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The Westphalian principles: dead of transformed and adapted to new reality?

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ABSTRACT : *The Westphalian principles of international relations, such as state sovereignty, territorial integrity and equality, as well as principle of political self-determination, have been first formulated in 1948 in a series of treaties that ended thirty years of war and set new rules of conduct for the European parties. The Westphalian principles were also use used as guidelines for creation of the League of Nations after the first world war and were part of W.Wilson's vision of the new just world order of nation states gradually replacing the colonial empires. The most recent interpretation of Westphalia principles was institutionalized in the United Nations Charter that set up legal framework for international relations after the Second World War. After the cold war, competing with the UN global governance projects, based on European regional organizations, such as the EU and NATO are criticizing the Westphalia principles, along with the UN Security Council, for being ineffective, outdated and "limited" in addressing new challenges, associated with intensifying globalization process in world's economy and international social life.*

KEYWORDS: *American foreign policy, global governance, NATO, UN, Westphalian principles*

I. INTRODUCTION

After the collapse of Soviet Union the US liberal democratic doctrine, backed by economic and military assets of the Western hemisphere, seemed to dominate international political discourse. At the same time the role of the US has changed through the 90's and early 2000's from leader of a uni-polar world to a leader in a multi-polar world of nation states engaged in complex relationship with international institutions as part of various global governance projects. The Westphalia principles [1], most recently developed in the UN Charter, need to be revised and sometimes even ignored as they are no longer suitable to facilitate new social transformations in the globalized world and are not helpful in addressing non-traditional security threats, such as international terrorism. The hypothesis of this study is that the Westphalia system of international relations has not been replaced by "post-modernist" or post cold-war world order of globalized economic and social life with new global governance institutions, where progress is being pulled back by "outdated" principles of international law, such as sovereignty and territoriality. Instead, since a major shift in European foreign affairs in the 17th century, the Westphalia principles of international relations remained an integral part of world order and complex political and legal matrix of global transformations. With the help of comparative historic and legal analysis and theory of international relations, the author attempted to apply cross-disciplinary approach to define the role of the Westphalia principles in major institutional transformations in the system of international relations after the WWI. The goals of this study are to compare theoretical interpretations of Westphalia principles of international law and their realization American foreign policy since Woodrow Wilson's administration until the present time in the context of developing global governance regimes.

Recent development of global governance theory in international relations can be viewed as a response to considerable global change, such as end of the Cold War and intensification of globalization processes[2] that allowed new "spheres of authority" (SOA's) [3] to emerge and constitute the new global government structure. In addition, while global governance as a social condition has existed for centuries, the global governance as an analytical perspective is the result of recent global events. Nowadays, the means of global governance can be state sponsored; non-state sponsored or jointly sponsored and can exist within the boundaries of nation-states, in transnational institutions, or in subnational entities. Global governance is conditioned by the particular global order[4] within which it exists and which allows one to make generalizations about particular patterns and means of governance while the particular governance pattern is embodied in a regime as implicit social or legal norms, rules and decision making procedures around which international actors' interests converge.

II. UNITED NATIONS CONSTITUTIONALISM AND TRANS-ATLANTIC SELF-CONTAINED REGIME

The new post-cold war world order represents a transition or a combination of international society and global civil society where membership is not confined only by community of nation states, but non-state actors such as NGOs, multi-national corporations, social movements and others[5].The idea of global civil society is embodied in two ad-hoc international criminal tribunals established by the UN Security Council to "prosecute persons responsible for serious violations of international humanitarian law" committed in the former territory of Yugoslavia in 1993 and Rwanda in 1994. These tribunals via UN Security Council resolution were given the ability to intervene in the affairs of two sovereign states and prosecute their citizenry outside their territorial boundaries by judges of foreign nationality. Such an intervention into the affairs of sovereign states marked a break from dominant norm of the Westphalia order and served as a precursor of the permanent International Criminal Court as an element of a complex "conglomeration of governance" [6]. The first attempt to establish the International Criminal Court was made in early 1950's to protect the principle individual human rights, but at that point the world order was tied to the principle of sovereignty in the first place and an idea of international society rather than global civil society. The new Post-Westphalia order can be viewed as evolution from the community of states to an international constitutional order. The UN Charter norms were accepted to codify public order in general and to establish the hierarchy of legal norms according to Article 103 where UN Charter norms are immune from any rebalancing against particular norms. Yet the International Legal Commission concluded on the fragmentation and regionalization of international law that underscores the universally accepted "specialty" of the UN Charter norms that could be regarded as a constitution of the international community due to the universal membership in the organization. Article 52 of the Charter suggests that the expansion of regionalism should be subordinated to the UN law and until recently, the state practice largely confirmed this understanding. For example, the NATO statute states in its preamble the "faith in the purpose and principles of the UN Charter." The change in NATO and EU politics away from the UN constitutionalism began after or in the wake of the terrorist attacks of 9/11.

The change on the EU policy of supporting the prevailing UN opinion in regional and domestic courts was reflected in the ECJ Kadi judgment in 2008 regarding the implementation by the EU and member states institutions of the sanctions imposed by the UN against the individuals, suspected of association with terrorism. Before the adoption of Council of European Union regulation 1286/2009, the EU institutions automatically endorsed the lists and the measure was implemented without an ex post facto hearing and so far, UN delisting entirely depended on the UN delisting. The 2008 Kadi judgment redefined the relationship between European and international law from a dualist perspective, with strong emphasis on the autonomous nature of the EU legal order. The court underlined that an international agreement such as UN Charter cannot affect the autonomy of the Community legal system, since the European legal order comprises non-derogable fundamental principles, such as rule of law and fundamental human rights. This judicial decision is open to different interpretations, but if the EU was to assert its freedom over a broad range of matters, the Kadi judgment, despite the primacy of the UN Charter would represent at least an available route to legal justification of hegemonic political aspirations and make the difference between exceptionality and multilateralism mostly form related.

Another case of the creation of "self-contained" [7] regimes was the introduction of concepts of constant global war on terror and transnational use of preventive force in the NATO Strategic concept of 2010. According to the UN Charter, the international law restricts severely nonconsensual transnational uses of force to those approved by the Security Council. Yet the NATO new strategy allowed for using traditionally domestic means of preventive force internationally and without time and geographic limits as an adequate response to: (a) the "unconventional threat" of military attack, secretly prepared, conducted without warning and regard of established rules of conduct of war; (b) failed state states and rogue regimes, that are unwilling or unable to conduct their established duties; (c) unprecedented destructive capacities of WMD; (d) increased capacities of non-state actors; (e) radical Islam; (f) unreliability of deterrence of terrorist groups; and (g) vulnerability of democracies. The report on the legitimacy of transnational use of preemptive force prepared by the Stanford University Task force concluded earlier in 1992 that despite the lack of legal authority for such actions, the states seem likely to continue to use preventive force without Security Council approval, as long as the Council remains unwilling or unable to act, and that international reaction to these preventive actions will continue to vary based not on their formal illegality, but on circumstances in each case that reflect each nation's necessity and consistency with the UN. The general recommendation was that state practitioners should apart from considering the legality of preventive actions, weigh the legitimacy of such actions and follow procedures that are likely to enhance the legitimacy, and thus the efficacy of such use of force [9].

While the NATO and European Security strategies [10] adequately reflect the shift in perception on international security threats they do not reflect exceptional standing of the UN Charter principles recognized by treaty law as codified by the 1969 and 1986 Vienna Conventions on the law of treaties. The European Union and NATO strategy supports the use of preventive force to accomplish "conflict prevention and threat prevention" even without the resolution of the security council with reference to United Nations High-level panel report on new threats and preventive diplomacy and use of preemptive force once an attack is "imminent," making it impossible to seek Security Council approval in advance. There is a significant variability in opinions on the extent to which force should be used internationally to prevent the threats up to recognition of transnational uses of force as insistent with strict international legal regulations. Yet the Strategy was adopted without prior resolution of legal controversies. There is a policy observation shared by certain NATO member states that it was wrong that the United Nations had the monopoly on legitimacy of warfare. This view explains why NATO's strategy in Kosovo politically was considered right, but implemented poorly. For example, K.Volker believes [11] that global geography of the scope of NATO responsibility to protect its members was an adequate response to a deeper diffusion of power between states and individuals, the transnational nature of threats and a general shift from bilateral to multi-lateral diplomacy globally.

The American response to this trend in Volker's opinion required allocation of new civil and military tools of foreign policy and inventory of common values within the counter-terrorism coalition. America does not have to give up traditional hard power, since all countries still use it. Even "soft power" strategy of the EU is changing towards more defense capabilities. The taboo of common security issues is not true for the EU any more. EU has been recently facing difficulties in seeking for tools of hard power not because they consider elements of traditional warfare outdated, but rather because there is yet no consensus on who will define the defense strategy – the EU or nation state members. Based on NATO's Kosovo experience, Volker believes that the US has not undermined its legitimacy, but instead needs an increase of credibility, that consists of capability and will. America has lost some of its power globally because the other states significantly increased their capabilities and now the US needs more involvement, which Volker justifies by President Obama's speech in Cairo, the Chicago speech on "the dark cloud of war" and the global geography of responsibilities of a regional NATO alliance according to its new strategy. Probably the most shared point of the debate between the NATO hard-liners and liberal trans-nationalists is acknowledgement of the high risks of the sudden withdrawal of the US from global affairs challenged by international terrorism.

III. "WILSONIAN GLOBALISM" AFTER THE WWI

Manela E. referred to Woodrow Wilson as "man ahead of time" when pointing out that the doctrine of "preemption," widely discussed in the post-cold war period, and used by NATO to justify its diverging from the UN position policies, originally was tied to the concept of " state sovereignty." In the center of "Wilsonian globalism'" that first influenced the creation of the League of Nations and later the policies of the United Nations, was the global governance organ was supposed to have authority to decide on war and peace matters not only to facilitate the relations between states in the interest of peace, rather "transcend" international relations through values shared by all people. The concepts of state sovereignty, self-determination and international intervention were part of his vision of "international origins of anti-colonial nationalism" that was supposed to be the first step on a way the new world order.

In this sense his ideas were neither realist, because it suggested American "ideals" to be the foundation of international order, nor isolationist, since these "ideals" were meant to be spread to other communities through American engagement in the world affairs in advocating self-determination and collective security. Therefore Woodrow Wilson's international liberalism was criticized at the same time for compromising American sovereignty after the World War I in his pursuit of the League of Nations on one hand, and for not going far enough in substituting the old world order of the empires and domination with the new world order of triumphing justice over might. Later he was also criticized during World War II and the cold war for his "naïve" and impractical moralism, idealism and illusion of international community while national interest seemed to dominate over Westphalia principles of sovereignty and peaceful resolution of the disputes. Nethertheless, foreign politics of different American administrations influenced by "isolationist" as well "national interest" advocates in the end supported the idea of a strong stand for American ideals in international affairs.

Despite advocating the principle of state sovereignty in international relations as one of the guarantees of peace, Wilson also believed that internal ethnic, social, and political factors in certain cases should justify the lawful redrawing of borders through a global institution. After the failed intervention in Mexico in 1914 Wilson believed that the US should strive for multilateral action in international affairs and subordinate its national interest to the interest of "world peace" along with other nations. Wilson's draft of the article III of the League of Nations Charter reflects his complex vision of political independence and territorial integrity being interconnected with self-determination process. Woodrow Wilson's vision of the League of Nations as a world council that would govern the world based on those new principles and being challenged by each member and "world's public opinion" at the same time was too radical to be adopted even by US, the US Senate, and even more so to be as accepted by the European powers. Most members saw the League of Nations primarily not as means of new just international order, but as a collective security guarantee for existing states. Even some of Wilson's team members were fearing that a new international system where sovereignty of individual state was penetrated and dependent on joint force of "world opinion" translated into the policies of the world governance institution, will make the world's political "dissatisfaction" permanent and boost propaganda rather than provide the guidelines for maintaining world peace. Despite Wilson's aspirations for long-term gradual reforms in and outside his country, the entire treaty of Versailles was rejected in the US Senate and the League of Nations became a tool of preserving the status quo in old world Europe.

When Wilson advocated the idea that security challenges of the world peace can come not only from aggressive intentions of states but from violence along the lines of ethnic, social or political oppression, his approach seemed revolutionary rather than evolutionary, especially in the light of revolutionary movement in Russia. His ideas started to sound more appropriate when at the end of the WWII the United States, Soviet Union, France and Britain as allies were setting up the framework of the United Nations global institutions to avoid future "shocks to civilization" such as another world war. Wilson's idea that security of the existing states or regimes can be compromised by the interests of "world peace" was unacceptable during the creation of League of Nations, but the United Nations members were now ready for the original Wilson's interpretation of a "collective security" regime where primacy of state security can be challenged by interests of world peace. The Security Council was entrusted the authority to intervene in the international affairs of states, redraw the boundaries, and rearrange sovereignties in the interest of peace. Wilson's doctrine of preemption that required a subordinating principle of state sovereignty to the interest of international community along with his idea, that lack of "good understanding between nations has been included in the UN Charter .

After the creation of the United Nations, in some cases of US military intervention, like in Iraq, the original Wilsonian "doctrine of preemptions" has gone through the stage of considerable misinterpretation. In several instances NATO's advocates of new security strategy and "collective security" actions tried to justify disregard of the world's "public opinion," formulated by the UN, by pointing to differences in political and legal systems [12] with non-members of the Trans-Atlantic alliance to justify military interventions in violation of principles of the UN Charter. As the US representative R.H. Jackson wrote in his letter to the president regarding the negotiations on the UN Charter, in the modern international law, unlike the Imperial times, there is a difference between the just and unjust wars and the war of defense and the war of aggression, which puts two parties of the same conflict in different legal position…and invasion of other countries or initiating war of aggression in violation of international law treaties is illegal …and rules of liability are common to all legal systems. In regards to "invasion of other countries or initiating a war of aggression in violation of international treaties" he also made a separate comment, common rules and values should be applied for all states "despite differences in their legal and political regimes". As H.H.Koh [13] mentioned in his comment on current standards of international law, the 2003 Iraq war did not have a legal basis for war according to the UN Charter, although the US claimed that Iraq was in material breach of the UN Security Council Resolutions 678, 687, and 1441 and Britain justified the war based on a material breach of preexisting Security Council resolutions.

IV. GLOBAL SOVEREIGN VS. LEADERS OR SOVEREIGN STATES UNDER G.W. BUSH

The controversy in the UN and Trans-Atlantic approaches to the universal norms of public law is reflected in the foreign policy of the G.W. Bush administration. The US during the Bush administration openly neglected or unilaterally reinterpreted the principles of public law, which undermined its legacy in global governance matters. In his work on "liberal Leviathan" [14] Ikenberry asserts that the United States should be a "world's Leviathan," arising out of power politics yet generating peaceful and profitable cooperation, shaping and managing a system of international institutions, norms and rules according to liberal principles [15]. This global order is beneficial for all, but the United States has a special place of privilege, ruling in fashion, yet subject to the rules itself. The rest of the world contracts with Washington for security but in exchange for America's restraint in exercising power. American authority is less absolute than Hobbes' sovereign is and America has to balance between leading and cooperating. It is impossible to do from a perspective of unconditional dominance translated into military action and neglect of diplomacy. It is not important if the American actions are perceived as altruism or profit as long as they promote civilized integration in a cooperative collective system. This is America's biggest advantage next to ambitious and unpredictable regional leaders such as China. America will be trusted for rule setting as long as its leadership does not undermine the idea of rule-abiding cooperation.

So far, the US has managed to follow this line within the NATO alliance and its system of alliances in Asia-Pacific. During two presidential terms, George W. Bush administration accumulated enough examples of acting as a "sovereign," rather than in concert with the rest of the world, which opened the discussion of the potential crisis of the liberal order globally. One of the proposals that the Shanghai group has carried in this respect was the creation of new non-dollar global currency – ruan', a mix of ruble and yuan. The proposal was never realized but could be viewed as an example of questioning the ideals of liberal order in the name of which the Soviet Union collapsed a little bit more than a decade ago. The legacy of the international order based in international laws and principles of the UN Charter was promoted by Russia under the administration of V. Putin. While certain aspects of Putin's domestic politics were a controversial topic, internationally Russia has been showing continuing pragmatic, predictable and rule-abiding leadership style. In Kosovo, for example, while the US took the situation as a "domestic" Trans-Atlantic matter, Putin's main argument was in favor of Serbia's sovereignty according to the fundamental principles of the UN Charter and respect for the UN Security Council as a source of global legacy for justified military action. While the US supported Georgia in its attempt to reclaim some territories by force from Ossetia, Russia became involved only after the UN peacekeeping forces in Ossetia were attacked and defended the Russian citizens who constituted the majority of the Ossetia region population. Russia was also the main proponent of settling the conflict between Iran, Syria and the US diplomatically and according to the decision of the UN Security Council versus the pressure that the US and its allies were applying based on the fact that the international decision making process in the UN framework takes time, is politically biased and can cause more damage than good. The latter sentiment already proved to be wrong in case of Syria and might prove to be wrong in Iran if a the well known and trusted in the West, M.J.Zarif, former ambassador to the UN and now foreign minister of Iran, will be able to realize his nuclear deal with the US that is currently being challenged by military interest groups in the US and Iran.

The challenges that the US faced after the collapse of the Soviet Union were not lying outside its national borders, say in the form of a competition with other regional leaders. In fact, regional leaders have proved to be good allies to the US that successfully subcontracted various regional affairs to the local leaders that had better on the field knowledge and grass-root connections crucial in both the Middle East and Asia. Most of the miscalculations that Washington made were a result of conscious manipulation of facts by the domestic American military lobby and local foreign authorities that depended on military budget more than on national interests. The loss of American prestige and American – led international order therefore was caused by the fact that the leader "was not actually doing what it was saying" rather than by the objective imperfections of the liberal democratic doctrine.

V. OBAMA'S LIBERAL INTERNATIONAL INSTITUTIONALISM.

The Iraq war has stirred a broad debate among neo-realists and liberal internationalists [16] regarding the interpretation of Westphalia and Wilsonian principles of world order in regards to the core principles of the Westphalia system such as state sovereignty, self-determination, self-defense and international intervention. H.H. Koh [17] for example criticized M.Doyle's [18] vision of prior legal authorization of actions that are better addressed on the post-hoc defense context. He also argued that there are at least three profound differences in governing multilateral control over humanitarian intervention and preemptive intervention, namely differences in: (a) internal/external checks; (b) risks of breeding counter-intervention; and (c) means of proportional response. The same arguments sound even stronger regarding the unilateral preemptive strike. He also uses the case of Cuban crises to prove that sustained sanctions don't work unless they are multilateral unilateral preemptive strike and to show that these major crises were peacefully resolved due to remarkable efforts of such lawyers as A.Chayes, N. Katzenbach, and N.Schlei that allowed for multi-lateral response to forestall a unilateral preemptive strike by the US. It is unrealistic to develop legal standards that will be able to prevent an illegal use of force. Rather the law should ban it and grant no exceptions. Legal standards are necessary to draw "bright-line rules" of maintaining meaningful default position against unwarranted use of force in emergency situations. These standards can be applied multilaterally through established institutions. Considering terrorism as grounds for enabling multilateral action of the willing against a sovereign nation state is a mistake. Attacks against private parties including by terrorists holding weapons of mass destruction is already covered by anti-terrorism laws and international criminal law, which would benefit from "updates" rather than being "mixed into" a different body of law.

Judging by recent cases of America's foreign policy towards Syria and Iran, the Obama administration seems to have recognized Bush's failures and chose to rely more on the international institutions, such as the UN, and multilateral diplomacy means instead of unilateral hard lining. While G.W. Bush generally sabotaged the system of international cooperation, the Obama administration was trying to return to the "true Wilsonian multilateralism." Hillary Clinton as a Secretary of State did not disregard power politics and publicly discredited D.Cheyny's reference to international law as "not a law." She rather tried to overcome the controversies by identifying American interests and norms with the world's, especially in economic cooperation. Dominance is necessary but not sufficient to hegemony. An attempt to change the system without consent/support from a wide range of recipients can undermine the power instead of promoting it. While the system makes the hegemon, as it happened in the second part of 20th century, it is the international law that sustains the system, not vice versa. It has become clear that the U.S. cannot operate anymore in an "imperial order," where the core state operates above the law. The American hegemony in a hierarchical liberal system evolved from the Westphalia system of state sovereignty and policy autonomy and binding international agreements but cannot substitute it.

Part of the confusion in understanding public legal order versus geopolitical order was caused by the fact that historically after World War II many American domestic rules and regulations especially in economic and financial sphere were adopted as world's rules, standards and regulations. At the same time, unlike the classical continental European legal doctrine the US laws did not recognize the superiority of the international public laws.

For example, the supremacy of international law is not reflected in the US constitution while American states can generally refuse to adopt certain federal regulations. Besides, the uni-polar world is not just conceptually problematic from international law perspective, but already failed to exist in case of Pax Romana that supported the domination of the empire in one part of the world only. The Pax Britannica in Europe did not involve much domination, rather just an ability to tip over the power balance, and Pax Americana was coexisting with Soviet doctrine until 1991. The New Haven policy oriented theory believes that the international law is a process of policy decisions and not a body of rules. It substitutes the idea of criteria of legality with “major purposes” and human dignity approach. But for the last decade it became clear that this doctrine has a potential for justifying almost every action taken by those who stand of the opposite sides of interpretation of freedom, justice and world order which does not serve nor the purpose of preserving the domination, neither the purpose of peace and stability.

In general, the need to revise some of the key components of the foreign policy associated with various legal matters was stated in Al Gore’s policy platform, who used the term of “forward engagement” that later developed into an anticipatory governance initiative put together by academia and policy makers and presented at the Woodrow Wilson Center for Strategic Studies. The initiative is based on the premise that international affairs are fast developing and complex and cannot adjust to American customary jurisdiction or be broken apart and solved piece by piece. Instead there is a need to increase the “adaptive capacity or our (American) legacy systems of government,” that were modeled for the 19th century [19] and cannot deal with the challenges of the 21st century.

D. Ollivant believes that the lesson that can be learned from the recent failures in foreign politics are that the values, such as liberalism or democracy, but not colonialism, are transferrable from one society to another, while the institutions such as parliament, police or any other government structures are not. Besides, even if it takes longer, the recipient of American military help, or financial assistance from the IMF, or any other type of help should have more personal input in the rebuilding process even if it takes longer because this will mean more institutional stability in the future. As the Chicago Council on Global Affairs concluded in its 2010 survey, Americans while remaining committed to an active role of the U.S. in world affairs - its problems, opportunities and actors - also became more selective in their support. They recognize the constraints of their resources and power and influence abroad [20]. Realizing the need for sustainable power and international authority as an alternative to destructive ideological arrogance and overreach, the Obama administration supported the so-called “smart power” approach. Smart power is a component of general “reclaiming of liberal internationalism” as opposed to the aggressive unilateralism.

However, after the September 11th 2001 terrorist attacks, American conservatives adopted the rhetoric of human rights and democracy as a cover for “militant imperiousness” and the Bush administration acted fundamentally inconsistent with the ideals it claimed to invoke, both in foreign and domestic politics.Because of undermining the alliances, international institutions and US credibility, the US power started to deplete. Global cooperation has encouraged distrust of the U.S. motives and such ideas as freedom and liberty are becoming associated, at least in the Middle East, with violent and unwanted occupation. Ironically, thanks to the international terrorism threat, the alternative ideas of international liberalism and Western-style democracy are still appealing in this region. Smart power as part of progressive liberal internationalism recognizes “adoptability” as the biggest strength and sustainable exceptionalism and is needed to repair to the damage done by abuses of war on terrorism. In legal terms, it means that there is a need to overcome the silent taboo of invoking international law cases in American courts in order to overcome existing contradictions [21]. The international institutions partially set by the US have developed and can be seen as a challenge to the US authority, but only in terms of fighting traditional wars. The current threats to the US security are transnational, complex in terms of actors involved and are more likely to be contained by multi-lateral settings rather than by means of bilateral diplomacy. As E.Brimmer, assistant secretary of state mentioned in her speech at SAIS in Washington, DC in June 4 2012, the US needs the UN as a most suited venue to exercise multilateral diplomacy as part of smart power. International law can be a tool and not an obstacle to the partnership that the US already built and intends to keep.

VI. NATION STATES AND GLOBAL INSTITUTIONS PROVIDING SECURITY OF INTERNATIONAL TRADE.

Such international structures, as GATT or WTO, are the most obvious examples of nation states and international organization being an integral part of the same global governance regime. Maintaining the security of international trading routes in the Asia-Pacific region is a positive example of national hard power that is used together with global governance institutions, such as International court of Justice of the United Nations, as internationally welcomed guarantee of peaceful economic development. The naval strategy of the United Sates in this region absorbs significant national resources but is serving the interest of a wide range of stake holders, including China, India, Japan, and Saudi Arabia, that depend on the security of regional trade routes. While there are different approaches to a long-term socio-political development of the region in liberal democratic India, communist China, federal constitutional monarchy of Malaysia or Malay Islamic Monarchy of Brunei, all these states have their major ports on the Asia-Pacific coast and have a clear understanding of immediate threat to their competing scenarios posed by transnational crime groups that conduct maritime terrorism, piracy, smuggling and trafficking and other challenges of globalized post-cold war world.

Originally, maritime terrorism was understood as piracy whereby any unauthorized act of violence on the high seas would be characterized as piracy [22]. Following the terrorist attack on the United States in September 2001, it was recognized that a terrorist attack [23] in a major port or vital shipping channel, particularly if it involves a WMD, could potentially close down international commerce for a length of time with economic repercussions, given that 90 percent of the world trade is facilitated by sea, and cause long-term environmental and social crisis. The South East Asia region, in particular the territory and territorial seas of three states–Philippines, Indonesia and Malaysia-constitutes can be seen as a single geopolitical space that affects the stability of the larger South East Asia maritime domain. The ties of commerce, navigation and settlements across the Celebs and Sulu seas are conducive to transnational criminal activities. These areas, being outside of central administrative control, and influenced by ethno-national, ideological and religious conflicts, allow criminal networks to recruit and operate hidden from national law enforcement agencies and counterterrorism agencies. The TBA continues to be a key logistical corridor for the Indonesian terrorist group Jemaah Islamiyah and its offshoots; the Sulu-archipelago based Abu Sayyaf Group, which conducts acts of maritime terrorism, kidnapping, piracy and other criminal activities, and the Moro Islamic Liberation Front-the largest terrorist organization in South Philippines, for arms trafficking.

Since its inception, the US anti-piracy mission has been the central focus of maritime security strategy aimed at keeping the international waters of the world open to free, safe and unencumbered access by mariners …for all nations [24]. At the same time anti-piracy nongovernmental organizations (NGOs) — ranging from industry and seafarer associations to think tanks and Track II scholarly networks — have also been influential in addressing this. The pressure exerted by NGOs, such as the International Maritime Bureau, on littoral governments in Southeast Asia resulted in greater state-to-state and regional military cooperation, as exemplified by the 2004 landmark maritime initiative between Malaysia, Singapore, and Indonesia – MALSINDO - to patrol the Strait of Malacca. Operation MALSINDO has been successful in curbing the number of pirate attacks and industry watchers assume that the current approach is working.

Yet while the actual number of piracy cases may be perceived as dropping, the total number of maritime crimes in the Strait of Malacca has actually increased. In particular, the smuggling of people and goods is contributing largely to the negative statistics. Each boatload of 50 to 100 undocumented migrants traveling between Malaysia and Indonesia across the Strait of Malacca, for example, earns the smuggling syndicates between US $15,000 and US $30,000, a high return for a relatively low risk. Unfortunately, undocumented migrants are just one commodity for smuggling syndicates. Other illegal but very profitable items include drugs, stolen motorcycles and outboard engines, cigarettes, timber, fish, sand, gravel and soil for reclamation work, not to mention maritime kidnappings for ransom. These unlawful activities along the Strait of Malacca and in the Sulu Sea--between Sabah in Northern Malaysia and the Southern Philippines are more predictable and less dangerous than maritime piracy.

While the U.S. Navy remains committed to fight against piracy, terrorism and smuggling and utilizes its national units to promote that fight, the American navy is also part of an international task force, the Combined Task Force 151 (CTF-151), that includes sophisticated monitoring of the world's oceans by both ships and aircraft. Those multinational naval task forces also serve the strategy of the prosecution of criminals apprehended at sea and the promotion of commercial shipping best practices [25].While hard power of national states in the region plays a significant role in maintaining non-traditional security, some of the matters of traditional security are being handled by international organizations. Economic stagnation in Europe reinforced the EU ties by closing the debate on the soft power/hard power strategy of future development [26]; the economic development of such leaders of the developing world as China and India has reinvigorated previously existing political tensions between the countries in the region that translated into the escalation of territorial disputes. The disputes in the South China Sea, for example, cause a significant aggressive change in the Chinese naval strategy, Indian military investment and further domino reactions in the region.

Generally, the attribution of maritime territories is regulated by the UNCLOS. The United Nations Convention on the Law of the Sea (UNCLOS) was the first attempt by the United Nations to apply the concept of sovereignty to the maritime domain. This convention is based on Westphalia tradition, which does not allow for historical claims of empires, and provides legal framework for demarcating territorial sovereignty and adjudication of disputes over resources and waterways. Neither China nor the United States has acceded to UNCLOS. China blames the US for hypocrisy of insisting that China should join the convention while not doing do itself while Washington argues that the U.S. Congress refuses to ratify UNCLOS because the United States has signed the 1994 Agreement for Implementation and the U.S. Navy obeys and enforces UNICLOS provisions de facto. China claims that in such case it can implement de-facto the maritime law norm that grants 200 nautical miles as an Exclusive Economic Zone (EEZ) to China and provides Beijing with sovereignty over the full territory’s natural resources of Senakaku islands. The United States insist that China should follow the UNCLOS provisions that draw a line at twelve nautical miles and follow the United Nations Commission on the Limits of the Continental Shelf opinion as baseline for adjudication. This situation might change if the US decides to sign the UNICLOS in order to back its allies in Asia-Pacific, such as Philippines, in their territorial claims, as well as adding more weight to American claims, such as over the Arctic resources.

Between the Hague conference in 1899 and the end of the Cold War, the maritime treaties were designed primarily to maintain the peace through preventing the expansion of war at sea and reducing provocative and risky behavior. In the past decades, the international maritime law has evolved from a set of rules designed to avoid naval warfare toward a new global framework designed to facilitate maritime security cooperation, broaden partnerships for enhancing port security, coastal and inshore safety, and promote the maritime domain. The 1982 Law of the Sea Convention (UNCLOS), entered into force in 1994, provides the umbrella framework for international law in the maritime domain. Post-9/11 updates were made to the 1948 Convention on the International Maritime Organization (IMO) and the 1974 Safety of Life at Sea (SOLAS) Convention. The 1988 Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation was amended to include the 2005 Protocol. Currently, Chapter VII of the United Nations Charter is being discussed in terms of its broader applicability to enforce action in the maritime domain by the Security Council. The normative framework of maritime security changed from hegemonic to collaboration and now favors involvement of an international judicial body, the ICJ, in marine border dispute resolution. As a result, five ASEAN members, Cambodia, Thailand, Indonesia, Malaysia, and Singapore have already decided to rely on the ICJ’s non-partisan status and adhered to its decisions. One of the positive examples of ICJ’s involvement in regional marine disputes is represented by the memorandum of Malaysia and Singapore to refer their dispute to the ICJ, which granted Pedra Blanca islands to Singapore, Middle Rocks to Malaysia, and South Ledge to whichever state in whose territorial waters it lies. Interestingly, this positive change coincided with the development of Coastal watch initiative by the Philippines, Malaysia and Indonesia with the US support for coordinated multi-lateral involvement of traditional naval capabilities along with other national law-enforcement agencies in order to increase the enforcement powers of the coastal states. The CWS was first conceptualized in 2006 and came into being in 2008 to boost maritime surveillance in the TBA [27].

The International Court of Justice has just began building its credibility in the South East Asia region [28], but its decisions have contributed to a new legal tradition in Asia: several sovereign nation states have successfully delegated their dispute regarding strategically located territories to UN’s ICJ and avoided military confrontation.

Partially due to historical reasons, such as the fact that the Westphalia principles did not apply in this region until the current nation states were formed after the World War II, unlike Europe, this region has formed a legal tradition of low-binding informal agreements and informal, avoiding rather than including disputes into their agenda. Negotiations permitted nations to "shelve" those territorial conflicts, which is counter-productive for a formal resolution process, but which has been necessary to create traditional "collective security" mechanisms in the region. On the other hand, once the leaders of the region come to a better understanding on matters of universal jurisdiction and the future of the security environment, the ICJ as a universal judicial organ can become one of the main means of dispute resolution without creating organizations similar to the EU's regional mechanisms.

VII. CONCLUSION

The 20th century can be viewed as a sequence of global governance experiments based on global institutional changes driven by such "shocks" as two world wars, the collapse of the European empire, the global spread of communist revolutions followed by collapse of Soviet Union along with numerous economic crises in the capitalist world. At the same time the expanding geographic scope of international financial and economic institutions as well as growing diversity of domestic political regimes and forms of self-organization of global civil society have been successfully facilitated by good old same principles of the Westphalia system of international law that kept developing to serve the evolving needs of the world community. First formulated in 17th century and promoted by Woodrow Wilson, the Westphalia principles created a dynamic and adjustable system that was able to incorporate new actors and address ever changing challenges, including the creation of major global governance institutions in the 20th century.

Even though the European integration is past the stage of inter-state political rivalry and is driven by pragmatic reasoning within the unified legal and administrative framework, its inward oriented policies are undermining its allure as a universal model for development. At the same time the leaders of economic growth in Asia do not have a unified alternative approach that would fully recognize and facilitate via adequate institutional infrastructure first regional and then global interdependency. The members of the regional "noodle soup" of multi-lateral trade and security organizations, such as ARF, SAARC, ASEAN, APEC ,American bilateral alliances, Pan-Asian and Afro-Asian frameworks follow contradicting concepts of nonalignment, noninterference, common security and open regionalism at the same time while international trade depends strong military commitments. Various negative impulses for revising the Westphalia principles and criticizing the UN as their main guarantor seem to be a side effect of American "overreach" policy, rather than a result of a long-term, gradual and irreversible development of alternative values and systems of internationalism. Stability in Europe and in Asia depend on peaceful engagement though global institutions, and first of all the United Nations, based on the advantage of shared values and principles necessary for developing economic and security cooperation. US leadership, incorporated into such structure of international institutions, is most likely to sustain, as long as its foreign policies do not promote "discriminatory exceptionalism" [29]. Indigenous European and Asian regional frameworks that can serve as alternative to the UN global governance tools without American contribution face difficulties due to the economic limitations in the first case and lack of inner regional identity in the second. On the other hand the Trans-Atlantic version of standards for global development is facing fair criticism from inside and outside of the organization.

Since 1648 Westphalia principles went through revision and adjustment during every major shift in world politics, including the post cold-war challenges of the creation of "transnational civil society" [30] and addressing non-traditional security threats, such as international terrorism. The Westphalia system was also evolving unevenly in different parts of the world respective to their engagement in such international institutions as League of Nations, the United Nations, the GATT and WTO, that ultimately formed the present version of the Westphalia system of norms and principles. During its evolution the Westphalia system facilitated peaceful competition between the great powers and hosted transformation of world market and social community by including first Europe, then in the rest of non-socialistic world, then former socialist countries. As a result various actors (state and non-state) with the help of legal principles of international relations (political sovereignty and territoriality gradually balanced by human rights mechanisms) and market principles of capitalist economy expanded their influence socially and geographically. While offering different welfare packages, all states in their social and economic development became interdependent and still depend on a global market, which in part serves as a venue for economic competition as an alternative to military expansion. Globalization or the spread of capitalist market in the end of 20th century did not undermine political state territoriality. Rather, the stability of modern transnational economy depends on international order and the legal and social security of its transactions, which can be provided only by states though their social contracts.

Evolutionary perspective on development of the Westphalia principles after the WWI and their influence on the creation of global institutions, such as the United Nations, allow disclosing cooperative nature of the relationship between traditional nation state and post cold war international institutions. The "old" Westphalian principles do not compete with the "new" principles of governance of global society, rather global governance projects compete with each other, while Westphalian principles provide an opportunity for peaceful development of interdependent financial market and trade. This study though was limited by the selected time period (from 1918 till present time) as well by geography and nature of League of Nations and NATO as Europe-centered collective security organizations. As a net step the author intends to consider the role of a global judicial institution in facilitating continuing competition of global governance projects.

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[27] Those principles, among others, include state sovereignty, territoriality, equality, ban on threat of use of force, principle of human rights and self-determination and priority of the interests of the world peace. And according to article VII, the Security Council "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression". See Charter of the United Nations//http.: http://www.un.org/en/documents/charter/preamble.shtml. Last accessed on June 3rd, 2014
[28] European Security Strategy: A secure Europe in a better world was adopted on December 12, 2003
[29] H.H. Koh was nominated by President B. Obama and approved by Senate as legal advisor of the Department of State in 2009 where he also served during Clinton administration. He was also Dean of the Yale law school in 2004-2009.

[30] Maritime terrorism means both an act of violence, for example exploding an oil or gas vessel, or use of international shipping for personal transport, shipping supply and means of finance of terrorist activities. Since 9/11, the term has included ungovernable or ungoverned spaces, where the host government lacks physical capacity and/or political will to exercise sovereign power and terrorists conduct their operations with impunity.

[31] Navy coast guard join to combat piracy/ U.S. Department of defense homepage. http://www.defense.gov/News/NewsArticle.aspx?ID=52749 (last accessed on November 5th, 2013); America and the Barbary Pirates: An International Battle Against an Unconventional Foe. The library of congress homepage. http://memory.loc.gov/ammem/collections/jefferson_papers/mtjprece.html (last accessed on November 5th, 2013)

[32] Boarding teams work to ensure law enforcement actions are completed and collect evidence to aid in potential prosecution. Coalition of air and sea assets compel suspect vessels to stop and comply with the boarding team.

[33] The 2008-2008 crisis hurt the European budget so that Europe is not choosing any more between paying for social programs over defense or vice versa, since now it can afford neither.

[34] It was intended to be an interagency effort involving the Philippine navy, national police, coast guard, intelligence agency, anti-terrorism task force, fishery, customs, immigration, health services and maritime industry authorities to establish the system of maritime domain awareness and later link with similar initiatives in Malaysia and Indonesia to create a sub-regional regime of MDA (Bakorkamla) that could be then tied into broader Asia-Pacific multi-lateral arrangements such as the Information Fusion center in Singapore.

[35] Part of the reason is that that the ICJ has moved from pure geographic approach of defining borders to socio-geographic "proportionality" approach, which makes the results "pseudo-mathematical" and raise questions in terms of their rationality.

[36] Violation of principle of equality of sovereign states