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THESIS:

Sovereignty of States in International Relations

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Introduction

The connection that sovereignty has with international relations has been a not easy and even complex topic where it has encouraged many researchers to approach this topic by making me one of them. The concept of the sovereignty has recently become a major bone of contention within international law and international relations theory. This thesis explores many of the key theoretical and analytical issues attending empirical research on state sovereignty. Also, this study contains explanations of the problems and challenges of sovereignty that existed earlier and that exist today, where as a special emphasis will be the connection that sovereignty has with society and the state.

To develop this thesis as areas of study important for this topic, but also for international relations will be the approaches of liberalism and neoliberal institutions which as to synthesize liberal and structural realist thought to create a perspective able to explain the role played by international non-state actors with regards to the influence they exert on the behavior of states. Realism, neorealism and radicalism they will also be part of this theoretical framework of the composition of international relations.

Meanings of some traditional understandings such as the traditional meaning of state sovereignty and sovereignty as an emanation of state power, and several other topics will be able to review critically the traditional understanding of the relationship between state sovereignty and international law.

The challenges that sovereignty has in addition to international interventions, where we have witnessed that sovereignty has come under pressure in many cases, as well as the definition and what we mean by humanitarian intervention, having it as a research field and as data and facts, we will use the case of Kosovo to better understand this topic.

Aims of the research

One of the aims of this research study is to show the development of sovereignty and the state during ancient times, up to the Westphalia agreement and important events that have developed sovereignty and international law, where thanks to these facts a comparison of state sovereignty and challenges will be made even today and how from those times there are some traditional meanings on sovereignty that are challenging and putting pressure on it to this day.

Also, the purpose of this study is whether sovereignty conflicts with international law when it is challenged by old and complex challenges, but also whether it is ready for new challenges, and whether the state has found mechanisms or adapts to international law.

Hypotheses

As a basic hypothesis of this research which can be tested at the same time, it is verified as well at the same time it will carry scope (application, operation, effectiveness), I have selected the answer to the question: Do the balances of state sovereignty and international law oscillate in the face of many challenges and problems, one of which is military intervention?

Research Methodology

In my research thesis I will use more of basic and specific scientific methods. In that sense, it counted:

- Method of analysis – analytical method will serve with purpose to determine the term, nature, prescribed procedure, and the basic features of institutions that are studied. Except that, the analytical method will serve to determine the characteristic of Court and Council.

- Historical method – finding historical data involves logic persistence, and common sense. It is very important method. With historical method will be discovered the causes, perpetrators, and will be resolved specific cases.

- Comparative method – comparison is a fundamental tool of analysis. It sharpens our power of description, and plays a central role in concept – formation by bringing into focuses suggestive similarities and contrast among cases.

- Empirical method - elaboration of practical examples and solving certain cases will apply the empirical method based on which will be applied practice – knowledge of judicial authorities who serve public services.

With application of all these mentioned methods with who are observed and examined details, performing the conclusion will be based on application on logical methods induction and deduction and with that forming conception about main research problem.

Importance of the thesis

This research is of particular importance for many reasons, but I would like to mention just a few of them. Sovereignty as a phenomenon has existed since ancient times and it has been talked about since the time when the early civilizations began where this topic was written and debated by Plato and John Lock. According to some scientists has begun to appear together with man and has developed and brought the state, and some others say that the state and sovereignty are so closely intertwined that you cannot separate.

This article will outline the connection between the sovereignty of the state and international law, and the reasons why they should be in a straight line and at the same pace and in no way different, that only in this way guarantee stability, security and peace and why in special cases is the violation of the sovereignty of a subject or in our case of a state, and if so why does this happen.

1. ON THE STATE, STATE SOVEREIGNTY AND INTERNATIONAL LAW: A HISTORICAL REVIEW

1.1. The State from definition to description

There is not a single creation of society that, although essential and unavoidable in any intellectual endeavor that tries to explain social development, remains completely unexplored and unexplained, as is the case with the state. The reasons why this is so, first of all, we can look for in the fact that the state and law in a large part of their historical development, were social creations that were manipulated, rather than creations that had their own legal evolutionary course. This is possible due to the fact that, looking from both a historical and a modern perspective, states, although they all have a lot in common, still differ greatly from each other. However, as Spektorski points out: „the life of humanity takes place within state communities".[1]

Depending on the historical currents and the epoch in which it was written about, the state acquired different meanings. Thus, medieval views on the state moved in the direction of justifying the then social order and the importance of the role of the church or the state and the law of the time.[2] The teachings on natural law, which emerged as a suitable starting point for utilitarian approaches, also contributed. Finally, Marxist views on the state and law aimed to challenge the role and importance of the bourgeois, capitalist social order and to justify the coming, socialist, or communist social order.[3] The historical section on how the state was understood is full of inconsistencies and revolutionary twists, so that, apart from giving us an overview of one way of thinking in a specific historical period, it does not give

[1] Евгеније Васиљевич Спекторски, *Држава и њен живот*, Правни факултет Универзитета у Београду, Београд, 2000, стр. 20.
[2] Милорад Жижић, Увод у право, Приштина, 1997, стр. 44.
[3] Ibid.

answers on the question: what is a state? Therefore, we will agree with the view that the ancient and medieval states are so different from the state in the modern sense, which raises the question: can the same notion of the state be applied to these fundamentally different states at all?[4]

However, the fact remains that the science of the state for a long time was in the shackles of the apologists of the existing social order and was an instrument for strengthening and preserving the existing relations that corresponded to the then ruling elite. All this indicates an incorrect approach in the research of the mentioned problem, which finally resulted in incorrect knowledge, which unfortunately, over time, accumulated, accumulating a half-truth that did not reflect its essence in any way.

In that sense, we can agree with Spektorski, who says that the previous attempts to include the concept of the state in one exhaustive definition are one-sided and that in those cases only one phase in the development of social life was taken into account, be it legal, political or sociological.[5] However, Spektorski further points out: "in addition to its multiplicity, state life flows through the same riverbed. Everywhere and always it has some general features, which justify the existence of a general notion of the state. That is why the definition of the state is possible, but one that is limited only to marking the formal symbols of the state and the elements which it consists of."[6]

Here we come to the point of the classical legal understanding of the elements of the state which defines the state as a territorial political community of people living under the administration of one state authority.[7] Accordingly, the state has its three constitutive elements and these elements are: territory, population and state power.[8] Professors Stojanović and Dimitrijević point out that the specificity of the state and how it differs from

[4] Евгеније Васиљевич Спекторски, Држава и њен живот, op.cit. стр. 21.
[5] Ibid.
[6] Ibid.
[7] Радомир Лукић и Мирослав Живковић, *Увод у право*, Савремена администрација, Београд, 1995, стр. 98.
[8] Ibid.

other entities, especially those that appear as subjects in international relations, is that it occupies a certain part of the Earth.[9] Furthermore, the people who make it up are called its inhabitants while the center of decision-making in the state is its government.[10]

1.1.1. The question of the constitutive elements of the state

Territory and population as constitutive elements of the state are not difficult to identify and define. These are the elements that, in addition to being subsumed under legal definitions, also have their specific physical characteristics, external manifestations, and thus their determination and concretization is facilitated. Territory, as the first constitutive element of the state, would be a three-dimensional space that at the same time determines its geographical borders in the modern territorialized world. A certain number of people live in that area because the state is "ultimately, an organization of one group of people, its population, whose energy it collects, connects and harmonizes for more efficient action, which is externally connected as state, because the state organized it."[11]

The third constitutive element of the state is state power. In legal science, power is most often defined as "a relationship of command in which one (or more of them) commands and the others obey it."[12] It is further pointed out that state power differs from other forms of power in that it is within state territories, supreme or sovereign and that all other authorities in the state are subordinate to the state authority.[13]

It can already be seen from the above definition that state power, if we want to view it as one of the constitutive elements of the state, cannot be any, but only the power that possesses special qualities due to which we can qualify it as sovereign. Yet, no matter how

[9] Војин Димитријевић и Радослав Стојановић, *Међународни односи,* Новинско-издавачка установа Службени лист СРЈ, Београд, 1996., стр. 90.
[10] Ibid.
[11] Радомир Лукић, Политичка теорија државе, Завод за уџбенике и наставна средства, Београд, 1995, pg. 59.
[12] Ратко Марковић, Уставно право, Правни факултет Универзитета у Београду, Београд, 2008., pg. 151
[13] Ibid.

simple it may seem at first glance to accept this statement, legal theory to date has not accepted or given a single notion of sovereignty.

1.1.2. Sovereignty as an attribute of state power

Apart from the noticeable differences that exist between writers and theorists of law who belong to different law schools, it is noticeable, and we will try to point out this problem in this thesis, that many writers have not clarified the meaning of the notion of sovereignty with themselves and their attempt to explain its true meaning. The reason for this may be the dialectical nature of the law itself and the terms it uses, and the impossibility of reaching a final conclusion about anything in social thought.

The problem is further complicated by the fact that a large number of lawyers did not even try to reveal the truth in their explanation of the concept of sovereignty, even if it was subjective, but the basic goal of many concepts was and remains to justify the existing state and legal order, and the interests of the ruling class. Because of that, the results they came to in their research were very often inaccurate while they were going back to legal science. This is certainly a problem that law has faced in the past but it still faces today. All this made the issue of sovereignty become so problematic over time that "some lawyers came to the conclusion that it was necessary to abolish the notion of sovereignty in the science of the state."[14] But in any case, it would be an act of capitulation of legal thought in front of the problem that belongs to the general place of the theory of the state and the theory of law and the retreat of science before one of its basic problems, which is unacceptable.

And although every scientific research pretends and strives to be true, that is, to at least bring us closer to the truth, if it is not already able to lead us to the truth, in trying to explain the modern meaning of sovereignty we will keep in mind that we are in the field of social

[14] Евгеније Васиљевич Спекторски, Држава и њен живот, op.cit. стр. 84.

scientific thoughts. This is especially true for law as a paradigm of unnecessary reasoning, in which, as Hasanbegović points out, although starting from the same facts or norms, but qualifying and interpreting them differently, therefore, judging differently, we can always come to a different solution.[15]

Respecting this argument, in the following chapters we will try to point out the evolution of the concept of state sovereignty and its meaning, especially from the aspect of modern international law, which, it must be pointed out, at the time when the greatest minds considered this problem, was not even closely developed as it is today. Aware of the gravity of the problem before us and the fact that there are no adjudicated things in social thought, we still think that understanding the sovereignty in the way it will be presented in this thesis will in any case be interesting. This is especially true for legal science, which, as it is pointed out, "in the argumentation of attitudes that are not obligatory in a given space ... or time ... can look for support for its own arguments pro et contra".[16]

However, before we focus on the modern meaning of the concept of state sovereignty and its connection with modern international law, we consider it advisable to point out the historical roots and general development of the idea of sovereignty and the idea of international law.

1.2. From a universal empire to a nation state

The specificity of this research is that sovereignty with all possible meanings of this term in theory and practice is placed in relation to contemporary international law. This is because

[15] Jasminka Hasanbegović, Perelmanova pravna logika kao nova retorika, Magistarski rad, Beograd, 1986, стр. 230.
[16] Ibid.

we believe that state sovereignty gained its true function at the time of the extinction of states that ruled on the principle of universal empire and the formation of the so-called small nation-states that communicate with each other in a relatively small territory. In this, increasingly closer communication between states, many of them equal in strength, are trying to establish mechanisms and rules that will regulate mutual communication, but also rules that will be primarily prescribed in advance.

This has conditioned the emergence of international law as a system of legal rules and principles that states will adhere to. Otherwise, their relationship would be based on a balance of power and constant conflicts that would ultimately weaken each state individually. As it is pointed out: "international law is impossible without the system of several states, which are aware of their own sovereignty and choice between regulated relations and anarchy."[17]

However, in such a community of states, in which some states appear as large and powerful while others are small and weak, there was a danger for the latter to lose the scepter of power from their hands. This is all the more so because the rules by which they regulated their mutual relations, which we now call international law, were created by the consent of the will, and it is very probable, and states are not immune from that, that various pressures it was achieved that a weaker state kneeled in front of a state that is stronger.

In order to reconcile the demands, on the one hand, for the states to agree on their future mutual relations, which would enable the creation of more or less predictable relations, and on the other hand, the acceptability of the given rules for all, a boundary had to be found in relation to communication between states under which they could not go without losing their statehood. This border was reflected in the establishment of the principle of state sovereignty, which meant a barrier to any external influence in the internal affairs of a state.

[17] David J. Bederman, International Law in Antiquity, Cambridge University Press, Cambridge, 2004., p. 2

Or better yet, as Bartelson puts it in his study: "Sovereignty simultaneously establishes the guiding principle of what is considered an internal matter of the state and what is external."[18]

As in the long period of human history, only states were actors in international relations, this external influence could only come from another state. In any case, the emergence of international law has conditioned the affirmation of the doctrine of state sovereignty. As international law has evolved over time to the extent that the question can be asked, to what extent is it at all common with its roots, so has the doctrine of state sovereignty undergone certain changes. But that is the backbone of this research. Nevertheless, we consider it advisable to look at the history of these phenomena, and we did so, for the reasons stated above, by placing these two legal phenomena in a mutual historical relationship in order to follow their further evolution.

Trying to find the roots of the idea of state sovereignty in those periods in which, that is the majority position of science, it was not present as a concept, we decided to at least briefly look at the relations between the states of the ancient century. We do so consciously, although we can agree with writers who, as Bartelson does, begin their exploration of the notion and meaning of sovereignty from the Renaissance through the Classical period to the modern meaning and understanding of this principle,[19] citing it as a principle particularly characteristic of the post-medieval international system.[20] In any case, we are aware of the fact that, when we talk about the development of international law, sharp historical cuts can be made to clearly demarcated periods of time. As Le Fir points out:

[18] Jens Bartelson, A Genealogy of Sovereignty, Cambridge University Press, 1995, p. 17.
[19] Ibid, pg.7
[20] Ibid, pg.17

> "Divisions of this kind always have something arbitrary in them, and one should be especially careful to believe that there is a sharp transition from one period to another."[21]

Thus, being interested primarily in the relationship of state sovereignty as a principle that we believe that its full affirmation and purpose is gained only with the advent of international law, we are guided by the Le Fir's statement in an effort to establish distinct historical moments in the research of the problem we are dealing with.

1.3. State sovereignty and international law of ancient civilizations

Modern knowledge about states and the law of ancient times, unfortunately, has not moved much from the way they have been talked about for more than a century. This is especially characteristic when discussing legal principles, but also the branches of law whose origin is related, if we speak in historical terms, relatively late, namely we are speaking about the last few centuries. However, there are a number of authors whose approach to the historical view of the state and law differs and who tell us that the ingrained opinion about the primitive state and primitive law, and the primitive relations that states had at the time, should be taken with a grain of salt. However, Lassa Oppenheim, quoted by David J. Bederman in her doctoral dissertation, points out that: "international law between equal and sovereign states based on the common will of the states concerned is a product of modern Christian civilization, and it can be said that it is about four hundred years old. "[22] Moreover, in his interesting study, Bederman points out that many writers insist that ancient states did not have a notion of sovereignty and therefore did not feel like they belonged to a wider, universal community.[23] Without these elements, the conclusion of the writers advocating

[21] Луј Ле Фир, Међународно јавно право, Издавачка књижарница Геце Кона, Београд, 1934, стр. 17
[22] David J. Bederman, International Law in Antiquity, op. cit., p. 12
[23] Ibid.

this view is that there could not have been any question of international law in ancient times.[24]

Although it confirms the view that the modern system of international law was established 400 years ago, Malcolm Shaw points out that some of the basic concepts of international law can be observed in political relations thousands of years ago. For example, around 2100 BC, a solemn treaty was signed between the rulers of Lagash and Uma, the cities of the states, located in an area historically known as Mesopotamia.[25]

The next well-known treaty cited as an example of international relations of ancient times is the one signed a thousand years later, between the Egyptian ruler Ramses II and the Hittite king, by which they pledged brotherhood and eternal peace.[26] After that in the Middle East of that time, many treaties were signed in order to create alliances and preserve the power of their empires.[27] In any case, Shaw points out, predominant access to ancient civilizations is culturally and spatially limited.[28] In ancient systems, however, there is still no understanding of the international community of states coexisting in defined relations.

The space for the existence of international law between states was very limited, and what could be pointed out as common was the existence of certain ideals such as, for example, the sanctity of signed treaties, which has continued to this day as an important element in communication between states.[29] However, as already mentioned, Shaw points out that in that period there was no evidence of the existence of a universal community and ideals common to all mankind.[30] But, as we have pointed out, there are increasing efforts to break

[24] Ibid.
[25] Malcolm Shaw, International Law, Cambridge University Press, New York, 2008, p. 14.
[26] Ibid.
[27] Ibid.
[28] It is assumed and there is true scarce evidence about the relations that were achieved by the civilizations of the Indian subcontinent and the Far East, including China, but the data are not such that we could draw certain conclusions.
[29] Malcolm Shaw, International Law, op.cit, p. 16
[30] Ibid.

the scientific clichés into which all authors fall when dealing with the development of international law, in which the old century is described as a time in which we can not look for the roots of international law and therefore no consideration of the rules and principles on which it is based, and one of those principles is certainly the principle of state sovereignty. Thus Bederman, contrary to the position of the majority, points out that in the period of dynamic state relations at that time, the Sumerian city-states established a pattern of diplomacy that we could describe today as a policy of balance of power.[31]

In his analysis, he goes further and points out, referring to Jacques Piernne, that the city-states of Mesopotamia were certainly sovereign creations in the modern sense of what we call state organization.[32] In any case, undeveloped as a concept of today, sovereignty and the feeling of belonging to them seems to have adorned the states of ancient times.

1.4. Ancient and medieval concept of sovereignty and international law

When we talk about the historical development of sovereignty and the evolutionary beginnings of the true meaning of this term,[33] it is pointed out that already in the era of slavery certain views on sovereignty appeared, and that even then formulated attitudes that are very close to today.[34] Aristotle considered the question: who in the state should be obeyed, that is, who in the state should exercise the highest authority, in fact, who in the state should be sovereign?[35] Aristotle answered that it should be the law, and in that sense he was close to some modern approaches and modern theories. The idea of the state and power was largely taken over by Rome from the Hellenistic heritage, and the notion of

[31] David J. Bederman, International Law in Antiquity, op.cit., p. 23.
[32] Ibid.
[33] We are consciously talking about the evolution of the notion of sovereignty because we want to point out the changes that this notion has undergone from its inception to the present day.
[34] Радомир Лукић, Теорија државе и права I, теорија државе, Научна књига, Београд, 1956, стр. 187.
[35] Ibid.

sovereignty was developed in the same way as the Hellenistic cities-polises.[36] Duško Dimitrijević points out that:

> „ Conceptually and terminologically, sovereignty did not exist in ancient times, but the legal content of sovereignty was an integral part of individual and collective freedoms within the Greek polis. The ancient Romans had some idea of sovereignty as the highest, absolute and indivisible power (*omni imperium suum et potestatem*) - power that is not bound by someone else's power, the right to govern or command (*majestas populi romani*) "[37]

However, regardless of the fact that the roots of international law are sought in ancient Rome, international law, as we understand it today, could not be imagined then, since Rome, like many other empires of antiquity, ruled according to the principle of universal empire.[38] This means that it was not possible to talk about respecting someone else's sovereignty. Only the interest in preserving one's own state could influence the state, above all by protecting itself, to respect the existence of another, but only to the extent that it was necessary and as long as the state interest required it.

The famous words uttered by Titus Livius and quoted by Le Fir: "There is an eternal war between the Greeks and all foreigners",[39] can be taken as a constant in the international relations of antiquity. However, perhaps the greatest merit of Rome is that it began to teach the peoples it united as part of its empire peaceful and normal relations that they had not known before in that form.[40] However, it is pointed out that in ancient science, the notion of sovereignty, identified and explained in terms of how it is understood today, with all possible differences and varieties, did not exist. There are, however, other tones which, although they

[36] Александар Костић, Криза идеје државне суверености у условима савремене глобализације, Магистарска теза, Ниш, 2006., стр. 8.
[37] Duško Dimitrijević, „Suverenitet i međunarodno pravo", Strani pravni život, 1-3/2006, стр. 51.
[38] Луј Ле Фир, Међународно јавно право, op. cit., pg. 23.
[39] Ibid, pg. 22.
[40] Ibid, pg.22-24

cannot give a complete picture, can intrigue scientific curiosity. For example, Lukić points out the following: "... it is true that the notion of sovereignty did not exist, but sovereignty itself did exist. Just as our ignorance of the existence of radium did not make it non-existent, so our lack of notion (knowledge) of sovereignty did not make it non-existent."[41] Another author thinks in a similar way, pointing out that:

> „even if the concept of sovereignty did not exist before the 16th century, it does not necessarily mean that it did not exist as a phenomenon in political reality, and that it was not otherwise conceptualized. Aristotle, for example, does not mention sovereignty, however, the fact that he insisted on the need for the existence of supreme power shows that he was close to the idea of sovereignty since every supreme power - the Kuphian aphen among the Greeks; summum imperium among the Romans, is by definition already sovereign ".[42]

As Hans Kelsen points out in a study that is important to us, to which we will often return:

> „One cannot dismiss the idea of the sovereignty of their state and legal order to the Greeks, and above all to the Romans, may have been so self-evident and unproblematic that there was no need to provide this idea with scientific discussion and that there was no reason for philosophical reasoning of the problem ".[43]

[41] Радомир Лукић, Теорија државе и права I, теорија државе, op.cit, стр. 192. (This remark by Professor Lukić especially refers to the critique of the understanding that sovereignty could not have been discussed before the emergence of absolute monarchies, ie that the states that existed before the era of absolute monarchies were non-sovereign.)

[42] Alain de Benoist, „What is Sovereignty?", http://www.alaindebenoist.com/pdf/what_is_sovereignty.pdf, p. 100

[43] Hans Kelzen, Problem suverenosti i teorija međunarodnog prava-prilog jednoj čistoj teoriji prava, Javno preduzeće Službeni list SCG, Beograd, 2003., стр. 29.

Our conclusion is that, even if sovereignty were terminologically identical to today, the content of that concept would be so different, that sovereignty in antiquity would have nothing in common with sovereignty today.

1.5. Westphalian concept-paradigm of the traditional understanding of state sovereignty

As one of the basic principles of international law, sovereignty and its conceptual definition, which still appears to be widely accepted, has its roots in the way in which European states organized themselves after the Peace of Westphalia in 1648, which ended the so-called bloody thirty-year war raging on the European continent. Historians and jurists dealing with international law have been unanimous for some time, and we join them here, that the peace treaties in Westphalia of 1648 established a modern European system of states as well as the rights that apply among those states. [44]

Although essentially a religious conflict, after which European rulers managed to break away from the hitherto undisputed religious but also secular authority of the Pope and the Roman Catholic Church, the Thirty Years' War resulted in a completely new geopolitical rearrangement of Europe. From a continent divided into several imperial giants, Europe is turning into a continent with a large number of states, uneven in size and aspirations, some of which have not given up claiming the legacy of former empires. However, the old empires never consolidated in Europe after the Peace of Westphalia, and one new idea, this time the idea of the nation-state, began to play a crucial role in the way the state would be understood in the future.

[44] Randal Lesaffer, Peace Treaties and International Law in European History-From the Late Middle Ages to World War One, Cambridge University Press, New York, 2004, p. 2

The nation-state, however, remained an unfulfilled ideal that in the future, just like the idea of a universal empire, due to its exclusivity and uncompromisingness in its very basis, will be the occasion of new bloody global and limited wars. However, it cannot be disputed that with the states organized on the religious or ethnic, if not the national cohesion factor, a new creation came on the scene as a result of the necessity of mutual communication of this large number of new, mutually similar entities in a relatively small European soil. That creation was international law. Karima Bennoune points out that "there would be no international law without a nation-state, and nation-states themselves would not be established or prevail without the idea of sovereignty."[45]

With the emergence of big number of new and to a degree equal states, there was also a need to regulate their mutual relations. First in Europe, and then in other parts of the world, it created the concept of international law, which can be described as the "Westphalian order", and which some authors call the "classical regime of sovereignty".[46]

Syntagms such as: inviolability of the state, the right to freedom from any external interference, the right to maintain relations with other states as they wish, and the right to rule over their own population, have their roots in the struggles of Protestant rulers in Europe in the first half of the seventeenth century, and they actually contained "legal rights and obligations covered by the notion of sovereignty".[47] The nation state, no matter the discussion we might have around it, from the Westphalian system and on, through centuries and to present day, has remained as the inspiration and basis of legitimacy, which has enabled a large number of peoples united around the idea and sense of national belonging to create their own state.

[45] Karima Bennoune, „Sovereignty vs. Suffering? Re-examining Sovereignty and Human Rights trought the Lens of Iraq“, European Journal of International Law, Vol. 13., No.1., p.244.

[46] David Held, „The Changing Structure of International Law: Sovereignty Transformed?”, http://www.polity.co.uk/global/pdf/GTReader2eHeld.pdf, p. 162.

[47] Abolade Adeniji, „Suverenost nacionalne države u eri globalizacije: teorijsko razmatranje“, Politička misao, Vol XLI, 2004., br.3. стр. 133., Also: Randal Lesaffer, Peace Treaties and International Law in European History, op.cit., p. 2.

The process of nation-building is still ongoing, although the circumstances under which the process takes place have changed significantly over time. At first glance, it seems paradoxical that the idea of the "national" is propagated and enjoys as important a status as the idea of the universal. Today's structure of the European Union is a good example of a compromise reached in order to preserve, on the one hand, national identity but, on the other hand, the feeling that despite all differences, there are many common values that further condition the need to insist on the same, by deepening them in the interest of all.

However, as it has already been said, the national, and this can be applied to multinational states that have appeared in various forms throughout history and still appear today, were not the only product of Westphalia. In parallel with it, as its main support, there was the idea of state sovereignty. It is also emphasized that "the recognition of the plurality and diversity of states - the creation of the so-called Westphalian system - the first step in the formation of the conceptual context in which the relations of the countries can be constituted on the basis of the idea of sovereignty".[48] This idea became a basic state principle and framework that has defended the government at the national level, but also the starting point at external level ie . external communication between states.

It is indisputable that, as it is pointed out, the idea of state sovereignty did indeed at one historical moment "contribute to the acceleration of the process of disintegration of a dilapidated social and political system and its replacement by a new, higher social and political system."[49] It is also indisputable that it was an expression and confirmation of the creation of nation-states in history.[50]

[48] Vesna Knežević-Predić, Ogled o suverenosti: Suverenost i Evropska unija, Institut za političke studije, Beograd, 2001., стр. 28.
[49] Ђ. Нинчић, „Проблем сувереności у савременом међународном праву“, Архив за правне и друштвене студије, Београд, 1948., стр. 354.
[50] Ibid, pg.355

The problem, however, was that the idea of state sovereignty over time became a theoretical explanation of the unlimited arbitrariness of the ruler, both internally and externally, and an expression of his striving for free power of all restrictions, not only legal but also moral.[51] This is especially due to the fact that sovereignty, before it began to be tied to the people or state, first belonged to an unlimited ruler. Having become popular, sovereignty in foreign relations has acquired a new feature by being tied exclusively to the state. Thus, what in domestic political life was the freedom and equality of the individual, in international life became the independence and equality of states, with sovereignty becoming a notion of that independence and equality.[52] In any case, the understanding of state sovereignty as a legitimate basis of its absolute infinity, led to the beginning of the understanding of sovereignty that later developed into the dogma of the so-called absolute sovereignty. Sovereignty, understood in this way, at one point became untenable and anachronistic. Regardless of this observation, to which we will return later in order to point out the unsustainability of a certain way in which sovereignty is understood even today, in the historical context in which it occurs, the idea of state sovereignty, regardless of the fact that it meant the absolutization of the state and its authorities, it had a very beneficial effect on a completely new way in which states began to communicate with each other.

Only with the idea of state sovereignty by which the state sets the border in external communication with other states, which must respect that sovereignty, wars of conquest, until then considered as one of the legitimate ways of realizing state interests, are slowly becoming recognized as unacceptable attack and inadmissible act against "inviolable freedoms" of another state. The principle of the universal empire is gradually transforming and slowly going into the past, and the principle of the universal idea of sovereignty appears on the scene, which is the most deserving for a change in the way in which states began to communicate with each other.

[51] Ibid.
[52] Ibid.

2. TRADITIONAL UNDERSTANDING OF THE RELATIONSHIP BETWEEN STATE SOVEREIGNTY AND INTERNATIONAL LAW - A CRITICAL REVIEW

2.1. Traditional understanding of state sovereignty - neo-Westphalianism

The most important creation of the Westphalian Peace Treaty was the horizontally placed structure of mutually sovereign states, and the Westphalian concept of state sovereignty, remained today as a paradigm of understanding the state and its government. However, as the circumstances under which the principles and rules of state organization were shaped, and the rules governing relations between states, which were recognized as international law, changed significantly and moved away from their Westphalian roots, a problem arose in understanding some basic principles that seem inappropriate to the contemporary historical moment.

As has been mentioned on several occasions, one of these principles is certainly the principle of state sovereignty. The so-called "Westphalian sovereignty" is defined as "an institutional structure for organizing political life based on two principles: the principle of territoriality and complete exclusion of external actors from the internal structure of government."[53] It is also defined as the exclusion of any actor outside the state border,[54] regardless of the position of the government trying to intervene.[55] It is indisputable that the Westphalian concept played a very important role in shaping the modern state and even the international community.[56]

However, given the huge changes that follow all social trends, the way we understand the state, the international society, and thus the law has changed significantly. Despite this, the

[53] David A. Lake, „The New Sovereignty in International Relations", *International Studies Review*. 2003, p. 309.
[54] The emphasis here is on all actors, regardless of the fact if we are talking about states or other entities.
[55] Winston P. Nagan, Craig Hammer, „The Changing Character of Sovereignty in International Law and International Relations", http://milestonsforlife.com/the taxistand/sov.pdf, p. 4
[56] David A. Lake, „The New Sovereignty in International Relations", op.cit., p. 309.

Westphalian idea of sovereign states imposing their will on their own territory without competition and denying the imposition of anyone's will from outside has persisted to this day. In order to understand how this concept, which from today's perspective can be described as neo-Westphalianism, and which has been in sharp conflict with modern international law, which has moved away from its Westphalian roots, has survived to this day, it is extremely important to point out how it manifests in contemporary legal theory. At this point, we want to point out the basic assumptions of sovereignty understood in this way. Within this chapter, we will try to present the traditional understanding of sovereignty, which we conditionally called "neo-Westphalianism", in brief, since we will return to it all the time in this thesis in an attempt to point out how the same understanding is currently unsustainable.[57]

2.1.1. Sovereignty as an emanation of state power

In addition to numerous attempts to define it, the state is most often understood as a "territorial community of people with supreme power."[58] It is further pointed out that the people and territory are considered personal and material elements of the state, while state power is considered as ideal or legal element, which is in comparison with other forms of organized society, a specific feature of the state and its power.[59]

We would add at this point its sovereign power, given that it is precisely its differential specificity in relation to all other powers. At this point, we will agree with this statement, and especially with the understanding of sovereignty as a legal element in determining the state, given that there are views that are opposite, and which determine sovereignty as its factual

[57] Note: In an attempt to present a traditional approach to understanding and explaining the principles of state sovereignty, we will cite a number of authors. This does not necessarily mean that these authors advocate a certain position, but the content of their texts and scientific analyzes has conditioned that the authors themselves have offered more concepts with which we will agree or not.
[58] Ратко Марковић, Уставно право, op.cit., стр., 151.
[59] Ibid.

property. And also, another important determinant of state power in accordance with the traditionally understood sovereignty is that, unlike other organizations or creations that exercise power, "Only the state draws the strength and importance of its power from itself, only its power is original."[60] This statement is subject to criticism and we will deal with the issue of the origin of state sovereignty in our further presentation. The fact that the source of sovereignty is the state itself is explained by the originality of state power, and it means that the state is an entity capable of self-justification (autogiustificazione).[61] This implies that, "as long as it lasts, the statae power is completely independent and determines itself, ie. it creates its own decisions."[62] It is further emphasized that state power is independent and that "it can give itself whatever content it wants."[63] In short, "the state does not derive its power from any other power ... it subordinates all other powers to itself, ie. it is higher than all other authorities."[64]

2.1.2. Sovereignty as non-limitation of state power

Boden also defined sovereignty as "the highest authority over citizens and subjects, a power that is free from the law."[65] According to him, sovereignty is supreme and unlimited power, which has monopoly in the area of creating right as well as state responsibilities.[66] "It considered the sovereign to be the person of the ruler when the principle of princeps legibus solutus applied."[67] The only limitation of state power was divine and natural law.[68] But even this, the only restriction on state power, was rejected first by Hobbes and then by Rousseau.

[60] Ibid.
[61] Ibid.
[62] Радомир Лукић, Теорија државе и права I, теорија државе, op.cit, стр. 184
[63] Ibid.
[64] Ibid.
[65] Роско Паунд, Јуриспруденција Књига I, ЈП Службени лист СРЈ, Подгорица, 2000, стр. 452
[66] György Antalfy, „O suštini suverenosti u svetlu teorije i prava", Zbornik radova, Pravni fakultet u Novom Sadu, Novi Sad, 1967-1968, стр. 510
[67] Ibid.

Hobbes pointed out that natural law has no meaning for the sovereign, unless he himself interprets and accepts it,[69] while Jean-Jacques Rousseau confirmed that the sovereign does not have to have any legal restrictions.[70] Rousseau points out that same "as nature gives every man absolute power over his limbs, the social contract gives the political body absolute power over its members; and it is the same power which, when controlled by the general will, carries, as I said the name, sovereignty."[71] The quality that first belonged to the ruler in feudal systems and absolute monarchies, in terms of legal irresponsibility (legibus solutus), gradually transformed into quality that belongs to the state power, regardless of who its bearers are. Thus, the English actually "forged weapons" against the absolute monarch from the notion of sovereignty, where the notion developed that sovereignty belongs to parliament.[72]

This is because "sovereignty is a property of the highest state power (really legislative power), and not of an absolute monarch, because there is no such thing in a modern state."[73] This so-called unlimited legal state power has two expressions. The first is its superiority within state borders, "since it has the strongest power, it is superior to all subjects in its territory, whether they are legal or natural persons."[74] The other type of unlimited state power is its external unlimited power, ie. the impossibility of any intervention in its legal order coming from outside, by some entity that is outside the state structure. In line with the above, "sovereign is the state power that does not depend on any other government on the

[68] Роско Паунд, Јуриспруденција Књига I, стр. 452
[69] Ibid.
[70] Jean-Jacques Rousseau, The Social Contract and The First and Second Discourses, Yale University Press, 2002, Book I, Chapter VII, pp. 165-166
[71] Ibid., Book II, Chapter IV, pp. 173-174
[72] György Antalffy, „O suštini suverenosti u svetlu teorije i prava“, op.cit., стр. 512
[73] Милан Владисављевић, Сувереност и међународно право-са гледишта устава уопште-, Архив за правне и друштвене науке, Београд, 1935, стр. 4-5
[74] Милорад Жижић, Увод у право, Приштина, 1997, стр. 54

outside, and is higher on the inside than any other power", which is one of the clearest formulas of sovereignty given to us by Boden.[75]

Characteristics of state power that we extrapulate from the notion of sovereignty, defines this power as the highest in the state and as independent and unlimited from the outside.[76] This unlimitedness from the outside, in accordance with the traditional understanding of sovereignty, means not only non-interference in internal affairs by any foreign government, but also superiority of the internal legal system in relation to the laws that comes from outside. Sovereignty is therefore not only the independence of one state from another, but also the independence of the state from any kind of international organization.[77]

It is indisputable that sovereignty implies the independence of the state and everything that can be implied by that. However, it is disputable, in relation to whom and how much is that independence in fact in the contemporary times. This issue is important, taking into account the fact that there is an increasingly developed mechanism for monitoring states by international bodies that enjoy undisputed authority.

And what is most disputable is that, even in modern considerations, the understanding of state sovereignty has not moved much from the concept offered by Boden.[78] Therefore, legal science still defines sovereignty as the independence of state power in relation to other states, the supremacy of state power in relation to the population and all social and political factors on its territory and the legal unlimitedness of state power.[79]

The statement that sovereignty means unlimited state power has always had its opponents, and today it is completely incorrect from the aspect of positive international legal regulations. Hence, it is surprising that this hypothesis is persistently tried to be placed

[75] Милан Владисављевић, Сувереност и међународно право-са гледишта устава уопште, op.cit., стр.4
[76] Ibid, pg.4-5
[77] György Antalffy, „O suštini suverenosti u svetlu teorije i prava“, op.cit., стр. 517
[78] Радомир Лукић и Мирослав Живковић, Увод у право, op.cit., стр. 113
[79] Ibid.

uncritically, regardless of the obviousness that makes it unsustainable, and which in this thesis we want to make more visible.

2.1.3. The relation of a sovereign state to international law from the position of traditionally understood sovereignty

From the position of unlimited state power, which implies unlimited and independent state from any external influences, derives the idea of the unlimited right of every state to prescribe the rules that it finds appropriate on its territory. In that case, the question of the relationship between international and domestic law becomes superfluous, because it is too clear that an unlimited state can be limited only by its own will, even then, only as long as it is in its interest.

"There is no legal regulation that would limit sovereignty,"[80] is the most common view of traditionalists. Accordingly, there is no international legal regulation that would apriori limit state power or force it to behave in a certain way, regardless of whether it wants to. Even when there are regulations that regulate issues that have as their subject relations that transcend national borders and produce effects at the international level, even then they are not regulations that stand above states, but only an internal branch of law that is often called "foreign affairs state law".

It is a concept that derives from the doctrine of the absolute sovereignty of the state and the rejection of any notion of the order of international law above states.[81] Although the inspiration for defining international law as external state or "external constitutional law" was Hegel's philosophy of law, especially influential in Germany,[82] Kreća rightly notes that: "the definition of international law as foreign state law means the relativization of

[80] Милорад Жижић, Увод у право, op.cit., стр. 56
[81] Hans Kelzen, Problem suverenosti i teorija međunarodnog prava, op. cit., стр.143
[82] Hegel, Grundlinien der Philosophie des Recht, 1821

international law to such a high degree that it is practically denied."[83] International law, according to this concept, "becomes a creation of sovereign states that limit themselves and in which sovereignty becomes the ability of exclusive self-determination and self-limitation of states. "[84]

Starting from the position that the fact of the existence of international law with its limiting influence on states is indisputable today, just as it is indisputable and surprising and persistent insistence on the absoluteness of state sovereignty, especially, this problem needs to be further examined.

2.1.4. Sovereignty as another name for the monopoly of physical coercion

In order to ensure respect for its order and force it into obedience, the state has the power at its disposal to achieve that. "There is no state power without force."[85] It is necessary for the state, both internally, for the reasons stated, but also externally, in order to react to any attempts to violate its legal order and territorial integrity. Only the state has the right to use force, ie a monopoly over physical violence, and that monopoly is legally unlimited precisely because "it creates the right itself ... and if it were limited, it would mean that it is subject to another monopoly of the same type, ie. that it has ceased to be a monopoly. "[86]

Finally, Lukić points out that: "sovereignty is just another expression for the monopoly of physical violence, ie. for the right imposed by that order."[87] Coercion is, according to this understanding, to the extent an exponent and emanation of sovereignty, that the state will lose sovereignty if it loses the monopoly of physical coercion in any way.[88] It is completely

[83] Milenko Kreća, Međunarodno javno pravo, Službeni glasnik, Beograd, 2008., стр. 66
[84] Ђ. Нинчић, „Проблем суверености у савременом међународном праву“, op.cit., стр. 357
[85] Евгеније Васиљевич Спекторски, Држава и њен живот, op.cit. стр. 80
[86] Радомир Лукић, Теорија државе и права I, теорија државе, op.cit, стр. 194
[87] Ibid.
[88] Милорад Жижић, Увод у право, op.cit., стр. 56

logical that, in accordance with this conception, the question of the justification of the use of coercion is not raised, because its use is justified whenever it is required by state interests. In communication with each other, as it is correctly observed: "two states stand opposite each other as two physical forces".[89] Thus the state appears as, as Carl Schmitt points out: "abstract personality" or "unicum sui generis with the monopoly of physical coercion that it mystically produces ”.[90]

However, reducing the meaning of state sovereignty to mere coercion would also mean legitimizing everything that can be solved by coercion in international relations. We see no reason why anyone should respect the sovereignty of the state if sovereignty means imposing one's will on another through coercion. Likewise, we do not consider acceptable the position that the loss of the monopoly of physical coercion in a territory means the loss of sovereignty over it. This is because, following the same logic, it could actually legitimize violence in international relations, and because state sovereignty, which we believe is one of the highest legal principles, could be denied by a simple manifestation of force. However, that again opens a new question, and that is: is sovereignty a factual or legal situation?

Traditional understandings represent the first concept, that is, that sovereignty is a matter of fact. This is a necessary consequence of its attachment only to the monopoly of coercion, which in the traditional concept appears as a legitimizing factor of sovereignty, which we consider unacceptable.

[89] Hans Kelzen, Problem suverenosti i teorija međunarodnog prava, prilog jednoj čistoj teoriji prava, op.cit., стр. 177

[90] Carl Schmitt, Political Theology-Four Chapter on the Concept of Sovereignty, The University of Chicago Press, 2005., p. 39

2.1.5. Sovereign states as the only subjects of international law

Proponents of the traditional understanding of international law still find it difficult to accept the fact that, in addition to states, some other entities have emerged as full-fledged subjects of international law, which are not actually states. As it is rightly noted, the international legal order itself arose on a strictly statist basis, and only sovereign states have managed to exercise certain rights at the international level over the centuries.[91]

In theory, it has become common, and we will agree, that the states are the so-called basic or original subjects of international law. The problem of subjectivity in international law, however, is complicated by the moment when, due to economic development and the institutional building of the international community, other entities began to appear which, although different in scope and form and quality and capacity from states, were still able to enter into legal relations with other members of the international community, and above all with sovereign states. Although this is especially characteristic of today, Gavro Perazić said more than four decades ago that:

"The modern age requires the expansion of the area regulated by international law, enlargement in other words, as well as expansion of subjects of international law ".[92]

What the "modern age" demanded almost half a century ago, has happened in the meantime. On the international scene, at the moment when the need arose, new forms of organizing the international community appeared, embodied in international organizations. Over time, not only did they not lose their significance, but on the contrary, they became more and more serious partners to the states in those relations in which their mutual communication became existentially important.

[91] Смиља Аврамов и Миленко Крећа, Међународно јавно право, Савремена администрација, Београд, 2001., стр. 73
[92] Gavro Perazić, Međunarodno ratno pravo, Kultura, Beograd, 1966., стр. 15

Although there have been heated theoretical debates about their legal nature and international capacity, the subjectivity of international organizations is indisputable today, and the evolution of international law seems to go on, so today there is more and more talk about the subjectivity of the individual and his increasingly active role in the international order. The state is a pillar of classical international law. As Serge Sur points out: "international law alone cannot be imagined without states, even if we understand it as a law that works against them."[93] In fact, this statement is indisputable, and we do not want to dispute this argument in this work. What we want to dispute is an attempt, regardless of the transformation it has undergone, to continue to perceive international law as a law created exclusively by states, which are the only creators and addressees of its rules.

Nothing has so much influenced the evolution of international law in terms of changing the way we understand and explain it as the emergence of universal international organizations. From that moment, and especially from the moment of recognition of their indisputable international subjectivity, a whole conception of state-centric approach to international law had to face the challenges of inconsistency of what was taught with the real situation, and that inconsistency became more and more obvious over time.

The reasons can also be sought in the free academic approach which did not see a particularly great influence on international law itself in the changes of international constellations and organization. But the explanation can also be found in conscious attempts to challenge the value of an objective international order that has matured, especially after World War II.

Given the nature of international public law, as a right that only states, which were at the same time its only creators, recognized for its addressees in the centuries of its existence, it is not strange, and we have already mentioned, that in the long run some of its the basic

[93] Serge Sur, „The State Between Fragmentation and Globalization“, European Journal of International Law, No.3., 1997., p. 422

principles remained preserved and immune to all sorts of changes that accompanied law as one very dynamic social phenomenon. The principle of state sovereignty is certainly one of the principles that marked the history of this new branch of law, which, through its cracks and unsustainable inconsistencies and irreconcilability with the newly created reality, tried to find the path of necessary development.

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In the introductory part of the exceptional textbook, Budimir Košutić, expressing great respect for Radomir Lukić and his famous textbook Introduction to Law, with which expressions of respect we join, nevertheless draws attention to an extremely important topic. For this textbook, this great professor says that "with its beautiful style and rare clarity and precision of expression, it has been a part of the writer himself for decades, as well as of every faculty where it was used as a textbook."[94] Nevertheless, Košutić remarks that thisnce the time that this book experienced its last edition "significant changes took place due to which it was necessary to make certain changes"[95] whose preparations took place with the consent of Professor Lukić himself.[96] This indicates that Lukić himself was aware of the need for revision and a different understanding and explaining certain legal concepts. And not because their original explanation was wrong. On the contrary, it expressed the meaning it had at that historical moment.

This happened, in fact, for the reason that over time, certain concepts began to acquire a completely new meaning in accordance with the reality in which these concepts were realized. Thus, Professor Košutić points out that the modern system of international relations has significantly changed in relation to the Westphalian system of states.[97]

[94] Радомир Д. Лукић, Будимир П. Кошутић, Увод у право, Правни факултет Универзитета у Београду и Службени гланик, Београд, 2008., стр. XI
[95] Ibid.
[96] Ibid.
[97] Ibid, pg.30

> „Numerous international regulatory institutions have been established, especially after the Second World War: the United Nations, the International Monetary Fund, the World Trade Organization, the International Court of Justice, the Permanent International Criminal Court and other institutions. Numerous international conventions have been concluded: conventions on human rights and freedoms, but also conventions which regulate the most important foreign activity of states - the right to wage war and rules that must be respected if war breaks out illegally. All these international institutions and conventions arose from the exercise of the sovereign powers of states, but at the same time they represented certain narrowings of those sovereign powers".[98]

These changes meant that the very nature of state sovereignty necessarily had to change. Therefore, Professor Košutić further points out:

> „It must be acknowledged that the nature of state sovereignty has changed, that its content consists of: (1) internal sovereignty; (2) external sovereignty, while the former third element, legal infinity, has irrevocably disappeared. Instead of legal infinity, as (3) the third element of state sovereignty, legal supremacy appeared, ie. the authority of the state government to pass the highest legal act, the constitution. Namely, state power is, to a certain extent, limited both by the constitution (principle of the rule of law, the legal state) and by international law, especially by conventions on human rights and freedoms".[99]

In fact, with this statement, Košutić already hinted at the importance of the problem we are dealing with in this thesis and made a great encouragement, but in a certain sense also an

[98] Ibid, pg. 30-31
[99] Ibid.

obligation for the modern meaning of sovereignty to be comprehensively explained. The obligation is all the greater for the science of international law, given that it is precisely international law that, judging by the opinion of Košutić, has the greatest impact on the formation of a positive legal concept of state sovereignty.

3. INTERNATIONAL LEGAL CONCEPT OF SOVEREIGNTY

3.1. International legal legitimacy of state sovereignty

If we accept the possibility that the state is really a fiduciary or trustee of the people over whom it exercises power, and we will say that it is a completely acceptable and legally viable concept, and if we accept the possibility that the content of the notion of sovereignty includes preemptive norms,all the while arguing that there cannot be a justification for acting contrary to the precepts of the peremptory norm, then the following question arises: what is the connection of the state with international law? Or differently, if the peremptory norm is a constitutive element of state sovereignty, and that same norm is in the function of protecting the fundamental and innate rights of the people over whom the state exercises power, isn't then the human the source of jus cogens together with the rights with which he comes into the world, most of which have a cogent character? In his dissenting opinion in the South West Africa Cases, Judge Tanaka exemplifies that:

> „ If we can introduce a legal category in the field of international law, namely jus cogens, recently examined by the International Law Commission, a type of imperative law that is the opposite of jus dispositivum, which is suitable for change by agreement by states, a right concerning the protection of human rights may be considered a right belonging to jus cogens "[100]

If a man with the rights that are immanent to him as a human being is the starting point of a peremptory norm, then its legitimacy should not be sought in the vague concept of the will of the international community, but in the will and law of the people. As we can conclude from this that sovereignty is not limited by an international norm but is limited by the rights

[100] Dissenting Opinion of Judge Tanaka, *ICJ Reports* 1966, Доступно на: http://www.icj-cij.org/docket/files/47/4969.pdf, p. 296

of the people living in the country in question, we may lose sight of the much-needed connection of these norms with international law.

It is true that all state activity is limited to fundamental human rights, which all universal human rights documents recognize and confirm as such. But that does not change anything in our understanding of the relationship between the state and international law, that is, the role that international law should play in that relationship. It is one thing to answer the question of what is the origin of the cogent norm, and it is another thing to answer the question, in what way will it be achieved to ensure its observance. Because the fact that the cogent norm is contained in the being of sovereignty, does not mean that it cannot happen that its commandment is violated.

Power as a relationship that exists between a superior and a subordinate can be legal and legitimate, just as it can be illegal and illegitimate. In any case, the one who performs it will always try to convince us that he performs it in the name of some legal principle from which he draws legality, even if that government was the most brutal model of governing at that time. However, tyranny, as the most brutal form of government, as Lalović states: "Although it has happened many times in Western history, it has never been honored with a philosophical foundation."[101]

Similarly, those who act in the name of sovereignty, from time to time they do it in a manner that they break every other principle, which as last resort can take the legal support from sovereignty. In such a situation, sovereignty becomes a brutal fact, naked and without content, as such torn from the world of law and inexplicable in any other way, as a force that rules by force of law. If we recognized it as a right, we would betray the idea of democracy and thus the idea that the people are the source of all power and that the measure of

[101] Dragutin Lalović, „U Hobbesovoj zamci: pojam suverenosti?“, *Politička misao*, Vol. XLIII, br. 1., Zagreb, 2006., стр. 5

respect for people's law is a measure of the legality of the sovereignty of the government that invokes that sovereignty.

However, as we do not want to give precedence to law over power, since that would make any legal argument superfluous, then state sovereignty, gaining its legal meaning and significance, becomes a concept that can certainly be placed in a seemingly irreconcilable context. Irreconcilable primarily because the phenomenon that has long since evolved is still explained by old reasons.

Then comes what Otto Gierke talks about, which Čavoški cites in his book, that is, "about the fundamental difficulty of uniting the traditional idea of sovereignty ... with the general idea of the rule of law (Rechtsstaat) which was immanent to the essence of natural law." [102] This is of course true if sovereignty is understood in the way that Boden understands it, which is also paraphrased by Čavoški "as the supreme authority over citizens and subjects who is relieved of the obligation to obey the law (Majestas est summa in cives ac subditos legibusque soluta potestas)".[103]

However, it is not and should not be like that. That is why C. H. Macilwain is right when he noticed that power (potestas) means not only mere force but also something more than that. It also means auctoritas, ie, “power based on positive law, ie power that is not only de facto but also de jure”.[104] One of the two legal realities we are dealing with in this paper at a time when the traditional concept of state sovereignty was born, but it did not exist. That other reality is international law as we know it today. And international law and state sovereignty and their coexistence can be explained only if we understand state sovereignty as a legitimate authority over the territory and the people who are on it. It is legal in that sense that this sovereignty is exercised in accordance with the limits set by international law, and in order to protect, above all, people who are in a subordinate relationship in relation to

[102] Коста Чавошки, *Право као умеће слободе-оглед о владавини права*, Службени гласник, Београд, 2005., стр. 163.
[103] Ibid
[104] Ibid, pg. 163-164

the government. Subordinate in the sense that they are not able to provide guarantees for the respect of their rights. As most of these rights are guaranteed by international documents and have a coherent status, international law, with the institutions and mechanisms at its disposal, appears as a guarantor that the state, in exercising its sovereignty, will not be to the detriment of the citizens in whose name it exercises that sovereignty.

For, "effective exercise of power contrary to international law has no legal effect and is considered illegal."[105] When we know all this, then it is certainly easier for us to understand the nature of sovereignty and the message sent to us by the fiduciary theory of jus cogens with explicitness it can turn away from itself, even that part of the scientific public which otherwise accepts the idea which is the basis of this theory. In any case, the concept of legal sovereignty, with strictly defined limits in its exercise and with the possibility of dealing with the consequences of exceeding those limits, brings the sovereign state and international law into perfect harmony. Finally, the concept of international legal sovereignty makes more understandable and acceptable other principles of international law, one of which is one of the most exploited, but at the same time the most controversial, the principle of self-determination of the people.

This principle, with its content and conditions necessary for its consumption, only confirms the thesis that the state draws its sovereignty from the will of the people, but also the thesis that international law serves to help implement that will. Hence, the restrictions that international law imposes on the state and exist in order to serve no one else, except the citizens of the states in question. For this reason, such restrictions cannot be considered a restriction of sovereignty, but quite the opposite. These limitations of the state mean precisely the affirmation of sovereignty and indirectly the affirmation of the rights of the people that this sovereignty provides them.

[105] Duško Dimitrijević, „Suverenitet i međunarodno pravo“, op.cit., стр. 61.

3.1.1. The right of the people to self-determination and state sovereignty

If we return again to the fiduciary concept that offers a solution, which in the idea of people's sovereignty has long been waiting to be understood in, we would say principled way, then the concept of the state as a fiduciary of the people over which its power extends becomes clearer.

Thus, the analogy that the protagonists of this concept, Evan J. Criddle and Evan Fox Decent, find with Kant's understanding of the relationship between parents and children becomes acceptable. Because, just as parents can be denied the right to parenthood if they do it to the detriment of their child, who is not able to defend himself against abuse or violation of entrusted rights by fiduciaries, and is not authorized to do so, so the state can be made to respect the rights of those over whom it exercises power. And, in the last resort, that power can be denied to it. This is because in this second case, too, persons who, although they originally have rights, do not have the right to exercise those rights independently, appear as injured.

However, unlike the relationship between parents and children, where the state with its legal order appears as the protector of the child's interests, in the relationship between the state and the people or citizens over whom the state exercises power,[106] the international community with its international legal order appears as the protector of their rights. This is most clearly expressed in the ultimate means that international law gives to the people in a situation where there is a violation of their rights by the state, and that is the right to self-determination.

Although the beginning of the formation of the right to self-determination is linked to the system of protection of the rights of national groups[107] established by peace treaties after

[106] Duško Dimitrijević, „Suverenitet i međunarodno pravo“, op.cit., стр. 61

[107] Although it is more correct to say people or peoples, because the use of the term "citizens" is often used as a synonym for nationals, although the idea that the state is a fiduciary of all people in its territory, which is only

the First World War,[108] the principle of self-determination becomes the legal principle on which the decolonization process rests but also a principle on which the United Nations is based.[109] It is not uncommon for the right of the people to self-determination to be recognized as "an unconditionally binding norm that cannot be violated by treaties or similar international transactions".[110]

The principle of self-determination of peoples formulated as a norm of general international law is most consistently presented in the Declaration on the Principles of International Law on Friendly Relations and Cooperation of States in Accordance with the Charter of the United Nations.[111]

In the mentioned document, in the chapter entitled The Principle of Equality and Self-Determination of the People, the following is emphasized:

> „Each State shall promote, together with other States or individually, the application of the principles of equality and self-determination of the peoples, in accordance with the provisions of the Charter, and shall assist the United Nations in fulfilling its obligations under this Charter.
>
> Each state is obliged to promote, together with other states or separately, universal and real respect for human rights and fundamental freedoms in accordance with the Charter ...

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correct, given that the state is obliged to command the norms contained in jus cogens, it respects every single person who is in a specific case subordinate to the state power

[108] Malcolm N. Show, „Peoples, Trritorialism and Bounderies“, European Journal of International Law, 3/1997., стр. 480

[109] Ibid.

[110] Antonio Kaseze, Samoodređenje naroda, (preveo s engleskog: Slobodan Divjak), Službeni glasnik, Beograd, 2011., стр. 153

[111] Vidan Hadži-Vidanović i Marko Milanović, Međunarodno javno pravo, zbirka dokumenata, Beogradski centar za ljudska prava, Beograd, 2005., стр. 33

> The creation of a sovereign and independent state, free association or integration with some independent states or the establishment of any political order freely chosen by a people, is for that people a way of exercising their right to self-determination.
>
> Every state is obliged to refrain from resorting to all coercive measures that would deprive the peoples mentioned above ... of the right to self-determination, freedom and independence. When acting against and opposing such coercive measures in the exercise of their right to self-determination, these peoples are empowered to seek and receive assistance, in accordance with the purposes and principles of the Charter of the United Nations".[112]

At first glance, the provisions on the rights of peoples to self-determination that we have listed seem perhaps too liberal. It seems that this document, and thus international law as a whole, given that the Declaration sets out the principles of general international law, is too benevolent towards the right of peoples to self-determination, which may ultimately lead to the creation of a new state in a territory that belonged to the predecessor state.

The question may rightly be asked: are these provisions of the Declaration contrary to those provisions of the United Nations Charter and other important international instruments which give States guarantees that their territorial integrity and sovereignty must not be called into question?[113]

In order to eliminate such a broad interpretation of the people's right to self-determination, the Declaration emphasizes the following:

> „Nothing in the preceding paragraphs shall be construed to authorize or encourage any action aimed at destroying or endangering, in whole or in part, the territorial integrity or political independence of any sovereign and

[112] Ibid, pg. 37
[113] Stevan Đorđević et al., Građa međunarodnog javnog prava, Prva knjiga, op.cit., стр. 348

> independent State acting in accordance with the principle of equality and self-determinationof the people ... and hence, governed by a government that represents the entire people of the territory regardless of differences in race, religion or color ".[114]

This provision also contains the answers to many of the questions we ask. Certainly, one of the main conclusions we can reach is that sovereignty is not a supranational, untouchable category that as such is not subject to any re-examination or even challenge. By providing for the possibility of self-determination of the people in a situation where the peoples face a government that does not act on the principle of equality or a government that does not allow the people to delegate their representatives to central government, the state shows an extraordinary dose of undemocracy, in which case leads to a state that discriminates against the people over whom it exercises power. International law therefore provides for the possibility that the sovereignty of such a state may be challenged and, ultimately, lead to the secession of part of its territory.[115]

However, to determine in each specific case the violation of the provisions of the Declaration that we have mentioned above is a serious task, and in the efforts to do so, very often there are opportune political reasons rather than legal reasons. However, the right of the people to self-determination is only a proof and a logical consequence of the widely accepted idea that the people are the original bearer of their natural rights, which they do not renounce by joining the community.[116]

Such a right is certainly worthy of the time in which it is exercised. Because at that time, it was not even the legitimacy of the government that presupposed its legitimate sovereignty.

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[114] Vidan Hadži-Vidanović i Marko Milanović, Međunarodno javno pravo, zbirka dokumenata , op.cit., стр. 38

[115] Бранко М. Ракић, Србија пред светским судом, Правни факултет Универзитета у Београду, Београд, 2009., стр. 63

[116] Маријана Пајванчић, *Уставно право I*, Нови Сад, 1998., стр. 128

The legitimacy of the government and thus of its sovereignty is a measure that governs international law. And for a government to be legitimate, it, as Pajvančić nicely points out, "must be worthy of being recognized by the citizens."[117] Hence, Pajvančić further points out, citing Habermas:

> „a modern constitutional state can expect its citizens to obey the law only if it is based on principles worthy of recognition in whose light then what is legal can be justified as legitimate — and in a given case as illegitimately rejected.“[118]

This rejection can affect the nucleus of state power, that is, its sovereignty. However, as mentioned, the right of the people to self-determination in no way means making the idea of state sovereignty meaningless and its dependence on the capriciousness and unfounded demands of the people of each individual state. By recognizing the right of peoples to self-determination, international law does not deprive or desecrate the sovereignty of states. On the contrary, a sovereign state that democratically represents its citizens and protects the rights of all those who, given that they are subordinate to its authority on its territory, is protected by international law, but only if that authority is exercised in a just manner.[119]

This is because modern international law, as Michael Reisman points out, "does not protect the sovereignty of the sovereign, but the sovereignty of the people."[120] International law, however, "is still interested in protecting sovereignty, but in its modern sense."[121] That means that "the object of that protection is not the force on which the tyrant who rules directly through it or through the apparatus of the totalitarian political order relies, but it is the permanent capacity of the population freely to express and make

[117] Ibid.
[118] Ibid.
[119] Fernando R. Tesón, *A Philosophy of International Law*, Westwieu Press, 1998., p. 21
[120] Michael Reisman, „Sovereignty and Human Rights in Contemporary International Law“, *The American Journal of International Law*, Vol. 84, No. 4., 1990., p. 869
[121] Ibid, pg.872

choices regarding the identification and policy of their leader."[122] People's right to self-determination therefore, is not reserved exclusively for individual groups within a state but for the people of that state as a whole.

However, the self-determination of the group affected by totalitarian rule appears as the most radical intervention that affects the nucleus of the state and its sovereign authorities, finally affecting its territorial integrity as a space where sovereignty extends. However, although international law, unlike domestic law, allows secession,[123] this law should by no means be understood as a law that exists regardless of whether the circumstances under which it makes sense are met.

The right to self-determination must not be understood as a right that encourages actions that go in the direction of undermining the territorial integrity or political unity of a state that acts in accordance with the self-determination of the people.[124] International law precisely "emphasizes the importance of the territorial integrity of states".[125]

Positive international law has a stimulating effect on states, reminding them that their basic role is to promote and protect the rights and freedoms of people living in their territories. As long as it performs this function, the state also fulfills its international obligation, which entails its international right to sovereignty, which in these cases is fully protected. Because, as Jovanović nicely pointed out: "The state can demand complete obedience from an individual only if the individual serves a moral ideal through it."[126] This fits into the logic of the universal right that every right must be accompanied by appropriate obligations, and

[122] Ibid.
[123] Boris Krivokapić, *Aktuelni problemi međunarodnog prava,* Službeni glasnik, Beograd, 2011., стр. 197
[124] William Reno, "Small arms, violence, and the course of conflicts" *International law and International Relations,* (eds. by Thomas J. Biersteker, Peter J. Spiro, Chandra Lekha Sriram and Veronica Raffo), Routledge, New York, 2007, p. 43
[125] Alison K. Eggers, „When is a State a State? The Case for Recognition of Somaliland", *Boston College International and Comparative Law Review*, Vol. 30., 2007, p. 215
[126] Слободан Јовановић, Из историје политичких доктрина: Платон-Макиавели-Берк- Маркс, op.cit., стр. 20

that logic must be applicable to states as subjects of law. The right of the people to self-determination should, however, be narrowly interpreted and applied only to those cases where, under the pretext of exercising sovereign rights, the state in question has indeed brutally violated the rights of the people on its territory.

"Positive international law does not recognize the right of national groups as such to separate themselves from the state of which they are a part by a simple manifestation of the will."[127] Therefore, it is necessary to establish in each specific case the fulfillment of the conditions provided by international law that only the right to self-determination would make sense at all. The problem, however, is that "in practice, the issue of international recognition of secession still does not depend so much on legal as on political factors."[128]

Otherwise, the widespread application of this right could lead to what one of Wilson's key associates, Walter Lipman, spoke of when, warning of the dangers of over-invoking the right of peoples to self-determination, he said that the principle of self-determination "could be used to propagate the fragmentation of virtually every organized state. "[129]

International legal sovereignty, and the right of peoples to self-determination, in addition to helping us understand the modern relationship between the state, its sovereignty and its international obligations, paves the way for us to solve another problem that plagues modern international relations. The problem of the creation of new states is complex primarily for reasons that contain no less political as well as legal reasons.

In this symbiosis of legal-political arguments that may seem blurred in the dialectic of social thought, the question of the emergence of new states has remained insufficiently researched and left to the illumination of precedents from the past. However, if we remain loyal to a consistent interpretation of international law, and if we look at the powers that its

[127] Alison K. Eggers, „When is a State a State? The Case for Recognition of Somaliland", op.cit., p. 215
[128] Boris Krivokapić, *Aktuelni problemi međunarodnog prava*, op.cit., стр. 199
[129] Бранко М. Ракић, *Србија пред светским судом*. op.cit., стр. 47

institutions have, we believe that the emergence of a new state is very much internationally funded. Any other conclusion would lead us to a logical impasse from which we could not emerge without first depriving international law of any relevance.

3.2. International legal recognition of sovereignty

Pointing out the complexity of the problem of the emergence of new states on the international scene, Christian Hillgruber begins his presentation by citing the famous internationalist Lauterpacht, who, although not revealing anything new, further confirms one great truth when he says: "A small number of branches of international law is of greater and more lasting importance for the right of the people than the question of the recognition of states ... However, there is probably no other subject in the field of international relations in which law and politics are so closely intertwined. "[130]

The problem, however, is that, while, as Hilgruber further points out, "the political significance of recognizing a new state is beyond any doubt, the legal rule applicable to this aspect of international public law is still vague."[131] To say that there is an explicit international rule that tells us when an entity will be granted state-building status, in which cases that rule would be imperative for states, in terms of the obligation to recognize that entity, would really be too ambitious.

First of all, because such a rule does not exist in its explicit form, and then also because, even if it existed, it should not be binding for the state. Because, states cannot be deprived of the right not to agree with the creation of a new state, especially in situations when the change of sovereignty affects its territory.

[130] Christian Hillgruber, „The Admission of New States to the International Community", *European Journal of International Law*, 9., 1998., p. 491
[131] Ibid.

Recognition of a state is a discretionary right of each individual state.[132] Another issue is respect for the minimum international standards that all actors must adhere to and which should protect the basic international rights of people, regardless of their territory.

It seems to us that the political moment in the problem of recognizing the state as a new sovereignty is most pronounced in the relation between the state and the entity that aspires to be so. However, in international relations, politics cannot be bypassed, nor is it a goal.

Finally, each state has the full right to conduct its own foreign policy, which includes the right to the absence of diplomatic or any other relations with states or entities that aspire to be, until the moment of exceeding the limits of peace and respect, as well as the obligation to preserve international peace and security.

However, here, more than the question of recognition of states by other states, whose modalities are already sufficiently presented in the science of international law, we are interested in the question of international legitimacy of the state and its sovereignty in a certain area, regardless of recognition or non-recognition by one or more states. Because, just as not all states have to participate in the creation of a rule of international law in order to be recognized as a general rule, so the non-recognition of statehood of an entity by a particular state or group of states does not mean that in this case that entity is not state in the sense of international law.

[132] Vladimir Ž. Čolović, *Sukob zakona i promena suvereniteta,* Beograd, 1999., стр. 22

3.3. Can sovereignty exist independently of rights?

It seems to us that in the theory of the state and law, no concept is understood in such different ways as is the case with state sovereignty. If we also take into account the fact that this is a variable concept, the problem is further complicated. Thus, Patric Macklem points out that "sovereignty is a concept that has different meanings for different people at different times."[133]

It, as this author points out, "can be imagined as such to rest in a divine being, in an individual, in a group of individuals, or in institutions or a group of institutions. It can also be imagined as absolute, limited, or both ... It can be indivisible, as in the case of a unitary state, or divisible, as in the case of a federal state."[134]

Finally, sovereignty "can be understood in a factual sense, as a concept that organizes political reality by a recognizable distribution of power to which it refers; in the normative sense, as a constellation of power that rests in those entities that have the legitimate authority to rule the people and the territory; and in a legal sense, as a force given to an entity legally authorized to exercise it."[135]

It is true that the state exercises sovereign power on its territory, but it is not true that there is no right or force outside or above the state that could restrict the state in creating its internal legal order, as Jelinek pointed out,[136] an understandik that has supporters even in current times. State power on its own territory can endanger and often brutally violate the rights of the people over whom it exercises power. Also, exercising power on one's own territory in certain cases can lead to a violation of the rights of states and people in territories where the power of the offender does not extend. For that reason, the territory of

[133] Patrick Macklem, „What is International Human Rights Law? Three Applications of a Distributive Account",op.cit., p. 585
[134] Ibid.
[135] Ibid, p. 585-586
[136] Георг Јелинек, *Борба старог с новим правом*, op.cit., стр. 86

the state is at the same time the "object of international law", because according to that law, "every state enjoys the so-called territorial sovereignty".[137]

This further means that the power of the state over its territory, which it enjoys, as Degan points out, "fullness and exclusivity", is limited by numerous reserves and exceptions, ie. restrictions imposed by general international law.[138] Because the basic rule is "that no state may exercise this power in its territory to the detriment of the fullness and exclusivity that any other state enjoys in its territory".[139]

In that sense, the question that Meklem asks points to the absurdity that the understanding of the unlimited right of a state on its own territory can lead us to: "Does international law authorize a state to redirect its natural waters in a way that affects the normal water supply of a neighboring state?"[140] The verdict in the case of the Corfu Channel from 1949 reminded us that the territorial sovereignty of the state is not absolute. The International Court of Justice pointed out the "obligation of all states not to allow the use of their territory for acts contrary to the rights of other states".[141] The arbitral tribunal pointed out the following later in the verdict in the "Lake Lanoux" case:

> „ Territorial sovereignty manifests itself as an assumption. It must retreat before all international obligations, whatever their source, but it retreats only before them".[142]

[137] Vladimir-Đuro Degan, „Teritorijalna suverenost države", Politička misao, Vol. XXXV, br. 1., Zagreb, 1998., стр. 56
[138] Ibid, p.56-57
[139] Ibid.
[140] Patrick Macklem, „What is International Human Rights Law? Three Applications of a Distributive Account", op.cit., p. 586
[141] Corfu Channel Case, (United Kingdom of Great Britain and Northern Ireland *v.* Albania), Judgement, *ICJ Reports*, 1949., p. 22
[142] Vladimir-Đuro Degan, „Teritorijalna suverenost države", op.cit., стр. 57; Видети такође и: *Reports of International Arbitral Awards*, Vol. XII, стр. 307

To retreat before international obligations means nothing more than to retreat before the legal relationship from which that obligation arises, and that actually means before the law. To say that the mere fact of possessing power that makes you powerful to exercise power in a certain territory would mean "that the rational foundations of the state are left at the mercy of an empirical manifestation of arbitrariness",[143] and that is exactly what, as Del Vecchio points out, can lead to an illegitimate state.[144]

On the other hand, as Del Vecchio further points out, to give up discussing the legal concept of sovereignty due to the complexity of the problem would mean that we are "forced to give up the idea that human society should be given a legal order."[145] This is exactly what we do not want. However, one specific situation in which a state or a part of it can find itself, and that is the state of armed conflict, additionally speaks in favor of the fact that sovereignty is by no means a factual matter and that without the legal establishment of force, one cannot speak about anything else but the aggression that is recognized as such in the coordinates of the international community and international law. That is why we are not talking about the right to force, but about the "right to use force".

[143] Ђорђо Дел Векио, *Право, правда и држава*, op.cit., стр. 170
[144] Ibid, 170-171
[145] Ibid, p.255

4. THE LAW OF ARMED CONFLICT (INTERNATIONAL HUMANITARIAN LAW) AND THE PRINCIPLE OF STATE SOVEREIGNTY

4.1. State monopoly over force as a threat to the international community

The evolution of international law, but also of law in general, can be most clearly seen in the corpus of those rules that until recently were recognized as the rules of international law of war. These rules, as well as the name by which they were named, reflected not only the right of the time in which they were to be applied, but also, to use the phrase of the famous lawyer George Tasic, the degree of "international legal consciousness".

Therefore, the historical-legal approach is important, not only for the law which, among other things, recognizes the determinants and laws of its own development that finally separate it into a separate humanities, but also for the social sciences as a whole. This is also because the degree of development of the law of a given time tells us not only about the law but also about all those segments and meanders of society that finally require a certain legal framework through which they will be able to manifest.

In this sense, the prohibition of the use of force in international relations, which has acquired the status of a cogent rule of international law, speaks much more than a simple prohibition of a certain way of behaving of the state. It speaks of the changed consciousness of all humanity, which at a certain moment recognizes force, not only as a danger to the interests of an individual state that may be exposed to it, but as a general danger to the entire international community. Lessons from the past have shown that there are no isolated conflicts and isolated wars.

The trigger for the First World War was an incident whose consequences could not have been foreseen even by its perpetrators. The Second World War, on the other hand, with its

domino effect, once again pointed out all the insecurity that an uncontrolled and unrestrained force at the disposal of individual states can inflict on the entire international community. All this has led to the maturing of the belief that the individual interests of an individual state must be harmonized with the interests of the community of states. Đordje Tasić calls this right, which goes beyond the interest of an individual state, a "solidarity right" and opposes it to a right, which, on the other hand, sees in the first place the interest of an individual state, which he calls "individualist right".[146]

The difference between these two legal concepts or legal paths is that in an international context, an individualist law would "correspond to a law where war is one recognized phenomenon and the other a law where war is a forbidden phenomenon."[147] Tasić also points out that war, as one of the "most brutal forms of competition", requires peaceful solutions, and they imply solidarity.[148] Certainly, time gave the right to this respectable lawyer. It was understood that the preservation of peace required the engagement of the entire international community, and war, except for defense, and any use of force, was formally prohibited and marked as a crime under international law.

However, only the proclamation of a ban on war, although very significant, can have its full effect only if that ban is respected. Therefore, it is absolutely true that today's law in that sense leaves much to be desired.[149] However, it cannot be said that the changes did not happen. And although armed conflicts exist in the world today, armed force is formally becoming a tool that states can no longer use as an argument but as an obligation. The obligation that the force at their disposal should not be a force that will start wars and create insecurity, but a force that will maintain peace and ensure security. The mere fact that the monopoly over military force and its initiation, which in the classical understanding of the

[146] See at: Ђорђе Тасић, Међународна правна свест, Правни факултет Универзитета у Београду, Београд, 2002., p. 63-78.
[147] Ibid, pg.69
[148] Ibid
[149] Ibid

state is so closely linked to its sovereignty, is not in the hands of the state, is enough to point to certain changes that accompany society and with it the concepts we explain its phenomena. In this sense, we believe that the rules of international law relating to cases of armed conflict can provide us with ample evidence of changes that have not taken place, but by gradually shaping the process that is still ongoing.

Finally, this is the only way to explain that from the law, which was recognized as International War Law, to come to the law that we recognize as International Humanitarian Law.[150] For our discussion, this is important because it is just another proof that in the focus of interest of international law, the state becomes as important as it is in a position to influence the rights of the people over whom it is able to exercise its power. This again means that the ultimate goal of international law is the people, which has its implications in the discussion of the relationship between domestic and international law, which we will look at it later on.

4.2. Sovereign state and the right to use force in positive international law

The right to use force, as a right immanent to the state, both internally, in a situation when it maintains its undisturbed regular functioning, but also externally, when it faces the armed force of another state or group of states, has undergone radical changes after World War II. Professor Konstantin Obradović says that these are "revolutionary changes" experienced by international law and "in the function of restructuring the international community through the desire to turn it, by creating the United Nations as an organization striving for universality, into an orderly international society in which the rule of force be replaced by

[150] Legality of Threat od Use of Nuclear Weapons, Advisory Opinion, ICJ Reports, 1996, p. 256., para. 75.

the rule of law.[151] As Professor Obradović further points out, discussing the differences that affect the "traditional" international law that was built after the Peace of Westphalia to be so different from the modern international law that is being built after the adoption of the United Nations Charter, these are actually conceptual and essential differences which significantly influenced the new approach in regulating the rules that apply in armed conflict.[152] Obradović describes these changes in the following way:

> "That, today the already "old", outdated international law, which, to underline, was shaped to regulate relations in an unorganized international community, rests on two cornerstones - practically absolute sovereignty of the state, on the one hand, and, as a counterpart, the virtually unlimited right of a sovereign state to resort to war and force in order to protect its interests, on the other hand. The purpose of international law is to protect the individual interest of the state, which is the only, exclusive subject of international law ...
>
> After 1945, the whole concept was fundamentally changed. First, the "pillars" on which international law rests have now been completely changed. First, sovereignty has been relativized and it will become more and more relativized over the next decades, as international competencies will increasingly encroach on the earlier domaine resérvé. Secondly, not only every war is definitely forbidden, but every individual (by the state) use of force, and even the threat of force, is absolutely forbidden. The right to use force - under certain conditions, of course - has been transferred to an international

[151] Konstantin Obradović, „Međunarodno pravo oružanih sukoba-od ratnog do humanitarnog", Humanitarno pravo-savremena teorija i praksa, (uredio Konstantin Obradović), Beogradski centar za ljudska prava, Beograd, 1997., p. 131

[152] Ibid, p.132

institution and only it is authorized to use it, but in the general interest: in order to protect international peace and security."[153]

It was also characteristic of traditional international law that the use of force in international relations was not only a common occurrence, but was even tolerated as one of the means of foreign policy action. [154] The reason why this was so, is that, among others, and the understanding that in international relations force can be freely used between subjects due to the lack of supreme authority as it exists within the state, where such free use of force on the other hand is not tolerated[155]. This only confirms the view that the use of force in international relations is in fact "an indicator of the degree of development of a particular legal order, and therefore it is not surprising that classical international law, which allowed the use of force in international relations, was seen as primitive and unbuilt[156].

However, modern international law, for some time now, not only does not tolerate the use of force in international relations, but, in accordance with the United Nations Charter, whose legal significance and importance we have already talked about, prohibits and threatens to use it. According to the UN Charter, "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other way inconsistent with the purposes of the United Nations"[157]. There is certainly an obligation to resolve disputes amicably, which is regulated at the appropriate place in the Charter as follows:

"The parties in any dispute, the duration of which may jeopardize the maintenance of international peace and security, should seek a solution primarily through negotiations, a commission of inquiry, mediation,

[153] Ibid, 132-133
[154] See: Војин Димитријевић и Радослав Стојановић, Међународни односи, op.cit., стр. 304.
[155] Ibid.
[156] Milenko Kreća, Međunarodno javno pravo, op.cit., стр. 167.
[157] Article 2 (4) of the UN Charter

> conciliation, judicial settlement, recourse to regional institutions or agreements, or other peaceful means of their choice."[158]

Thus, adhering to the letter of international law, states today are deprived of the opportunity to use force in any way, primarily war, which would take action against another state, in order to protect some of their interests. However, as the actions of states cannot be foreseen in advance, and as, regardless of prohibition, it can happen and happens that states often violate this prohibition, the United Nations Charter provides for the possibility that the state may use force in cases of self-defense. In this regard, the UN Charter provides that:

> "Nothing in this Charter diminishes the innate right to individual or collective self-defense in the event of an armed attack against a member of the United Nations, until the Security Council has taken the measures necessary to preserve international peace and security. Measures taken by members in the exercise of this right to self-defense shall be promptly reported to the Security Council and shall in no way call into question the powers and responsibilities of the Security Council to take such action under this Charter at any time if it deems it necessary to maintain or restore the international peace and security"[159]

Although the ratio legis of the provision on the right to use force is imposed on us at first sight by its necessity, the provision formulated in this way is, however, very restrictive. First of all, it gives states the possibility to launch their military force only in cases of a real armed attack on their territory, thus preventing the state from preventing the possibility of such an attack, even in those cases when all circumstances indicate that it happens,[160] which raises

[158] Article 33 (1) of the UN Charter.
[159] Article 5 of the UN Charter.
[160] Note: Some authors consider the interpretation of the United Nations Charter in a way that it does not allow preventive self-defense to be disputable, especially because the Charter itself in Article 2 (4) prohibits the threat or use of force, thus raising the question of state reaction to such a threat. More on this in: Gregory A. Raymond and

the question of the so-called preventive self-defense[161]. The reason why this is so is that the Charter insists on finding a peaceful solution. This means the obligation that "before using force, all non-violent approaches to resolving the dispute must be exhausted in order for the use of force to be legitimate and lawful"[162]. Furthermore, this provision is restrictive also because it does not give the attacked state too much freedom as to the autonomy of the defensive actions it undertakes, but puts the defending state in an obligation to inform "immediately" the Security Council. The state is therefore given a very limited opportunity to react until someone else, in this case the Security Council, takes care of it, which falls under its general competence to preserve peace and security in the world.

The conclusion is that even in the case of an attack on one's own territory, it is not the state, but the "international community ... that has a monopoly on the use of force and the right to self-help is allowed only as an exception." [163] And not only does it not have the authority to act unlimitedly and independently at the external level, but it seems to us that de lege ferenda rules of international law in accordance with its further development and penetration into the domain of what is traditionally understood as domestic issues towards increasing restrictions on the use of force by state bodies and within state borders[164]. Thus, Bačić points out the following: "Given the strengthening of all aspects of the rule of law, in some future the legal exceeding of the limits of state punishment could lead to the

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Charles W. Kegley, Jr., "Preemption and Preventive War," The Legitimate Use of Force, (Edited by Howard M. Hensel), Ashgate, Hampshire, 2008, pp. 100-103.

[161] About it: Howard M. Hensel, „The Rejection of Natural Law and its Implications for International Relations and Armed Conflict, The Legitimate Use of Force, (Edited by Howard M. Hensel), Ashgate, Hampshire, 2008, p. 83.

[162] Ibid.

[163] Ian Brownlie, „Boundary Problems and the Formation of New States",op. cit., стр. 186.

[164] At the Eighth United Nations Congress on Crime Prevention and the Treatment of Criminals, held from August 27 to September 7, 1990 in Havana, a small but very important document entitled Basic Principles on the Use of Force and Firearms by Law Enforcement Officials was adopted. This document, we can say, is a rudiment, but it is certainly the beginning of the international community's interest in the actions of civil servants, which should certainly be paid attention to. And not so much because of the obligation, because its provisions are given in the form of recommendations, but certainly because of the signals that the international community sends to the states in that sense; More about that in: Miloš Petrović and Senad Ganić, "Intersection points of international soft law and the Law on Police", Suppression of crime within international police cooperation, Proceedings, Criminal Police Academy, Belgrade, 2011, p. 327-336

proclamation of such penal norms as unconstitutional and contrary to international legal conventions."[165]

In any case, "by eliminating the right to use force and waging war, and by narrowing other forms of self-help in international relations, the United Nations Charter limited the sovereignty of states in its generally recognized form, but on the other hand created preconditions for fuller development of other characteristics and above all those whose quality was equality[166].

However, the question of the right to use force is interesting to us for another reason because we want to contrast the modern meaning of sovereignty to the traditional concept. The fact that the rules of international law relating to the status of the occupied territories speak best of the extent to which the de facto authority over the territory alone is insufficient to establish any legitimate and internationally legitimate authority. Therefore, we consider it important to address this problem in this analysis.

4.3. Sovereignty and military occupation

In his famous work Leviathan, in the chapter which bears an indicative title "On those things that weaken the state and lead to its disintegration", Thomas Hobbes cited the case of "state disintegration" as one of the possible situations leading to the "mortality" of the state. [167] At this point he says the following:

> "Finally, when in war, external or internal, the enemies win the final victory, so that there is no longer the protection of the subjects who remained loyal, since the forces of the state did not survive on the battlefield, then the state

[165] Franjo Bačić, Kazneno pravo-opći dio, Informator, Zagreb, 1998., p. 4.
[166] Duško Dimitrijević, „Suverenitet i međunarodno pravo“, op.cit., стр. 58.
[167] See: Томас Хобс, Левијатан, op.cit., стр.268

> disintegrated, and every man is free to protect himself by the actions which his own discretion dictates. Because the sovereign is the soul of the state from which comes the life and movement of the state. When it is gone, the state does not rule its parts, just as the human skeleton no longer rules its limbs when its, though immortal, the soul leaves it. Because although the right of one sovereign monarch cannot be extinguished by an act of another, the obligation of the members of the state can still be extinguished. Because the one who needs protection can look for it elsewhere, and when he gets it, then he is obliged to obey out of fear, to protect his protection as long as he is capable. But once the power of an assembly is abolished, then its right has completely failed, because the assembly itself has been extinguished, and consequently there is no possibility for sovereignty to be restored. "[168]

This classical understanding of sovereignty, present even today, is a consequence of its inability to reconcile a legally unlimited state with the real impossibility of always being de facto unlimited, given that its power can sometimes fail and give way to the force of the stronger. The problem is that in such a worded thought, the whole idea of sovereignty has been reduced to a force that can be adorned with sovereignty whenever it pleases. However, although we cannot blame Hobbes for this reasoning, given that at the time he wrote about his famous Leviathan, force was one of the legitimate factors in international relations, especially, we can blame those who have not moved from the position that is listed above.

And not only because sovereignty cannot be hypostasized and because, as Kelzen points out, "sovereignty is not a fact that can be observed in the external world of social facts, and such a fact cannot be, but only an assumption of the observer, a presumption of consideration, a presupposition of valuation", [169] but also because sovereignty, like any other phenomenon in

[168] Ibid.
[169] Hans Kelzen, Problem suverenosti i teorija međunarodnog prava, op.cit., 38.

society, is subject to change. Because sovereignty is also a "historical concept, a concept that arose at a certain stage of development of an individual global society and which, together with changes in the context in which it arose, changed itself."[170] And the context is such that the possibility of the state to lose its sovereignty in the way Hobbes described, today, legally, is completely excluded.

War, today, is banned as a mean of resolving international disputes. However, the rattling of weapons is unfortunately still very much present on almost all meridians. The irony is that we got a world without wars, but also a world with a large number of armed conflicts. However, although the use of force, except for the one initiated by the mechanisms of the United Nations and in accordance with the powers of the Security Council in that sense, is prohibited,[171] that prohibition is still, even brutally violated. We must therefore take the existence of these conflicts as a fact.

Regardless of the nature of the conflict, however, the rules of humanitarian law require that they must be respected. But even before the consolidation of the international community took place in the way provided by the UN Charter, when there is a war, and thus the rules governing it, ceased to exist as legal phenomena, force was recognized as a means by which it could not be legitimized the acquisition of another's territory. Therefore, we consider it important to refer to these rules here.

According to the Hague Ordinance on the Laws and Customs of War on Land from 1907, which established the principles of war occupation that are still valid today and on the basis of which the rules that legally regulated the protection of civilians in the occupied territories were later conceived, [172] the occupation is defined in the following way:

[170]Vesna Knežević-Predić, Ogled o suverenosti: Suverenost i Evropska unija, op.cit., p. 8.
[171] Ulf Linderfalk, "The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences", op.cit., pp. 863-864.
[172] See: Владан Јончић, *Међународно хуманитарно право*, Правни факултет Универзитета у Београду, Београд, 2010., стр. 237-266

"The territory is considered occupied when it is really subordinated to the authorities of the enemy army. The occupation extends only to the territory where that authority is established and is able to be maintained. Since the legitimate government de facto passed into the hands of the occupier, he is obliged to take all measures that depend on him to establish and ensure as much as possible, public order and security, respecting, except for absolute impediment, the laws in force in the country. ".[173]

From the definition of occupation in the way it was done in the Rulebook, several conclusions emerge: that the occupation is a factual and not a legal state, then that the occupation is a temporary state and, finally, which is a logical consequence of the previous two conclusions, that the occupation does not entail a change of sovereignty. [174] This means that "the occupier has no legality of appropriating the occupied territory, ie its annexation". [175] In other words this means that the occupied territory "cannot become an integral part of the state space of the occupying power and that the occupier cannot act as a sovereign on it"![176] The fact, therefore, is "that a certain territory is occupied due to the development of hostilities, in no way prejudges the future status of such an area, nor changes its legal position as an integral part of the state territory of the country to which it belonged before the war."[177] The occupier is, as Obradović points out: "only in the position of a person who temporarily manages someone else's property and, according to the terminology of civil law, he has only the state and not property over the occupied territory." [178] Although this comparison was made with the intention of explaining why war or military occupation as a violent act was regulated by any rules at all, Professor Vučinić's position is closer to us when

[173] Articles 42 and 43 of the Rulebook: Stevan Đorđević, Milenko Kreća, Rodoljub Etinski i Momčilo Ristić, Građa međunarodnog javnog prava-Knjiga treća, Dnevnik, Novi Sad, 1985., стр. 1202
[174] Zoran Vučinić, Međunarodno ratno i humanitarno pravo, Službeni glasnik, Beograd, 2006., p. 387.
[175] Ibid, p.388
[176] Ibid.
[177] Konstantin Obradović, Milan Šahović i Milivoj Despot, Međunarodno humanitarno pravo, razvoj- primena-sankcije, Beogradski centar za ljudska prava, Beograd, 2002., стр. 77.
[178] Ibid.

he says that: “the codification of the rules of war occupation was inspired by the desire to maintain order in the occupied territory in a quasi-legal order in which the non-combatant population would be spared, as much as possible, from the cruelty that comes with any conquest of territory by enemy troops ... ". [179]

Why, however, is it important for us to deal with the issue of the legal status of the occupied territory here, when it seems that in that sense there are no disagreements in doctrine or practice? First of all, because in explaining sovereignty, we often separate ourselves from what we have previously determined to be its ultimate source. Thus, even today, there are inconsistencies among the authors, which are caused by the claim that sovereignty, no matter how much it is explained and understood as a legal concept, must simply be tied to the monopoly of physical coercion. Thus, David M. Edelstein, at the beginning of his presentation in an interesting study, points out that "military occupation is the temporary control of a territory by a state (or group of allied states) that does not give the right to permanent sovereignty over the territory.[180]. Furthermore, the same author emphasizes that to be considered an occupying power, “the acting force” must “take control of the occupied territory and exercise sovereignty over that territory for a significant period of time.”[181] The inconsistency of this approach is that which way binds to the occupying force. As sovereignty belongs to the people, and as, on the other hand, the people reluctantly, ie by force, "agrees" to the occupying power, it means that the occupying power does not have a shred of sovereignty over a given territory, even if it had the best intention in relation to the people and occupied territory. Therefore, at this point we reject not only the claims that, as Fazal (Tanisha M. Fazal) points out, "the declaration of occupation serves as another formal

[179] Zoran Vučinić, Međunarodno ratno i humanitarno pravo, op.cit., p. 386.
[180] David M. Edelstain, Occupational Hazards, Cornell University Press, 2008., p. 3.
[181] Ibid., p.4

expression of the death of the state" [182], but also attempts to make the sovereignty of the occupied state meaningless by reducing it to, as some authors point out, "bare title". [183]

The occupying power not only has no right to exercise sovereign power over the territory it has occupied, rather, even in a certain sense, it must "submit" to the laws of the occupied state, and only exceptionally can it repeal those laws.[184] This is a kind of precedent in international law and law in general, which can only be explained by the fact of the existence of supranational authority, which can only oblige a state to guarantee respect for the legal order of another state with its own monopoly of coercion. "This practically means that the occupier has no legislative competence in the occupied territory, nor does he have the right to extend the validity of the laws of his country in that territory."[185] All this corresponds to the prohibition of the occupier to demand loyalty to his force by the population of the occupied territory. [186] Are we talking about the same sovereignty that we claim and prove belongs to the people? If this is already the case, it certainly cannot be obtained by swearing to someone to give it to you, after you have taken it yourself without asking. At this point, the famous maxim of the great Valtazar Bogišić can certainly be applied, which says: "What is born with a coat of arms is not corrected by time; what is illegal from the beginning, does not become legal in time"[187].

[182] Listed according to: Peter Stirk, „Sovereignty and Military Occupation“, IBRU Conference, 2009., стр. 3; http://www.dur.ac.uk/resources/ibru/conferences/sos/peter_stirk_paper.pdf

[183] Ibid., p. 4, Note: Professor Peter Stirk cites Yoram Dinstein at this point, referring to his work: The International Law of Belligerent Occupation, Routledge, 1992.

[184] See: Article 43 of the Hague Regulations of 1907; See also Article 64 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

[185] Zoran Vučinić, Međunarodno ratno i humanitarno pravo, op.cit., p. 392.

[186] Владан Јончић, Међународно хуманитарно право, op.cit., p. 242.

[187] Valtazar Bogišić, Izabrana djela-Opšti imovinski zakonik za Knjaževinu Crnu Goru, Službeni list SCG, Podgorica, 2004., чл. 1006

Conclusions and Recommendations

To conclude, this thesis has argued that the intellectual history of sovereignty has created and maintained a hierarchy in international relations, to the extent that the theory and practice of statehood is 'colonized' through latent ethnocentric a priori assumptions. The ontological foundations of sovereign statehood as existing in the thought of Hobbes creates, inherently, a normative hierarchy in which those that exist outside of the zone of European enlightenment are 'othered' and are cast as those that lack the qualities of civilization as defined by the West.

In practice, this hierarchy is visible in contemporary and historical intervention in the global south. Historically formal colonialism was justified on the grounds that those in the Orient were in need of the properties of European civilization, and this rests on the ontological assumption that outside of the Western state system exists an anarchical "zone of otherness". It is worth noting that there has been essential continuity in the construction of the relations between the Orient and Occident with respect to this, as interventionism today is justified under the assumption that the West is the sole protector of human rights in international relations.

Affording primacy to sovereignty as a mode of political organization in international relations has established the West as the overarching intellectual authority in global politics, such that the normative benchmarks for statehood are assumed to be solely Western. In theoretical terms, this 'colonises' relations in global politics, as all knowledge of the qualities of statehood, sovereignty and what it means 'to be' a sovereign state is defined in solely Western terms. In practice, establishing the West as the site of epistemic supremacy has led to the evaluations of state development and modernity only in respect of European standards, underwriting myopic applications of solutions to problems which existed in a specific ethnic temporal and spatial context.

Overall, then, the hegemony of sovereignty as a political concept reinforces colonial identities in international relations, in which the West is conceptualized as being ontologically and epistemological superior to the 'Orient', structuring the global system in terms of a normative hierarchy.

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