Towards Global Justice: Sovereignty in an Interdependent World

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The time of absolute sovereignty … has passed; its theory was never matched by reality.

Boutros Boutros-Ghali
An Agenda for Peace
(New York: United Nations, 1992), para 17

The diplomacy generated by the Arab Spring replaces Westphalian principles of equilibrium with a generalized doctrine of humanitarian intervention.

Henry Kissinger
Syrian intervention risks upsetting global order
Washington Post, 2 June 2012

Foreword

This is an important book, which comes at a crucial time in the realignment of international relations, as states of the world begin to make common cause against external threats like terrorism and climate change, while accepting their own vulnerability to international monitoring and even armed intervention to ensure that they treat their own peoples with a modicum of dignity. Students brought up to believe in the traditional principles of Westphalian sovereignty seemingly embodied in Article 2(4) of the UN Charter, now find it difficult to account for a world in which Milošević and Mladić can be put on trial, where Charles Taylor goes to jail for many years, and where the UN and regional bodies encourage—by sanctions, indictments, and even armed intervention—a popular revolt against a long-lasting Libyan regime. This is not the world of independent nation-states, with political and military leaders bedecked with legal privileges and immunities. It is a world where "sovereignty"—classically the power of national entities to treat their own people as rulers wish and freely to follow their own national interests—is no longer an accurate account of how the world works, let alone of how it will work in the very near future. This book offers a credible theory of post-Westphalian sovereignty, based on interdependence rather than independence.

The author does not abandon the classical theory, but rather shows how it can and must be revised and reconfigured in a model that will explain, for example, the ground-breaking Security Council Resolutions 1970 (to refer the situation in Libya to the ICC prosecutor) and 1973 (that NATO should take "all necessary measures" to protect the civilian population from a regime that ruled the country for forty years). Academics—because they do not much live in the real world—have been slow to appreciate what was in truth a millennial shift from expediency to justice in international affairs. The belief in human rights is not "*The Last Utopia*" as Samuel Moyn would have it, but rather a system for reordering relationships between states and actively enforcing minimum standards of fair treatment. Conflict resolution, too, is no longer a matter merely of allowing expendable dictators to leave the bloody stage with amnesties in their back pocket and Swiss bank accounts intact—as the Mladić arrest has shown, they can run, but they cannot hide forever. Throughout the Arab world young people are organizing on

Facebook and posting photos and films on You Tube when tyrants counterattack them—they understand that this will constitute evidence which may one day bring those responsible for atrocities to international justice. John Locke's argument for the right to revolt when rulers break their compact by oppressing the people is on its way to becoming a part of international law through the "responsibility to protect" principle that this book so astutely analyses. Its particular strength comes from the author's experience of how regional security arrangements work, and her ability to show how the imperatives of NATO, EU, and UN membership variously impose duties on nation-state members that prevent them pursuing their own national interest at the expense of the global or regional interests of state communities.

This is a ground-breaking work which expounds a theory of interdependent sovereignties which is coherent and capable of accurately describing the limits on the nation-state in the twenty-first century. The author is a theoretician who has left her armchair to participate as an army officer in regional security arrangements and in observing the workings of justice in the Hague and has returned to academe to make sense of them—producing this bold template for understanding the limits of political power in a globalized world. International relations is not a subject that can be divided into historical or legal or philosophical or political perspectives—it can only be understood scientifically by examining how all these subjects cohere. The strength of this book is its multidisciplinary approach which leads to a new theory of how human rights will be better protected in a better world.

London, June 2012   Geoffrey Robertson QC
                                                                                      Doughty Street Chambers

Foreword

A review of the crucial questions of our times—which is the new world order? what kind of power distribution is expected in the near future? what about China's position and role in the changing global power equation? and so on—reveals a fundamental need for assessment to be thoroughly undertaken. Namely, whether we still find ourselves in the Westphalian systemic paradigm, or whether we have already entered a new paradigm, be it post-Westphalian, post-modern, or otherwise named.

Practically, an ongoing debate within the academic community that has as its subject the configuration of the new global security architecture, or the future structure and functionality of the world system in the twenty-first century is unfolding into this direction of analysis. Does the Westphalian paradigm remain valid when we face the prevalence of the "zero-sum game"—to quote Gideon Rachman's *Zero-Sum Future*—or will it become obsolete in a kind of progressive "win–win world", free of hegemonic wars that were previously unavoidable?

The extraordinary significance of a correct answer concerning the direction of the systemic evolution is reflected in Simona Țuțuianu's book, in an area of research that has been (and still is) explored by numerous and well-known international relations analysts. On Google, one can find at least five million entries which refer to various (and not only academic) papers connected to the present challenges to the Westphalian system. The most recent controversy which highlighted the undermining of the Westphalian paradigm concerns the doctrine of preemption about which Henry Kissinger stated after the events of 9/11: "At bottom, it is a debate between the traditional notion of sovereignty of the nation-state as set forth in the Treaty of Westphalia in 1648 and the adaptation required by both modern technology and the nature of the terrorist threat" (see H. Kissinger in *Preemption and The End of Westphalia*). This debate stresses major challenges to the structural transformation of national and international security threatened by stealth attacks.

More important than anything, is the fact that this bold demarche comes from a unique scientific space—that of Eastern Europe—projecting in the international scientific world a point of view focused on the vast theme of interdependent old

and new sovereignties, everything based on a rich and diverse bibliography. The author comes from this complex region in terms of security developments that conditions different perceptions on national sovereignties (there are a lot of new nation-states here) being well familiarized with the scientific standards in the field and having the wisdom to use the necessary and appropriate leverage to identify a coherent answer to the aforementioned question. At least two aspects are very important.

First, the Westphalian system—that of uncontained supremacy of the national sovereignty—has faced major defiance in the post-Cold War era which radically transformed it. Whether we speak about the international courts in the Hague and a new codification of international law by "overcoming" the principle of national sovereignty, or about the "Responsibility to Protect" doctrine (the case of Libya and maybe that of Syria, in the future), these developments clearly show that we are entering a new systemic paradigm different to the traditional Westphalian one.

Secondly, if this hypothesis is to be verified, an interpretative grid based on the *win–win game* scenario is activating, suggesting the preeminence of the logic of international cooperation at the expense of traditional rivalries, which ensures the optimization of global systemic management. In my capacity as Co-chairman of the Regional Stability within the Greater Black Sea Area Working Group of the Partnership for Peace Consortium of Defense Academies and Security Studies Institutes (RSGBSA WG), I have explored the virtues of this interpretative grid's applicability during the implementation process of relevant regional scientific projects aimed to develop ideas for practical cooperative activities among the littoral states and interested international actors. Achievements are notable, thanks to a strong network of experts to which the author currently belongs and, whether it is supporting development of democratic defense institutions, promoting defense education enhancement to prepare future leaders, or conducting research in support of regional stability, the current work of the RSGBSA WG has a direct line back to the above-mentioned scenario.

These are two starting points for reflection which are very thoroughly presented by the author, assisting us to move forward in finding workable answers to the delicate question: *What next after Westphalia?*

Bucharest, June 2012   Prof. Mihail E. Ionescu

Preface: A Personal Note

Is the Westphalian logic of national sovereignty old-fashioned? In this book, I aim to examine its demise by way of explaining the limits of political power in a globalized world, without the utopian idealism found in many academic treatments of international law. I believe that obituaries of the classical theory of nation-state have been written too soon: the demise of the Westphalian concept has been premature and a "responsible sovereignty"—incorporating the developing international law of crimes against humanity—is a better way to account for the extent to which nations today accept (or at least pay lip service to accepting) the imperative of complying with human rights norms. It is also a better way to hold them to their humanitarian promises.

Political theory has not caught up with the developments that over the past decade have surprised and even astounded Westphalian traditionalists as they hear the daily news: General Pinochet arrested in London; Milošević on trial; Charles Taylor sentenced to lengthy imprisonment; indictments from an International Criminal Court (ICC) against Colonel Gaddafi and charges against the former Ivorian president Laurent Gbagbo; President Ben Ali of Tunisia convicted in absentia and President Mubarak of Egypt convicted in person. The question has now become: can heads of state keep their heads? The "Arab Spring" which not long ago would have been a few local insurgencies crushed by state violence, now garners international support, with the events in the region widely viewed as popular campaigns against tyranny. Domestic laws in many parts of the world are trumped by International Court rulings or over-ruled when they conflict with international treaties, while even national security policies must take into consideration regional security arrangements, international actions against terrorism, multilateral actions against piracy, international efforts to combat global warming, and multilateral efforts to stop human trafficking and other transnational crimes. No longer can a state act exclusively, on the advice of Machiavelli or Dr. Kissinger, in what its government conceives to be its national interests: there are global conventions and constraints to be considered.

Once upon a not-very-long time ago, students of political theory and international affairs were taught the three verities of the nation state: territorial

sovereignty, formal equality between states, and the principle of nonintervention in international affairs. Today, this teaching is obsolete: sovereignty, even for the most powerful of states, is not absolute. Leviathan has changed, and cannot rule without looking over its shoulder.

The book examines how independence has become interdependence across a range of state functions. Yet does this mean that traditional Westphalian concepts of sovereignty should be abandoned in constructing a new theory of world governance for the twenty-first century? Not at all—the emerging pattern invites reconfiguration in a new model, which can be called the pattern of interdependence-based sovereignty. This model serves to explain contemporary events that puzzle traditional theorists, such as the war over Kosovo and the indictment of Bashir. The revival of the Nuremberg principle and its validation in Security Council Resolution 1970 (referral of Libya to the International Criminal Court) and the precedent-making UNSC Resolution 1973 approving NATO intervention in Libya and use of "all necessary means" to protect civilians. We are witnessing the emergence of a new action philosophy which is restructuring the post-Cold War system of international relations, notwithstanding traditional opposition from China and opportunistic dissent from Russia. Security Council Resolution 1970 and 1973 were, after all, unanimous, and although there has, at time of writing, been no agreement over what to do about Syria, there is at least an agreement that something should be done, even if it is only sending UN peace observers to a place where there is no peace to observe.

The book explains why and how power is drained from the centre of nation-states: a multiplication of international treaties, conventions and regulatory networks, international and regional peace-keeping operations and, especially, regional cooperation arrangements; terrorism after 9/11 and a very important external factor—the hegemony of the US, especially in terms of military force. These factors have contributed to questioning the classical theory of the nation-state and have led to the emergence of an international community which promotes government by rules for the common good—albeit a system which at this early stage is far from perfect. We are witnessing, in a sense, the "twilight of Westphalia" in the emergence—in modern law, in revisionist history, and in international affairs—of a new global generalization based on human rights. Ironically, the 1948 Universal Declaration on the subject, regarded in its time as no more than a set of nonbinding promises by states to do their best, has now crystallized into a set of standards that may in certain circumstances actually be enforceable.

The theory of interdependent sovereignties is developed as a paradigm that appropriately describes governance by states in today's world. The very fact that "sovereignty" remains a part of that description means that the Westphalian idea has not been abandoned: the state remains an essential construct, but one with its freedom progressively limited by interrelational constraints and by the overarching demand for universal human rights. There is neatness and even an idealism in the standard academic approaches in international law: their descriptions do not always conform to the way that law works (or does not work) in the real world. I attempt to illustrate it by examining the proceedings in the Milošević case.

I conduct a microanalysis of this new internationally-responsible sovereignty at work in the European Union, as well as in the context of regional mechanisms that encourage it, such as the Regional Stability within the Greater Black Sea Area Working Group of the PfP Consortium of Defense Academies and Security Studies Institutes.

The conclusions of the book draw together the above developments in a new theory of "inter-dependent sovereignties"—by which nation-states are free to govern their people to the extent, but only to the extent that they accord rights to life and liberty which can be monitored and ultimately enforced by external actors and adjudicators. In their foreign relationships, this sovereignty endows states with the freedom to follow their national interests but again subject to international or regional arrangements for collective security, not only to make common cause against pariah states and terrorism but also against natural threats such as climate change and pestilence. In this way, a new theory of post-Westphalian sovereignty is postulated which accounts for the above-mentioned developments and will hopefully provide a road map to a better world.

I thank Geoffrey Robertson QC who guided me through the labyrinth of human rights issues, and to Mihail E. Ionescu, director of the Romanian Institute of Political Studies of Defense and Military History, for sharing his rich range of expertise and knowledge of international relations. The Institute and its researchers deserve recognition for lightening my load and providing valuable collegial support. I am much indebted to my publisher at T.M.C. Asser Press, Philip van Tongeren, and to my editor Marjolijn Bastiaans. My thanks also to Lionel Nichols who helped me with the English translation. Last but not least, with gratitude to my family whose love and support always sustains me.

Bucharest, July 2012

Contents

Abbreviations

BSDC	Black Sea Defence College
BSUF	Black Sea University Foundation
CIA	Central Intelligence Agency
CIS	Commonwealth of Independent States
CSCE	Commission on Security and Cooperation in Europe
DCAF	Geneva Centre for the Democratic Control of Armed Forces
DoD	United States Department of Defence
EU	European Union
EUCOM	U.S. European Command
GBSA	Greater Black Sea Area
GWOT	Global War on Terrorism
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IPAP	Individual Partnership Action Plan
IPSDMH	Institute for Political Studies of Defence and Military History
ISAF	International Security Assistance Force
KLA	Kosovo Liberation Army
MAD	Mutually assured destruction doctrine
MCT	Mobile Contact Teams
MENA	Middle East and North Africa
NATO	North Atlantic Treaty Organization
NIISP	National Institute for International Security Problems from Ukraine
NISA	NATO International School of Azerbaijan
NSC	The White House National Security Council
OECD	Organisation for Economic Co-operation and Development
OSCE	Organization for Security and Cooperation in Europe
PfPC	Partnership for Peace Consortium of Defence Academies and Security Studies Institutes
PMSC	Political-Military Steering Committee of Partnership for Peace

RSGBSA WG	Regional Stability within the Greater Black Sea Area Working Group of the PfP Consortium of Defence Academies and Security Studies Institutes
SAC	Senior Advisory Council of the PfP Consortium
SCMCH	Initiative of South Caucasus and Moldova Clearing House
UN	United Nations
UNSC	UN Security Council
US	United States
WEU	Western European Union

Chapter 1
Sovereignty Over the Years

Abstract Theories of sovereignty, from Jean Bodin to John Rawls, are explained and the problem of positivism, namely principles that do not play out in real life, explored. A description of "functionalism" as an attempt to explain what works in international relations is given. Why does "sovereign equality" fail to explain a world in which some states have more sovereign prerogatives than others? The UN Charter enshrines Westphalian sovereignty but provides no room for moral judgements other than by Security Council's use of Chapter VII powers. However, treaties and imperative norms of customary international law provide constraints on sovereign absolutism. Amoral realism theories, deriving from Realpolitik fail to account for new notions of state responsibility in an independent and globalized world. There is now a greater dependence on liberal institutions and regional arrangements for collective security, and a need to provide for a new theory of how sovereignty is limited in the world. Constructivism emerged in the 1990s as a moderate branch of a bigger family of critical currents, which shows that the social identities of individuals and states are more important than the material structure of the international system. A constructivist analysis assists the understanding of the evolution of sovereignty by applying the mechanism of socialization of norms in the field of human rights and humanitarian intervention. According to the constructivist logic, sovereignty is no longer an untouchable, sacred reality, but an imperfect social construction.

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1.1 The Fate of Sovereignty: A Word of Caution in an Interdependent World?

Sovereignty may be regarded as both a simple and a complex issue. On the one hand, it seems very simple—the indefeasible right of each sovereign to exercise power, influence, and action over its own territory and to establish relations with the other states of the world, on an equal footing and according to the unanimity principle. On the other hand, it may be regarded as being very complicated since the states are not absolutely independent entities, but interdependent, coexisting together on the planet, and hence the politics and strategies of one state are largely conditioned by the politics and strategies of others, as well as by their synergetic or divergent effects on the international scale.

This is the reason why theories of sovereignty, although within the sphere of a quite rigid determinism, become more and more nuanced and interesting, striving for dynamism and complexity. Some theories start from the premise that the international system based on states is very precise and almost closed (therefore lacking the perspective of self-development) and dynamic in the sense of a non-linear and unpredictable evolution which generates a continuous and uncontrollable propensity to conflicts. Certainly, the theories concerning sovereignty are nuanced and numerous, some of them proving the immutability and inflexibility of the state and the rule of law, others looking for new forms of organizing the world, than based on a system of sovereign states, or promoting the principles of a world governance.

The unmistakable, and, in general, unanimously accepted reference, especially on the European continent, is the Westphalia moment. The Peace of Westphalia in 1648 marks the starting moment of placing the state at the world's center, which implies respecting it and its frontiers and setting up the principle of equality among the sovereign states.

The events following the Peace of Westphalia showed that sovereignty and the principle of equality (absolutely necessary to exercise and respect national sovereignty), are not sufficient for managing the world's crises and conflicts and for ensuring the security of both the states and their citizens. On the contrary, the principles of sovereignty and equality among states increased uncertainty and distrust. This has given rise to an excess of documents and bureaucratic relations that cannot justify the huge gap between the rich and the poor, the existence of the failed states, state aggressiveness, wars, and the general deterioration of international peace and security.

The emergence of international agencies and organizations has led to significant changes in the pattern of decision making in the world politics. This of course, raises a series of questions: Is there such a thing as "world politics"? Who is a part of it? Who benefits from it? Is politics the outcome of the international organizations that tend to act as a super-state? How is politics manifested on the international stage? What is, or, more precisely, what may be the role of the states in its elaboration? Nowadays, international organizations are controlled by their Member States. The decisions they make are ratified by the parliaments of the Member States and become compulsory for them only after they adhered to those norms and the national parliament approved them. The principle according to which international law has priority over domestic laws is strictly limited to situations where the state consents to such an arrangement through its membership of the respective international organization. For instance, European Union law is not binding upon central Asian states, but the UN Charter is mandatory for all Member States.

At the same time, new forms of multilateral and multinational policy have been instituted and implemented in the form of international governmental organizations, international non-governmental organizations, and a variety of trans-national pressure groups. One can draw the conclusion that interdependency has increased and that this has led to an increase in bilateral, regional, and international agreements. Moreover, on every country's territory there are influences from other countries in the form of economic, cultural, and information networks. In addition, the number of the representatives of one country in another country is continuously increasing.

The new European society of states is supported by a new conception of international law also known and referred to as the Westphalia model. The term "Peace of Westphalia" denotes a series of peace treaties which ended the Thirty Years' War which lasted from 1618 to 1648. The model defined the system of international relations that operated between 1648 and 1945, although some analysts argue that it remains in operation today.

The Westphalia model should be considered as the description of a normative trajectory in international law, which was not completely articulated until the end of the eighteenth century and the beginning of the nineteenth century, when territorial sovereignty, the formal equity between countries, non-intervention with internal affairs, and state consent for international legal obligation became essential principles of international society. This pattern describes the development of a world order consisting of sovereign territorial states, an order in which there is no supreme authority. Within this pattern, the states (which are and must be effectively sovereign) solve their own misunderstandings and, if necessary, are able to resort to the use of force. They engage in diplomatic relations, but cooperation is minimal due to the fact that each country seeks to promote its national interest above all others. Likewise, this pattern is based on the fact that states accept the logic of the efficiency principle, a principle according to which, in the end, force creates laws at international level.

The Westphalian pattern of sovereignty can briefly be presented as follows:

1. The world consists of—and is divided into—sovereign territorial states that recognize no superior authority.
2. The legal processes, as well as dispute resolution mechanisms and legal enforcement are the right of individual states.
3. International law is oriented toward the establishment of some minimal set of coexistence rules, which are ratified and accepted by the states; the establishment of some long-lasting relations between people and states serves a purpose only to the extent to which it allows for the achievement of the state's objectives.
4. Responsibility for the illegitimate actions that occur within state borders is a "private issue" concerning only the involved states.
5. Before the law, all the states are regarded as equal: the legal regulations do not take into account the power asymmetries.
6. Misunderstandings among countries are very often solved by the use of force; the principle of effective power is dominant. There is no constraint to stop the use of force; the international legal standards offer a minimum protection.
7. Decreasing the number of impediments affecting the freedom of state represents a "collective priority".
8. Individual human beings are not subject to international law, nor can they access international law to obtain remedies against states.

This new state order, while it offered a framework for the expansion of the state system, simultaneously supported every state's right to autonomous and independent actions. The states were conceived as "separate and distinct political orders", without any common authority to shape or limit their activities. From this point of view, the world is made up of distinct political powers following their own interests, with the support of diplomatic initiatives organizing their coercive power.

These principles devolve upon an ontological idealism which does not exclude a "Brownian movement" of the entities (particles) which exist (from the point of view of conflicts and in the same time for cooperation purposes) within the international system. However, if one were to view the Westphalia system as one in which each state is a system and all the states, as a whole, do not actually generate a system (taking into consideration the identification rules and the systems' structure) but merely coexist (the states' interests, that represent the basis for their policies, being neither harmonious nor complementary, but only interrelated), then the architecture of international relations is mainly random and unpredictable.

Given these conditions, it is understandable that the basic rules of relations among states have as a starting point uncertainty or insecurity defined on a set of uncertainties, suspicions, and lack of trust, but having a tendency toward dynamic constructions, which facilitates increased certainty and trust. The treaties, agreements, conventions, and other international documents, as well as the organizations and bodies created along the way, were not conceived as, and do not represent, super-state instruments, but are merely products of a world built upon competition, suspicions, and even chaos. We therefore cannot draw the conclusion

that state ontology is dangerous, counterproductive, and obsolescent, but that this kind of reality is as it is, and the ideal patterns of *de jure* equality are not supported by the international realities.

The same type of relationship exists between the Westphalian model and the real world, as it is for example between mechanical determinism and dynamic and complex determinism. That is why the objective in this book is to commence and develop an analysis of the realities and limits of a model which has generated and legitimized the modern national state, the tendencies to overcome this pattern, and the emergence of a new model which is not based on independent trends, but on interdependencies. Countries are continually forced to create international bodies which, by their will (or, more accurately, the will of the states) will be increasingly forced to accept and obey the rules and regulations issued and accepted by themselves, in order to ensure their security and protection, as well as the security and protection of their own people.

The starting point for research is to clear up the current paradoxes of the current theories on sovereignty, to identify the ontological and epistemological coordinates of the current realities for the Westphalian pattern, and to develop a new pattern based on the dynamic of international relations which would better respond to contemporary realities. It is necessary to identify a new type of sovereignty different from the Westphalian or post-Westphalian one, or at least to recognize an adaptation of the concept and the ways it is put into practice by the new realities in the dynamic of international relations. A possible pattern for sovereignty in the modern age, in the process of globalization, might be called *a pattern of sovereignty based on inter-dependencies.* This is supported by the following five considerations:

1. An analysis of the Westphalian logic, as it is reflected in the main historical theories of sovereignty throughout the years and the effects it generates on the dynamic of international relations;
2. Identification of the main security-related risks and threats from the perspective of the dynamic of the sovereignty concept in the contemporary age;
3. An analysis of the impact of international criminal law and the international bodies created under its aegis—The International Criminal Court and the international criminal tribunals—on sovereignty;
4. Understanding the role of the epistemic communities in the development of the cooperative security within the Greater Black Sea Region and, implicitly in enforcing the national sovereignty;
5. Identifying and analyzing the current understandings of state sovereignty and noticing the consonant, resonant, and different elements, and, if possible, a denominator of these elements to explore new elements of this concept required in the globalization era.

The sovereignty principle is one of the basic principles of the international relations, and the international legal bodies are complementary to those of national jurisdictions and work effectively for the benefit of national states. The authority of these bodies is guaranteed by lawful states which have created these bodies and became part of them, simply because they need them. The new conditions emphasize

the interrelations, the states being forced to enhance their cooperation and solidarity to balance their interests in the disfavor of isolation and lack of trust, and to undertake measures to punish, through a common effort, the criminal actions overlapping their authorities. Generally speaking, countries after regime change face difficulties in judging their former leaders for committing some crimes (although the leaders' impunity should not be an obstacle for bringing them to justice, especially for crimes against humanity), but the other countries together with the consent of the one in cause can and must do it. In other words, that means respecting the principle *E pluribus unum*.

Questions relating to the Westphalian model of sovereignty have been considered in numerous papers. But the questions that are important for states, governments, the international community, the scientific world, and the legal world have not yet been completely answered due to the fact that, after the Cold War and the subsequent creation of a geopolitical landscape, these have become multiplied and more complex in nature.

The book analyzes the realities of this concept, by underlining the common elements and the impact points of the different perspectives of the national sovereignty architecture, and by describing the current and future national sovereignty pattern in the context of globalization called the model of *sovereignty based on interdependencies*.

Making use of some international relations theories, such as institutionalism and constructivism, allows us to evaluate the dynamic of the interaction between state actors, of the circulation (socializing) of norms and ideas, associated to reshaping sovereignty in an increasingly more interdependent world. It should be acknowledged from the outset that the sovereignty concept is not an essential feature of international relations, like the physical power of the states, but a set of ideas, norms, and beliefs whose validity is based on the notion of legitimacy and legal order. It is therefore important to use the constructivist and institutional analysis grids during such an endeavor.

New relationships, new determinations, and new challenges of the security environment do not challenge the national sovereignty concept, but on the contrary, make it stronger and more responsible, imposing its adaptation to the new global conditions. They also modernize the concept, taking it out of conflicts and from the perspective of some chaotic and unpredictable evolutions.

Understanding of the concept of national sovereignty requires a theoretical foundation based on historical theories of the state and sovereignty. This commences in the Middle Ages and continues up to present times and requires reference to the main theories of international relations as part of a multidiscipline approach—the only one capable of fully explaining such a complex phenomena.

There are numerous definitions covering the sovereignty concept, most of them including notions such as: the supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; supreme will; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; the self-sufficient source of political power; the power to do everything in a state without accountability—to

make laws, to execute and to apply them, to make war or peace, to form treaties of alliance or of commerce with foreign nations.[1]

From an etymological point of view, the term "sovereignty" dates back to the middle of the fourteenth century in the old French and English (influenced by the Normans) in the form of the etymon *sovereynete*, having the meaning of *pre-eminence*, or *authority/law* at the end of the same century. In 1715, it was attested with the sense of *existence as an independent state*.[2] In the sixteenth century, the famous French thinker Jean Bodin gave it the Latin form of "suverenitas".[3]

Thus, the concept of sovereignty refers to the authority over the legislative process and over the territory. It is not only a juridical concept but a philosophical and sociological one due to the complexity of its connotations and determinations.

1.2 Dominant Schools of Thinking

There are many historical schools (trends) dedicated to national sovereignty, starting with the Middle Ages and continuing to the present. Among the theorists of sovereignty, living before or in the time of the Peace of Westphalia, one might mention Niccolo Machiavelli,[4] Jean Bodin,[5] Hugo Grotius,[6] Thomas Hobbes,[7] John Locke, J. J. Rousseau,[8] Friedrich Hegel and others.

The Roman jurists of the Antiquity distinguished between the *summum imperium* (supreme authority) and *merum imperium* (illegitimate authority). The saying "quod principi placet legis vigorem habet" (what is convenient to the prince becomes law) suggested, actually, the personalization of the power.

During the Italian Renaissance, Machiavelli emphasized the fight for survival between the state-cities, stating that the prince should have complete power over his subjects and complete freedom in dealing with the neighbor states. The prince also had the right to give up ethical, moral, and religious rules in order to ensure the success of the entity that he was leading.[9]

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[1] See the classical definitions of sovereignty: http://www.hawaii-nation.org/sovereignty.html, accessed on 5 October 2010.

[2] On line Etimology Dictionary, http://www.etymonline.com/index.php?term=sovereignty, accessed on 5 October 2010.

[3] Bodin 1986b.

[4] Machiavelli 1950.

[5] Bodin 1986a, Grotius 1984.

[6] Grotius 1984.

[7] Hobbes 1660, Pogson Smith 1909.

[8] Rousseau 1964.

[9] Machiavelli 1950.

For Jean Bodin, sovereignty represents "an ultimate and perpetual power",[10] not just an attribute, but the core substance of the Republic[11] which cannot exist in the absence of sovereignty, regarded as a shape of its absolute and ultimate power. Sovereignty is described as a perpetual, supreme, and indivisible power. Within this context, the state transcends the traditional defining frameworks, being overcome in its most important attributes by the person of the monarch. In other words, sovereignty, as the final defining attribute of the state cannot exist in the absence of an ultimate perpetual indivisible power and of a clear distinction between the state and its leaders. The state does not benefit from the attribute of sovereignty unless it has the capacity to assume and enforce it. According to such an approach, sovereignty transcends the material world and the human force, gaining both natural and divine legitimacy. Under these circumstances the sovereign power represents an expression of the representative legitimacy of the divine power, and constitutes itself as an ultimate regulating foundation for the state internal affairs.

Half a century later, during the time of the Thirty Years War, the Dutch thinker Hugo Grotius tackled the problem of sovereignty to give it a new dimension, closer to the material world. In his view, however, exerting sovereignty suffers from two major limitations. On the one hand, the governors who deal with state sovereignty may be held responsible for unjustly exercising it (unjust war and its consequences)[12]; on the other hand, the states exercising their sovereignty are subject to the nations' laws which regulate and give coherence to the whole international scene. In other words, the natural law and the sovereignty may become conflicting, so the latter, breaking the norms, may be limited in what concerns the international relations.

Finally, with the contribution of Thomas Hobbes, state sovereignty passes from the level of the natural or the transcendental order to that of the social contract (pact), and fully enters the domain of the international relations.[13]Asserting the natural individual tendency for concluding a social agreement that comes from the natural basic need of peace and security, Hobbes theorizes the voluntary consensus of the individual and members of the society, as an ultimate explanatory and founding resource of political legitimacy. Through this process, the governing pact is devolved and state sovereignty is validated by the acceptance and support of members of society. Eager to receive protection from the state, individuals give their assent to cede a part of their natural rights (especially the right to use force against their aggressors) to the sovereign that acquires an absolute power. One of the consequences of sovereignty cession from the individual to the state (Leviathan) is the disappearance of the internal anarchy and its relocation to the international scene. States created in this way arrive at inherent conflicting relationships, lacking an arbitrator above all. Hobbes considers that a

[10] Bodin 1986a, pp. 11–26.

[11] Ideal form of aggregation of the state institution, Ibidem.

[12] Haggenmacher 1983.

[13] Manent 2000.

social contract cannot be possible in a world of sovereign states. Due to his ideas, similar to Machiavelli but with a deeper philosophical bent, Hobbes can be considered an outstanding forerunner of the twentieth century realistic tradition in international relations.

Expressing specific group interests quantified accordingly, this perspective on state sovereignty can be translated in the international relations system by a state of anarchy and lack of regulations, because nothing can transcend and encroach upon state sovereignty.[14]

In the same tradition of the social contract theory, John Locke proposes a liberal model of the state according to which individual groups create a state with the role of an impartial arbiter to protect the lives, properties, and liberties of its subjects. The sovereign is legitimate when it contributes to realizing the "common goal" and if it respects the natural right of the citizens.[15]

With the Westphalian Peace, sovereignty imposed itself as a determining reality of the way in which the state entity is structured and interacts, both internally, with its subjects—citizens of the state—and externally, within interstate relations. Its dimensions and validity remain in direct relationship with the power of state entities to which it is associated. Although founded on natural right and divine legitimacy, sovereignty became dissociated from the monarch and associated with the state institution, signaling a fundamental change that was put into international practice as a result of the French Revolution.

Jean Jacques Rousseau is the theorist responsible for the shift from the initial conception on state sovereignty with the interpretations introduced in equation by John Locke, Montesquieu and Kant,[16] and the associated practical change that was later brought about by the French Revolution. According to Rousseau, sovereignty results from the social contract, the foundation of all governance, state organization, expression, and all ultimate attributes that characterize the nation-state. The people's sovereignty is indivisible and inalienable, as it is based on the "general will". Within this context, the state and its sovereignty suffer a substance transformation, from the transcendental principles of the divine or natural right to that of the people's will. In this context, the outcome of both a contractual relationship and of a pact of will, the state is functional and completely structured on one condition: that its subjects' rights[17] should be respected. Rousseau's contemporary, the English philosopher David Hume, although considering the notion of social contract to be a fiction, insists on the fact that any governance should be founded on the preliminary consent of the governed people.

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[14] Vayssiere 2007.

[15] Locke 1988, p. 137.

[16] On the evolution of the theoretical approaches on sovereignty of the mentioned authors, see Badie 1999, pp. 23–30.

[17] For a recent detailed analysis of the theory of social contract concerning the state and sovereignty in relation to the nation, see Foisneau 2007.

The exponent of the historical German school, Friedrich Hegel, asserts that the state is the supreme embodiment of the peoples' spirit, its sovereignty being ultimate. He is the preacher of the "Peoples' rights" doctrine (Volkerrecht). Hegel wrote: "The external political right derives from the relation between the independent states; what is in this rapport in itself and for itself acquires an imperative form since its reality relies on distinct sovereign wills. … The states are not private persons, but completely independent totalities, and thus, their relation is different from moral and private law relations… The people as state, represents the spirit in its substance rationality and in its immediate reality, that is why it represents the absolute power on the earth; consequently, a state is in a sovereign interdependence relation with other states".[18]

It becomes increasingly necessary to ask the following question: is Hegel's finding, from that period when the notion of sovereignty received a very consistent definition and a thorough juridical grounding based on the natural law, still available? In other words, are the principles of the philosophy of right formulated by the philosopher still topical?

The modern day international system does not accept supreme authority and can therefore be considered "anarchic". At least, this is its major attribute in the classical philosophy inspired by Hobbes. But it must be added that it builds institutions in order to help the states in exerting their sovereignty in external relations, in particular, to support the sovereignty principle on the functions and roles of those institutions (which are rather interstates entities, even though they seem supra-state ones). With their states' endorsement, the institutions should do what the states are not able to do.

The sovereign state is, and will for some time, be its own master. There is nothing above it. The international system is not superior to the state; it is only a *modus vivendi* of the states. It is a community of states. But, to go on existing, under the new extremely restrictive and menacing circumstances, the states have instituted principles that they are bound to respect. One of these principles is that of sovereignty. In contemporary international law, it is enhanced through the elaboration of a set of normative documents that do not give the states absolute power (this concept is disputable and doubtful), nor absolute powers of self-determination, but create responsibility toward other sovereign states, toward its own citizens and the human rights, formulated and accepted by states. It seems that such an assertion, once indisputable concerning the relation between the states, becomes obsolete, and, in a way, inopportune. More and more theorists express their doubts over categorical statements and assertions that traditional notions and concepts should be adjusted to accommodate the new realities, determinations, and configurations of international relations. Is there a common denominator of the theories and doctrines on the sovereignty issue?

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[18] Hegel 1969, p. 373.

More recently, John Rawls outlines a new philosophical vision, trying to reconcile the citizen's need for freedom with the need for equality. He proposes a new form of social contract based on the idea of an original position in which every individual is called to decide on the justice principles from behind a "veil of ignorance". This veil does not allow the people to know their own positions and interests, in order to prevent the fact of being influenced or the alteration of the idea of justice in equality. Thus, it leads to a perspective on sovereignty founded on equality and on the same opportunity being provided to everyone to attain leadership positions.[19]

Generally speaking, the great changes in the way to conceive sovereignty and the state system were done through the so-called "revolutions"—rupture moments which allowed the passage from the polycentric world with dispersed authority from the Middle Ages to post-Westphalian world of the states which concentrate sovereignty in unique decision centers.[20] The European Westphalian model was also gradually applied to the other continents, through colonization, decolonization, and independence. Effectively, an importation of state and, implicitly, an importation of the notion of sovereignty have taken place.[21] Is it possible that the revolution of ideas have been more important than the political and social revolutions?[22] To know and understand the world of ideas and theories does not mean, certainly, to neglect the material factors that have shaped the state system and the types of sovereignty in their historical evolution.

1.2.1 Juridical Paradigms Regarding the Sovereignty Principle

The interpretation of the sovereignty concept lies on the ideas of two schools of thinking: the natural law concept and the positive law concept. It is known that natural law theories (*jus naturalis)* played an important role in developing jurisprudence, especially in western European states. Starting from the idea that there are certain "laws" that, in spite of being unwritten and immutable, have been encoded in the human nature, from which emerge rights and obligations impossible to ignore, the western jurists borrowed the ancient Hellenic and Roman heritage and grafted it onto the trunk of the Christianity (see the works of Thomas Aquinas, and then, of Suarez, Grotius,[23] Pufendorf,[24] etc.). We have already explained the impact of Hobbes' and Locke's ideas about the social contract

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[19] Rawls 1971, p. 303.

[20] Ruggie 1986, p. 141.

[21] Badie 1992.

[22] One of the authors who emphasizes the idea of "revolution of ideas" in shifting the paradigm of sovereignty is Daniel Philpott, Philpott 2001, pp. 3–4.

[23] Grotius 1738.

[24] Pufendorf 1717.

derived from the natural law theory. The French Revolution in 1789 was fuelled by these ideas of natural law developed during the Age of Enlightenment, and the new sovereignty concept acquired its acknowledged juridical form.

The other tradition, or "positive" law sought to separate the legal sphere from ideas like morality and equity and to explain how the laws were born and what their significance is. Austin and Kelsen are the most well-known representatives of this tradition. Kelsen, for example, strove to identify the "fundamental norm"— *Grundnorm.*[25]

Sovereignty in international law is considered a principle on which international relations are based and which ensures stability and mutual respect for these kinds of relationships. It is certainly a very old principle, in some analysts' view a Post-Westphalian one, dating back to 364 years, and in others' opinion being even older, that emerged when the state's authority over the legislative process and the obligatory character of the law were instituted. From the notion of absolute sovereignty, specific to the French royalty in the seventeenth and eighteenth centuries, following the French Revolution the notion of people's sovereignty appeared. International law recognized the importance of sovereignty to the interstate system as a coherent ensemble. Thus, in April 1949, in the Corfu Channel Case, the International Court of Justice stated that: *le respect de la souveraineté territoriale est l'une des bases essentielles des rapports internationaux".*[26]

One of the strongest traditions in political theory that was highly influential in the juridical theory was Realism. Hans J. Morgenthau, specialist in international law and founder of this important school of International Relations, shows that the tendency of condemning the sovereignty principle is due to the perception of the conditioned relation between the principle and the weakness of a decentralized system of international law. This tendency is more frequent than a serious effort to understand the sovereignty's nature and function in the modern states system.[27] Morgenthau considers that there were only few theorists who made efforts to explain the content of the concept, the rest manifesting a great confusion relative to the meaning of the term and what is or is not compatible with the sovereignty of a certain nation.[28] The great variety of theories and conceptions on sovereignty implies a common denominator: *ignoratio elenchi,* which means that ignoring the question leads automatically to the confusion of the principle with the means of understanding and applying it.

It is well known that, during the 1940s, Morgenthau strongly attacked juridical positivism in the name of functionalism, claiming that positivism had degenerated, being reduced to a narrow way of thinking like a medieval scholastic theory.

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[25] *Positive Law Theory*, http://www.hku.hk/philodep/courses/law/Positive%20Law%20hnd.htm, accessed on 6 October 2010.

[26] Dauvillier 1974, pp. 153–154.

[27] Morgenthau 2007, p. 333.

[28] Ibidem.