

## **Sovereignty**

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### **A. Introduction**

- 1 The principle of sovereignty, ie of supreme authority within a territory, is a pivotal principle of modern international law. What counts as sovereignty depends on the nature and structure of the international legal order and vice-versa.
- 2 Most of the other, if not all institutions and principles of international law rely, directly or indirectly, on State sovereignty; it suffices to mention, for instance, the relationship between the conditions and attributes of statehood or the principles of territorial or personal jurisdiction, immunity, and non-intervention, on the one hand, and considerations of sovereignty,



on the other. The 1945 → *United Nations (UN)* system itself is based, albeit not directly on the principle of sovereignty itself, on a necessary corollary of that principle: the principle of sovereign equality of its Member States as guaranteed in Art. 2 (1) UN Charter (→ *States, Sovereign Equality*). Provided States have supreme authority within their territory, the plenitude of internal jurisdiction, their immunity from other States' own jurisdiction and their freedom from other States' intervention on their territory (Art. 2 (4) and (7) UN Charter), but also their equal rank to other sovereign States are consequences of their sovereignty.

- 3 Curiously for such a pivotal concept, but maybe precisely because it is such, its meaning has been changing across historical and political contexts and has also been heavily contested at any given time and space. Recently, upholding the concept, by reference to the State or in general, has become a ground of major contention among international lawyers and theorists; while some argue that the concept of sovereignty, or at least of State sovereignty is obsolete and should be abandoned in favour of new concepts of supranational or transnational political organization through which the current sharing, limiting, and parcelling of authority can be better explained, others see new forms of political authority and integration beyond the State, such as the European Union ('EU') for instance, and their inherent limitations as a confirmation or at least a development of the concept of sovereignty or even of State sovereignty (see also → *European Union, Historical Evolution*).
- 4 As a matter of fact, because of its essentially contestable nature, the concept has been remarkably resilient both epistemically and normatively, and its pregnancy in contemporary legal discourse has not been undermined but rather increased by controversy. Of course, arguably that resilience may be explained in very different ways, and notably by reference to conservative political imagination (or, worse, to Stephen Krasner's idea of 'organized hypocrisy'; Krasner [1999]) or to a given ontological status of concepts and not necessarily by reference to the international institutional and legal reality itself.
- 5 The purpose of this entry is to present the current state of the debate about sovereignty in international law. Because the principle of sovereignty is a founding principle of the international legal order whose understanding is conditioned by one's general approach to international law and its validity, and → *legitimacy*, and reciprocity, and since the discourse and practice of sovereignty are as a result closely intertwined, an accurate and complete presentation of the legal institution of sovereignty requires including some international law theory. However, the entry pertains to international law and international law theory only, and is not concerned with the distinct albeit connected sovereignty issues that arise within international relations theory or political theory more generally except to explain some of the political dimensions of the principle of sovereignty in international law. Nor does it pertain to dimensions of the debate that are specific to the EU except when they are relevant to the evolution of sovereignty in international law.
- 6 The entry provides, on the one hand, a restatement of sovereignty's historical development, a presentation of the concept and its various conceptions, a critical explanation of its legal nature and sources, and an analysis of its current regime under international law; and, on the other, a discussion of its contentious relationship to → *human rights* and democracy and an assessment of some of the specific difficulties it raises for international law nowadays and of how it is currently developing.
- 7 As some of the constitutive dimensions of sovereignty are addressed in the context of the principle of sovereign equality under the UN Charter, and since the sovereignty-correlative principles or institutions of international law mentioned in the first paragraph are discussed separately in corresponding entries (eg → *Self-Determination*; → *Subjects of International Law*), the present entry focuses on foundational issues and questions relative to the development of the international legal system more generally. It is actually important to discuss sovereignty separately from many of those correlated principles as the latter are mostly also attributes of statehood under international law and their fate in contemporary international law is closely tied to that of States, whereas sovereignty need not necessarily be.

## B. Historical Evolution

- 8 Since its origins, the content and implications of the concept of sovereignty have constantly evolved. In Richard Falk's own terms, the history of the concept of sovereignty is one of 'conceptual migration' (Falk 789): different periods in history have generated different difficulties which in turn have influenced the legal answers sought to political problems and conditioned the function granted to sovereignty at any given time and space.
- 9 This section introduces some of the different conceptions of the polysemic concept of sovereignty, thus hopefully revealing how today's predominant, albeit sometimes contradictory, conceptions are in fact the result of historical tensions and contingencies. Historical variations of the concept differ in three main respects: the subject of sovereignty (person or function); the nature of sovereignty (absolute or limited); and the source of sovereignty (law-based or not). All three are highlighted in the course of the historical presentation. The presentation straddles both political and legal



data and their construction and assessment by political and legal thinkers. Importantly for the parochialism debate in international law, the history of the concept of sovereignty is mostly European or Western, and related to European and Western developments, even in the second part of the 20<sup>th</sup> century.

### **1. From Ancient Times to the Treaty of Westphalia: The Emergence of Modern Sovereignty**

- 10 In a nutshell, modern sovereignty emerges during the late 16<sup>th</sup> century rupture in the political organization of Europe and is then conceptualized by Bodin in his model of the ideal Republic.

#### **(a) From Ancient Times to Westphalia: Nascent Modern Sovereignty**

- 11 Roughly speaking, the concept of sovereignty has been present, albeit under different denominations, as a fundamental principle of the national and international political order since early antiquity and more precisely since Aristotle.
- 12 In its modern understanding, however, the emergence of the concept of sovereignty is usually traced back to the 17<sup>th</sup> century. Given the theocratic foundations of political power in medieval Europe, there was no need for the earlier Christian *universitas* to establish the sovereignty of a State on its territory. Progressively, however, political power emancipated from religious power, and the establishment of a secular and territorial authority was secured thanks to the development of the principle of the sovereignty of States of equal power.
- 13 More precisely, the modern conception of sovereignty is usually said to date back to its official consecration in the Treaty of Westphalia in 1648 (→ *Westphalia, Peace of [1648]*). It was then that the principle of territorial delimitation of State authority and the principle of non-intervention were formally established. Westphalian sovereignty can be seen as a rupture in two respects: secular authority over a given territory was regarded as ultimate and independent from religious power; and no more external intervention in the realm of sovereign jurisdiction was authorized whether religious or secular (→ *Westphalian System*).
- 14 It is important to bear in mind, however, that this constitutes a historical simplification. Modern sovereignty was in fact largely established well before 1648, on the one hand, and sovereignty was still questioned later on and until the end of the Austro-Hungarian Empire, on the other. Sovereign equality was first recognized or at least practised at the 1555 Peace of Augsburg. And it was only after the fall of the Empire and the weakening of the Concert of Nations that the model of coexistence of equal and sovereign States could be deemed predominant.

#### **(b) Bodin: Conceptualizing Modern Sovereignty**

- 15 The original theoretical model of State sovereignty is often attributed to Jean Bodin and his *Six Livres de la République* published in 1576. This book provides the first coherent theory of State sovereignty, although it is only towards the end of the 17<sup>th</sup> century that it was recognized as such in practice. In a period of intense religious conflicts, Bodin describes an authority capable of putting an end to the war: the Republic.
- 16 Bodin's account of sovereignty differs from the medieval conception, first of all, because it separates sovereignty from the person of the sovereign; sovereignty has become a real function which can be attributed to any person or institution. Secondly, Bodin's sovereign authority cannot by definition be subject to any rule or restriction; sovereignty amounts to the absolute and perpetual power of the Republic. Finally, the sovereign is the source of law and is not submitted to its own laws (*legibus solutus*), although it is of course limited by natural law and rules of divine origin (see also → *Natural Law and Justice*).

### **2. From the Treaty of Westphalia to the 20<sup>th</sup> Century: The Fleshing Out of Modern Sovereignty**

- 17 By the time Bodin had issued his model of sovereignty, the notion of sovereignty *qua* impersonal function, the notion of limited sovereignty, and the notion of legal sovereignty, which were to become the pillars of the modern conception of sovereignty, were already emerging. These three key notions were gradually developed by the next generations of political theorists and in particular social contract theorists. From the late 18<sup>th</sup> century and during the 19<sup>th</sup> century, the modern notion of sovereignty started diffusing into domestic practice throughout the globe.



**(a) From Hobbes to Rousseau: Understanding Domestic Sovereignty**

- 18 A hundred years after Bodin, the English author Thomas Hobbes recast the idea of sovereign authority with his *Leviathan*.
- 19 In this first version of social contract theory, the sovereign is still conceived as an absolute master, but its power is clearly no longer original and unconditional. It results from a contract among individuals and amounts to a function or property of the State and the legal order, which can be attributed or re-attributed if necessary. It is no longer the quality of a person or group of people in particular. According to Hobbes, the supreme authority of Leviathan should enable the English people to escape civil war through a fictive social contract among individuals which can in turn secure peace in exchange for freedom. Secondly, as for Bodin, the sovereign and its laws are vested with absolute authority and as such there are no normative limits on the sovereign, not even by its own laws. Finally, however, and as for Bodin, the sovereign is limited by the laws of nature and in particular the individual right to protect one's own life.
- 20 Fifty years later, this quasi-absolute conception of State sovereignty was first questioned by John Locke.
- 21 In Locke's social contract theory, the authority of the sovereign no longer derives from a social contract among individuals, but from a contract between individuals and the sovereign that can therefore be held accountable for a violation of the contract and for the infringement of individual rights in particular. It is crucial, according to Locke, to establish strict limits to the power of the sovereign and to ensure a division of powers as well as constitutional control of the latter. As a result, Locke's approach to sovereignty, by contrast to Bodin's or Hobbes', is the very first one that conceives of a limited sovereign but also of a legal sovereign that is a source of law but at the same time bound by its own laws.
- 22 The final touch had now been made to the modern concept of sovereignty. The idea of limited sovereignty that finds its source in its own laws had appeared for the first time. True, the limited dimension of sovereignty had been propounded before, among some early modern philosophers writing in the early 17<sup>th</sup> century. This is the case for instance in the work of Hugo Grotius, Alberico Gentili, and Francisco Suarez, who defended the possibility, albeit limited, of disciplinary interventions by other sovereign States.
- 23 One finds the idea of limited sovereignty again later in Jeremy Bentham's model of constitutionalism. It was Jean-Jacques Rousseau, however, who a few years after Locke succeeded in reconciling the quasi-absolute and extremely resilient conception of sovereignty one finds in Hobbes with a more constitutional approach to its limits.
- 24 Rousseau's account of sovereignty does that by conceptualizing popular sovereignty and explaining how the exercise of the sovereignty of political institutions is submitted to the respect of the general will. Political sovereignty becomes a mere reflection of popular sovereignty; if the sovereign does not respect popular will, it risks losing its attributions. Seen in those terms, sovereignty can both be deemed absolute when it is original, and limited when it corresponds to derived political or institutional sovereignty. Sovereignty and democracy were clearly bound from then on.
- 25 In the following centuries, conceptions of popular sovereignty and democracy dominated debates on the concept of sovereignty. They can be found, for instance, in the constitutionalist thought of the late 18<sup>th</sup>-century America and France where it is the people ruling through a body of law that is the subject of sovereignty.

**(b) From the 19<sup>th</sup> Century to the Early 20<sup>th</sup> Century: Matching Domestic Sovereignty with International Sovereignty**

- 26 If, for a long time, the internal sovereignty of the State on its territory and in its internal affairs lay at the heart of debates, the question of external sovereignty of the State in its international relations gradually moved centre stage during the 19<sup>th</sup> century.



- 27 It is important to emphasize, however, that the notion of external sovereignty was not entirely absent from classical authors' considerations. The emergence of modern sovereignty went hand in hand with claims to external independence and this concern may be retrieved, for instance, in Machiavelli, Bodin, or Hobbes' writings.
- 28 The emergence of the modern State was matched by the development of centralized political and legal orders which were territorially and personally determined and between which there were no links of subordination. In those circumstances, external sovereignty captured the relation of independence of sovereign States outside their national boundaries and their equal rights in mutual relations.
- 29 It is only during the 19<sup>th</sup> century, however, that these concerns and claims were properly conceptualized *qua* prerogatives of external sovereignty both by political thinkers and by interstate practice. This coincided with the development of international law besides the domestic law of each sovereign State. Quickly, external and internal sovereignty became two necessary sides of the same coin. And this became clear both in domestic law where external powers were gradually regulated on top of the internal framework of national sovereignty, on the one hand, and in international law where external and, albeit to a lesser extent at first, internal aspects of sovereignty became objects of international rules and principles, on the other.
- 30 If States were to remain ultimate authorities on the inside, they needed to be independent on the outside. Alongside conflicts of sovereignty among independent States, the necessity of developing international legal rules gradually emerged. In the absence of a global supreme power, sovereign States could only be held accountable to each other according to freely endorsed mutual promises. And the only way of ensuring the respect of these obligations was to impose international legal rules for mutual respect of sovereignty and of mutual promises among sovereign States. Without such legal rules, sovereignty would be reduced to mere factual power.
- 31 It rapidly became clear that public → *international law* and sovereignty implied each other. To be fully in charge of its relations with other States in a society of equally sovereign States and to be externally sovereign, and hence in turn to be able to protect its internal sovereignty, a State needed to be submitted to public international law. However, for public international law to arise, it needed independent sovereign States to freely consent to mutual rights and obligations and to their regulation. As a result, since sovereignty implies the existence of public international law, it became self-evident that sovereignty is inherently limited. Even if, by definition, a sovereign State cannot be limited by the laws of another State, it may be limited when these laws result from the collective will of all States.
- 32 This gradual realization coincided with the development of classical international law from the early 19<sup>th</sup> century onwards and the → *Vienna Congress (1815)* in particular. International law was deemed the law that enabled international coexistence between sovereign States; it covered all areas pertaining to the organization of States' external sovereignty, ranging from border regulation to dispute settlement. It also protected internal sovereignty by prohibiting intervention in another sovereign State and guaranteeing immunity to one State before another's authorities. The need for such a law of coexistence triggered the codification of international law in the second half of the 19<sup>th</sup> century and the creation of the first international organizations ('IOs') through which States organized their external relations more efficiently than on the basis of one-to-one relationships.
- 33 Interestingly, while domestic sovereignty was already deemed an impersonal function, intrinsically limited and law-based in the modern conception used in 19<sup>th</sup>-century constitutional law, sovereignty was at first conceived as a personified State function, as self-limited at the most and as an actual source of law in the 19<sup>th</sup>-century classic international law paradigm.
- 34 This differentiated regime of sovereignty, whether one looks at it from a domestic or international law perspective, can be explained both by the differences between those two faces of sovereignty and their inherent connection as two faces of the same coin. First of all, there was only one sovereign on the inside, but many and equal ones on the outside in the absence of a global and single sovereign. Even if sovereignty was limited in domestic law by reference to the original popular sovereign by that time, its legitimate sovereignty on the inside and equality on the outside meant that it had to be unbound on the outside except by self-limitation. Secondly, and this is as much a cause as a consequence, international law was conceived exclusively as a network of conventions and mutual promises whose source was State consent. Finally, classic international law dealt almost exclusively with external sovereignty.



### 3. From the 20<sup>th</sup> Century to Present Times: The Internationalization of Modern Sovereignty

- 35 The 20<sup>th</sup> century was characterized by the development of modern international law, timidly at first (→ *History of International Law, World War I to World War II*) and more clearly from 1945 onwards (→ *History of International Law, since World War II*). At the same time as modern international law was emerging, the modern concept of sovereignty was being finally internationalized, both in its external and internal dimensions. At last, the modern concept of sovereignty and modern international law would be in line with each other.

#### (a) The First Part of the 20<sup>th</sup> Century: Formalizing International Sovereignty

- 36 The first part of the 20<sup>th</sup> century is usually regarded as the time of conception of modern international law and of the so-called law of international cooperation (→ *Co-operation, International Law of*). The → *League of Nations* was created in 1919 and new fields fell into the material scope of international law. First attempts to secure the prohibition of the use of force and to consolidate duties of peaceful dispute settlement were made, albeit not always successfully.
- 37 At least in its first part, the 20<sup>th</sup> century also corresponds to a period of emergence of the modern model of external sovereignty. This is particularly clear when one reads the first decisions of the → *Permanent Court of International Justice (PCIJ)*, and in particular the *Lotus* and *Wimbledon* judgments (→ *Lotus, The*; → *Wimbledon, The*). There, sovereignty is conceived as limited and law-based, but only because this equates with being self-limited by consent-based legal rules.
- 38 According to the Court in its 1923 *Wimbledon* decision, far from being an abandonment of sovereignty, 'the right of entering into international engagements is an attribute of State sovereignty' (at 25). This was confirmed by the PCIJ in 1927 in the *Lotus* case:

[i]International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed (at 18).

- 39 This formalization of the 19<sup>th</sup>-century concept of external sovereignty in the international legal order was matched by the emergence of a more formal and empirical conception of sovereignty in political and legal theory.
- 40 In the first part of the 20<sup>th</sup> century, the concept of sovereignty entered into a formalization phase which progressively emptied it from any evaluative content and consequently of the normative constraints which were inherent to it since Locke. Sovereignty remains a function or property of the State or the legal order, but it is no longer limited by external values, and this is reminiscent of Bodin's and Hobbes' early modern approach to sovereignty. One finds this formal concept of sovereignty at work in Kelsen's, but most vigorously in Schmitt's writings.
- 41 According to Kelsen's legal theory, sovereignty remains a normative concept, but it is a legally normative concept and not a moral or political one. State sovereignty implies that its legitimacy and authority can be established exclusively by reference to the legal system itself. It requires no reference to principles outside that very legal order. According to Schmitt, by contrast, the concept of sovereignty is not even normative in a legal sense anymore. It is a legal concept, but a purely empirical one in that it refers to a factual situation; the sovereign is that entity which is vested with the ultimate power of solving extreme situations. For Schmitt, the mixture of legal and moral elements in earlier conceptions of sovereignty actually constituted the fundamental problem of sovereignty throughout its history.

#### (b) From 1945 Onwards: Modernizing International Sovereignty

- 42 The second part of the 20<sup>th</sup> century corresponded to the establishment of modern international law and of the new conception of international law *qua* law of cooperation between sovereign States.
- 43 From that time onwards, international law has developed to allow sovereign States to cooperate and not only to coexist. As of 1945, IOs and institutions have proliferated at a regional level and more globally to organize and enhance those forms of cooperation. The creation of the UN in 1945 is an example, but one can also mention the EU's predecessor



entities: the three European Communities created in 1951 and 1957. European integration remains a unique example of post-national integration and political autonomy beyond the State.

- 44 Gradually, and sensibly more so since the end of the → *Cold War* (1947–91) and the 1990s, new subjects of international law have been recognized (by sovereign States): IOs, of course, but also, even though to a lesser extent, individuals and groups of individuals. Furthermore, with increased → *interdependence* and cooperation among States, international law has gradually applied to areas that previously belonged to the domestic sphere. This is the case in the field of → *international economic law* and international human rights, of course, but also, more recently, of international → *migration law* or international environmental law. Finally, new forms of relative normativity have emerged in international law by which States can be bound through objective legal norms they have not consented to, or cannot derogate to imperative norms even if they want to (→ *Ius Cogens*).
- 45 Those three phenomena, ie delegation of sovereign powers to IOs, international law's internal subject matters and its relative normativity, have at first been interpreted as restrictions on both internal and external sovereignty. In an increasing number of cases, international law seems to be limiting States' sovereignty without their consent; sovereignty is therefore limited but no longer only in a self-limiting fashion. Sovereignty is often said, as a result, to have been circumscribed and tamed or even relinquished in the second half of the century.
- 46 Reading these developments as the end of or as a reduction of sovereignty amounts to a misconception, however. They are in line with modern sovereignty as it was conceived of in the domestic context since the late 18<sup>th</sup> century and are merely signs of its adaptation to new circumstances. Just as modern domestic sovereignty became an impersonal function of the State for the people, modern international sovereignty finally became a function distinct from the legal persona of the State. Moreover, just as modern domestic sovereignty emerged through a limitation of classic and early modern sovereignty, modern international sovereignty is a limited version of its classic correspondent. Further, just as modern domestic sovereignty is law-based, modern international sovereignty finds its sources in international law and not only the other way around. Finally, just as modern domestic sovereignty has an internal and an external dimension, modern international sovereignty is no longer only external, but it also has a growing internal dimension as international law regulates elements of internal State organization and competence. In short, modern international sovereignty is as important for the self-determination of democratic States in international law as ever, but to serve the same purpose its modalities have changed.
- 47 To understand how this internationalization of modern sovereignty finally came about, it is useful to distinguish two key developments: the internationalization of popular sovereignty, and the development of sovereignty beyond the State.
- 48 First of all, with the democratization of States and the correlative development of human rights protection within States in the second half of the 20<sup>th</sup> century, domestic sovereignty had gradually become more and more limited and found its source in a democratically legitimate legal order. Post-1945, international law was seen by modern democracies as a new way to secure their democratic development and, given the relationship between human rights and democracy, to entrench human rights protection from the outside through minimal international standards. This was captured by Hannah Arendt's famous idea of a 'right to have rights', which was the only properly universal human right there could be as it was a right that only international law could guarantee.
- 49 International sovereignty objectively limited in this way became, in other words, a direct way to secure domestic sovereignty in a legitimate fashion. As a result, modern State sovereignty now finds its source both in constitutional and international law—and this in turn explains the circumstances of constitutional and legal pluralism where distinct valid legal orders overlap. Seen differently, the sovereigns behind international law are → *peoples* within States, and no longer States only. Importantly, however, international sovereignty protects a collective entity of individuals—a people—and not individual human beings per se. Of course, their fates are connected, in the same way democracy and human rights are correlated. But sovereignty, and sovereign equality, in particular, protects democratic autonomy in a State's external affairs and remains justified for this separately from international human rights.
- 50 This development explains, for instance, why it is wrong to oppose sovereignty to human rights in the second part of the 20<sup>th</sup> century; without sovereignty, many human rights-related developments, such as decolonization, would not have taken place and without the role human rights played in their creation, many of today's sovereign States would not exist. Of course, this is not to say that sovereignty cannot be in tension with human rights. However, when it is, the tensions are reminiscent of those between popular sovereignty and human rights in the domestic context and ought actually to be resolved in the domestic context.



- 51 Interestingly, many of those new international limitations to internal sovereignty are not consent-based, but stem from customary norms or general principles. This may be explained by the fact that these norms can be understood as the reflection of the minimal common denominator to the practice of all democratic sovereign States constituting the → *international community* and are produced as a result by accretion of the gradual recognition of those norms at the domestic level by modern democracies. Once internationalized, those norms may as a result work as a legitimate limit on the autonomy of those States to contextualize and hence to flesh out those minimal international standards in their respective jurisdictions, thereby contributing to the development of the international standards themselves bottom-up.
- 52 Of course, the internationalization of modern sovereignty goes hand in hand with the democratization of international law itself. If international law is allowed to regulate internal matters, its democratic legitimacy has to be guaranteed. As this is clearly not yet the case, even in a non-statist minimal model of democracy, the legitimacy of international law is still open to debate. And so is that of its role in the limitation and constitution of domestic sovereignty. As long as those questions have not received a satisfactory answer, the resilience of the *Wimbledon* self-limitation approach in certain parts of international law, as exemplified in the → *International Court of Justice (ICJ)*'s → *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)* ('*Nicaragua Case*'; at para. 263) and arguably in the ICJ's *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* ('*Kosovo Advisory Opinion*'; at paras 56 and 123), should not come as a surprise.
- 53 Secondly, material and economic interdependence between States has meant increased institutional cooperation at a transnational, international, and supranational level, and the creation of corresponding IOs. The delegation of sovereign competences to IOs is compatible with the sovereignty of Member States and does not turn IOs into sovereign States (see → *Reparation for Injuries Suffered in the Service of the United Nations [Advisory Opinion]*).
- 54 With time, however, increased integration in IOs has given rise to new channels of political decision-making that do not fit the intergovernmental framework of the 19<sup>th</sup> century and first half of the 20<sup>th</sup> century and hence also to new fora of human rights protection beyond the State. The EU is the paradigm example of such a supranational organization. One may find a confirmation in the gradual democratization of its decision-making processes and the recent transformation of its human rights framework into a municipal human rights body.
- 55 Of course, such developments may potentially lead eventually to a new non-State sovereign or a new larger sovereign State depending on one's conception of the State, and hence to a loss of sovereignty and accordingly of statehood on the part of Member States. Thus, treaties for → *confederations of States* constitute a legitimate act of sovereignty, even though they may eventually terminate a specific State's sovereignty by leading to a → *federal State*. When conceived in modern terms *qua* democratic sovereignty, there is nothing in sovereignty that prevents it from being eventually abandoned in favour of a larger and different form of sovereignty if that new sovereign entity better protects the values and purposes of the people *qua* subject of sovereignty. But that is yet to be done, even in the EU.

## C. Concept and Conceptions

### 1. The Normative Concept of Sovereignty

- 56 In international law, internal sovereignty is used to mean the supreme authority within a territory or the ultimate power within that territory (*Customs Regime between Germany and Austria [Advisory Opinion]* [*Individual Opinion of Judge Anzilotti*] 57). These two definitions refer to very different facets of sovereignty which correspond to its normative and empirical dimensions. Both have been present at different times in the evolution of the concept of internal sovereignty and their tension underlies most of the concept's history. A third additional conception of sovereignty is absolute independence or freedom and it captures what is at stake in external sovereignty (arbitrator Max Huber in the → *Palmas Island Arbitration*).
- 57 *Qua* normative concept, the concept of sovereignty expresses and incorporates one or many values that it seeks to implement in practice and according to which political situations should be evaluated. It follows therefore that the determination of the concept of sovereignty cannot be distinguished from the values it entails and from the normative discussion that generally prevails around it. The starting point for those discussions are not core criteria of the concept, but shared paradigms that can be progressively amended.
- 58 Sovereignty *qua* authority or independence can only be understood by reference to the values that make for a good State, or more generally a good political entity. Those values are various and so are conceptions of sovereignty as a result. One may mention self-determination, democracy, human rights, justice, but also other values that are constitutive of a good polity.



## 2. Conceptions of Sovereignty

- 59 Conceptions of sovereignty often come in pairs: political/legal; internal/external; absolute/limited; and unitary/divided.

### (a) Political/Legal Sovereignty

- 60 Political and legal sovereignty have always been closely linked in the history of the concept; most theories either derive legal sovereignty from political sovereignty or vice-versa, while others see both dimensions as irreducibly connected. The paradox of *pouvoir constituant* and *pouvoir constitué* or of *rule sovereignty* and *ruler sovereignty* is inextricably tied to the modern claim to sovereignty. Different accounts have been given of the priority between political and legal sovereignty across the centuries and have contributed to perpetuating the centrality of the concept of sovereignty. Some authors have even argued that this paradox and mutual claim are testimony of the conceptual incoherence of sovereignty.
- 61 While Austin and command theorists give priority to political sovereignty over legal sovereignty, Hart and later positivists have criticized that approach and give priority to legal sovereignty over political sovereignty. Other authors like Kelsen argue, on the contrary, that political and legal sovereignty are identical because the law subsumes the political and cannot therefore be put in any relationship of priority. More recently, some authors have tried to dissociate legal and political sovereignty and re-associate legal to institutional sovereignty.
- 62 Political sovereignty is difficult to conceive without rules to exercise and constrain that sovereignty, but legal sovereignty is hard to fathom without a political power to establish its legal rules in the first place. Both are intrinsically connected as a result and cannot be set in any order of priority. The law remains a political instrument and creation, whether at the national, European, or international level. This is how it can be said to be legitimate. As a consequence, legal sovereignty ought to match some form of political sovereignty. Sovereignty amounts to the competence of a political entity. And this in turn explains the idea of *Kompetenz-Kompetenz* and the difficulty of establishing one's own competences without legal sovereignty.
- 63 It follows therefore that legal and political sovereignty, even though they are conceptually distinct and can exist separately in some cases, are not logically separable in the long run. This also implies that when they are both granted, neither of them can be given priority over the other. This does not, however, imply that they should be regarded as identical as on a Kelsenian model; they have a conceptually distinct nature and content. There is, in other words, an imperfect logical relationship between the two forms of sovereignty.
- 64 Recently, the concept of de facto sovereignty has appeared in certain national decisions, indicating that sovereignty need not necessarily correspond to a legal status. While this approach served an internal constitutional purpose in those cases, one should be wary of disconnecting the political from the legal dimensions of sovereignty. It confuses the sheer exercise of power with sovereignty and brings back the vexed question of the relationship between the empirical and normative dimensions of sovereignty depicted before.
- 65 At a time when law is no longer only State-based, as demonstrated by the emergence of the EU's legal order, the development of → *lex mercatoria* and other forms of transnational global law, legal and political sovereignty must somehow be able to be kept conceptually distinct from State sovereignty. International law itself is not State law (or only indirectly through State consent and even so not across the board) but is a source of State sovereignty, raising issues about the validity of its sources and their legitimacy. While it was acceptable for classical international law to be based on State consent and indirect State sovereignty, modern international law is no longer only about State self-limitation and is an actual source of State sovereignty. As a matter of fact, international law is not—or not yet, some would say—the law of a global State or political community but of many national and regional polities. As such, the question of the relationship between legal sovereignty and political sovereignty is important in international law even outside the issue of the relationship between law and State.
- 66 Sovereignty should be situated at the boundary between politics and law, rather than being clearly embedded in one or the other. This interpretation of the relationship between political and legal sovereignty solves a long-standing paradox in international law or at least makes the most of it.



- 67 This tension is clearly at play in the context of popular sovereignty. As explained previously, the notion of popular sovereignty goes back to Rousseau's dissociation of the original sovereignty of the *demos* from that of political institutions and to modern constitutionalism. Through the constitution, the people constitutes itself as a distinct entity and sovereign while also transferring the exercise of its sovereignty to a constituted institutional sovereign. Thus, political and popular sovereignty are reunited, and then artificially separated through law in order to bind the sovereign to the people, thus delineating the sovereign and the people at the same time. In a democratic context, therefore, sovereignty is both law-based and the source of law.
- 68 When transposed to modern international law, popular sovereignty and its legal disconnection from the State or set of institutions exercising it explains how international law can be a source of State sovereignty, or more generally of political sovereignty in a larger political grouping of States, without itself being State law or the law of that larger polity. International law now contributes with domestic law to the shaping of internal sovereignty and internal competences as the law of a given people in a multi-level polity.

### **(b) Internal/External Sovereignty**

- 69 Traditionally, the concept of sovereignty has always operated in two distinct manners: sovereignty can be exercised in relation to one's internal affairs, on the one hand, but also to one's external affairs, on the other. The former is usually referred to as internal sovereignty and the latter as external sovereignty.
- 70 The distinction between internal and external sovereignty should not be conflated with that between domestic and international sovereignty. The latter distinction refers to the legal order and perspective that is the source of sovereignty. Domestic sovereignty is both internal and external as domestic law regulates both the State's internal affairs and its external relations, and the same can be said of international sovereignty after 1945. International internal sovereignty refers to the international rights and duties of a State that pertain to its ultimate authority and competence over all people and all things within its territory, and in particular to the correlated principles of territorial and personal jurisdiction and integrity, and of non-intervention. International external sovereignty pertains to the international equal rights and duties of a State in its relations to other States, and in particular to its original legal personality and the correlated principle of State and state agents' immunity.
- 71 Even though there exists a historical and conceptual link between these two forms of sovereignty, as discussed above, it is important to distinguish between them in practice.
- 72 First of all, and although this may be contested from a democratic legitimacy perspective, different institutions exercise sovereignty in both cases: the executive acts as a sovereign in external affairs, while it is usually the legislative which is regarded as sovereign in internal affairs. Hence the difficulty there can be in distinguishing between parliamentary sovereignty on the inside and State sovereignty on the outside. Secondly, their functions differ; whereas internal sovereignty pertains to all political and legal matters, external sovereignty usually only relates to questions of coexistence and/or cooperation among distinct sovereign entities. Finally, external sovereignty can less easily be described as final or ultimate as it is necessarily equal; it can only be equally ultimate since a sovereign can only coexist as an equal to other sovereigns. In internal affairs, however, sovereignty is usually final.
- 73 Consequently, some authors argue that both forms of sovereignty can be kept distinct. Although they may be, conceptually at least, they cannot be separated logically; for there to be external sovereignty, there must be internal sovereignty and vice-versa. Without external sovereignty and the delimitation from other sovereigns, the internal sovereign cannot define its own competences and exercise authority, and without internal sovereignty in the determination of competences and the exercise of authority, there cannot be an external sovereign that can relate to other sovereigns. It is difficult therefore to place one before the other in a logical order of development. The only exception one may mention is the internal sovereignty of protectorates that is not (yet) matched by external sovereignty (→ *Protectorates and Protected States*).

### **(c) Absolute/Limited Sovereignty**

- 74 The question of the degree of power and amount of competence necessary for an entity to become or remain sovereign has given rise to a long controversy in the history of the concept.



- 75 According to some authors, sovereignty can only be absolute; this is the classical conception of sovereignty one finds in Bodin and Hobbes in particular. The modern conception of sovereignty understands it, however, as inherently limited through domestic law, but also, since the second half of the 20<sup>th</sup> century, through international law and this even without the consent of the sovereign State and hence beyond self-limitation. Whereas classic international law saw sovereignty as self-limited at the most, modern international law binds sovereign States in their internal and external dimensions, often without their consent.
- 76 This is most particularly the case of external sovereignty which, as presented before, cannot be regarded as ultimate or final; it is inherently limited since public international law and external sovereignty imply each other. It is important to realize, however, that these inherent limitations to external sovereignty have also become constitutive limitations to internal sovereignty in modern international law. Besides domestic constitutional limitations and transnational human rights guarantees, more and more constitutional orders have become so intertwined that much of their laws and decision-making competences overlap and their internal sovereignty has been affected, as is the case in the EU in particular.
- 77 In response to this difficulty, some authors have suggested the idea of limited sovereignty. The problem then is to know when sovereignty is so limited or fragmented that there can no longer be any talk of sovereignty. The concept of sovereignty implies a certain amount of intensity or of competence over a certain range of matters. As presented before, legal sovereignty is a general competence, ie a competence to determine one's particular competence; as such, it requires a minimal level of control over those competences. In other words, is there a threshold below which sovereignty is emptied of any content and if so, where does that threshold lie?
- 78 Some authors have denied this identification of sovereignty with a threshold-concept. One argument against it may reside in the contestation of sovereignty and hence of this minimal threshold. The essentially contestable nature of the concept of sovereignty is an analytical statement, however, which is perfectly compatible with the recognition of the normative content of the concept and of its contestability. One might even consider that these minimal threshold constraints are part of the analytical framework one has to assume when using a contestable concept, ie that it is a concept, that it encompasses values, that it is contestable, etc. It remains difficult, however, to establish where the minimal threshold of sovereignty lies. Another argument against this all-or-nothing approach to the concept of sovereignty resides in the increasing number of cases of States where there is a foreign military or civil presence that is reminiscent of → *mandates* or protectorates but where sovereignty has been re-transferred to the State. In those contexts, gradations of sovereignty have been suggested along the lines of bundles of sovereign rights. None of these categories have been recognized by international law, however.
- 79 When turning to the minimal content of the sovereignty threshold, some authors merely agree with the idea of a threshold without providing more information. Others enumerate different competences which might constitute a minimal threshold of authority and be used to identify a sovereign entity. They mention territorial supremacy, control over nationality acquisition, immigration control, or national security. Generally, the problem is the absence of consensus and the constant change in the paradigmatic constitutive elements of sovereignty. The content of the threshold cannot but remain contestable and different paradigms have been used at different times in the history of the concept of sovereignty; it suffices to look at paradigms like immigration control or monetary policy to see that they have gradually given way to new ones, in the EU in particular, and hence to new thresholds of sovereignty.
- 80 In short, it is one of the characteristics of sovereignty to be a threshold-concept, whose threshold itself is contestable. Sovereignty is not a matter of degree, as a result. Of course, it can be lost as in failed States or gained as in a newly independent State (see the *Kosovo Advisory Opinion* regarding the rupture between the transitional constitutional order established by UNSC Resolution 1244 of 10 June 1999 [SCOR 54<sup>th</sup> Year 32] and the independent State's sovereign order; → *Failing States*; → *New States and International Law*), but in each case it is either all at once or not at all.

#### **(d) Unitary/Divided Sovereignty**

- 81 Another classical and related distinction pertains to the divisibility of sovereignty. The issue whether sovereignty can be divided is as controversial as that of whether it can be limited. In fact, both issues are very closely connected and often conflated. Older and recent literature refer to absolute sovereignty to mean unlimited sovereignty as much as undivided sovereignty. For the sake of clarity, I will refer to absolute sovereignty by contrast to limited sovereignty only, although divided sovereignty can obviously no longer be deemed absolute either.
- 82 Authors like Bodin or Hobbes feared the division of sovereignty as much as its limitation. In a post-Westphalian world where competences are not only transferred, but also concurrent or shared, however, such fears have become obsolete;



the division of competences has indeed become the rule in the EU and beyond. This applies in almost all domains and at all degrees of authority. The division of sovereignty can be vertical or horizontal, depending on whether it takes place among distinct political entities such as two States or between a State and the EU, or whether it takes place within a single political entity according to territorial or other federal divisions or according to distinct political functions. In the EU, the division of sovereignty goes along both vertical and horizontal lines.

- 83 The increasing division of sovereignty has been made possible by the shift in the subject of sovereignty post-1945: peoples have become the subjects of modern international sovereignty. Those peoples organize and constrain their sovereignty through the international and the domestic legal orders at once. In other words, modern State sovereignty finds its source both in constitutional and international law; the same subject is sovereign and autonomous under international law and domestic law at the same time. This very plurality of sources of law and sovereignty in the new world order is often referred to as constitutional pluralism, ie the coexistence of overlapping autonomous constitutional orders in the same political and legal community and territory. In this context, the principle of → *subsidiarity* becomes a principle of effective democratic sovereignty and a way to allocate decision-making power in a multi-level polity. It provides a test of efficiency in the allocation of sovereignty and may be regarded as part of the correct application of the concept of sovereignty when it is divided.
- 84 As in the case of limited sovereignty, divided sovereignty cannot be entirely fragmented through division without risk. There must be a limit to the amount of division of competences there can be. This is something proponents of divided, shared, or pooled sovereignty do not foresee. In response to the limits of the unitary approach of sovereignty, the idea of disaggregation and re-aggregation of sovereignty around a bundle of rights has indeed been brought forward by some to grasp the poly-centred dimension of contemporary sovereignty. The problem with this kind of model of pooled or shared sovereignty, however, is that by being everywhere, it seems that sovereignty is nowhere. It is important, therefore, to account for a minimal threshold of competences which may neither be limited nor shared, along the lines of the model discussed previously.

#### D. International Legal Basis

- 85 Sovereignty being at once political and legal, and external and internal, its legal status is bound to be controversial domestically, but even more so in international law. As it is both a source of international law and international law-based, sovereignty is best presented from both perspectives. Importantly, however, if sovereignty is international law-based and hence inherently limited through international law, the compatibility between the legitimate authority of international law and sovereignty and the paradox this raises ought to be addressed next.

##### 1. The International Legal Sources of Sovereignty

- 86 Sovereignty is both a general principle of international law and a principle about international law. As such, although it is legally protected within international law, it also has an ultimate dimension to it that makes it foundational to the international legal order as a whole. This cannot but affect the nature of the sources of the principle of sovereignty in international law.
- 87 Among the → *sources of international law* that protect the principle of internal and external sovereignty per se, one should mention general principles of law and → *customary international law*. This has been confirmed by the ICJ in its *Nicaragua Case*. There are, however, no explicit guarantees of the principle of sovereignty in international conventional law itself.
- 88 By contrast, numerous variations of the principle and so-called 'correlated' principles of sovereignty, as opposed to the principle of sovereignty itself, can be found in conventional international law. This is the case in particular of Art. 2 (1) UN Charter for the principle of sovereign equality, but also in the → *Friendly Relations Declaration (1970)* for the detailed rights that follow from that principle of sovereign equality. The UN Charter also protects sovereign States' → *domaine réservé* and prohibits other States' intervention on sovereign States' territory (Arts 2 (4) and (7) UN Charter). Further correlated principles to the principle of sovereign equality may be found in general principles of international law and customary international law, and have been progressively recognized in international adjudication.
- 89 An interesting question is the rank of the principle of sovereignty within the international legal order. On a constitutionalist interpretation of that order, sovereignty being one of its foundational principles, it could be said to be a *ius cogens* norm. This seems to be confirmed by the conditions of Art. 53 → *Vienna Convention on the Law of Treaties (1969)* given the prevalence of the principle in the international community.



## **2. Sovereignty and the Sources of International Law**

- 90 International sovereignty is not only law-based, as discussed before, but it is also a source of international law itself.
- 91 Well before international sovereignty was deemed to be law-based and hence inherently limited through law, it was regarded as a source of law. The classic paradigm of sovereignty was precisely that international law could be based exclusively on sovereign States' consent. Self-limitation was the condition for the binding nature of international law on sovereign States. Nowadays, the inherent legality of sovereignty is one of the central characteristics of modern sovereignty and especially of popular sovereignty. And this is also true of modern international sovereignty since 1945.
- 92 Except in cases where IOs' institutions are involved in international law-making, international law has few institutional resources of its own. It depends on States for the making, but also for the enforcement of its provisions. Sovereign States, but also sovereign IOs such as the EU, function as law-makers in the international legal order. This is clearly the case for contract-like treaties, but also for other more legislative forms of international law-making. Whereas in the former, States act as individuals entering into a set of mutual promises, in the latter instance States act as officials of the people. This is even more clearly the case when international law binds individuals directly within domestic law. If international sovereignty can be a source of law at the domestic level, States' sovereignty in international law-making can be identified with that of institutions of the sovereign people albeit outside the polity.
- 93 These considerations about the role of sovereign States and IOs as international law-makers have important normative consequences. States and IOs do not make international law for themselves as free rational agents, but as officials for their respective populations, other States, and IOs. Their role as officials constrains their competence not only in terms of internal accountability, but at the international level itself. States are bound by the rule of international law, ie the set of values and principles associated with the idea of international legality. In the last resort, sovereign States are not the bearers of ultimate value. They exist for the sake of a people. In the international context, States are recognized by international law as trustees for the people committed to their care. This, of course, becomes clear from international human rights law, but it is also the point of most norms of international law: ultimately, international law is oriented to the well-being of human individuals, rather than to the freedom or autonomy of States.
- 94 Of course, in cases where the normative requirements stemming from the States' role as officials in international law-making are not respected, States can still enter into normative albeit non-authoritative relationships. This is the case with contract-like treaties, for instance. The difference is, however, that they do not act as officials in such cases and cannot in principle bind as a public authority would.

## **3. Sovereignty and the Legitimacy of International Law**

### **(a) The Legitimate Authority of International Law**

- 95 If international sovereignty is both international law-based and a source of valid international law, it is pivotal to the legitimacy, ie legitimate authority of international law. International law's authority is justified or legitimate if it has the right to rule and create duties to obey on the part of its subjects.
- 96 Interestingly, one of the main challenges to the legitimacy of international law is that it allegedly fails to respect the sovereignty of States, intruding upon domains in which they should be free to make their own decisions. Sovereign States are the primary subjects to binding international norms. State sovereignty is often understood in international law as a competence, immunity, or power, and in particular as the power to make autonomous choices (so-called sovereign autonomy). And most duties stemming from international legal norms directly constrain the action of States. The legitimate authority of international law is as a result often opposed to State sovereignty the way the legitimate authority of domestic law is opposed to individual autonomy.
- 97 Following the analogy between States and individuals entering private contracts discussed before, sovereign States are generally held as being able to bind themselves as free rational agents. For a long time, this was actually the only way in which the legitimate authority of international law over sovereign States could be justified. The paradox or dilemma of sovereignty implies indeed that States must be capable of binding themselves if international law is to exist, and also incapable of binding themselves through international law if they are to be absolutely independent. Among the different ways out of the paradox, self-limitation was deemed the least unobjectionable. This is explained by reference to the



idea of normative immediacy, famously captured by the ICJ in the *Wimbledon* case (at 25), according to which those States that are immediately bound by law and vice-versa are sovereign and legal persons (see also *Reparation for Injuries Suffered in the Service of the United Nations [Advisory Opinion]*).

- 98 This approach is misleading in modern international law, however. To start with consent does not provide a sound justification for the authority of law *tout court* and even less for that of international law due to inequalities between States. Moreover, many international law norms can no longer be drawn back to State consent in their law-making process anyway. Finally, they can actually bind other international subjects than States consenting to them and a consent-based justification would leave a large part of international law unaccounted for.
- 99 There is another more promising way to justify the authority of international law on sovereign States, but also on their populations and on IOs that is in line with the modern account of sovereign autonomy proposed so far.
- 100 First of all, a few clarifications pertaining to the justification of authority are in order, however. According to the service conception of authority, authority can only be justified if it facilitates its subjects' conformity with the (objective) reasons that already apply to them and hence respects their autonomy.
- 101 The application of the service conception has a pre-requisite therefore: the subject bound by a legal norm needs to be an autonomous subject, as it is only so that its freedom to choose from a range of options can be furthered by an authoritative directive. Autonomy, in other words, does not mean freedom from duties, but only from those that do not correspond to objective reasons that apply to the autonomous subject and do not help the subject to respect those reasons. A subject is autonomous if his freedom is complete for the purposes of leading a good life.
- 102 The analogy between authority for States or other institutional subjects of international sovereignty, on the one hand, and individuals, on the other, presupposes therefore that the value of autonomy extends to the choices and actions of States. At first sight, it seems plausible that it does, given the value of shared membership in a national political community and, as a result, of the collective self-determination of such communities. The problem is that the value of State autonomy can only be explained in terms of the autonomy of the people constituting it. States are quite unlike individuals when it comes to the value of their autonomy. Their autonomy cannot simply be equated with that of any of their domestic legal subjects, but is the product of those subjects' autonomy as a political entity. By analogy with an individual but also because of the imperfect analogy with an individual in the service of which sovereignty actually lies, sovereign autonomy is even more clearly dependent on the purposes of being a good polity.
- 103 When a State is morally bound by a norm of international law, the duties imposed on it will require action that burdens individuals either indirectly, through international State action that is costly to national resources, or directly through the duty to enact domestic laws in order to transpose international law into domestic law or implement the latter directly in the domestic sphere. This affects individuals' balance of reasons as a result and explains why the autonomy of a State and its ability to be bound depends on its constituency's autonomy and hence on its ability to represent the latter. As a result, States can only be bound by international legal norms when they represent those subjects as officials and hence can bind them as proxy subjects to international law. This approach also has the advantage of providing a single legitimacy concept applicable to all sources of international law and to all subjects of international law duties whether States, IOs, or individuals as all of them are reducible eventually to individuals.
- 104 Of course, States remain free rational albeit artificial agents and as such they can enter into binding agreements the way an individual would enter a contract. This can be the case for many contract-like treaties and other international agreements, although consent does not necessarily bind in all cases. The opposite view would simply strip States of their right to bind themselves and hence from any of the meaningful implications of their quality as *primary international* legal subjects. Further, States' international legal obligations to obey would remain in place even if they were illegitimate, as they are often backed-up by legal sanctions. And so would States' moral obligations to abide by morally correct directives which would bind individuals (and States for them collectively) in any case. But populations unrepresented by those States would not be morally bound by those legal directives *qua* legitimate law. Nor could those States be accordingly.
- 105 Secondly, for the authority of international law to be actually justified and hence legitimate, the reasons international law provides ought not only to match pre-existing reasons of sovereign States, ie the reasons that make them good States. They ought also to be able to preclude those reasons by helping the subject to respect them better than on



his own. The justifications for their exclusionary quality can be numerous and range from cognitive or volitive qualities to coordination abilities.

- 106 In the circumstances of reasonable disagreement and social and cultural pluralism that prevail globally and even more severely among States, coordination provides one of the best justifications for the legitimate authority of international law, even outside clear coordination problems. More particularly, democratic coordination constitutes the justification to the legitimacy of international law that is most respectful of individuals' and peoples' political equality and hence of the reasons that apply to sovereign States. What democracy requires in international law-making and between sovereign States will be addressed below.

#### **(b) Legitimate Authority and Sovereign Independence**

- 107 Interestingly, even when the conditions for the legitimate authority of international law over sovereign States are fulfilled, there could still be some matters over which it is more important for a sovereign to be able to decide independently. This is by analogy to what applies to individuals: it is important that, in some cases at least, a person reaches and acts on her own decision, rather than take a putative authority's directives as binding, even if doing the latter would result in decisions that, in other respects, better conform to reason.
- 108 In general, it is difficult, however, to distinguish those cases from cases where legitimate authority can apply, the incompatibility being at the most contingent and relative to certain circumstances. The contingency of the independence condition is even more clearly the case in international law. If States are deemed as officials both *qua* law-makers and *qua* proxy-subjects of authority in the international legal order, their independence cannot simply be equated with that of any of their domestic legal subjects. It is the product of those subjects' autonomy as a political entity and the value of that autonomy which itself depends on that of the individuals of which it is constituted.
- 109 As indicated before, considered in both its internal and external dimensions, a State's sovereign autonomy is a legal construct, not something whose value is to be assumed as a first principle of normative analysis. In its internal dimension, the State works as a legal organization—it is the outcome of organizing certain rules of public life in a particular way. Its sovereignty is artificial and it is legally constructed for the benefit of those whose internal interests it protects. In its external dimension, the sovereignty and the sovereign autonomy of the individual State are equally artefacts of law. There can be no domestic or international legal order without sovereign States, but equally there can be no sovereign States without domestic and international law. What a State's sovereignty is and what it amounts to is not given as a matter of the intrinsic value of its individuality, but determined by the rules of the international legal order. Those rules define State sovereignty so as to protect the internal and external interests and values of the political community *qua* sovereign equal to others, but also to protect the interests of their subjects.
- 110 If this is correct, the potential cases of incompatibility between the legitimate authority of international law and State sovereignty are likely to be even more contingent in the international legal order than in the domestic context. At the same time, however, sovereign States are collective entities and as such their relationships are likely to be even more riddled with disagreement than individuals. Moreover, one of the values of sovereignty being self-determination, it is clear that decisional independence is of value in the case of sovereign States as well. Finally, given the circumstances of social and cultural pluralism that prevail globally, it is likely that State autonomy can be exercised valuably in very different manners. All this makes self-determination over certain matters as important in the case of sovereign States as for individuals, albeit for different reasons. This is clearly the case for constitutive standards in a democracy such as human rights and democracy itself. And this in turn explains why those international standards are minimal and have to be contextualized within each sovereign State.
- 111 In sum, State sovereignty is not necessarily compatible with the authority of international law. It is only the case when the latter has legitimate authority, ie furthers State autonomy and the reasons that underlie State autonomy. Those can be understood by reference to the values that make a good State or more generally a good political entity such as self-determination, democracy, and human rights, but also the values that make a good international community of equal sovereign entities. Of course, this should not be taken to mean that State sovereignty is only incompatible with international law's authority when it is illegitimate. There may be cases where autonomy requires legitimate authority, but others where self-direction is valuable despite the *prima facie* justification of international law's authority. Too much international regulation would empty sovereign autonomy from its purpose.
- 112 In short, it would be wrong to explain sovereignty by reference to the legitimacy of international law, but also conversely the legitimacy of international law by reference to sovereignty. It is by reference to the values they both serve that the authority of international law can be justified in some cases, and hence the *prima facie* restrictions to State autonomy this implies.



## E. International Legal Regime

- 113 Sovereignty being both a source of international law and international law-based, it is useful to present briefly what its regime and content are under international law, and more precisely what rights and duties the sovereign status entails.

### 1. Sovereignty qua Independence

- 114 As presented before, sovereignty is alternatively or cumulatively referred to as ultimate power and supreme authority. Externally, it implies a degree of independence or freedom. As a legal regime or status, international sovereignty, and more particularly international external sovereignty entails the rights that can guarantee sovereign independence, but also the duties that correspond to those rights in a community of equal sovereigns where all rights are reciprocal.
- 115 Most sovereignty rights and duties are usually derived from the principle of sovereign equality and have been addressed separately as a result (Art. 2 (1) UN Charter and the 1970 Friendly Relations Declaration; → *States, Equal Treatment and Non-Discrimination*; → *States, Sovereign Equality*). It is interesting to review them briefly, however, as some pertain to equality between States and the rights and duties of each of them by reference to the others and their mutual relations, while others only pertain to one sovereign entity at a time, such as human rights duties for instance (→ *States, Fundamental Rights and Duties*). Importantly, new duties of sovereign equality have arisen that not only pertain to protecting the equal independence of sovereign States, but also to their interdependence. More generally, it is interesting to ponder the notion of correlatives to the principle of sovereignty and its implications.
- 116 Whereas some authors argue that sovereign rights and duties are correlative, others do not even conceive of sovereignty in terms of rights and duties but in terms of the components of sovereign States' independence and the corresponding restrictions on others'. Importantly, the existence of sovereignty rights and duties need not imply that sovereignty is reducible to them and to a bundle of rights.
- 117 If one accepts the correlation between sovereignty rights and duties, it is important to identify the duty-bearer(s) of sovereignty rights or the right-bearer(s) of sovereignty duties. Some argue sovereignty rights and duties are *erga omnes* and include other sovereign States and their populations (→ *Obligations erga omnes*). This determination is particularly important in case of human rights violations where the questions of a correlative duty of → *humanitarian intervention* on the part of other States and the identity of its duty-bearer(s) in a community of equal sovereign States are raised. Another interesting question pertains to the hierarchy between sovereignty rights and duties in case of conflict between sovereignty rights and/or sovereignty duties. International law remains ambivalent on both counts.

### 2. Sovereignty Rights

- 118 Among sovereignty rights, one usually finds listed the following rights: plenary territorial and personal jurisdiction within one's territorial boundaries; the presumption of legality of one's sovereign acts; constitutional and organizational autonomy including self-determination; and the protection of one's *domaine réservé*. Those main sovereignty rights are listed, among others, in Art. 2 UN Charter and in the 1970 Friendly Relations Declaration.
- 119 The primary right of a sovereign State corresponds to the independence of that State and absence of subordination to any other State or entity (albeit not to international law). It protects the plenary jurisdiction of that sovereign State over its territory and the people on it. This is a principle of customary international law. Of course, in view of what was explained before regarding the limits to State sovereignty, jurisdiction is never absolutely plenary.
- 120 Another sovereignty right pertains to the presumption of legality of a sovereign's acts. This dates back to the idea of international immediacy, famously captured by the ICJ in the *Wimbledon* case (at 25). According to this idea, sovereign States are immediately bound by law and as a result the only original legal persons able to produce valid international legal acts. Their full legal personality and right to (co-)regulate the life of the domestic and international community is an important right to secure their independence. Of course, given what was said earlier about the official role of sovereign States in international law-making and the correlated duties, the presumption of legality of sovereign acts needs to be nuanced. Further, legality does not yet imply legitimacy, as discussed before. Furthermore, IOs, and to a certain extent individuals, have now become international law-makers in certain international regimes. What all this implies for the presumption of legality of sovereign States' acts remains to be seen (see also → *Act of State Doctrine*).
- 121 A third sovereignty right one should mention is the sovereign's right to constitutional or organizational autonomy. This is a consequence of the plenary jurisdiction over the State's internal affairs (*Nicaragua Case* 133). It can be equated with self-determination, at least when it pertains to the institutional autonomy of existing sovereign States. When self-



determination is used to imply the right to become a sovereign State, international law remains ambivalent (UNGA Resolution 1514 (XV) 'Declaration on the Granting of Independence to Colonial Countries and Peoples' [14 December 1960] GAOR 15<sup>th</sup> Session Supp 16 vol 1, 66). Thus, questions largely unanswered to date include the relationship between State sovereignty and self-determination in case of conflict. Another difficult question is whether international law actually can set limits over the right to self-determination when it goes further than a right to institutional autonomy and is said to include the right to become a sovereign State in the first place. These issues have surfaced recently pertaining to the international legality of → *secession* in particular (see the ICJ's *Kosovo Advisory Opinion* on the nature of the question, and in particular judges' concurring and dissenting opinions). Another connected issue pertains to the positive dimension of the right to self-determination and more particularly its democratic implications. Pushed to its full normative conclusions and in line with the values of good polity underlying modern sovereignty indeed, self-determination triggers minimal democratic duties in the laying-out of the governmental regime on the part of each sovereign.

- 122 Finally, one should mention the protection of a sovereign State's *domaine réservé* and freedom from external interference and intervention. According to Art. 2 (7) UN Charter, sovereign States are protected against United Nations' or other States' interventions in matters which are essentially within their domestic jurisdiction. International law defines what those matters are (see *Nationality Decrees Issued in Tunis and Morocco [French Zone] [Advisory Opinion]* 23–4) and it is an evolutionary notion as a result. The UN Charter actually excludes from that scope human rights and other legitimate forms of intervention based on Chapters VI and VII UN Charter. As a matter of fact, the scope of sovereignty's *domaine réservé* has been constantly diminishing in recent years due to the increasing amount of international law norms pertaining to the exercise of internal sovereignty.

### 3. Sovereignty Duties

- 123 There are four sovereignty duties corresponding to the rights mentioned above: immunity of other States and State agents before one's jurisdiction; respect for international law and duty to cooperate; prohibition of intervention; duty of peaceful dispute settlement. Those main sovereignty duties are listed, among others, in Art. 2 UN Charter and in the 1970 Friendly Relations Declaration.
- 124 The first duty, that corresponds to another sovereign's right to plenary jurisdiction, is a duty to grant that sovereign and its agents (→ *Heads of State*, and diplomatic and consular agents) immunity in one's jurisdiction. State immunities and all correlated immunities have long been protected under international customary law (*par in parem non habet jurisdictionem*) and have recently been codified through international treaties (→ *United Nations Convention on Jurisdictional Immunities of States and Their Property* [2004]). They have radically evolved in the past 20 years, however, to become more limited overall. Some may argue, although this is still controversial, that this is because they can no longer protect sovereign States against another State jurisdiction when what is protected by those immunities does not correspond to the values State sovereignty is meant to protect in the first place and for which sovereignty is actually protected; the best example would be aggravating human rights violations. Based on democratic autonomy, others would argue, however, that, except for violations of minimal international human rights guarantees, human rights violations ought to be addressed domestically or through international judicial or political mechanisms, but should escape another State's jurisdiction.
- 125 Another important sovereignty duty is the duty to abide by international law and to cooperate with other international law subjects in the implementation of international law (Art. 2 (2) UN Charter). This includes legal duties, of course, but also moral duties to support a just international system and the international → *rule of law*. The moral duties to obey international law *qua* law are more complex and have been addressed in the previous section. Importantly, those direct duties to abide by international law, together with the legality of sovereign acts pertain exclusively to States. States are no longer the only subjects of international law, however, and other subjects, such as IOs and individuals, are increasingly vested with direct duties under international law, duties that cannot be explained through the prism of State sovereignty but may be through the modern conception of popular sovereignty.
- 126 Another duty one should mention is the prohibition of intervention, whether through the use of force or not, into another State's *domaine réservé* but also more generally into its sphere of plenary jurisdiction (→ *Corfu Channel Case* 35). The only exceptions are humanitarian intervention and authorized intervention (see also → *Intervention by Invitation*). This is a principle of customary international law that has also been codified under Art. 2 (4) and (7) UN Charter and often recognized by the ICJ's decisions. Given that the scope of sovereignty's *domaine réservé* has been constantly diminishing in recent years, so has the scope of the prohibition of intervention, at least that of collective intervention.



Finally, sovereign States have duties to settle their disputes peacefully. Even though they have a choice of means (eg Art. 33 UN Charter) and have no duty to bring disputes to an end, they should not settle their disputes through the use of force. This is a principle of customary international law that has also been guaranteed under Art. 2 (3) UN Charter.

## F. Contentious Issues

- 128 As stated previously, the concept of sovereignty is an essentially contested concept whose regular determination and application imply contestation and broaching contentious issues.
- 129 Those controversies have become more numerous since the second half of the 20<sup>th</sup> century, with sovereignty being threatened *qua* useful concept in itself. In a multi-level international legal order where States are increasingly interdependent and where international and supranational organizations are gaining in importance (→ *Supranational Law*), paradigms of sovereignty are being revisited faster than they have ever been before in the history of the concept. Some of those issues have been discussed in previous sections, but two of them will be addressed in more detail here: the relationship between sovereignty and human rights; and the relationship between sovereignty and democracy.

### 1. Sovereignty and Human Rights

- 130 Sovereignty and human rights are often held to be in tension and even in opposition. As argued before, this approach is misleading given the parallel development of modern sovereignty and international human rights in the second half of the 20<sup>th</sup> century.
- 131 Post-1945, international law was seen by modern democracies as a new way to secure their democratic development. Given the lack of consensus on minimal democratic requirements and in view of the intricate relationship between human rights and democracy, entrenching human rights protection from the outside through minimal international standards became the way to guarantee their new democratic regimes. International sovereignty objectively limited in this way became, in other words, a direct way to secure domestic sovereignty in a legitimate fashion. As a result, modern democratic sovereignty now finds its source both in constitutional and international law. Seen differently, the sovereigns behind international law are peoples within States, and no longer States only. And those peoples organize and constrain their sovereignty through both the international and domestic legal orders.
- 132 Of course, this is not to say that State sovereignty cannot be in tension with human rights. Importantly, international sovereignty protects a collective entity of individuals—a people—and not individual human beings *per se*. True, their fates are connected, in the way democracy and human rights are correlated. But sovereignty, and sovereign equality in particular, protects democratic autonomy in a State's external affairs and remains justified for this separately from international human rights and so-called humanity's law. Thus, the tensions between international human rights and State sovereignty are reminiscent of those between popular sovereignty and human rights in the domestic context. The difference is that one of them is international while the other remains domestic. This actually explains why those tensions ought to be resolved within the domestic context where democracy and human rights are in a mutual relationship.
- 133 In short, State sovereignty cannot be dissociated from the protection of the political equality and human rights of the individuals constituting that State, and cannot *per se* be regarded as incompatible with the values it is meant to help pursue. However, given the value of both individual and collective autonomy in the human rights context and their potential contradictions, two different consequences follow depending on the kind of international human rights norms at stake.
- 134 First of all, sovereignty could not be invoked to escape the legitimate authority of the human right to have rights at domestic level. Sovereignty can only protect political autonomy when it exists in a normative sense; it cannot therefore be opposed to the legitimate authority of the international human right to have rights. In such a case, self-determination is undermined and sovereignty forfeited.
- 135 In case of violation of the minimal right to have rights and of minimal sovereignty duties as a result, ordinary mechanisms of international dispute settlement can be triggered, ranging from political recommendations to full adverse judgments depending on the sources of the rights violated and the mechanisms available. Those mechanisms imply some kind of international institutional framework through which other States but mostly individuals can initiate claims against a sovereign State.



- 136 It is in this context that the question of humanitarian intervention has been raised. In case of massive human rights violations, and as a last resort, humanitarian intervention may be on the cards. As it implies the use of force, it ought to be authorized or ordered by the UN Security Council in the context of Chapter VII UN Charter and under the usual conditions and constraints. Some authors argue, however, in view of the limited scope of action of the Security Council and the humanitarian disasters this system may condone, that there may be cases where humanitarian intervention by a coalition of States may be morally permitted or may even constitute a moral duty. This triggers well-known controversies pertaining to the moral right or the duty to intervene and to the exact right-bearer(s) and duty-bearer(s) of that intervention and in particular whether they encompass other States and populations than that of the victims. A common view is that, when a sovereign State cannot respect its primary duties to protect human rights on a large scale and hence forfeits its sovereignty in a sense, other States would be justified in intervening collectively to prevent → *genocide* for instance or a default duty to intervene might even ensue if the costs are not disproportionate for the intervening States. What is essential and still difficult for such an approach, however, is the determination of the threshold at which the minimal right to have rights is violated and sovereignty forfeited and hence intervention becomes justified or compulsory.
- 137 Those questions have come to the fore again recently following the emergence of the principle of → *responsibility to protect*. That principle was first articulated by a group of experts in 2001 and then codified in a UN General Assembly Resolution (UNSC Resolution 1674 of 28 April 2006 [UN Doc S/RES/1674]; see also the 2005 World Summit Outcome). It is still unclear whether that principle has binding force and in particular whether it has binding force as customary international law. The exact scope of its divergence from the current legal regime of humanitarian intervention also remains to be established. In particular, it is important to clarify whether the responsibility to protect implies, besides the human rights duties of the sovereign State in question and its own responsibility to protect as it already exists, actual duties to intervene and more precisely duties on the part of other States and/or the international community itself and along which modalities of subsidiarity.
- 138 Secondly, however, with respect to further international human rights, States may not commit to more than their constituency could and what that right to have rights or self-government authorizes. When the international legal norms at stake pertain to the basic rules of political legitimacy at the domestic level and to the details of human rights protection, both international sovereignty and international human rights law have met their intrinsic limitations. Deciding on what makes us members of a political community and how to protect our equal rights as such is likely to be the last issue to leave the scope of collective self-government and hence of sovereignty. Hence, for instance, the application of principles such as the State → *margin of appreciation* or → *proportionality* in international human rights adjudication.
- 139 This two-tiered approach to the relationship between human rights and sovereignty corresponds to a two-pillar construction of the international legal order that protects democratic autonomy through sovereignty, on the one hand, and individual autonomy through human rights, on the other. The international legal order protects the political equality of individuals within the domestic polity through the interdependence and complementarity between equal State sovereignty and international human rights: by guaranteeing the basic conditions for political equality through the right to have rights and to self-determination, on the one hand, and through the principle of equal State sovereignty and political autonomy for the rest, on the other. Human rights and sovereign equality are the two complementary pillars of a dualist international legal order (Cohen [2010]).
- 140 This understanding of the relationship between human rights sovereignty also has the benefit of making clear that (the limits of) domestic legitimate authority ought not be conflated with (the limits of) national sovereignty in international law.

## 2. Sovereignty and Democracy

- 141 International sovereignty and domestic democracy are sometimes held to be in tension. As in the human rights context, however, this approach to their relationship is misleading.
- 142 True, non-democratic States are sovereign and benefit from all rights and duties of a sovereign State. As they benefit from the principle of sovereign equality, requiring them to be democratic seems to be an invasion of their sovereignty. This corresponds, however, to the classical view of sovereignty in international law where the political regime was a matter of internal sovereignty and hence left to domestic law. During the second half of the 20<sup>th</sup> century, democratic requirements on States have multiplied in international law, *qua* human rights duties (eg political rights, right to self-determination) but also per se. One may mention the international human right to democratic participation in this respect



(→ *Democracy, Right to, International Protection*). Examples of such minimal democratic standards are even more common in European law than in the international realm.

- 143 Post-1945, international law was seen by modern democracies as a new way to secure their democratic development and to entrench democratic requirements from the outside through minimal international standards. According to modern sovereignty, the sovereign subjects behind international law are peoples within States, and no longer States only. And those peoples organize and constrain their sovereignty through both the international and domestic legal orders. Although this is more controversial, those international democratic standards may not only constrain existing sovereign States, but may also contribute to the emergence of new sovereign States, through the right to self-determination in particular.
- 144 Interestingly, many of those democratic limitations to internal sovereignty are not consent-based and top-down, but stem bottom-up from customary norms or general principles. This may be explained by the fact that these norms are the reflection of the minimal common denominator to the practice of all democratic sovereign States constituting the international community and are produced as a result by accretion through the gradual recognition of those norms at the domestic level in modern democracies. Once internationalized, those norms may as a result work as legitimate minimal constraints on the autonomy of those States to contextualize and hence to flesh out those minimal international standards in their respective jurisdictions, thus contributing in return to the consolidation of those standards at the international level (see generally Buchanan [2010]).
- 145 Of course, the democratic legitimacy of those international constraints on democracy may still be questioned. If international law is allowed to regulate internal matters, including human rights and democracy, its democratic legitimacy has to be granted. The internationalization of modern democracy should go hand in hand with the democratization of international law itself. As this is clearly not yet the case, even in a non-statist minimal model of democracy, the legitimacy of international law is still open to debate. And so is that of its role in the limitation and constitution of domestic democracy as a result.
- 146 Importantly, this quest for the democratic legitimacy of international law *qua* source of democratic sovereignty does not necessarily amount to an attempt at politicizing the international community *qua* sovereign polity or even *qua* sovereign global state. It may be a consequence but not a necessary one. Other forms of global or international *demos*-cracy can be explored. Part of the answer comes from indirect State democracy as international democratic and human rights standards develop as minimal common standards, but direct democratic legitimation is also needed as in a federal polity.
- 147 True, many obstacles remain before international law-making can be regarded as democratic in the latter sense. Different sources and different subjects call for differentiated democratic regimes in international law-making. Moreover, international democracy cannot be developed without an integrated multi-level approach, and multilateral democratic models ought to include domestic democracy. Relations between levels of law-making and governance that all correspond to the same sovereign peoples but in different groupings depending on the subject matter constitute another vexed issue. Subsidiarity is often put forward as a legitimate principle to govern the exercise of sovereignty in a multi-level polity and pluralist legal order. Other difficulties pertain to the modalities of participation and representation on a large scale, and to the relationship between deliberation and voting.
- 148 Finally, difficult issues remain within democratic theory itself. One of them is political equality and the interdependence of stakes that is required for political equality to even matter and for democracy to be called for. While the latter is still contested and so are other elements constitutive of a proper political community in international relations, the former also needs to be revisited to be applicable to the international context. Indeed, the entities whose equality is at stake are not only individuals but also States in a two-pillar international structure, and even IOs. In those conditions, the imperatives of national democracy and sovereign equality can be in tension, thus creating difficult dilemmas for national authorities. And so can those of international majority rule when in tension with current sovereign equality and minority States' protection. Besides the heterogeneity of the equal subjects and their mutual composition, the equality between democratic and non-democratic States also raises difficult issues.
- 149 In those conditions, the modern principle of sovereign equality itself needs to be revisited in light of a complex approach to political equality and the heterogeneity of the subjects thereof. It is no longer the governing principle of a society of equal but independent States, but that of a community of different albeit interdependent actors.



## G. Assessment

- 150 The concept of sovereignty is a pivotal principle of modern international law. It underlies almost any other principle and institution of international law. At the same time, it is law-based and hence defined and constructed through international law. This makes it vary and a very difficult principle to pin down with full determinacy. The concept's indeterminacy is made even more intractable by its essentially contestable nature and the need to engage in a normative discussion over the values it protects whenever sovereignty is invoked and applied.
- 151 After providing a restatement of sovereignty's historical development, a presentation of the concept, and its various conceptions, an analysis of its current legal basis and regime under international law and a discussion of two of the main contentious issues raised recently in connection with State sovereignty, a concluding assessment of some of the specific difficulties it raises for international law nowadays and of how it is currently developing may be useful.
- 152 There are four main difficulties one may point at that are currently at the centre of discussion: the subjects of sovereignty; their relationship; their autonomy in relation to the legitimate authority of international law; and the legitimacy of minimal international human rights and democracy standards.
- 153 The first vexed issue is the subject of sovereignty. While classical sovereignty was State sovereignty, the subject of modern sovereignty is the people. This has turned the State into one of the vessels of sovereignty, and the most important one, but it also explains how international organizations may also have been gaining in sovereignty. This has brought its own set of new questions, particularly regarding the relationship between State sovereignty and the people and the debate around self-determination. Another difficult issue pertains to the relationship between sovereign peoples and in particular whether sovereignty rights and duties are *erga omnes* and how they are to be ranked and according to which criteria, when domestic sovereignty is said to be forfeited. A further source of contention lies in the mutual rights and duties of sovereignty that have to do not so much with the equal independence of States but with their interdependence and the development of an international political community.
- 154 The next controversial question pertains to the relations between various sovereign entities in a multi-level polity. The legal aspect of this question is often referred to as legal or constitutional pluralism (→ *Kadi Case*). Here questions arise with respect to the allocation of competences between levels of governance or legal orders, and whether subsidiarity is a legitimate tie-breaker. Other related questions pertain to the ultimate loss of State sovereignty through supranational integration when popular sovereignty is deemed better protected by supranational institutions.
- 155 Another vexed issue is related to the legitimacy of international law debate. If under the modern concept of sovereignty, international law no longer binds only by self-limitation of the sovereign, but on the contrary by reference to the people whose autonomy is at stake, many doors open regarding the legitimate authority of international law for other subjects of international law, including individuals and IOs. More work is needed, however, to understand how international law may bind some subjects and not others, and, when it binds different subjects, whether it binds them differently and how their duties relate given their interconnection through sovereignty. Further exploration of the ways in which international law may be produced in a more democratic fashion, and under what mechanisms, is also called for.
- 156 Finally, and this is related, with modern international law and modern sovereignty, the democracy and human rights nexus was extended to international law as the latter became the guarantor of minimal democracy and human rights standards in sovereign States. The legitimacy of those standards is usually in reciprocal tension in a domestic polity. In international law, however, it remains to be fully understood. Difficult questions pertain to the localization of the co-originality between international standards of human rights and democracy and hence to the relationship between them when either of them or both have their sources in international law. Further vexed questions relative to what is the legitimate minimal degree of those international guarantees, the limits of their contextualization, and the parochialism critique belong to what promises to nourish lively debates in the years to come.

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