that state elements inherent in European nation-states, e.g. people, territory, sovereign rule etc, merged so closely over the course of common history so that they have become indivisible (ibid 10), which also stipulates a common political agenda. This development has now found its expression in the structure of the European Union.

It could be argued that this transformation was a yet another step forward in the genesis of the concept of internal sovereignty. Contemporary readings of sovereignty, including those which claim that internal sovereignty has been jeopardised by the forces of globalisation, somewhat overstate the impact it has on the formation of domestic policy.<sup>62</sup> As Rudolph argues, sovereignty has not been weakened by globalisation, but, quite on the contrary, reinforced.<sup>63</sup> Modern liberal democracies choose to participate in the global society voluntarily because they are able to assess the economic, social and political benefits of such participation and make choices independently of the external forces, which amounts to the exercise of classical Westphalian sovereignty. The only distinction is that the decisions now come from the government entrusted by the people to make such choices, not from the sovereign monarch or authority alone. It is noteworthy in this context that the transformation of the modern monarchic dynasties of Europe from absolute to constitutional over the course of XVIII-XX centuries is also the evidence that internal sovereignty was transformed, but it does not mean it has ceased to exist. A shift of power from one entity to another, or to a multiplicity of entities does not necessarily entail the failure of the entire model of sovereignty.

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<sup>62</sup> Rudolph, ‘Sovereignty and Territorial Borders in a Global Age,’ 2-3.

<sup>63</sup> Ibid 3-4.

One of the arguments critics use to demonstrate the alleged inadequacy of the Westphalian sovereignty is the increased permeability of borders which is seen as a failure of interdependence sovereignty. Rudolph employs the Krasner's theory to address it. He concludes that "the transgression of borders becomes an essential affirmation of sovereignty rather than evidence of its irrelevance. It is the expression of choice – of authority."<sup>64</sup> Further, he argues that "the transgression of borders" is different depending on what crosses the border. The system is fairly lenient for the incoming flows of financial capital, investments and goods: states tend to encourage foreign investment. The system is however much more restricted and scrupulous for the incoming flows of migration, i.e. refugees, expats, foreign workers etc.<sup>65</sup> This is an explicit evidence of independent choices state authorities make concerning the regulation of incoming traffic which has found its best expression in the creation and functioning of the European Union. The final section of this chapter will explore how the internal state sovereignty has been transformed in the EU, as evidence of its viability and adaptability to the constantly emerging new legal and political circumstances within states and beyond.

### 2.2.2. Internal sovereignty in the EU.

The adjective used to describe the EU legal order is usually '*supranational*' rather than '*international*.' It has been used for a reason: largely due to the doctrine of supremacy of the EU law which has evolved over time from the caselaw of the European Court of Justice. The groundbreaking cases were *Van Gend en Loos*,<sup>66</sup> which reaffirmed that the Community was "a new legal order", a completely new sovereign entity of international law where participating states had limited sovereign rights; and *Costa v ENEL*,<sup>67</sup> where the Court held that the Community law was supreme to the national law of Member States:

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their

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<sup>64</sup> Ibid 3.

<sup>65</sup> Ibid 2.

<sup>66</sup> Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

<sup>67</sup> Case 6/64 *Costa v ENEL* [1964] ECR 585.

sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.<sup>68</sup>

The Court further deliberated and developed the concept of supremacy in subsequent cases, such as *Simmenthal*,<sup>69</sup> where it said that the supremacy of the Community law could be applied retrospectively, that is, even if the national statute post-dated an EU regulation or directive in question.<sup>70</sup> This has generated a certain resentment among the Member States, especially those which adopted a dualist approach to international law (such as the UK). This was largely overcome and by now national Supreme Courts would normally acknowledge the supremacy of EU law over national law, although most of them have retained the ultimate power to delegate authority (*Kompetenz-Kompetenz*) when deciding whether the Community action over certain matters falls within the Community's competence.<sup>71</sup> Tokár argues that the fact that *Kompetenz-Kompetenz* has been retained by individual states is the evidence that they remain sovereign: even though they have delegated the legislative supremacy to the EU institutions, they did so voluntarily and hypothetically could claim it back.<sup>72</sup> After all, membership in the EU is voluntary and a state can always leave the Union if it deems necessary, as it has already happened with Greenland in 1985.

The peculiarity of EU law is not even in the unique distribution of power and competence between the Community institutions and Member States. Rather, it is the fact that the Community law (specifically decisions adopted under Article 249 of the EC Treaty<sup>73</sup>) is expressly directed at natural or legal persons, which, as Tokár argues, undermines the classic presumption that nationals of Member States cannot participate in international law as independent subjects, unlike states.<sup>74</sup> This may be deemed as an explicit example of internal sovereignty undergoing substantial changes to fit the needs of the new form of sovereign entity. Another good example would be the changing border regime: the Schengen *acquis*, which eliminates border controls between the participating state, has already become part of the Community law and

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<sup>68</sup> Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases and Materials* (4<sup>th</sup> edn OUP, Oxford 2008) 345.

<sup>69</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629.

<sup>70</sup> Craig & Búrca, *EU Law: Text, Cases and Materials* 4<sup>th</sup> edn, 347.

<sup>71</sup> See *ibid* the Member States perspective: France p. 357; Germany pp. 362-363; Italy p. 365; UK p. 371; Poland p. 373.

<sup>72</sup> Adrián Tokár, 'Something Happened', 13.

<sup>73</sup> EC Treaty (Treaty of Rome, as amended) art 249.

<sup>74</sup> Adrián Tokár, 'Something Happened' 7.

newly joined Member States are obliged to implement it upon accession.<sup>75</sup> The example of Schengen is even more peculiar because states which are not EU members (Norway, Iceland and Switzerland) also participate in it, and therefore such transformation of internal sovereignty applies to them too.<sup>76</sup>

Therefore it is fairly clear that internal sovereignty is still very much viable, albeit transformed. Its transformation is especially explicit in the increased role of individual natural and/or legal persons which have come to participate along with the states in the creation of the unique supranational order of the European Union. This is even more prominent at the international level, where major human rights instruments are directly interfering into matters which have been previously thought of as the domain of state or local governments alone. Chapter 3 will discuss the issues around external sovereignty which is primarily concerned with the recognition of and interaction between states at the international level, and explore whether it has also been challenged by globalisation and transformed to meet the newly emerging demands of the international legal order.

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<sup>75</sup> Europa Glossary, [http://europa.eu/scadplus/glossary/schengen\\_agreement\\_en.htm](http://europa.eu/scadplus/glossary/schengen_agreement_en.htm), accessed 5 May 2009.

<sup>76</sup> See further E Berg & P Ehin, 'What Kind of Border Regime is in the Making? Towards a Differentiated and Uneven Border Strategy' (2006) 41 *Cooperation and Conflict* 53-71, for a more detailed discussion of the contemporary European border regime.

### Chapter 3. External Sovereignty

This chapter takes a different perspective on the sovereignty debate. So far we have discussed the relationship between organs of state authority and people who represent the nation at large. A vertical hierarchy of sources of law and authority is inherent in such a structure. The external sovereignty model is, on the contrary, horizontal: the principle of sovereign equality stipulates that states are equal in the international plane and the only legal superior above them would be international law.<sup>77</sup>

As it has been shown above, internal sovereignty is currently undergoing a significant revision, albeit the basic principles of the Westphalian order remain influential. This chapter argues that external sovereignty is an inalienable part of the classical Westphalian sovereignty model and therefore indivisible from internal sovereignty. Much of the new research into external sovereignty suggests that it has become the new default definition of sovereignty per se. Researchers who adhere to this opinion usually also maintain that internal sovereignty is no longer relevant.<sup>78</sup> The author would suggest that, just like internal sovereignty, external sovereignty is constantly transforming and shaping to fit the needs of the increasingly interdependent and globalised world. In many instances it serves as a catalyst for changes occurring in the internal sovereignty model, able to strengthen it where needed.<sup>79</sup>

It is therefore unfeasible to discuss changes in internal sovereignty without taking external one in the account. Still, it would be either unfeasible to suggest that external sovereignty prevails over internal or vice versa. Rather, they compliment each other, and one would usually cause the above-mentioned transformations in another's model or framework. This chapter hopes to illustrate this by discussing the concept of sovereign equality in the first place as one of the fundamental normative principles of

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<sup>77</sup> G Simpson, *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order* (CUP, Cambridge 2004) 28.

<sup>78</sup> Cf. MacCormick, *Questioning Sovereignty* 129.

<sup>79</sup> Krasner, *Sovereignty: Organised Hypocrisy* 18: "In an uncertain domestic political situation (a situation in which domestic sovereignty is problematic), international recognition can reinforce the position of rulers by signalling to constituents that a ruler may have access to international resources, including alliances and sovereign lending."

the international legal order.<sup>80</sup> Secondly, we shall look at the relationship between external sovereignty and the international community in general, paying special attention to non-state actors. This chapter argues that the extensive body of international human rights law generated after World War II is one of the major reasons for their empowerment, which enabled them to participate in international law as independent actors along with states. This phenomenon has been regarded as groundbreaking for the international relations model in the XXI century and external sovereignty in particular. Its implications for the traditional Westphalian sovereignty model will be the subject matter of the final section of this chapter.

### 3.1 Sovereign Equality in International Law.

Sovereign equality has been referred to in Chapter 1 as one of the foundational principles of the international legal system. This principle presupposes that heads of powerful dominions (in political, military or economic sense) treat those of less affluent states with the same respect and dignity they would account to other powerful leaders – the principle known in Latin as *par in parem non habet imperium*. It was interpreted as a *sui generis* insurance against the emergence of a hegemonic power and also presupposes that in case of war against a hegemonic state, the laws of war will apply to all participant states without distinction, irrespective of their political capacity or military potential.<sup>81</sup> This stipulates an absence of a formal hierarchy in the international arena. As Gerry Simpson argues, “Westphalia symbolises, for international law, a transition from strict hierarchy to equality or from a vertical ordering, with the Pope and Emperor at the pinnacle, to a horizontal order composed of independent, freely negotiating states.”<sup>82</sup> Given the significance of this principle, many scholars maintain that it belongs to the *ius cogens* family:<sup>83</sup> that of peremptory norms of international law from which no derogation is permitted.<sup>84</sup>

Sovereign equality has its origin in Vattel’s *Le droit de gens*, where it was understood as an international law correlative to the natural equality of people. Vattel himself described it in the following terms:

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<sup>80</sup> G Simpson, *Great Powers and Outlaw States* 26.

<sup>81</sup> Brown, *Sovereignty, Rights and Justice* 32-33. See also G Simpson, *Great Powers and Outlaw States*, 31-32.

<sup>82</sup> G Simpson, *Great Powers and Outlaw States*, 30.

<sup>83</sup> Ibid 27.

<sup>84</sup> Wallace, *International Law*, 33.

Since men are by nature equal, and their individual rights and obligations the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. ... A dwarf is as much a man as a giant is; a small republic is no less sovereign than the most powerful Kingdom.<sup>85</sup>

One could argue that the principle of sovereign equality, by virtue of being derived from the natural equality of people, has become a foundation for the international human rights regime. Vattel, a great believer in the equality of men, attributed comparable equality to sovereign states. If however states are sovereign and equal based on the model of human relationships, the people who live in these states would be sovereign and equal too. Thus it is them, not the monarch or institution, which is the highest and most powerful authority in the state; and in this case such model of governance is consistent with the principles of Westphalian sovereignty. The paradox is that if this line of argument is correct, it would then also be consistent with the democratic thinking and political organisation of contemporary liberal democracies: popular sovereignty presupposes that the people are the wielder of the highest sovereign power.<sup>86</sup> Therefore, Westphalian sovereignty does not contradict the popular sovereignty principles; moreover, popular sovereignty then becomes an ‘advanced edition’ of Westphalian sovereignty suited to the needs of a modern democratic society. Ultimately it means that human rights, although traditionally perceived as one of the greatest challenges Westphalian sovereignty faces today, are in fact consistent with the notion of sovereign equality which in turn stipulates the necessity of Westphalian sovereignty. This would be a yet another argument to demonstrate why Westphalian sovereignty and its external dimension in particular are still relevant and standing in the modern international plane, and able to meet its demands for equality, justice and appropriate protection of human rights.

Simpson suggests that “[s]overeign equality is a principle designed to regulate the inter-state system.”<sup>87</sup> He argues that it would not be appropriate to refer to it as simply a legal right, or a sovereign immunity, or a legal principle; rather it is a combination

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<sup>85</sup> E de Vattel, *Le droit de gens*, Introduction, Sec. 18 and 19, as quoted in G Simpson, *Great Powers and Outlaw States* 32.

<sup>86</sup> Cf. the US Constitution, Preamble: “We the people of the United States...”

<sup>87</sup> G Simpson, *Great Powers and Outlaw States*, 39.

of all three. Sovereign equality defines positions of states and their mutual relations, and provides for a number of certain rights and immunities, e.g. the right to self-defence and immunity from foreign invasion.<sup>88</sup> Even though these rights tend to clash,<sup>89</sup> this should not be regarded as a contradiction to the principle but rather a part of a normal functioning of a multi-level and complex system of international relations. After all, commentators recognise that state sovereignty has never been absolute.<sup>90</sup> The principle of sovereign equality, firmly embedded in the UN Charter, provides an important legal background and/or a regulatory framework for the international relations between states vis-à-vis each other as well as non-state actors. The next section will examine the problems associated with non-state actors which now engage in international law as fully-fledged subjects. It will also highlight some implications for external sovereignty of states in the new arena.

### 3.2 International Community versus State Sovereignty.

The preceding argument shows that the Westphalian model and both of its dimensions (internal and external) are relevant and functional in the contemporary complex geopolitics and international law. Sovereign equality is only one example of how external sovereignty has been modified to accommodate the interests and concerns of the participants in new international order.<sup>91</sup> Sovereignty is a flexible concept but so is the international community which often empowers the change.<sup>92</sup>

One of such important changes was (and still is) the incorporation of non-state actors in the framework of international law.<sup>93</sup> The notion of a non-state actor is very broad and embraces *inter alia* individuals, multinational corporations, influential non-governmental organisations, rebel and separatist movements etc. More than that, Harding and Lim suggest that today even governments have acquired a private, 'non-state' flavour in the international legal system: in some cases, partial secession of public authority to "bodies of more indeterminate status" such as in the EU, or an

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<sup>88</sup> Ibid.

<sup>89</sup> Ibid 38.

<sup>90</sup> Ibid 40; Rudolph, 'Sovereignty and Territorial Borders in a Global Age' 2.

<sup>91</sup> Harding & Lim, 'The Significance of Westphalia' in *Renegotiating Westphalia* 9.

<sup>92</sup> R McCorquodale, 'International Community and State Sovereignty: An Uneasy Symbiotic Relationship' in C Warbrick and S Tierney (eds), *Towards an 'International Legal Community'? The Sovereignty of States and the Sovereignty of International Law* (British Institute of International and Comparative Law, London 2006) 244.

<sup>93</sup> Harding & Lim, 'The Significance of Westphalia' in *Renegotiating Westphalia*, 15.



influential role multinationals play in the political order of many developing countries point out that the process of “privatisation” of public entities has already commenced.<sup>94</sup> This may well be interpreted as a partial threat to external sovereignty, and a violation of internal one in particular.

The fact that individuals have come to the forefront of international law is fairly self-evident: it is enough to look at, for example, the ILC Articles on State Responsibility, which directly attribute responsibility for wrongful conduct of an individual acting in the official capacity to the state they represent.<sup>95</sup> Before that, individuals did participate in international law too but that was considered more of an exception to the general rule. For example, piracy and slavery have long been considered crimes under international law; pirates and slave traders were regarded as *hostis humani generis*, enemies of all mankind, and could be prosecuted by any state which apprehended them wherever they were.<sup>96</sup> Today we can observe the implementation of a similar idea in the setting of international criminal tribunals, which date back to the Nuremberg trials. The progressive development of international criminal law has shown that heads of states and senior diplomatic officials can be stripped of immunity and be brought to an international trial in a different country if they have allegedly engaged in crimes against humanity or violated *ius cogens*.<sup>97</sup> Sometimes, even an explicit violation of internal sovereignty occurs, such as in the *Eichmann* case, when Argentina complained to the UN Security Council about the apprehension of a Nazi war criminal on its territory by Israeli secret agents without its explicit leave to do so.<sup>98</sup>

This and other similar cases have provided a plentiful food for thought for modern legal and political scholars, giving them a good ground to doubt the validity of Westphalian sovereignty in the modern age. Indeed, the individuals and other non-state entities are able to promote their own independent agendas which may well differ from and even contradict those of sovereign states. Despite this, Krasner argues that whereas “[r]ecognising the standing of individuals is a departure from

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<sup>94</sup> Ibid 20.

<sup>95</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries (2001) ILC 53<sup>rd</sup> Session, UN Doc A/56/10, art 5.

<sup>96</sup> McCorquodale, ‘International Community and State Sovereignty,’ 260.

<sup>97</sup> A Cassese, *International Law* (2<sup>nd</sup> edn OUP, Oxford 2005) 436-450, 453-458.

<sup>98</sup> Ibid 52.

conventional international legal concepts... this standing is still the result of voluntary choices by states.”<sup>99</sup> an argument similar to the one used when we discussed the distribution of power and political and legal capacity in the European Union. Harding and Lim rightly ask: why would states voluntarily impose certain restraints on sovereignty? They conclude that the answer is not of legal but of political nature: states are no longer able to resist the external forces which have subdued many of their internal shields to protect internal sovereignty. This is essentially what is meant by the “modification of the Westphalian model.” states, confronted with the international legal and political forces they can’t control, would rather go with the flow and ensure that their sovereignty is preserved, although modified.<sup>100</sup> An adoption of such a strategy would also facilitate their relations with other states which are likely to have found themselves in a similar position, thus upholding the principle of sovereign equality.

This also confirms the argument that sovereignty is a flexible concept. For example, McCorquodale, while generally denouncing sovereignty as a “legal fiction,”<sup>101</sup> does admit that it exists in the relationship between different international actors, both state and non-state ones. He describes it as a “relational and not static,” and agrees that it “changes over time with changes in the relationship.”<sup>102</sup> Thus one could argue that sovereignty, by virtue of its ‘relational’ nature, is not limited to relationships between states alone. It may also accommodate non-state actors, without necessarily losing a right to be called sovereignty.<sup>103</sup>

### 3.3 Human Rights: Jeopardising Sovereignty?

The last but not the least, the comprehensive international human rights regime has long been the critics’ favourite argument to denounce Westphalian sovereignty as an outdated notion.<sup>104</sup> Human rights as “an increasingly important component part of international law”<sup>105</sup> have been regarded as a persuasive tool which is able to

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<sup>99</sup> Krasner, *Sovereignty: Organised Hypocrisy* 114.

<sup>100</sup> Harding & Lim, ‘The Significance of Westphalia’ 8.

<sup>101</sup> McCorquodale, ‘International Community and State Sovereignty,’ 244-245.

<sup>102</sup> Ibid 247.

<sup>103</sup> Ibid 247-248.

<sup>104</sup> Krasner, *Sovereignty: Organised Hypocrisy*, 23.

<sup>105</sup> B Bowring, ‘Ideology Critique and International Law: Towards a Substantive Account of International Human Rights’ in C Warbrick and S Tierney (eds), *Towards an ‘International Legal*

intervene into domestic affairs of states in order to prevent grave injustice, intolerance and violence, thus allegedly jeopardising the idea of sovereign equality and state immunity. There are however good reasons which show that this might not necessarily be the only possible interpretation of the role and influence of human rights.

While it is true that awareness of human rights and civil liberties made governments in all parts of the world reconsider their political and social agendas, it is also true that they have often failed to reach to the wielders of sovereign power. Chile under Pinochet, Cambodia under Pol Pot, Afghanistan under Idi Amin, and contemporary Myanmar and Darfur are only a few of numerous examples which spring to mind in this context. Lack of accountability of sovereign leaders before the international community is a dark side of Westphalian sovereignty which is now changing with the introduction of international criminal tribunals, as it has been argued above. Still, even though the adoption of the Universal Declaration of Human Rights and the leading human rights conventions has been a significant step forward in terms of raising awareness and attracting the necessary attention to the ongoing violations, the power of human rights usually does not reach beyond this threshold. There are limits to what the UN Human Rights Council (previously the UN Commission on Human Rights) can do: the High Commissioner for Human Rights can realistically only monitor the implementation of conventions; they can demand reports but they cannot coerce states to comply.<sup>106</sup>

Krasner argues that the human rights framework is based on conventions which do not violate international legal sovereignty; and it remains debatable whether they compromise Westphalian sovereignty in his own terms.<sup>107</sup> We have referred to his distinction between authority and control in Chapter 2; according to Krasner, both Westphalian and international legal sovereignty are concerned with the issues of authority.<sup>108</sup> As it has been shown above, authority probably carries more weight for the standing of Westphalian sovereignty than control, founded on brute force. States,

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*Community'? The Sovereignty of States and the Sovereignty of International Law* (British Institute of International and Comparative Law, London 2006) 194.

<sup>106</sup> Krasner, *Sovereignty: Organised Hypocrisy*, 113.

<sup>107</sup> Ibid 106.

<sup>108</sup> Ibid 10.

when exercising sovereign authority, can “bargain” its certain aspects to promote other, likely more important ones,<sup>109</sup> the previous argument suggests. This is consistent with the Rudolph’s understanding of Westphalian sovereignty which “represents the authority granted to the state by a defined national group to defend its interests.”<sup>110</sup> It follows that human rights conventions do not violate sovereign authority and consequently Westphalian sovereignty in general: states choose freely whether to ratify a certain convention or not, which may be a reflection of their political or economic agenda. For example, whereas the ICCPR has enjoyed a practically worldwide recognition and ratification, the ILO Convention 169<sup>111</sup> does not share a similar popularity: there is a clear tendency among states to uphold and promote civil and political rights, but they are generally reluctant to grant a similar recognition to economic, social and cultural rights.

Similarly, referrals to the International Court of Justice are unlikely to jeopardise sovereign authority either. It is true that the Court decision, binding for all the parties to the case, constitutes an external intervention and violates Westphalian sovereignty in Krasner terms. Nonetheless, such intervention is, according to Krasner, compatible with international legal sovereignty (or external sovereignty in our terms) since both parties have to accept the Court’s compulsory jurisdiction pursuant to Article 36(1) of the Statute of the Court.<sup>112</sup> It is peculiar that no human rights cases have been referred to the Court so far,<sup>113</sup> although *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*<sup>114</sup> filed by Georgia in August 2008 following the infamous border conflict with Russia may give the Court the opportunity to interpret the Convention in the new light.

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<sup>109</sup> Rudolph, ‘Sovereignty and Territorial Borders in a Global Age,’ 4.

<sup>110</sup> Ibid 6.

<sup>111</sup> Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 72 ILO Official Bull. 59.

<sup>112</sup> Krasner, *Sovereignty: Organised Hypocrisy*, 112.

<sup>113</sup> Ibid 113.

<sup>114</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (Pending) ICJ Press release 2008/24 <http://www.icj-cij.org/docket/files/140/14661.pdf> accessed 5 May 2009.

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This chapter attempted to show that the international legal and political regime, despite its evident complexity, is nonetheless consistent with the principles of Westphalian sovereignty. International relations theory, built on the principle of sovereign equality, has undergone significant changes fuelled by the role of non-state actors and human rights in international law. The argument presented in this chapter hopefully shows that none of these forces severely damage the Westphalian model, although they do cause certain changes in its paradigm which also accounts for its resilience and ability to change where necessary. As it has been shown, the UN human rights accords do not violate external sovereignty.<sup>115</sup> Whereas the attribution to non-state actors a similar status previously enjoyed only by states is a major departure from conventional understanding of the framework of international law, this is nonetheless consistent with choices states make to adapt to the new legal order, and thus constitutes an exercise of Westphalian sovereignty.<sup>116</sup> This is not to suggest that states are the only ones which get to decide in the international arena: rather, decisions today are made by a general consensus, when the new ideas are often generated by non-state agencies, drafted as conventions in the UN and associated international organs, and ratified by states. Conclusion will attempt to synthesise all of the preceding argument which supports a case for Westphalian sovereignty, and present some final reflections on its revised status in the modern world.

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<sup>115</sup> Krasner, *Sovereignty: Organised Hypocrisy*, 113.

<sup>116</sup> Ibid 114.

## Conclusions. What Happened to Sovereignty?

Our survey of Westphalian sovereignty is approaching its end. This thesis has attempted to show that the topic of sovereignty is complex and contentious, and that it leaves many questions open-ended and welcomes further debate. We have tried to show that sovereignty is a flexible but resilient concept which is able to adapt to changes in the domestic and international legal order without causing significant damage to its foundations. We have reviewed two dimensions of Westphalian sovereignty: internal and external which, despite being concerned with different relations between different actors, share a number of similarities, and constantly interact and reinforce each other. This allows us to portray Westphalian sovereignty as a disaggregated but unified concept: although its building bricks are closely intertwined, changes in one of them do not necessarily affect another. In this conclusion, we will place discussed international law in the context of *de facto* politics to present the argument about the viability and resilience of Westphalian sovereignty in the new light and further reinforce it.

As we have seen in Chapter 1, there is a number of certain Westphalian principles which lie in the foundation of the international legal order, and which may also directly or indirectly affect the distribution of power and competence in the domestic setting. First, the principle that states are sole actors in the Westphalian system has undergone substantial transformation and expanded to include a multitude of non-state actors. Despite this, states are the most influential players in the international arena and retain the deciding vote, as it is evident in the ratification and implementation of human rights conventions. Secondly, the Westphalian principle of sovereign equality is and has always been one of the cornerstones of the international legal order. The thesis has shown that it is consistent with popular sovereignty. Besides, it appears to have provided a certain framework for the human rights regime which makes it possible to argue that human rights are consistent with Westphalian sovereignty.

Sovereign equality is usually accompanied by the principles of non-intervention and self-defence. They have received a great deal of attention in the past decade in the

context of the Bush administration foreign policy and the Allies' military intervention in Iraq and Afghanistan. One of the debatable issues is the scope of the right to self-defence: how far a state can go to exercise it, and to what extent one can employ the use of force in the war against terror?<sup>117</sup> It is evident that today politics is heavily involved in the interpretation of these two principles. This however does not contradict Westphalian sovereignty per se, since the model itself is fairly flexible, and, as the thesis shown, it has never been absolute. It follows that a certain infringement of sovereignty is unlikely to cause severe damage to the entire model: in case of a military conflict, both parties will have their sovereignty infringed but there is a good chance that they will be able to restore it once the conflict is over. This also shows the resilience of sovereignty: even though it can be easily infringed, it can be subsequently re-established. Post-World War II Germany is one such example.

The premise that Westphalian sovereignty has allegedly failed has attracted much discourse. Its advocates usually enumerate a number of external forces apart from globalisation, which allegedly reduce the capacity of states to take unilateral decisions in the domestic sphere. Camilleri and Falk suggest the following list of those forces which, according to them, lie at the heart of modern political and social life: "the internationalisation of production, trade and finance; the homogenising architecture of technological change; the globalisation of the security dilemma; the escalating impact of ecological change; and the rise of local and transnational consciousness."<sup>118</sup> These forces do indeed constitute a significant impetus which promotes change in the Westphalian paradigm, but, as this thesis argues, they are hardly able to undermine its foundational principles. States have always interacted with each other on the regional and international scale. They have always waged wars and engaged in military conflicts. They tended to lose territory only to engage in another war and annex the territory of their unfortunate neighbour. The very fact that nation states have survived well into the XXI century through its numerous military conflicts and two devastating world wars, shows that Westphalian sovereignty contains much resilience within itself, and that *states* remain the wielders of sovereign power in the modern globalised world.

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<sup>117</sup> See C Gray, *International Law and the Use of Force* (2<sup>nd</sup> edn OUP, Oxford 2004) 98-99 for an academic perspective on the right to self-defence.

<sup>118</sup> Camilleri and Falk, *The End of Sovereignty?* page 242.

Shifting away from the political and military discussion, it is interesting to examine the forces of economic globalisation in this context, even though this topic is beyond the scope of this thesis. Economic globalisation, associated with an increase in global trade and weakening of state borders, was and still is seen as a threat to Westphalian sovereignty. As this thesis has shown, states are picky in their internal border policy. Even though most of the European states have implemented the comprehensive Schengen regime in the context of the Four Freedoms policy (freedom of movement of goods, services, people and capital), the outer borders of the European Union remain under a strict supervision of the national border authorities and have even earned the name ‘fortress Europe.’ It has been shown that financial and monetary strings are able to move fairly easily worldwide. However, the picture is different for migration which remains one of the most debatable topics on the political agendas of most developed states.

Economic globalisation becomes an even more challenging phenomenon in the light of the world economic crisis which has hit both developed and developing economies on the unprecedented scale which has not been seen since 1929. A wide appreciation of the necessity of governmental regulation was clearly voiced both at the 2009 World Economic Forum in Davos and G20 Summit in London.<sup>119</sup> According to Prime Minister Syed Yousaf Raza Gillani of Pakistan, “The case for a regulated world economy and multilateral governance is made forcefully by the financial crisis.”<sup>120</sup> Although the question whether or not the *laissez-faire* philosophy has fallen remains open, states have been repeatedly encouraged by policy-makers and the private sector alike to recreate a comprehensive regulatory framework as part of the holistic approach to deal with the crisis. This is a yet another example of Westphalian sovereignty in action.

Therefore, if we try to answer the question in the headline, ‘What happened to sovereignty?’ the answer would probably be ‘nothing much.’ Although Westphalian

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<sup>119</sup> Global plan for recovery and reform: the Communiqué from the London Summit, <https://londonsummit-stage.londonsummit.gov.uk/en/summit-aims/summit-communication/> accessed 5 May 2009; World Economic Forum Annual Meeting 2009, ‘What Should Governments Do To Avert a Deeper Crisis of Confidence in Global Governance’ (WEF Report) [http://www.weforum.org/pdf/AnnualReport/2009/global\\_governance.htm](http://www.weforum.org/pdf/AnnualReport/2009/global_governance.htm) accessed 5 May 2009

<sup>120</sup> 2009 WEF Report.



sovereignty has been challenged by various forces, it appears to be very resilient and at the same time willing to incorporate and adapt to a comprehensive change. Probably this has stipulated the fact that it has not ceased to exist (although it did have a plenty of occasions to do so), but welcomed certain modifications and continues to influence the international and domestic legal order in the XXI century. There is however one significant threat Westphalian sovereignty faces, and that is the collective right of peoples to self-determination. Most states are multiethnic, and their multicultural diversity has been further promoted by the increased levels of immigration during the later half of the XX century. If one allows nation states to pull themselves apart on tribal grounds, the modern interpretation of Westphalian sovereignty, i.e. an effective power of the highest authority, will be compromised. Therefore states are reluctant and even hostile to accept the act of secession in most cases, as evident today in South Ossetia and Northern Pakistan.

The final conclusion of this thesis is that it is untimely to declare the fall of Westphalia: the concept continues to exert much influence on the formation of domestic and international politics and associated law. Although it would be hard at this junction to make any predictions for the future of the concept, it may be assumed with a fair degree of certainty that, given its volatile history and a record of change, it will continue to exist as a framework of relations between the people and authority in the domestic sphere, and that of the interstate relations on the international arena, constantly modifying and adapting to change where needed.

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