MODERN VERSUS POSTMODERN STATE AND SOVEREIGNTY

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In today's globalising and fragmenting world, where the great picture of sovereignty is being replaced by 'language games' around this notion, it is worth noting that there has not actually been much discussion of the term. In many articles the dispute is rather short and not deep enough in comparison with discussions of other terms in international law. The designation of 'sovereignty' needs to also take into account the cultural diversity of the world – different dominant beliefs, customs, ethnic traditions, and values. In relation to globalisation, the existence of different civilisations and values side by side creates a completely new situation. In order to understand paradigmatic breakthroughs in statehoods and sovereignties in today's globalising world, we will take a retrospective look at when modern states were just starting to develop.[1]

SOVEREIGNTY AS IT RECENTLY STILL WAS

The modern nation state, which evolved in the 16th and 17th centuries, was originally a European phenomenon. Afterwards, there was an attempt to export this modern model of the state all over the world.[2] Hannum writes that this export, which started with colonisation, continues through globalisation.[3] Today, the Western world considers it normal that a state is religiously neutral and secularised. Weber is of the opinion that secularisation, which was built on the underlying principle of the Peace of Westphalia – *cuius regio, eius religio* – was not accidental at all. It had been programmed earlier in Judaism and Christianity.[4] The principle of "*cuius*" has been treated as a declaration of the freedom of religion. On the other hand, it was also a restriction, as the sovereign parties to the contract had to be Catholic or Protestant. Consequently, the official religion of states had to be one of these two. Those who practiced a different religion from the official one were entitled to emigrate.[5] In order to surpass religious wars, states had to be founded upon an ideology other than religion. Religion was thus replaced by secular belief – belief in the nation and state – by the pan-European enlightenment. "The State is to be a fellowship of free and equal men, and everyone is to devote himself to the 'welfare of the whole,' to be dissolved in the State, to make the State his end and ideal. State! State! so ran the general cry, and thenceforth people sought for the 'right form of State,' the best constitution, and so the State in its best conception. The thought of the State passed into all hearts and awakened enthusiasm; to serve it, this mundane god became the new divine service and worship. The properly *political* epoch had dawned."[6]

Therefore, it should be emphasised that the nation state of the 18th century does not largely differ from Byzantium as, in Europe too, a sovereign was both the head of the state and church. (In Russia that had happened from the times of Peter the Great, although not for long.) A Westphalian nation state with one centre started to stand on its own two feet only in the 19th century. Habermas, addressing the evolution of the nation state, notes that the word '*natio*' refers like '*gens*' but unlike '*civitas*', to peoples (often 'savage', 'barbaric', or 'pagan' peoples) who were not yet organised in political associations. The classical use of the word 'nation' means tribal associations, integrated through geography, settlement and neighbourhood, and also through culture – common language, customs, and traditions.[7] It was in this meaning that the concept of 'nation' was used

[1] I. Grauberg. Sovereignity in international Law and Politics: Theory and Practice.-. Kingś College London- 2013. pp.89- 97.
[2] I. Grauberg. Sovereignity in Contemporart International Society.- Journal of Social Sciences of Tallinn University Law School. 2011, pp. 3- 12.
[3] H. Hannum. Autonomy, Sovereignty, and Self-determination. The Accommodation of Conflicting Rights.– Philadelphia 1992, p. 25.
[4] M. Weber. The Protestant Ethic and the Spirit of Capitalism. – London: Routledge 2001, pp. 13–39.
[5] W.C. Durham. Perspectives on Religious Liberty. A Comparative Framework. J.D. van der Vyver. J. Witte (ed.). Religious Human Rights in Global Perspective. Legal Perspectives.– The Hague: Martinus Nijoff 1996, p. 3.
[6] M. Stirner. Ego and its Own. – London: Rebel Press 1994, p. 93.
[7] Most importantly in H.S.Maine's "Ancient Law", mainly in the first chapter analysing development of Roman and Greek law form then existing society. But also J. Habermas. The Inclusion of the Other. – Studies in Political Theory, Wellington Graphics 2002, p. 213.

throughout the Middle Ages. In the 15th century, 'nation' started to be associated with the language of a concrete nation. After the French revolution, 'nation' acquired the meaning of the source of a firmly fixed source of sovereignty. Expressed by Lafayette and Sieyes in the many drafts of revolutionary documents. Each nation now had a right to political self-determination. Ethnic relations are replaced by formations of democratic will. Habermas stresses that in the second half of the 19th century, the term 'nation' was used together with the concept of 'citizens'. The nation of citizens gained identity not on the basis of ethnic-cultural similarity, but through the activity of citizens who actively exercised their democratic rights of participation and communication.[8] "In political usage, the concept 'nation' and 'people' have the same extension. But in addition to its legal definition the term 'nation' has now the connotation of a political community shaped by common descent or at least by a common language, culture, and history."[9]

Once Schmitt stated that the modern state has 'banished' religion to the private sphere. A liberal answers Pilate's question "Jesus or Barabas?" with the desire to defer answering. Schmitt believes that in this way the state attempted to ensure a peace that allowed for welfare, personal freedom, etc. Therefore, the state applied a premise that it had not created or maintained – the Christian spirit that carried Europe and the whole world.[10] If it had earlier obeyed the will of God then now, in an autonomous secularised world, man would himself create laws. In actuality, state secularity started to mean religious neutrality in Europe, which is indicative of the state's tolerance towards different religions. In the public sector founded on the principle of secularity, religion is treated in the same way as liberalism or communism or any other faith or ideology. There is only one rule in and for the state itself – the law. The nations and all citizens are granted equal rights under the law irrespective of their religion, race, or origin. This was quite a philosophical novelty in medieval times from two angles. First, human beings and nations seemed to be all different and thus had different rights. Second, the foundation of the whole of society were based on the differentiation of social states and strata. In the first case, the breakthrough required abstraction that led to similarity, and in the second, to the recognition of humanity as a whole.

The concept of a nation is not equivalent to nationalism. Major historical catastrophies, wars, revolutions, and so on, contributed significantly to the evolution of nationalism. Not all of them were negative. The French revolution, although including dictatorship under Robespierre, contributed to the modern and free Europe. The Napoleonic wars made the first crucial step to the unification of Europe. Code Napoleone is the foundation of all modern European legislation.

Sovereign nation states must ensure order on the territory under their jurisdiction.[11] Intervention in the internal affairs of another state had been considered illicit but without it we would not have been able to build up the new Europe. Sovereignty as a form of full external and internal independence became the foundation of the political and legal order of international society.

Based on the above, one might ask what created the system of sovereign nation states after the Peace of Westphalia. Some authors believe that this would be a totally erroneous approach, since we cannot speak of any system of sovereign states dating back to that time.[12] Krasner, for example, says that in reality there had never been and never will be sovereignty. If one accepts this standpoint, then it should be asked what are these individual nation states that are entitled to make laws and resort to violence?[13] Hence, for the time being, let us put the standpoints of Krasner and his possible sympathisers aside. Instead, let us ask: What characterises that Westphalian system? Its basic characteristics have been cited to be as follows:

First, a war may be conducted only by a sovereign; second, a sovereign may not conduct a war in another state to enforce

[8] J. Habermas, *ibid*., p. 214.
[9] *Ibid*., p. 107.
[10] See C. Schmitt. Political Theology. Four Chapters on the Concept of Sovereignty. 1922. Available at http://idepolitik.files.wordpress.com/2010/10/schmitt-political-theology.pdf.
[11] H. Schilling. War and Peace at the Emergence of Modernity: Europe between State Belligerence, Religious Wars, and the Desire for Peace. – Münster: Westfalishes Landesmuseum 1998, pp. 23–46.
[12] S.D. Krasner. Sovereignty: Organized Hypocrisy. – New York: Princeton University Press 1999, pp. 10–15.
[13] E. Loone. Suveräänsus. Seadus. Immigratsioon (Sovereignty. Law. Immigration).Atlex, Tartu 2004, p. 8 (in Estonian).

a religion it desires; third, there is no legitimate power above the sovereign entitled to make decisions binding to the state; fourth, a sovereign cannot do everything; fifth, sovereignty is territorial. The main principle of Westphalian sovereignty, however, has already been mentioned – whose realm, his religion (*cuius regio, eius religio).*

The Thirty Years War was actually not only a war for power, to conquer a particular territory, but also a war to enforce the right of religion. The relationship of the state and religion, the relationship of the state and ideology then titillated the minds of people most. England did not directly participate in the Thirty Years War. However, in England a civil war was fought even before Hobbes' 'Leviathan' was published. That war was also fought for the right of religion. Therefore, several streams of Protestantism were considered to be genuine. It is important to stress that Hobbes himself precluded the justification of the state with any ideology, including religion. In the following decades, this opinion spread in Western Europe.[14] As we know, the principles of Westphalia were used also when drawing up the Treaty of Muenster.

The Westphalian international system was designed mainly by Europeans. Until WWI, the balance of powers that had formed after the end of the Napoleonic Wars in 1815 determined international law and international relations in Europe. The political map of Europe was shaped by the countries of the so-called 'European concert' – England, France, Russia, Prussia, and Austria. The foundation regarding *de jure* recognition of states was quite similar to today's situation: the liberalisation process of a state had to be built upon the cooperation and consensus of major powers and international institutions.

World War I redesigned the political map of Europe. The collapse of three empires resulted in the appearance of numerous states that all claimed recognition. Numerous nation states emerged which all claimed *de jure* recognition. *De jure* and *de facto* recognition, which as late as in the 19th century had been mainly a subject of legal and theoretical discussion, became a practical model of conduct in international relations and international law. International law at the time of WWI did not yet prohibit wars of aggression. Therefore, there was no legal reason not to recognise occupation as a fact that had taken place. By the way, the right of the self-determination of nations, expressed post-WWI in Wilson's 14 points, has unfortunately still not been practically implemented in international law.

Nevertheless, it is important to emphasise that after WWI, several major changes occurred in international law. The principle supporting *de jure* recognition of nation states – *ex factis jus oritur* (the law arises from the fact) – was replaced by a new principle – *ex injuria jus non oritur* (law does not arise from injustice). The USA, on the basis of the 1928 Kellogg-Briand Pact, developed a doctrine which prohibited war as a means to carry out policies. The Kellogg-Briand Pact was further developed by the 1933 Montevideo Convention, which was originally signed by six Latin-American countries. The USA and eleven European countries also joined this convention on the rights and duties of American states. Today, the Montevideo Convention has been signed by 27 states. Article 1 of the Montevideo Convention sets out the definition of a state as a person of international law. A state has four qualifications: a permanent population, a defined territory, government, and capacity to enter into relations with other states.[15] In addition, the reality of sovereignty may include that right to install and collect taxes and establish conscription to the standing army. The Montevideo Convention also developed further the Kellogg-Briand Pact, emphasising that occupation was null and void and that disputes must end in reconciliation.

Hence:

1) In the Westphalian system of nation states, the sovereign or nation and their representative continue to be the source of *de facto* law. That power has three key features. First, absoluteness because independent nation states cannot be limited. Second, unitarity because power must apply to all things and acts and cannot be divided or relinquished. Third, it is the supreme power because power must be final in all of its decisions.

2) Such a treatment of sovereignty is indicative of certain links with a territorial-nation state. This is the only context in which

[14] *Ibid.*, p. 30.

[15] Montevideo Convention on the Rights and Duties of States. Available at http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897.

sovereignty can be realised. Only in a nation state can governors acquire a monopoly of decision-making in the realms granted to them, which no longer needs a higher power or its limitation.

3) Nation states belonging to the international community are sovereign; however, they must follow generally recognised international norms, rules, and obligations. Order and stability must be ensured by the principles underlying the Peace of Westphalia: first, the balance of powers which aim to prevent the rise of larger and more powerful states in order to limit the possibility of aggression; second, all participants must follow the rules and principles engrained in international law; third, larger conflicts must be attempted to be solved by international consultations; fourth, diplomatic communication must be developed which would help states make contact in order to resolve conflicts.[16]

Westphalian sovereignty created a basis for the entire international political system and international law. It paved the way for attempts to create an international society in which independent nation states have plenipotentiary power over the territory under their jurisdiction, consider the interests of other states and do no harm to the interests of their people. The Westphalian Peace is the pillar of sovereignty by which the church was separated from the state.[17] Or more precisely, state was separated from the church. The concepts of international society mentioned above include both the realist concept based on the interests of a modern state and the balance of powers, as well as extreme versions of value-regulatory concepts, according to which chaos and anarchy can be replaced by the hegemony of 'world government' or a system of collective security. Needless to say, the modern world also includes the UN as an international organisation. On the one hand, the UN emphasises the sovereignty of its member states; however, on the other hand, it attempts to stabilise the current modern order and would resort to using force for this purpose, if needed.

From the perspective of international law, when justifying the transformation of sovereignty in today's postmodern world, one is bound to consider the relationship between the principle of *ex injure jus non oritur* and that of *ex factis oritur jus*. Namely, what is the relationship of the principle of lawfulness and that of practicality, when solving concrete cases, so as not to ignore the legal arguments for state sovereignty against changes in society?

Unlike the modern world, which is built on the principle of balance, the postmodern world is built on openness, transparency, and trust. "The postmodern state defines itself by its security policy. It does so as a matter of political choice. There is no iron law of history that compels states to take the risk of trusting transparency rather than armed force as the best way of preserving its security.… Lying behind the postmodern international order is the postmodern state – more pluralist, more complex, less centralised than the bureaucratic modern state, but not at all chaotic, unlike the premodern."[18]

SHIFT IN SOVEREIGNTY

Two interstate agreements were the driving factors behind the emergence of the postmodern world: The Treaty of Rome (1957), which launched European integration, and the Conventional Armed Forces in Europe (CFE) Treaty, which according to Cooper was born of the failures, wastes and absurdities of the Cold War. "The path toward this treaty was laid through one of the few real innovations in diplomacy – confidence-building measures."[19] At the core of the CFE Treaty is intrusive verification, which Cooper believes is a key element in a postmodern order where state sovereignty is no longer an absolute. In a situation where sovereignty has been sacrificed to security and foreign policy, it proceeds from the principle that allows interference in internal aspects of external affairs. However, the aspirations of the Organization for Security and Co-operation

[16] A. Watson. European International Society and its Expansion. The Expansion of International Society, ed. by H. Bull and A. Watson. – Oxford: Clarendon Press 1984, pp. 13–32.
[17] H. Schilling. War and Peace at the Emergence of Modernity: Europe between State Belligerence, Religious Wars, and the Desire for Peace. – Münster: Westfalishes Landesmuseum 1998, pp. 23–46.
[18] R. Cooper. The Breaking of Nations, Order and Chaos in the Twenty-First Century.– London: Atlantic Books, p. 50.
[19] *Ibid.*, p. 35.

in Europe (OSCE) in providing internal standards of conduct (freedom of press, treatment of minorities, etc.) to sovereign states are much more far-reaching.

Today's world is much more complicated than to be divided into just North and South based upon economy, or East and West based upon culture and values. It is Samuel P. Huntington who stated that there is not one and only one cultural axis. Instead of the East and West it would be more appropriate to speak about the 'West and the rest', which would also be indicative of the existence of many of those who belong to the non-West.[20] If the Arab world is placed in the non-West, one should certainly ask, which are these basic cultural values and traditions that distinguish, for instance, an Islamic country from the Western model of a state.

One of the features of the postmodern world is the loss of distinction between states' internal and external affairs, which is bound to affect state sovereignty. "Mutual interference in some area of domestic affairs and mutual surveillance (of food safety, of state subsidies, of budget deficits) is normal for postmodern states. In most European countries the judgements of the European Court of Human Rights on all kinds of domestic matters (whether you can beat your children, for example) are accepted as final. Force is rejected as a way of settling disputes."[21]

As the postmodernism exists through a lack of borders, classifications, and so on, the borders of postmodern states are also less important. Even court and administrative decisions are enforced across state borders, right down to parking tickets. In this environment, security, which was once based on walls, is now based upon openness and transparency. It needs still to be remembered that transportation documents (bills of lading, way bills etc.) are not mutually transparent, yet the problem is currently under discussion. At the same time, some postmodern relations are restricted by agreements. With Russia, transparency is restricted, for instance, by the CFE Treaty. The old imperialism is dead in the postmodern world, as many states no longer aspire to new territories. The exception in Europe is Russia, which has occupied Crimea, Eastern Ukraine and parts of Georgia. Hence, the postmodernising world can be treated as a highly-structured and organised network that has no central power. In terms of security, for the majority of the world, anarchy continues to be the dominant reality. "When someone has decided to use force, the system returns to the law of the jungle, however many trade agreements there may be,"[22] as occurred during WWI. One must agree with Cooper that if postmodern cooperation structures enhance the security of states better than the Westphalian system of the balance of powers, then the states' opportunities to exercise their sovereignty improve.

State and sovereignty are not constants anymore but change in time and space together with society. A postmodern state is less dominant, "state interest becomes less of a determining factor in foreign policy: the media, popular emoticon, the interests of particular groups or regions (including transnational groups) all come into play."[23] At the same time, that is not to say that "the state has outlived its usefulness. It does not even mean that sovereignty has become meaningless. However, as the state and sovereignty are historical categories, they change and sometimes they change considerably."[24] State sovereignty from the postmodern perspective is primarily shared, not an absolute supreme power. From the legal angle, the state no longer has a monopoly in law-making in a postmodern state. The monopoly of the state to employ force is also restricted by alliances and weapon control agreements (e.g. the CFE). This means, however, that a modern state, being a sovereign ruler of its territory that was once able to do there whatever it wanted without external interference, has today exhausted itself. There are many sociological reasons for that but one philosophical reason as well: postmodernism means, after all, the elimination of any type of limit, border or line, and thus they do not exist for the states either.

Postmodern sovereignty construes itself through various international associations, unions and agreements that presume cooperation and democracy built on consensus. Peace-building is just a part of the activities by sovereigns as is the conduct of war. Cooper is of the opinion that sovereignty for a postmodern state means a seat at the table. Or, some fixed position within the realm of members of the international community. As a postmodernising state is less centralised and more plu-

[20] *Ibid.*, p. 46.
[21] *Ibid.*, p. 37.
[22] *Ibid.*, pp. 47–48.
[23] R. Cooper. The Breaking of Nations, Order and Chaos in the Twenty-First Century.– London: Atlantic Books, p. 50.
[24] R. Müllerson. Ordering Anarchy. International Law in International Society – Martinus Nijhoff Publishers, p. 134.

ralist and resembles more of a network than a bureaucratic system, then the state will become less dominant in a postmodernist society. Just like a tribe, a town, a republic and an empire, the modern state will soon become a relic of the past. The postmodern viewpoint is a response to what Habermas calls the crisis of legitimation. Habermas believes that the state has become dysfunctional because it has "colonised the world of life".[25] The postmodernist alternative presents the possibility of a society without the authority of the state, offering autonomy and independence from the state to law as a social regulation. Emphasis is on juridical pluralism.[26] This opposes Kelsenian legal fundamentalism. It is also emphasised that the state is no longer the only source of the rule of law. People live in families, work in offices and factories, buy goods at markets and in shops, fulfil various social roles, share different values, etc.[27]

We will repeat that later, in a postmodern society, the state simply ceases to exist in the sense of the last 500 centuries. One example of that will suffice: Huawei is definitely more sovereign than even the communally centralised Chinese state. The power of Musk is more significant than that of Macron. Even the social policies of the "yellow vests" were stronger than that of Macron. For those who dislike Trump it is inevitable that we accept that the movements of Boston and Wall Street were more powerful than those of the US president.

As the role of the state in today's world has become increasingly problematic, the lack of its involvement where substantial roles are played is also less noticeable. Hence, one may think that in such a society, external policy will be less dependent on the interests of the state. Could this mean the end of the state? Cooper believes that states will remain a fundamental unit of international relations for the foreseeable future, even though they may have ceased to behave in traditional ways. His justification is that, "identity and democratic institutions remain primarily national" despite economy, law-making and defence being increasingly embedded in international frameworks, and the borders of territories possibly becoming less important in postmodern society.[28]

It is possible to agree with Cooper in relation to European nation states, where for centuries identity has been founded primarily on ethnicity. At the same time, it should be pointed out that identity, like sovereignty, is not a constant that is independent of time and space. This especially concerns the current European Union, where the evolution of a new postmodern state offers opportunities for a partial change of identity rooted in ethnicity. One should also agree with Cooper that in international relations the state will continue to be a fundamental unit for some time. It is quite another thing, however, whether the state as a fundamental unit of international relations will be a singular or multilateral subject in the future. This is a question that only time will answer.

But the key question with an evolving international society and world order is how states, as subjects of international law, communicate with each other in this shared reality. Keeping in mind that they have to communicate with new sovereigns as well. What will these relations and connections be like? Are these built on international society as a large network-based institution, where relations between states are regulated by laws made on consensus not conflict? Or to put it another way, would they be based on the method of conflict where major powers, especially the United States, set themselves against all of Eurasia, or will it be a method of consensus, where an attempt should be made to find common ground?

In the search for a new world order, not much consideration has been given to the fact that Western society accounts for just one third of the whole world. It means that besides Western civilisation, which covers mostly the European and American Christian world, there are many other civilisations in the world that do not share Western values of freedom and democracy. In the past, these civilisations were isolated from each other and as such did not pose a particular danger to each other. Unfortunately, this is not the case today, when a country without much law and order can still have an international airport.

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[25] J. Habermas. Legitimation Crisis. Beacon Press, Boston, Massachusetts 1975, p. 54.
[26] N. MacCormik. Questioning Sovereignty. Law, State, and Nation in the European Commonwealth. – Oxford University Press 1999, pp. 97–122.
[27] See G. Lloyd. Part of Nature: Self-knowledge in Spinoza's Ethics. – Ithaca: Cornell University Press 1994.
[28] R. Cooper. The Post-modern State and the World Order.– London: Demos, Foreign Policy Centre 2000, p. 39.

Such countries may evoke sympathy; television may bring their sufferings to our homes. Furthermore, where the state is too weak to be dangerous, non-state actors may become too strong.

Hence, premodern, modern and postmodern worlds are closely interconnected through globalisation. "A world divided into three needs a threefold security policy and a threefold mindset. Neither is easy to achieve."[29] One can agree with Cooper that there is no new world order, just a new world that is not composed of states of different shapes, contents and legal traditions; instead of a new world order, there is a zone of safety, mainly connected with the postmodern world, and outside it a zone of danger and a zone of chaos.[30] In this context, one is bound to ask whether the postmodernising state may mean the end of classical sovereignty.

The discourse of the postmodern world attempts to unburden itself from all closed systems and order the world through relationships with other systems. From the instrumentalist perspective that has grown out of pragmatism, the concept of sovereignty does not necessarily correspond to any 'real world'. Its different meanings are important as their use makes it possible to control and, to a certain degree, foresee events. Everything depends on the purpose of using the concept. What is the purpose for which the concept of sovereignty is used, how does sovereignty function in different language contexts? What is the context of its use? For instance, what is the concrete purpose of solving an international conflict? What is the relationship between political agreements and international law in solving one or another situation concerning state sovereignty and independence?

In order to govern and regulate the globalising world, such international institutions that have primacy over nation states, values and rules are needed that would create conditions to unite this diversity and to resolve conflicts endangering global peace through global civil society.[31] For instance, consider the UN, NATO, the International Atomic Energy Agency, the World Bank, International Monetary fund, on the one hand, and universal values and rules, human and civil rights, fundamental freedoms, on the other. There has been almost as much speculation about global civil society as about global world governance. Despite the somewhat utopian nature of the idea, the issue of a global civil society is worthy of attention, particularly in view of its democratic decision mechanism,[32] which directly pertains to the issues of the legitimacy of power or sovereignty. Finally, it must be kept in mind that the WTO is definitely a more important global structure than the UN and any of its other subdivisions. The question remains: what types of laws and legislation will replace the norms we traditionally call constitutions. This question is even more important if we keep in mind that many international corporations operate by rules that are definitely more humane than those embedded in traditional international law. And their outcome is more humane as well (e.g. Musk's space programme, producing new materials etc).

DOES SOVEREIGNTY MATTER IF STATES DO NOT?

Sovereignty (if it still exists) does not need to satisfy, and indeed in many cases cannot, all the requirements of sovereignty established by the Westphalian Peace in a globalising world. For instance, a state may be recognised *de jure* internationally but be *de facto* subjected to external control. Krasner believes that in such a case sovereignty is violated, as the key qualifier of a sovereign state is its right to external non-interference,[33] be it in the form of military intervention by force or an invitation to intervene.

We can agree with Krasner insofar as such a situation is seriously contrary to the principle that the communication of states, as subjects of international law in international society, relies on equality and lawfulness. The equality of states has been

[29] *Ibid.,* p. 57.
[30] *Ibid.,* pp. 16–55.
[31] M. Desai. Global Governance. Global Governance: Ethics and Economics of the World Order. – London: Cassell 1995, pp. 6–21.
[32] J. Habermas. Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy.– Cambridge: Polity Press 2007, pp. 359–388.
33 S.D. Krasner. Sovereignty: Organized Hypocrisy. – New York: Princeton University Press 1999, pp. 126–127.

called the pillar of international society.[34] Bruno Simma has reiterated this principle in that all states of the world have *suprema potestas,* and as such are not in some kind of hierarchy. International law must observe the equal bases of the sovereignty of all states. This principle has usually been treated as sovereign equality.[35] International law has mainly emphasised the dual function of the principle of sovereign equality. First, it accepts a pluralist international society – nations treat each other above all as humans not as Christians or Muslims. Second, the principle of sovereign equality is indicative of the idea of an egalitarian international legal order, which means that all states are legally equal. Equality in sovereignty is the most important principle of sovereignty in international law. Hence, equality can be spoken of only in relationship with another equal person, be it a natural or legal person. Müllerson writes that "...states are not only legally equal, they are also legally supreme. What the latter means is not easy to define. States have to observe international law and their consent is not necessarily and always needed for the binding effect of international legal rules. Equally, decisions of international bodies may be legally binding for states even without their consent. However, it seems that the prevalent view among states themselves, as well as among legal writers, is that a state is sovereign only in so far as it is not constitutionally subordinated to another state."[36]

The *jus cogens* character of all fundamental principles of international law – sovereign equality, non-interference in internal affairs, non-use of force, peaceful settlement of disputes, self-determination of peoples, respect for human rights, international cooperation and good faith – makes them open to question.[37] Some of them, for instance, the principle of the self-determination of nations, are "controversial even as *jus dispositivum*; the suggestion that they constitute *jus cogens* is difficult to accept."[38] But Müllerson argues that "not all fundamental principles, and all aspects of the content of these principles, have *jus cogens* character". Despite this, one should be doubtful "about the applicability of the very concept of *jus cogens* in the law of treaties, especially as it is formulated in Article 53 of the Vienna Convention on the Law of Treaties."[39] Here, he refers to the secret protocols of the 1939 Molotov-Ribbentrop Pact between the Soviet Union and Germany, which divided their spheres of interest (territories of Poland, Estonia, Latvia, Lithuania, and Bessarabia). "A treaty whereby the USRR and Germany would have agreed, say, to divide fishing rights in the territorial waters of Poland or Estonia would equally have been null and void since states simply do not have, in the absence of consent, the competence to deprive other states of their legal rights by way of treaty."[40] This means that the rules of *jus cogens* may be spoken about in international law only to the extent that two states "agree by way of the conclusion of a treaty to do something that is prohibited by a *jus cogens* norm against each other and not against any third state (e.g. if two states were to agree that they will not settle their border disputes at the negotiating table but only on the battlefield)".[41]

The principle of the equal basis of the sovereignty of states has had an important role in the development of the international society. It has been even instrumental in the restoration and development of the independence of many small and not (I would delete 'overly') strong states like the Baltic states – Estonia, Latvia, and Lithuania. The principle of sovereign equality has become an important principle of international law, especially at times when international society has rapidly expanded. As a result of globalisation and the fragmentation of society, the number of states has increased at an unprecedented pace. However, as more and more states have evolved under the jurisdiction of international law, many are in fact unequal to developed sovereign states. Benedict Kingsbury points out that sovereignty somewhat contains or manages the existing inequality between states.[42] At the same time, it should be emphasised that no legal principle, be it a principle of international or domestic law, can make someone more or less equal in a *de facto* meaning. Size, level of development, and so on, are not related to the right of existence of any state. Legal principles and their application are especially important in hard cases.[43]

[34] L. Oppenheim. International Law: A Treatise. Vol. II. – London: Longman, Greens & Co. 1952, p. 365.

[35] G. Simpson. Great Power and Outlaw States by Gerry Simpson,– Cambridge University Press 2004, pp. 26–60.

[36] R. Müllerson. Ordering Anarchy. International Law in International Society –Martinus Nijhoff Publishers 2000, p. 120.

[37] *Ibid.,* p. 156.

[38] J. Crawford. The Creation of States in International Law. – Clarendon Press 1979, p. 81.

[39] R. Müllerson. Ordering Anarchy. International Law in International Society– Martinus Nijhoff Publishers 2000, p. 156.

[40] See, e.g., From the Molotov-Ribbentrop Pact to the Treaties on Military Bases: Documents and Materials.– Tallinn: Perioodika 1990.

[41] *Ibid.*, p. 157.

[42] B. Kingsbury. Sovereignty and Inequality. – European Journal of International Law 1998. Vol. 9, pp. 599–625.

[43] R. Dworkin. Taking Rights Seriously. – London: Duckworth 1977, p. 22.

The application of the formal principle of sovereign equality requires the actual consensual will among the states to resolve conflicts and vexed questions. Hence, in reality the application of the principle of the sovereign equality of the states depends also on political agreements and mutual understanding. If this is not achieved, both the principle of sovereign equality as well as other principles of international law will be nothing more than words in a legal document.

Speaking today of the end of Westphalian sovereignty, it is sobering to remember that the Peace Treaty of Westphalia, which created the legal basis for international society, did not immediately bring peace to Europe. Plant notes, "Of course, the Treaty (of Westphalia) and its principles of sovereignty did not just emerge from a void. There had been for some time before 1648 an assertion of principles which we would now call principles of sovereignty, such as the principle of *Rex in regno suo ist imperator,* which was used to justify the French declaration of *de jure* independence from the Holy Roman Empire; and *Civitas superiorem non recognoscens est sibi princeps* was also invoked".[44] In addition to establishing the principle of sovereignty, one of the foundations of the treaty, *cuius regio, eius religio* (whose realm, his religion), removed religion from the causes of war. "But what the Treaties of Münster and Osnabrück really did was legally to consecrate the international liberties of Europe, as they had been secured by the religious revolution. The idea of a united Christendom was abandoned. Internationally, religions were made equal. Pope and Emperor lost theoretically what they had long lost practically, their hegemony… The Canon Law ceased in fact to be international, which it most distinctly was in the Middle Ages; became (subject to concordats) merely a conceded machinery for regulating a department of particular states… In theory the dogma that all states are equal begins to supersede the medieval conception of a universal hierarchy of officials".[45] Speaking about the system of sovereign states created in Europe by the Treaty of Westphalia; that is, of international society it needs to be remembered that this system was never put into practice in its totality. Rather, it may be treated as a certain manner of conduct from the social and political perspective.[46] Within states, the sovereignty of the nation or of a monarch as a sovereign is spoken of.

One more note: in the postmodern world we need to notice that the subjects of Westphalia are changed today. The corporations of Elon Musk, Gates and Huawei are definitely more influential, socially important and sovereign than many states. Even the conducting of warfare is actually carried out by private organizations – like the Wagner army operating out of Russia.

International law tells us "about where sovereignty resides within a state's territory", what Roth calls "the last word on public order"[47] (Meaning that it does not cover new sovereigns in international law, as we mentioned earlier). Where is Leviathan (Hobbes), who has the monopoly on legitimate violence (Weber), who gives orders (Austin) or who makes decisions in an emergency situation (Schmitt). "This aspect of sovereignty goes to the supremacy of the sovereign over international competitors."[48] International law has long wanted to know who carries effective control, "but not what he is (from the perspective of legitimacy)". There are examples from the practice of international society itself, when the simultaneous treatment of sovereignty from different – international and domestic – perspectives may create chaos instead of order. For example, the confusion arising around the sovereignty of Iraq after the Iraq intervention in 2003. "In Security Council Resolution 1500(2003), for example, the Council that would mark 'an important step towards the formation by the people of Iraq of an internationally recognised, representative government that will exercise the sovereignty of Iraq'. Resolution 1511(2003) stated aid that the Governing Council 'embodies the sovereignty of Iraq during the transitional period'. Resolution 1546 then spoke of Iraq's reassertion of 'full sovereignty' in June 2004. But prior to these resolutions, Resolution 1483(2003), passed a few weeks after the invasion, had reaffirmed the sovereignty (and territorial integrity) of Iraq."[49]

Gerry Simpson asks how this overabundance of sovereignties should be explained. Allot notes that the relationship between international and domestic law "follows also that the three levels of the international legal system are a hierarchy, with

[44] R. Plant. Rights, Rules and World Order in Global Governance. – London: Cassell Imprint 1995, p. 191.
[45] N.J. Figgs. Studies in Political Thought From Gerson to Grotius.– Cambridge University Press 1956, p. 123.
[46] S.D. Krasner. Compromising Westphalia. – International Security. 20 (3), 1995 pp. 115–151.
[47] B.R. Roth. State Sovereignty, International Legality, and Moral Disagreement Available at http://www.law.uga.edu/intl/roth.pdf, p. 45.
[48] G. Simpson. Guises of Sovereignty. Conference publication. End of Sovereignty. 8.–10.04.2004, p. 9.
[49] *Ibid*., 8.–10.04.2004.

international constitutional law dominating the exercise of legal powers within the national public realms, including the power to make, apply and enforce national law".[50] The author believes that the problem is that in the globalising and post-modernising world sovereignty, just like any other concept, cannot be treated as an absolute. The meaning of any concept, including that of sovereignty, depends on its angle of construct and purpose. It is just like a language game of Wittgenstein, where the meaning of words depends on the specific context and purposes for which one or another word is used, on what is the purpose of one or another word. Wittgenstein has succinctly compared language with a toolbox. The meaning of a word, just like the meaning of a tool, depends on the purpose of its use. [51]

CONCLUSION

We have reached the conclusion that many fundamental features of states and their sovereignty do no work anymore. The postmodern world and thinking have eliminated borders and differences not only between countries but in our thinking as well. From here we should ask if there are no 'normal' states anymore, then perhaps the time for the states themselves has disappeared. And perhaps there are other entities that replace the states and perform their functions – provide jobs and living, develop culture, guarantee social security?

And how will our democratic mechanisms deal with them? We do not know how the members of the board are selected but we know that these corporations rule our lives.

50 P. Allot. The Concept of International Law.– 10 European Journal of International Law 1999, p. 38.

51 L. Wittgenstein. Philosophical Investigation. Basil Blackwell– Oxford 1953, p. 116.