Shared sovereignty in a two State context:

a problem of distributive justice

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Abstract

Most—if not all—conflicts in international relations have—to an extent—something to do with sovereignty. On the theoretical side, we learn at University that either considered as a strong concept or one that has lost relevance, it is still discussed. On the practical side, the prerogatives a State has over its people and territory appear to be the highest. Within these ideal and real backgrounds, there are various sovereignty disputes around the world that struggle between legal and political limbo, *status quo* and continuous tension with various negative consequences for all the involved parties (e.g. violation of human rights, war, arms trafficking, only to name a few). It is increasingly clear that the available remedies have been less than successful, and a peaceful and definitive solution is needed. This thesis proposes a fair and just way of dealing with certain sovereignty conflicts.

Part One presents the core argument to work out the structure upon which this thesis will be developed. There is a traditional idea that sovereignty must be unshared and unlimited. I argue that in actual fact both in theory and in practice sovereignty is always limited. Thereby, I consider how shared sovereignty is possible—how a State can limit itself and stay sovereign. Chapter One, the Introduction, presents the basic constitutive elements of this thesis. Chapter Two examines if sovereignty can be (in fact, may actually be) limited, and therefore can be shared. To show this I use both criticism of the best known theories of sovereignty and investigation of the historical facts.

Part Two explores the minimum elements that must be acknowledged conceptually, legally and realistically in order to give flesh to shared sovereignty and the way it needs to work if we want a peaceful understanding amongst the parties concerned. Chapter Three appraises 'shared sovereignty' and similar expressions used in political and legal literature. In order to do that, I show which notions of shared sovereignty are not relevant. Chapter Four examines how a relevant notion can be developed, using the analogy of self-ownership. Chapter Five discusses the main remedies applied at international level in sovereignty issues and why proposed alternatives to shared sovereignty will not solve the problem.

Part Three considers how distributive justice theories can be in tune with the concept of sovereignty and explores the possibility of a solution for sovereignty conflicts. I argue that shared sovereignty can be that solution based on Rawlsian principles. Chapter Six introduces and explores a new conception of shared sovereignty. Chapter Seven evaluates what sorts of institutions and arrangements could, and would best, realise shared sovereignty so defined by showing in outline how it might be applied to territory, population, government and law. Chapter Eight brings together the main points of this thesis, and shows possible further implications.

Declaration

No portion of the work referred to in this thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.

Copyright Statement

A Mamá y Papá

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I started this thesis three years ago. However, the project began a long time before. This not only has been a PhD in Law but also—and mainly—in life. International financial crisis, domestic crisis, personal ups and downs have been present along the way. And together with all these issues, many people have helped me to make what was originally a dream and later an aspiration, a concrete reality. Some of them have accompanied me all the way. Others appeared either for a reason or for a season. Yet others have been always there for me even if they did not know it. To all of them I am immensely grateful.

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Part One

"A wheel within a wheel [...] is considered […] as an absurdity in politics: But what must we say to two equal wheels, which govern the same political machine […]".
David Hume, *Essays: moral, political and literary* (Liberty Fund, 1985), p. 370.

Chapter One

Sovereignty conflicts as a distributive justice dilemma

Introduction

We are used to seeing and accepting as fact that in one territory there is one population governed by an ultimate authority, with a common legal bond or system of norms. What would happen if that one territory and population had two ultimate and hierarchically equal sovereigns (legally speaking) and, at the same time, two valid sets of norms? [1] Would it be possible, for instance, that Israel and Palestine had sovereign authority at the same time over Jerusalem? Would it be possible that Argentina and the United Kingdom were at one time sovereign over the territory and population of the Falkland/Malvinas Islands? If the answer was positive, what would the consequences be—in terms of territory, population, government and law?

There are many cases that can be characterised as sovereignty conflicts in which international agents (namely, two sovereign States and the population of the third territory under dispute) claim sovereign rights for different reasons over the same piece of land. Besides, these conflicts have a particular feature: their solution seems to require a mutually exclusive relation amongst the agents because it is thought that the sovereignty over the third territory can be granted to only one of them. Indeed, sovereignty is often regarded as an absolute concept—i.e. exclusive, and not shareable.[2]

[1] The possibilities in the case of a joint enterprise in terms of law can be numerous (e.g. it could be an independent valid set of norms for that territory or a third system, it could be a combination of the two systems or anchored to both or just to one of the sovereign States, it could be the system of one of the claimants but jointly administered).

[2] The concept of State sovereignty has raised and is still linked to fervent debate. For an insight into the discussion see Robert Jackson, ed., *Sovereignty at the Millennium* (Oxford: Blackwell Publishers, 1999). For an eclectic view of the topic see Neil MacCormick, *Questioning Sovereignty: Law, State,*

In light of this obsession with absolute, and rejection of shared sovereignty, long-standing disputes still continue to be presented around the world as a zero sum game[3], with many negative outcomes of different sorts (e.g. social struggle, bad governance, inefficient exploitation of natural resources, tension in international relations, and threat to local and international peace). Thus, while these conflicts are in principle confined to specific areas and start with negative consequences primarily for the local population, they tend quickly to expand to the regional and—even—the international level (e.g. effects on international price of oil, arms trafficking, terrorism, war).

International relations and legal and political scholarly literature offer various potential remedies that one could use to solve the problem. These include independence, self-determination and free association—to name a few. Although these remedies are useful in certain conflicts, they are futile in several others. Hence, these conflicts remain unresolved and in a legal and political limbo.

The challenge is to present the agents with a solution that can acknowledge their individual claims without disregarding those of their competing parties. However desirable, such a solution may seem Utopian. I propose to see these conflicts from a different yet broad perspective rather than as conflicts between separate and independent rights.[4] Therefore, I view the problem as a distributive justice[5] issue following the work of Rawls.[6] That is because distributive justice principles are a particularly appropriate tool to address sovereignty issues, just as

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and Nation in the European Commonwealth (Oxford: Oxford University Press, 1999) and Neil MacCormick, "Beyond the Sovereign State," *The Modern Law Review* 56 (1993): 1-18.

[3] In the context of this thesis the expression 'zero sum game' refers to the situation in which the gain or losses of a participant in a sovereign conflict are balanced by the gain or losses of its peers in the dispute. Since both the rights and burdens of the sovereign States over the third territory are still under discussion, they cannot actually put them into practice (at least fully) which translates into both sovereign States not being able to actually make use of their intended rights over the third territory.

[4] Sovereignty can be seen as both: a) a whole: a single right or prerogative to govern a given piece of land (territory), its respective population and to create and apply law to them; b) individual rights: many divisible sub-rights depending on the subject matter (territory, population, government and law). For the purpose of this thesis, to see sovereignty as a totality or a whole group of rights or these same rights in their individuality does not affect its essence. The fact that these rights can be shared amongst several international subjects and the way to do it is, in contrast, what defines this research. For an extensive analysis of the concept of sovereignty see Harold J. Laski, *The Foundations of Sovereignty and Other Essays* (London: George Allen & Unwin Ltd., 1921); John Hoffman, *Sovereignty* (Open University Press, 1998); and many others.

[5] Distributive justice issues are those concerned with the allocation of benefits and burdens in relation to wealth and income. See John E. Roemer, *Theories of Distributive Justice* (Harvard: Harvard University Press, 1996); Samuel Fleischacker, *A Short History of Distributive Justice* (Harvard: Harvard University Press, 2004); and many others.

[6] See John Rawls, *A Theory of Justice*, *Revised Edition* (Oxford: Oxford University Press, 1999).

they have previously been applied in assigning rights and obligations in other social institutions.[7] As a consequence, reviewing different theories (e.g. 'first come, first served'; just acquisition; the principle of equality) may help us to resolve the problem. This thesis aims to explore if a solution that certainly is desirable can also be possible and may offer a peaceful way of solving sovereignty conflicts through the use of principles of distributive justice.

Sovereignty conflicts of various natures

At first glance, the international scene presents several sovereignty conflicts of very different types; to name a few: Falkland/Malvinas Islands (Argentina and the United Kingdom), Jerusalem and other surrounding areas (Israel and Palestine), Gibraltar (Spain and the United Kingdom), Kashmir (India and Pakistan), Cyprus (Greek Cyprus and Turkish Republic of North Cyprus), Transnistria (Trans-Dniester or Transdniestria and Moldova), Quebec (Quebec and Canada), Kuril Islands (Japan and Russia), Tibet (and China), Hong Kong (and China), Northern Ireland (the Republic of Ireland and the United Kingdom), South Ossetia (and Georgia), Abkhazia (and Georgia), Nagorno-Karabakh (and Azerbaijan).

Although all the above international disputes are interesting in their own way, in order to be sure the principle I intend to develop will generalise, I will need to introduce simplifying assumptions. The main reason is to leave aside conflicts in which not only the sovereignty over a third territory is disputed but also basic notions such as statehood are still discussed. That is to say, if statehood is feasible that is what may happen. But here I assume that statehood (for whatever reason) is not possible. Consequently, because of the scope of this thesis it is more useful to analyse in depth international differences in which the basic elements that form State sovereignty are settled rather than to make a comprehensive study of cases in very different stages which would have only an outline. Besides, the conclusions may be applied to a wide range of conflicts. With these reasons in mind, two clarifications should be made at this point in order to define the object of this project.

In the first instance, it is true that although these cases have in common a sovereignty issue they have their own peculiarities:

[7] *Ibid*., p. 4.

a) Some States are fully sovereign both *de jure* and *de facto* (e.g. Argentina, the United Kingdom, China, etc.).
b) Some States are only *de facto* sovereign (e.g. Palestine—which in fact still has only partial local autonomy, Turkish Republic of North Cyprus, etc.).
c) Others have already solved the conflicts or are approaching an integration process into a larger legal order (e.g. Hong Kong, Northern Ireland, etc.).
d) A few cases are difficult to define as belonging to any of the previous categories. They possess most of the elements that could potentially grant their statehood but there is no foreseeable evidence this will happen (e.g. Tibet).

Following the previous categorisation this thesis will focus attention only on disputes concerning two fully sovereign States (both *de jure* and *de facto*) over a third, disputed territory.

Furthermore, two groups can be identified, using another classification criterion:

a) One in which there are two sovereign States (*de jure* and *de facto*) disputing their rights over a third territory and its population;
b) One in which there are two States, one sovereign *de jure* and *de facto*, and the other one having only *de facto* sovereignty over the territory under dispute.

For the purpose of this analysis, only the first set of cases will be of interest.

So this thesis will deal with disputes between two sovereign States (*de jure* and *de facto*) over the sovereignty of a populated non-sovereign third territory (e.g. Falkland/Malvinas Islands, Gibraltar, Kashmir, and the Kuril Islands). That is not to say my analysis will not generalise to other disputes. In other words, although practical reasons make it impossible to include every single sovereignty conflict in the analysis—even if they were only seen theoretically, the principles that will be reached may be generalised in order to be applicable to cases left aside or simply not considered in this research.

General structure

To evaluate the potential for using principles of distributive justice to resolve certain kinds of sovereignty conflicts, I am going to proceed in the following manner.

Chapter One, the Introduction, will present the basic elements that constitute this thesis.

Chapter Two will address a key task in developing the new approach: to examine if the concept of sovereignty which is assumed by many to be absolute can be (and in fact, actually is) limited. In order to do that we will follow two lines of analysis: a) conceptual; and b) historical.

Chapter Three will focus on explaining a revised concept of shared sovereignty. This and similar expressions have been used in the political and legal literature before. However, its meaning remains tangled, with specific real cases or national and international agendas making it difficult to be applied to different realities. It is for that reason that we will review different ways in which this concept (in various versions) and similar ones have been previously applied in legal and political scholarly literature.

If we establish that sovereignty can in theory be limited, the next step will be to evaluate if sovereignty can be shared (i.e. how a State can limit itself by sharing part of its rights and obligations and still remain sovereign). Chapter Four will examine self-ownership[8] as a way to define sovereignty.

As with any kind of conflict, sovereignty issues can be addressed in a variety of ways and—possibly—solved. Chapter Five highlights the main remedies applied at international level and will focus on judging if the revised conception of shared sovereignty offers any comparable advantages in order to make it a desirable solution.

We will discuss if the new version of shared sovereignty is a reasonable remedy for certain sovereignty conflicts and if it offers every claimant a just environment in which their interests are mutually respected. Chapter Six will introduce and explore: a) the conditions for achieving justice—toleration, peace, etc.;

[8] The term 'self-ownership' will be used with its full content and will be applied directly in this thesis, not as a metaphor but as a way to understand how both concepts (sovereignty and self-ownership) are similar, being one of these similarities the fact that both can embrace shared paradigms. See Gerald Allan Cohen, *Self-ownership, Freedom and Equality* (Cambridge: Cambridge University Press, 1995).

b) why the 'just acquisition' principle[9] may not work; and c) why the Rawlsian method of conceiving of the respective claimants as behind a 'veil of ignorance'[10] just might. The latter is of utmost importance as the analysis will be conducted under these circumstances; that is, in an original position in which the three representatives will be in a particular situation, both in regard to their particular circumstances and that of the original position itself.

If a new shared sovereignty is possible, desirable and just, the next step will be to test the proposed model by working out what sorts of institutions and arrangements could, and would best, realise it. In order to do that this thesis will make use of some sovereign conflicts to show that good reason for acceptance can be extended from the general principles to workable institutions that realise those principles in: a) population; b) territory; c) government and law; and d) all that they imply (e.g. defence, natural resources, financial system). Chapter Seven will contain this discussion.

Finally, Chapter Eight will conclude the thesis by assessing its potential and highlighting any possible limitations and implications.

Theoretical background

The model proposed in this thesis is constructed using many theoretical elements. But, there are three main notions on which it is based.

The first element is the concept 'sovereignty'. The term immediately presents a problem for our paradigm: 'sovereignty' is supposedly an absolute concept which cannot, in principle, be limited. Despite this apparent preliminary setback, we will review various conceptions of this concept to see if that supposition is correct. For instance, we will see how a theory like that of Hans Kelsen introduces 'sovereignty' in an absolute form. Although it could be argued that later theorists have modified Kelsen's ideas (e.g. Hart[11]) or have been opposed to them (e.g.

[9] Robert Nozick's notion, developed in *Anarchy, State and Utopia*, which will be clarified and applied in subsequent sections.

[10] John Rawls' idea of the original position, mainly developed in *Theory of Justice* (also, to some extent, in *Justice as Fairness and Political Liberalism*). Details of its application will be discussed in subsequent sections.

[11] Herbert L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994), in particular Chapter IV, referred to the sovereign and subjects and Chapter X referred to obligations and sovereignty of States. Specifically in regards to Hart's opinion about Kelsen in reference to

Natural Law scholars, Dworkin, MacCormick[12]), they do not challenge his notion of sovereignty in what is of interest here. Hence, we will see how Kelsen deals with 'sovereignty' in a few of his main works[13] to determine the consequence of this 'absoluteness'. In the same way, we will examine other authors (and their respective theories) who hold the same view—i.e. that sovereignty is an absolute concept. We will evaluate if their conceptions of sovereignty do actually accept limitations and, whether there is no such thing as a theory of absolute sovereignty.

The second element is a set of principles often applied to economic activity. Distributive justice principles are those that refer to the allocation of benefits and burdens, mainly in terms of income and wealth. But, they can also be applied to rights to, and opportunities for action. This thesis will make use of them in order to analyse if it is possible to characterise sovereignty in terms of the allocation of benefits and burdens concerning a territory under dispute. There are many scholars who have developed their opinion about principles of distributive justice. However, John Rawls—in particular in his *Theory of Justice*[14]—is the one who cannot be left aside when dealing with them. This is because the theories presented after his either argue against it or borrow its elements. Hence, although other authors and their respective works will be visited in the development of this thesis, Rawls' *Theory of Justice* occupies a preeminent position. To be precise, it is his method—not necessarily his solutions—that I am interested in making use of.

Even if we can demonstrate that sovereignty is not absolute and hence, accepts limitations, there would still be a further problem with a shared sovereignty model. We must make clear that although sovereignty does accept limitations it does not lose its essence. And that is because we need for the shared sovereignty model to work not one single sovereign power but two—at the same level and with equal prerogatives over the same territory and population. It is for that reason, and in order

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sovereignty, national and international law see Herbert L.A. Hart, "Essay 15: Kelsen's Doctrine of the Unity of Law", in *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983).

[12] Dworkin does not refer to sovereignty –at least in particular; see Ronald Dworkin, *Law's Empire* (Harvard: Harvard University Press, 1986) and Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard: Harvard University Press, 2002). In contrast, MacCormick develops an eclectic view of sovereignty without necessarily challenging Kelsen; see MacCormick (1999), *op. cit.*

[13] Hans Kelsen, *General Theory of Norms* (Oxford: Oxford University Press, 1991); Hans Kelsen, *Principles of International Law* (New York: Rinehart & Company Inc., 1952); Hans Kelsen, *General Theory of Law and State* (New York: Russell & Russell, 1945); Hans Kelsen, *Introduction to the Problems of Legal Theory* (Oxford: Oxford University Press, 1992); and many others.

[14] John Rawls' *Political Liberalism*, *Justice as Fairness: A Restatement* and *The Law of Peoples* will be also discussed in this thesis.

to see sovereignty as limited or limitable without losing its essence, that it is useful to work in parallel—i.e. using an analogy—with similar legal institutions. Therefore, as there is already ample legal scholarly literature supporting the idea that, although considered also *prima facie* as absolute, some legal institutions accept limitations without changing their nature and can be shared amongst multiple agents, we will make use of them. By analogy, if other legal institutions that are thought to be absolute can accept limitations and be shared, it is not contradictory to maintain that sovereignty has limits and may also be shared.

Sovereignty in public law finds its parallel in the right of property in private law, and this latter concept accepts limitations in the use of property. So, we will analyse the similarities and demonstrate how if the right of property can be limited and shared, sovereignty can be also curtailed without losing its essence and shared between two agents. One of the ways to understand the right of property is the theory of self-ownership, our third basic element. To be more precise, self-ownership is not really about a right to property. It is a way in which freedom can be understood. Hence, as we will see in Chapter Four self-ownership is not directly about property; rather, a right to property is derived from it. Robert Nozick is, in contemporary legal and political literature, the dominant figure for such an enterprise. Besides, his main work *Anarchy, State, and Utopia* deals—as Rawls—with principles of distributive justice. Specifically, he develops a theory of self-ownership based on Locke's arguments and the idea that each individual has rights in himself and no rights whatsoever over others. Moreover, he includes the self-ownership idea within principles of distributive justice, when he develops a historical entitlement theory—how people obtain the ownership of things, namely just acquisition, how these things are held when justly acquired and how they can be justly transferred. Although Nozick seems to be against limiting self-ownership, as we will see he concedes it is not an absolute concept; hence limitations can be applied. Furthermore, the historical entitlement theory is the recurrent problem when discussing sovereignty conflicts, and Nozick offers a clear way to untangle its elements.

The following Chapters explore these elements in the context of certain kinds of sovereignty conflicts and defend the conclusion that principles of just distribution provide a reasonable remedy. I will argue that this reasonable remedy

lies in viewing sovereignty conflicts as a problem of distributive justice. We will begin by considering the first of these issues, that is limited sovereignty.

Chapter Two

Limited sovereignty[15]

Introduction

The starting point of the shared sovereignty model is, unsurprisingly, the concept of 'sovereignty'. However, this concept presents us with a problem: that sovereignty is often seen as absolute, unlimited and hence not shareable. I intend to demonstrate in this Chapter that there is no such a thing as absolute sovereignty. This thesis has to show that limited sovereignty is the norm, though the nature of the limitations varies. Ergo, if sovereignty can be limited then whatever it entails might be shared.

Given the importance of the idea of sovereignty to the subject and argument of the thesis, we need to give (i) a full and rigorous analysis of the concept of 'sovereignty' and, in doing so, (ii) consider leading accounts of the notion. It is worth noting at this point that the concept of 'sovereignty' is not crucial *per se* for this thesis except in that it has limitations. Therefore, in order to give a full analysis of sovereignty and to show that it is always limited—hence shareable—the former (i) will be done with a conceptual analysis; the latter (ii), through identifying specific theorists or bodies of literature that take sovereignty to be absolute and a brief overview of a few major thinkers who consider sovereignty to be limited.

The concept of 'sovereignty'

Conceptual limitations have to do with any given term and its application within a certain domain. So, every concept has defining characteristics that makes it somehow limited (contrary to beliefs, assumptions, or justifications). In other words, a concept identifies a particular group of phenomena according to certain criteria. With regard to a concept such as sovereignty these criteria change over time as people's situations, beliefs, assumptions or justifications change. Furthermore, the criteria writers think they are using are not always the ones they turn out to be

[15] My gratitude to Prof. Dr. Horacio Daniel Piombo for his help and advice in developing and re-structuring this Chapter.

actually using when one examines the phenomena and what they say about them.[16] For instance, following a classical definition of the concept that is central to this thesis we find that:

> "[Sovereignty is] a Supreme authority in a [S]tate. In any [S]tate sovereignty is vested in the institution, person, or body having the ultimate authority to impose law on everyone else in the [S]tate and the power to alter any pre-existing law. […] In international law, it is an essential aspect of sovereignty that all [S]tates should have supreme control over their internal affairs […]"[17]

Evidently, there are many other definitions of sovereignty that can be quoted.[18] We will review some of them later on in this Chapter through a historical account. Nevertheless, we can already see with this classical definition that there are several notions related to sovereignty: supreme authority, institution/person/body, inward and outward view, power, and so on. Indeed, this myriad of notions makes sovereignty a complex concept. That is because as a word, 'sovereignty' has the same linguistic difficulties any other language unit has (ambiguity, vagueness, open texture as per Hart's classification).[19] Is that the only problematic presented by such a concept? To answer the question affirmatively would be over-simplistic (or over-optimistic); contrary to that, not only has this particular word the same linguistic issues any other term may potentially have, but it also possesses specific characteristics that makes it valuable yet highly complex. It is a multi-faceted term with influence in politics, law, and many other areas with several conceptual implications in all of them. We have thereby to focus our attention first on the analysis of some of these conceptual implications—i.e. the ones that are linked to this thesis.

The kinds of conceptual issues we are going to consider include:

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[16] Genaro Carrio, *Notas Sobre Derecho y Lenguaje* (Argentina: Abeledo Perrot, 1965).
[17] Elizabeth A. Martin and Jonathan Law, ed., *A Dictionary of Law* (Oxford: Oxford University Press, 2006).
[18] There are many scholars who share roughly the definition of sovereignty used here. See in partic. Jackson, *op. cit.*, p. 148, fn. 10.
[19] Hart (1994), *op. cit*., pp. 124-154.

- Confusion between supreme and unlimited or absolute authority and how different sorts of limits—e.g. internal, international, religious—relate to the concept of sovereignty.
- Whether sovereignty is a form of authority or power or both.
- The related distinction between *de jure* and *de facto* sovereignty.
- Whether sovereignty is a feature of an office (or institution) or of a person or body of persons. Linked to this, the difference between sovereignty as something possessed by a State (e.g. the United States, Argentina) and sovereignty as something that may or may not be possessed by an institution within a State (e.g. Parliamentary sovereignty in the United Kingdom, the absence of a single sovereign institution within the United States).
- What it is for a State to be 'internally' and 'externally' sovereign.
- The notion of 'popular' sovereignty.
- Whether we can think of sovereignty as something possessed within a limited jurisdiction (e.g. 'I have authority over matter X but not over matters Y and Z, but my authority over X is final and complete, so I am sovereign over X') or whether sovereignty must entail a notion of unlimited jurisdiction.

Before starting with the conceptual clarifications it is important to highlight that I am working with the concept of sovereignty—hence its conceptual implications—as it already exists and I do not propose a new definition. From there it is that I will understand sovereignty as having one meaning: supreme authority. But that is different from defining sovereignty as absolute authority. So, the first conceptual clarification that we need to make is to differentiate between absolute sovereignty and supreme authority.[20] There are some terms we need to clarify first in order to have a better understanding: a) supreme versus subordinate; b) absolute versus limited; and c) undivided versus divided.

Supreme authority means the highest power to rule—to create and apply law—in a certain territory and for a certain group of people—as opposed to inferior or subordinate authority. Therefore, while absolute sovereignty is not possible—

[20] For a further analysis about the distinction between supreme and absolute see Hart (1994), *op. cit*., pp. 105-106. Hart uses the word 'unlimited' whereas I use the term 'absolute'.

hence sovereignty is always limited as we will see—supreme authority is the way in which power is understood within a State. To be more precise, the difference between supreme and subordinate refers as Hart says "to a relative place on a scale".[21] In relation to sovereignty, it has to do with a vertical view—i.e. that one that has a superior cannot be a sovereign since sovereignty means supreme, the highest authority on a scale. In that sense, when dealing with international agents, a State is sovereign as long as it has supreme authority over its territory and population. If it does not, it may be something else—e.g. a colony, a member of a federal State, etc., but not a sovereign State.

Undivided sovereignty means a power or authority that is not apportioned in segments whereas divided sovereignty has to do with segmenting that power or authority in different parts. It is indeed a notion that sees sovereignty in a horizontal manner. In that respect, if we think of sovereign States internally we find that some of them divide their power between different institutions—e.g. legislature and executive. But, in the international scenario, the sovereign State is mostly seen as an indivisible power no matter how it is internally organised.

To have absolute sovereignty means to be able to do/not to do or order/permit someone to do/not to do what one wishes. Although it may be theoretically possible, reality shows that there is no absolute sovereignty—all sovereignty is always in some way limited as we will see in this Chapter. In other words, absolute sovereignty refers to an unlimited power—i.e. that one who is an absolute ruler has the power to do and not to do as he wishes. On the contrary, limited sovereignty has to do with the constraints or limitations of any kind sovereignty may be presented with—e.g. legal, factual, internal, external, etc.

These classifications are indeed interlinked. From there, absolute sovereignty must always be supreme and undivided. That is because if sovereignty was either subordinated to any other authority or power or it was divided amongst different agents or institutions it would be somehow limited—i.e. it would either have vertical or horizontal constraints or limitations given by the superior or the other institution or authority, respectively.

It is important to make clear that to limit sovereignty does not necessarily mean to divide it. There are indeed two different criteria here. For instance, there can

[21] *Ibid.*

be supreme authority that can be limited and undivided. Let us think of a sovereign State with a uni-personal supreme authority. There are many historical cases in which we have the sum of the three powers in 'one hand'—e.g. Juan Manuel de Rosas in Argentina and some others that we will see in this Chapter. However, even if this authority was supreme and undivided both internally and externally, it would still have a series of limitations—e.g. internally, the national legal order, factual circumstances such as the local economy, and so on; and externally, the mere presence of other sovereign States and the international context.

This thesis faces a problem: to show how to share sovereignty is possible. That is not how to divide sovereignty but how by acknowledging its limits, sovereignty can be shared. In order to do that we have just showed that sovereignty is not absolute—i.e. it accepts limitations. However, it may remain supreme and undivided. The problem stems from equating limits with divisions. Indeed, to divide sovereignty is a way in which sovereignty can be limited. However, it is not the only one. And it is not enough for our thesis either. That is because to divide may imply to share but it does not need to. Indeed, 'to divide' and 'to share' sovereignty mean to somehow limit it. But these expressions mean something slightly different—i.e. for one thing is 'to divide' sovereignty, yet another thing is 'to share' it.[22]

For hermeneutic reasons we need to be even more precise: 'to divide' and 'to share' imply more than one entity involved. However, to divide sovereignty implies to separate it into 'sections', 'areas', parts. But, it does not necessarily mean that the division has to be reciprocal, multilateral and in a certain way fair. To share, on the contrary, assumes a relationship of some kind; to share something presupposes a certain division, appropriation, participation, accord with others. In other words, while 'to divide' only means the existence of more than one entity and a partition, 'to share' implies all this and that these entities have a certain relationship. The extent of this way of understanding sovereignty—i.e. shared sovereignty—will be discussed in the following Chapters.

A second conceptual issue is whether sovereignty is a form of authority or power or both. Indeed it is a form of exercise—i.e. a form of authority. For instance,

[22] Specificities in relation to different conceptions of 'shared sovereignty' will be discussed in Chapter Three.

the governor of a colony in the British scheme of the 19th and 20th centuries could make certain decisions, but they were revocable by a body outside and higher in the scale—i.e. a form of authority, metropolitan and part of the imperial government. But it is also a form of power, for example, in the exercise of maritime jurisdiction. The following quotation illustrates clearly this point:

> "Is sovereignty independence? Is it autonomy? The first is a notion of authority and right, but the second is a notion of power and capability. Historians, international lawyers and political theorists tend to operate with the first concept. Political economists and political sociologists tend to employ the second concept."[23]

They are indeed intertwined ideas. For the historical reasons we will see in the next section, nowadays power is territorially organised into States. As Philpott rightly points out States are members of the international society. However, these territorially organised powers so called States have to possess the quality of sovereignty to be members of that international society. Sovereignty is in fact one of the faces of authority—i.e the one that defines who are the States in a given international society.[24]

In relation to this point, language may also play an important part. We need to take account of the difference, in English political theory, between power and authority. Power is the ability to have one's commands obeyed; authority is the existence of a sense that it is (or is usually) right to obey these commands. They go together, politically (though on the personal level you can have power without authority, as with the gunman, or authority without power, as with the aged and infirm father, or the small and slight mother)—loss of power means loss of authority, and loss of authority with the army and police means loss of power. But they are different, although not all languages mark the difference—e.g. 'macht' in German means both.

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[23] Jackson, *op. cit.*, p. 2.

[24] See Philpott's view in Jackson, *op. cit.*, pp. 144-167. In what is important here, Philpott understands that authority at the international level appears in three faces that answer three different questions respectively: "The first face answers: Who are the polities in a given international society? The second face answers: Who may belong to the society: And, who may become one of these legitimate polities? The third face answers: What are the essential prerogatives of these polities?"

Intrinsically linked to the way in which sovereignty is understood either as authority or power or both is the distinction between the case of *de jure* and *de facto* sovereignty, our third conceptual issue—i.e. it all depends on the legitimacy. Let us assume the occupying power in a war exercises sovereign functions dictating military orders. At a later stage, territorial transfer (*debellatio bellica*) through a peace agreement, all that remains, then, becomes legitimised, *ab initio* in exercise of sovereign rights (the State is *de jure* sovereign of the formerly occupied territory). But if a body such as the United Nations—e.g. its Security Council—declared the occupying power was an aggressor State, the issue remains only as a *de facto* sovereign exercise.

Another key point, our fourth conceptual issue, is whether sovereignty is possessed only by a State or it may be also possessed by an institution within a State. There are particular cases in which we seem to be in presence of sovereignty without a State. However, these peculiarities have to do with very specific elements. For instance, the birth of the Order of Malta[25] was due to the influence of the Catholic Church. Leaving aside exceptional cases, sovereignty is understood in principle as possessed only by States. For example, Argentine provinces, constituent of the federal State after the national dissolution in 1820, and then, with the demise of President Rivadavia introduced in the Constitution of 1826, demonstrate how sovereign entities delegate a portion of their sovereignty in the federal State (Federal Pact of 1831), and then do it in a text encompassing the organisation of the new State in 1853. In Germany, the process is reversed. Arguably, the federal State transferred sovereignty to the Länder with the Bonn Constitution, 1949.

It is common use to say that there are sovereign institutions within a State. Once again this is an issue related to the use of the vocabulary. To be more precise, what varies—and may be argued—is whether any institution, person or body has this authority (or, for the political theorists, ought to).

The word 'sovereignty' means supreme authority; the word 'authority' means power, command; the words 'power' and 'command' imply that there are

[25] See *Scarfo v Sovereign Order of Malta* (1957) 24 ILR 1, Tribunal of Rome, Italy. In what matters here: "The limitations on the sovereignty of the Order of Malta which undoubtedly exist result mainly from the absence of State territory and citizens […]. These limitations, however, are not such as to be able to negative its sovereignty. Its sovereignty exists in law and is determined by its own legal order […]"

individuals, group of individuals—even for some, institutions such as a constitution—who have the power to dictate certain commands and individuals who must obey them. There are three levels of sovereignty depending on how an individual is understood in relation to any authority: in his individuality, in his relationship with other individuals (a community) and as a member of a community as a whole in relation with other communities. It is for this reason that political, legal and philosophical literature distinguish: a) a sovereign individual; b) a sovereign authority/representative; c) a sovereign society/nation/State. Indeed, in all three cases the word 'sovereignty' is used. In the first case, 'sovereign individual' refers to a particular human being and the power he has over himself—and all that this implies. This particular person might be sovereign either due to his individuality—*per se*—or because he somehow relates to others—reflective sovereignty. Chaucer's thoughts on women's sovereignty and Nietzsche's idea of the sovereign individual are examples of this first use of the word 'sovereignty'.[26] In the other two cases, the term 'sovereignty' can be applied either to: a) the highest authority in a political community in a given territory (the sovereign)[27]; b) the political community as a whole in its relation with other political communities (the sovereign State).[28] Bodin's and Hobbes' modern notions exemplify this line of interpretation.[29] As this thesis deals with State sovereignty—in particular, shared sovereignty between two or more sovereign States—I will focus the attention on these latter two ways of understanding sovereignty.

The fifth conceptual issue has to do with seeing the same phenomenon and its two sides. Every State has what we may see as two faces of sovereignty: a) internal or inward looking sovereignty; b) external or outward looking sovereignty. Internal sovereignty refers to the right every State has to determine its type (monarchy, democracy, etc.), governmental structure (prime minister, president, congress, etc.), and rules for its citizens or whoever inhabits its territory. That is to say, it refers to the exercise of a monopoly of power by one or a series of public institutions within a territory in order to create and apply law for its population. By

[26] Refer to *The Canterbury Tales* (*The Tale of the Wife of Bath*) by Geoffrey Chaucer and *The Genealogy of Morals* by Friedrich Nietzsche.
[27] F. H. Hinsley, *Sovereignty* (Cambridge: Cambridge University Place, 1986), p. 1.
[28] *Ibid*., p. 158.
[29] Refer to *The Six Books of the Republic* by Jean Bodin and *Leviathan* by Thomas Hobbes.

international or external sovereignty is meant the capability each State has to deal on an equal basis with other States. This view assumes the legal personality of the State and implies, amongst others, the principle of inviolability of State borders. Indeed, both spheres of sovereignty may share the same 'space'. For example, a bilateral treaty of dual nationality between two sovereign States is signed within an international context and will have legal effects in the two sovereign States in relation to their respective populations.

It is important to mention at this point that this thesis will be largely located in the second domain as sovereignty conflicts mainly concern questions of international nature. However, as we will see, this thesis will also draw extensively on material located in the first domain or internal sovereignty. That is because, as we will see in the next section, the beliefs, assumptions, and justifications in order to mistakenly see sovereignty as absolute—hence, non-shareable—have to do with societal evolution. Therein, I will make use of examples of limited sovereignty in the domestic context (internal sovereignty) so as to show more clearly that current misconceptions in international relations (external sovereignty) stem from ancient ideas that have been anthropomorphised in a larger context, that of the international scenario.

Notions such as 'popular' sovereignty, our sixth conceptual issue, are political in nature. Primarily aimed for the reform or creation of the law that gives shape to fundamental institutions, it focuses on people's power to give themselves a Constitution, or to elect a new government by the will objectified in the suffrage. The idea that sovereignty is an attribute that people as a collective have and that by delegation rests on their representatives is key in social contract theories. Some of them will be reviewed in the historical section of this Chapter.

The seventh conceptual issue is whether we can think of sovereignty as something possessed within a limited jurisdiction or whether sovereignty must entail a notion of unlimited jurisdiction. The way in which a State exercises its sovereignty through its executive, legislative and judicial authorities is what is called jurisdictional sovereignty. In principle, a State extends its jurisdiction within the boundaries it is sovereign of. While a sovereign State may have exclusive power to prescribe what is law within its boundaries, the same cannot be said about its

enforcement. Either understood as prescriptive or as enforcement, jurisdictional sovereignty is far from being absolute. In the former case, a sovereign State indeed has supreme authority to create and apply the law for its population within its boundaries. However, there are many cases in which limitations apply—e.g. immunities from legal process by States and international organisations in the courts of a peer State—in which diplomatic immunities are but one of many cases; certain crimes such as genocide which foreign bodies may enter a sovereign State to punish or prevent; cases of concurrent jurisdiction; only to mention a few. In the latter case—i.e. enforcement—jurisdictional sovereignty is limited by the nature of international relations itself. In other words, the limitation of the enforcement has to do with States and their sovereign equality recognised in international public law as the non-interference principle. This notion is so important for international relations that it is expressly included in the text of the United Nations Charter (art. 2.7).

So far we introduced the concept of 'sovereignty' and discussed some conceptual limitations. It is time now to identify specific theorists or bodies of literature that take sovereignty to be absolute. In the following section we will have a brief historical overview of a few major thinkers and explore their ideas about sovereignty and its limitations.

Aim of the historical account

Substantive limitations have to do with the inability to perform or certain restrictions in the performance or functioning of a given activity. While conceptual limitations are crucial to understanding sovereignty in subsequent Chapters, substantive limitations complete the picture. It is time then to give some attention to the arguments of sovereign theorists on why they have thought that authority must take the form of sovereignty. Indeed, not only is this a conceptual issue but also a substantive one about the form that authority must take if it is to function satisfactorily.

In the following paragraphs we will see that the main reason for authority to take the form of sovereignty has to do with beliefs, assumptions and justifications that respond to societal evolution. The concept of 'sovereignty' is a modern one but

the elements that give it flesh have been always present in our societies (at least in the Western world). And that is the purpose of the historical account below, to show how the ideas developed by modern and contemporary scholars depart from beliefs, assumptions and justifications that had been already used before when referring to authority. Furthermore, this form of viewing authority has always had in one way or another certain limitations. To put it in other terms, the so called sovereign authorities from the Ancient and Middle Ages and their characteristics find a parallel in the modern and contemporary idea of sovereign States. The notions once applicable to the individual (and hence the limitations to those notions) have been anthropomorphised in that of the State. Therefore, the value of a historical account rests in showing how modern and contemporary beliefs, assumptions, and justifications in relation to sovereignty actually stem from ancient conceptions that have been anthropomorphised.

As we will see, the concept of 'sovereignty' was created to express the independence of the modern State in relation to spiritual powers in the Christian world of the Middle Ages: Papacy and the Holy Roman Empire. Certainly, nowadays it operates as a nationalist assertion. And from the point of view of the law, it is directly linked to the structure of the modern State implying the dogma of the impenetrability or absoluteness of State law in relation to other States. The latter, of course, has implications for what is now the area of private international law (Conflicts of Laws in British terminology). The limitlessness of sovereignty is related to the idea of universal Empire or State as we will see in the following historical account. Absolute notions of sovereignty are as unthinkable in reality as are absolute rights, though these are defended by some writers in the field of human rights. This relativity that characterises rights is shown by the American Convention of Fundamental Rights and Duties of States, and in the field of human rights in the Convention of Bogotá of 1948, predecessor of the Universal Declaration of Human Rights, which combines rights and duties in a single text.

A historical account of the early use of the idea and notion of sovereignty in Ancient and Mediaeval Ages and as a more clearly defined concept in Modern and Contemporary Times will show how, after a very early period, the sovereign has nearly always been regarded (in Western Europe, at least) as limited. So, we will see what we may call three different stages in the development of 'sovereignty': first, the

idea or notion (Ancient Age); then, the use of the word 'sovereignty' for the first time but in a different context—literature (Mediaeval Age); finally, the legal and political clearly defined concept (Modern Age). This account will introduce all the three possible scenarios (sovereign as one, a few or the many). However, the important point is that in all cases 'sovereignty' understood as supreme authority appears to be limited—i.e. not absolute.

Why a historical review of a concept that was created in the Modern Age? It is a fact that in relation specifically to the State and as a juridical idea, the concept of sovereignty was brought to life between the 15th and 16th centuries. Bearing that in mind, I agree with Kostakopoulou that "[…] sovereignty has been informed by Bodin's, Hobbes' and Austin's monistic conceptions of sovereign power. But these conceptions represent only certain, historically conditioned, readings of sovereignty. The theory of sovereignty is not a single and unified tradition."[30] That is to say, the notion or idea of sovereignty was present in human history a long time before modernity. From a synonym of property (the Lord is sovereign of his land) to a more legal-political notion, it has evolved in parallel with the idea of the State. From a chief of a small tribe to a current President or Prime Minister and a developed State, the basic notion is the same: supreme authority.

A brief account of the different uses of the idea of sovereignty throughout the Ancient, Middle, Modern and Contemporary Ages demonstrates fundamentally that its basic elements have been always present but it has been an attribute of different subjects. If we use a metaphor, the same play has been represented many times in the same theatre and the main character has been acted by many different actors using the same outfit. Nevertheless, in order to avoid unnecessary confusion, it is imperative to be aware that the term has had different uses during its history (from a mere notion or idea to a more clearly defined concept). In that sense, I agree with Stroud when he says that "[t]he largest difficulty in legal history is precisely that we look at past evidence in the light of later assumptions, including our own assumptions about the nature and working of law itself."[31] With this in mind, the

[30] Dora Kostakopoulou, "Floating Sovereignty: a Pathology or a Necessary Means of a State Evolution?," *Oxford Journal of Legal Studies* 22 (2002): 135.
[31] Francis Charles Milsom Stroud, *A Natural History of the Common Law* (Columbia: Columbia University Press, 2003), p. xvi.

historical review will focus on the notion and concept of sovereignty in relation to the specific Ages in which it was used.

The exposition that follows gives a hint of these different uses: without intending to be an exhaustive list, it provides an illustrative reference of how diverse the uses of the word 'sovereignty' have been when applied or related to a political organisation such as a State, or to a given individual or a group of people. But it may be argued that the selection of philosophers and legal scholars could have been either narrower or broader—why these specific authors and not others? It is important to highlight once again that this thesis is not about sovereignty but shared sovereignty; hence, it is imperative for the success of this theoretical enterprise to show how a concept that is thought to be absolute can be (in fact, it is) limited. The main point is to bring evidence that there have been authors throughout human history who have shown that the notion or concept of sovereignty can be limited. Some of these authors maintained nevertheless that sovereignty is an absolute idea; however, their words imply that there are limitations on what they claimed to be unlimited. To quote and analyse every single author and school of ideas related to sovereignty is empirically impossible and theoretically unnecessary. At the same time, at least a glimpse of the idea of limited sovereignty is a 'must' in order to develop the shared sovereignty paradigm.

Two last clarifications must be made before starting with the historical account. Firstly, we will see that the limitations to sovereignty may be actual, theoretical, or both. That is to say, we will see that: a) the powers of the ruler were always in some way limited; and/or b) theories always introduce some limitations to sovereignty, even though some theorists did not admit it. Secondly, we will also see that these actual and/or theoretical limitations have to do with either internal sovereignty, external sovereignty or both. However, as we have seen in the previous section, to talk about external and internal sovereignty is to refer to two facets of the same phenomena. Therefore, the limitations to one facet always affect in some way sovereignty as a whole. Moreover, limitations that are present in early stages of societal evolution and could be seen as related to what we may call internal sovereignty have been anthropomorphised in modern and contemporary times in the way in which international relations are understood.

The Ancient World

It is a fact that sovereignty as a theoretical concept was coined by Bodin in the early Modern Age. However, sovereignty as a notion has been always present in human interrelations.[32] There is arguably a strong case for thinking sovereignty may have been limited even in early days. Indeed, most of these limitations were actual and had to do with factual circumstances. But there are even in these early stages some theoretical ones too. There are several reasons that support this idea: a) we only know about a few big empires and some particular tribal societies; the numerous other societies may have been different; b) in a polytheistic system divine authority does not mean unfettered authority—even a supreme God, let alone a 'mortal god' like the Pharaohs, has to respect the various spheres of influence of other gods; c) the Code of Hammurabi's reference to the succeeding rulers in case they annulled his law—requesting Anu, the Father of the gods, to withdraw the new ruler from his throne[33]; d) if the Book of Esther[34] is reliable in that respect even the Persian king (who seems to have been particularly powerful) may have been able to pass any law, but having passed it had no authority to repeal it.

In Ancient Ages, the Pharaoh, the chief of the tribe, the King or the Emperor was the highest and only authority (moral, religious and legal). The monarch was at the same time the positive and natural source of norms. His commandments and decisions were irrevocable and perpetual. There is one characteristic the conception of sovereignty loses later on in history: perpetuity. As an authority whose power came directly from the Gods (in some cultures, the ruler was a God himself) the sovereign essentially represented permanence in time, and inalterability. Moreover any action or omission that was legally wrong was also incorrect morally and religiously. At this point, the three normative systems had the same contents, the

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[32] See Nicholas Greenwood Onuf, "Sovereignty: Outline of a Conceptual History," *Sage Publications Inc., Alternatives: Global, Local Political* 16 (1991): 425-446; Jorge Emilio Núñez, "The Origins of Sovereignty in the Hellenic World," in *International Law, Conventions and Justice*, ed. David A. Frenkel (Athens: ATINER, 2011); Heinrich A. Rommen, *The State in Catholic Thought, A Treatise in Political Philosophy* (London: B. Herder Book Co., 1950), in partic. Chapter XVII; Martin Van Creveld, *The Rise and Decline of the State* (Cambridge: Cambridge University Press, 2004); Hinsley, *op. cit.*; Ernst H. Kantorowicz, *The King's Two Bodies, a Study of Mediaeval Political Theology* (Princeton: Princeton University Press, 1997); Mark Munn, *The Mother of the Gods, Athens, and the Tyranny of Asia, a Study of Sovereignty in Ancient Religion* (California: University of California Press, 2006); and many others.

[33] Charles F. Horne, *The Code of Hammurabi* (Forgotten Books, 2007), Epilogue.

[34] R. C. Morgan, *The Book of Esther: Typical of the Kingdom of God* (London: Binns and Goodwin, 1854).

same creator and the same interpreter. Although there was no State[35], technically speaking (at least as defined nowadays), the sovereign was already present (maybe the terminology was non-existent but the populations had in fact an ultimate and supreme authority or group of them). Tribes without one ruler, tribes with one ruler, city-states and empires, all shared a few similar characteristics: the State was not present, the communities were small but they all had an authority, however diffuse and however appointed. And in many of these civilisations (if not all) the ruler seemed to be almost unrestricted, with unlimited power. However, his powers were only *almost* unrestricted. They all had by default at least one constriction: although they were in most cases representative of the gods (if not the God themselves), their powers were constricted by religion.[36] Whether the sovereign was a representative of a God or the God himself, in both cases religion was above them. It is often taken for granted that being the creator in regard to the three normative systems (law, moral and religion), the ruler was in some instances above the religious norms; hence he was fully sovereign, an absolute and unlimited ruler. However, even the immortal God might have had limitations.[37] It seems a holdover of our past hyper-religious fervour that we tend to think of sovereignty as a unitary, unlimited concept. Without entering into a debate, such a high, unitary and unlimited hierarchy has never been repeated in human history. Thus, such an absolute sovereign above all three normative systems has never existed again (at least in practice) as the rest of this historical account will show.

Ancient Greece

In Ancient Greece (as described by Herodotus, Plato, Aristotle[38]) the people gain a more starring role. As we will see, the crucial point to make in relation to

[35] Van Creveld , *op. cit.*, in partic. Chapter 1.

[36] *Ibid*., in partic. p. 54.

[37] See Genesis 18:25 when Abraham asks the Lord "Shall not the Judge of all the earth do what is just?" See also Genesis 47:22 and Genesis 47:26 when during the famine in Egypt the land of the priests is the only one that did not become Pharaoh's property. See as well Hebrews 6:13-20 God's promise to Abraham. In the latter example, God gave his promise and his oath (Hebrews 6:18). The oath is binding (Hebrews 6:16). So, God is bound and this will never change (Hebrews 6:17). Therefore, God limits himself his absolute sovereignty.

[38] Although neither of them specifically wrote about the concept of sovereignty, as we know it in the Modern Era, they discussed and developed the notion with proficiency. In Herodotus' *Histories* there are accounts of societies with many of the features of what is regarded nowadays as a sovereign State.

absolute sovereignty in this period is related to the 'who' rather than the 'what'. Unlike previous civilisations, the Greeks accepted the idea of plural authorities. At least in factual terms, the supreme authority is now divided into different offices—hence there is no absolute prerogative of any singular individual. As in the very early stages, Greece presents a notion of sovereignty with both actual and theoretical limitations. It is important to mention that there is a distinction between what actually happened and what philosophers and theorists thought should happen. In reality, as permanent settlements, Greek cities differed from nomadic tribal societies in adding a territorial element to their political organisation. Although the notions of government and ownership might be confused, and different types of government exist, rulers are always present in this period. However, the rulers do not 'own' free persons. Also, within the Assemblies some people have the right to express themselves.

Two new developments appear: freedom and citizenship. And both—to an extent—mean that the supreme authority has to be adapted to a new paradigm. First, to be a member of a Greek community an individual had to be free. Freedom differentiates the slave from the free man. But freedom—at least for Aristotle—does not only mean acting according to our own will but also that our acts are not intended to serve someone else's interest.[39] Second, to be a citizen implies to be considered part of the community with certain rights and obligations. Some men in Ancient Greece are then free men and citizens. The following quote is clear in defining citizenship according to Aristotle:

> "In Book III, Chapter I [of the Politics], we find three separate definitions of the citizen. The first is […]: 'a man who shares in the administration of justice and in the holding of office' […]. The second is […]: 'those who share in indeterminate office' […]. The third, final definition is […]: 'he who enjoys the right of sharing in deliberative and judicial office' […]"[40]

In the case of Plato, I would recommend focusing on the triad composed by *The Republic*, the *Politicus* (or *The Statesman*) and the *Laws*; with Aristotle, the *Nicomachean Ethics*, the *Politics* and the *Constitution of Athens*. For a more detailed account see Núñez, *op. cit.*

[39] R. G. Mulgan, *Aristotle's Political Theory, an Introduction for Students of Political Science* (Oxford: Clarendon Press, 1987), p. 15.

[40] Curtis N. Johnson, *Aristotle's Theory of the State* (Macmillan, 1990), p. 117.

There is another limit to absolute sovereignty in this period that is linked to freedom and citizenship: the State is identified with community.[41] The notion of *polis* relates to a group of people with a certain civic and political bond and a given government, without reaching the status required to be considered as what nowadays is regarded as a State. A modern State is usually viewed either as a group of people with the same authorities—the sociological/political view—or a group of authorities representing these people—the institutional view. In Greece, the *polis*, the city-State, included both the people and the institutions. That is because the *polis* was directed only by citizens (who were the only ones permitted to be part of the government). The other inhabitants were either free foreigners, slaves, women or 'children'.[42]

On the theoretical side, even authors such as Plato and Aristotle, although recognising the virtues of direct democracy, do not agree with the idea of popular sovereignty. Both discuss different types of governments, but Aristotle's view of ancient kings is of particular interest: he thinks they originally had total sovereignty but gradually yielded it.[43] Thus, society itself has to be divided into different classes to be virtuous and only one of them will rule. It must be made clear that Aristotle, unlike the Plato of the Republic, does not advocate division into classes, although he does support restricted citizenship. The State must be ruled by the wiser of its citizens.[44] Without using the concept, even Plato implicitly includes the notion of public sovereignty.[45] As Barker maintains, "[i]n opposition to Plato, who sought to institute a human sovereign, Aristotle turned to the conception of neutral and dispassionate law as the true sovereign of the State."[46] Although Barker is right in this comment on Plato, Aristotle and law in relation to The Republic, the remark does not apply to the Laws. However, Aristotle does not define this concept either[47]; for him sovereignty is tightly linked to citizenship and the functions of the State.[48]

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[41] Hinsley, *op. cit.*, in partic. pp. 28 and ff.

[42] Mogens Herman Hansen, ed., *The Ancient Greek City-State* (The Royal Academy of Sciences and Letters, 1992), p. 8.

[43] Aristotle's *Politics*, Book 3, Part XIV offers a view of different 'royalties' as 'true forms of government' including examples of several limitations to sovereign power.

[44] In Book VI of the *Nicomachean Ethics* Aristotle differentiates between *sophia* –theoretical wisdom- and *phronesis* –practical wisdom, the latter also related to political activity.

[45] D. Lee, trans., *The Republic of Plato* (Penguin Books, 1987), p. 119.

[46] Ernest Barker, *Greek Political Theory: Plato and his Predecessors* (Methuen & Co. Ltd., 1952), p. 13.

[47] Johnson, *op. cit.*, p. 125.

[48] *Ibid*., p. 128.

It is true that sovereignty as a pure concept (at least, as per the current understanding of its meaning) is non-existent in Ancient Greece. Yet, the notion of sovereignty is present[49] and, what is of utmost importance for this thesis, it is a notion of limited sovereignty. As an example, in the modern era it is common not only to refer to a people's sovereignty but also to the sovereignty of law. We find that Herodotus uses the notion when explaining the standpoint of the Greeks in the discussion between Demaratus and Xerxes, when he states:

> "The point is that although they're free, they're not entirely free: their master is the law, and they're far more afraid of this than your men are of you."[50]

In relation to this, for Aristotle—when possible—men should not be sovereign but the law.[51] Is there a change of sovereign then? The answer is no. We have to understand this idea of sovereignty of law coherently. Plato and Aristotle want a virtuous ruler who is able to do what is in the people's interest. As they know human beings do have vices they need to put in practice a solution: a system of norms that can secure the achievement of that common interest; hence, the law. In any case and in what matters to this thesis, sovereignty, both in practice and in theory in Ancient Greece was limited by others' part in the government, by what could be done to free people and by the law itself.

Ancient Rome

From the Latin come some of the words that are still used to define sovereignty: *principatus*, *suprema potestas*, *maiestatem*.[52] Although they share some characteristics, they only define the highest, the supreme authority—not necessarily sovereignty in current understanding of the term. In order to determine the highest

[49] C. E. Merriam, *History of the Theory of Sovereignty since Rousseau* (Batoche Books, Kitchener, 2001), pp. 5-6.
[50] Robin Waterfield, trans., *The Histories of Herodotus* (Oxford: Oxford University Press, 2008), p. 440. For further details see Núñez, *op. cit.*; Munn, *op. cit.*, pp. 16 and ff.
[51] Johnson, *op. cit.*, p. 133.
[52] Jean Bodin, *The Six Bookes of Commonweale* (London: Impenfis G. Bishop, 1903), in partic. Book I, Chapter Eight; Jaques Maritain, "The Concept of Sovereignty," *The American Political Science Review* 44 (1950): 343-357; Greenwood Onuf, *op. cit.*

authority in Ancient Rome, it must be said that Roman history is usually divided into two main different periods: the Republic and the Empire.[53] For clarity in the exposition, a third period related to very early stages in their civilisation will be briefly reviewed. Without entering into a historically detailed debate about the transition from one into the other or their particular circumstances, at first glance, despite the fact the Romans were not familiar with the concept of sovereignty *per se* in any of these three periods, its notion was a preeminent feature in the development of their society and institutions.

Leaving aside the historical arguments and the mythology in regards to the foundation of Rome either due to the emigration from Troy or Romulus as their first King[54], the Romans were very conscious of having started with kings and having deposed them. That same community turned its rulers down with one consequence that would be present throughout their history: the supreme authority or sovereignty was either avoided or—better said—divided, so that no one person had absolute power.

With the Republic and its various offices held for fixed periods the characteristics of a King managing the community from above disappear. Despite this fact, the early periods in Rome left in their community important traces such as social division in classes (patricians and plebeians).[55]As a direct outcome, although sovereignty was divided, the access to these various offices was a 'social struggle'.[56] In any case, whether the Romans had an open or a narrow system of participation, the key point here is that the Republic makes a division in relation to supreme authority; hence sovereignty is limited. Even in emergency they might hand over all the power to an individual (the dictatorship) but only for a limited period.[57] Arguably, for these same reasons Caesar was murdered—people feared a new kingship—and Augustus did not openly accept a dictatorship.[58]

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[53] Walter C. Opello and Stephen J. Rosow, *The Nation-State and Global Order, a Historical Introduction to Contemporary Politics* (Lynne Rienner Publishers, 1999).
[54] Fergus Millar, *Rome, the Greek World, and the East –Volume I- The Roman Republic and the Augustan Revolution* (North Carolina: The University of North Carolina Press, 2002), Chapter III.
[55] *Ibid*., p. 88.
[56] *Ibid*., p. 91.
[57] *Ibid*., pp. 111 and ff.
[58] *Ibid*., p. 269.

In due turn, the Republic cedes its place to the Empire. What may seem a reaction to the shared sovereignty of the Republic is not. As we will see, even what may appear at first glance as an absolute sovereign with the Emperor, limitations of different nature curtailed his power. Another interesting point of this period is the possibility of analysing sovereignty from an international and an internal perspective. From an international perspective, the Empire does not accept equals hence even the notion of sovereignty seems at least superfluous (or even not applicable at all).[59] The Empire was the only political entity in any sense; the rest were barbarians. As there were no other recognised empires to have relations with, international affairs were reduced to border fighting and diplomacy was slim (if there was any at all). In consequence, a concept such as sovereignty (at least in its external version) was futile. Even though the external sovereignty was blurred (or non-existent) and there was one and only one Empire, hence one authority, the internal sovereignty seemed to have had a strong presence (at least there was a hierarchy of authorities with one being the highest). From a purely internal perspective, the Emperor had *de facto* supreme authority but according to Roman law he was only the people's representative.

There seems to be a contradiction in terms—at least in theory—in what is referred to as sovereignty and either its absoluteness or limitability. Ulpian recognised that Rome's population had the *imperium* and the Emperor was the ultimate representative—i.e. his power was limited. At the same time, Ulpian also maintained that *princeps legibus solutus est* (the sovereign is not bound by the laws) and *quod principi placuit legis habet vigorem* (that which pleases the prince has the strength of law).[60] So, was the Emperor the sovereign or was the Emperor representing the Roman population so that they were the real sovereign? The question in itself is interesting; it is not useful for this thesis. The key issue for this thesis is to clarify if sovereignty in Ancient Rome was an absolute or limited notion (whether the Emperor or the population was the sovereign). In that sense, it has been argued that the Emperor's sovereignty in this period was absolute.[61] It has been even maintained that some of the characteristics from the Roman *dominium* were

[59] Van Creveld, *op. cit.*, in partic. Chapter 1.
[60] Hinsley, *op. cit.*, in partic. p. 42.
[61] Van Creveld, *op. cit.*

transferred to sovereignty[62]; without entering into a discussion about this transition, the fact is that even *dominium* has its limits in Ancient Rome.[63] In what is specific to the Emperor's sovereignty, it has also been maintained that he was above the law in clear contradiction to the principle *Nemo est supra leges* (no-one is above the law). In a nutshell, he was sovereign and his sovereignty seemed to be absolute. However, this absoluteness appears to be only theoretical.

In actual terms, time, distance, religion, finance showed that the powers of the ruler were limited. Moreover, even though the Emperor might have been conceived as being above the people and law, the power he had was transferred to him by the people (who were its right holders) to him through the Senate.[64] As a way of example, in the event that the Emperor passed away he did not have the right to determine succession and the new Emperor had to be designated once again by the Senate (even if this was in fact 'rubber stamping' what the old Emperor or the army had decided).[65]

There is in Ancient Rome a hint of an absolute sovereign both in the very early stages of their civilisation and during the Empire (it may not be sovereignty in the later sense, because of the lack of peers in regard to the Empire). But despite the fact that the King first and then the Emperor could be considered in principle as absolute rulers, there are many practical and theoretical instances in which their sovereignty was limited.

The Middle Ages

'Sovereignty' in the Middle Age can be interpreted in two ways: either there was not a proper sovereign and the concept of sovereignty loses its shape[66] or the Mediaevals did have a notion of sovereignty that, in effect, was dual (natural and positive law, holy and human secular sovereignty). It is also in the Middle Age that the word 'sovereignty' is introduced but in a different context: literature. In *The Tale*

[62] James J. Sheehan, "The Problem of Sovereignty in European History," *The American Historical Review* 111 (2006): 1-15.
[63] Peter Birks, "The Roman Law Concept of Dominium and the Idea of Absolute Ownership," *Acta Juridica* (1985): 1-37.
[64] Hinsley, *op. cit.*, pp. 43-44.
[65] *Ibid*., in partic. p. 43.
[66] Jaques Maritain, "The Concept of Sovereignty," *The American Political Science Review* 44 (1950): 343-357.

of the Wife of Bath (*The Canterbury Tales*, 1380) Geoffrey Chaucer mentions sovereignty as a desire every woman has in relation to men. At this early stage the word 'sovereignty' already implied a kind of supreme authority but at individual level.

In actual terms, with the decline of the Roman Empire, the social and political spheres fragmented into smaller societal organisations.[67] Since it had many different societal groups in different conditions, it is not strange that this period[68] is characterised by constant tension amongst them in terms of power, each trying to be the highest one.[69] The first part of the period, known as feudalism in Western Europe, finds three corporate groups (estates): the clergy, the nobility and the bourgeoisie.[70] However, throughout the period there were two well differentiated higher sovereigns: the Church (the Pope) and the King (Emperor, feudal Lord). For some scholars the sovereignty of the Pope was above the sovereignties of any Emperor or King as it was delegated by God himself (this was the reason why as a ritual solemnity the Pope had to crown the new monarch validating his secular sovereignty). Others considered them equal. Others still, depending on the circumstances, rejected that authority (e.g. Henry VIII and the creation of the Anglican Church).[71] At first, even the Emperor owed his position to the Church as the eternal and natural law was held to be above human law.[72] However, later on both of them claim absolute power over the totality (ideal and real).

Actual limitations were accompanied by theoretical ones in this period. From the idea of the 'two swords' (the Church and the King) to the one of 'two kings, two bodies', the Medieval Times show how sovereignty was limited (there was no shared sovereignty but—at best—dual sovereignty). In regard to the King, the idea of *gemina persona* (human by nature and divine by God's will and hence the doctrine of 'two kings, two bodies') was coherent with the duality between the sensible world

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[67] Van Creveld, *op. cit.*, Chapter 2.

[68] I refer here to the Mediaeval Times in Europe only. For further details in regard other Empires and civilisations, see Van Creveld, *op. cit.*, Chapter 2.

[69] Noemí García Gestoso, "Sobre los Orígenes Históricos y Teóricos del Concepto de Soberanía: Especial Referencia a los Seis Libros de la República de J. Bodino," *Revista de Estudios Políticos, Nueva Epoca* (2003): 301-327.

[70] Opello, *op. cit.*, in partic. part. I, Chapters 2 and 3.

[71] Gerald B. Phelan, trans., *On the Governance of Rulers (de regimine principum) of Saint Thomas Aquinas* (Toronto, Canada: St. Michael's College, 1935); A. P. D'Entreves, ed., and J. G. Dawson, trans., *Selected Political Writings of Aquinas,* (Oxford: Basil Blackwell, 1948).

[72] Hinsley, *op. cit.*, in partic. Chapter III.

and the world of God.[73] He represented both the contingencies of time and the perpetuity of power. However, that did not mean his powers were absolute: he was not allowed to do wrong (*lex solutus*[74]—unlimited, absolute law—*against rex infra et supra legem*—the King was the highest authority and hence above the law, but at the same time he remained below the law of God).[75] It is in fact a constant in Mediaeval Times that any kind of positive law was limited by natural law, even in the event that the sovereign was considered to be above the positive law.[76] The mutual influences between the Church and the Kings were continuous too, so it is unsurprising that some concepts are shared (perpetuity, holiness, symbols, etc.).[77] Between both Church and King the links were multiple (hence, the similarities in many aspects) and also the tensions (disputes in relation to wealth obtained through taxation and revenues for instance are a recurring issue in this period).[78] Like the King, the Church had the notion of 'two bodies of Christ' that implied the human side and the mystical, holy one.[79] From there, these notions were applied to Christian society as a totality implying the classification into natural and fictitious personae.[80] The later Mediaeval Times had a tendency to use the classic Greek authors (in particular Plato and Aristotle), so that the duality between two different worlds, that of ideas and that of physical actuality, was also present. The 'eternity of the world' was also borrowed from them to sustain the idea of permanent power.[81]

Saint Thomas Aquinas is probably one of the best (if not the best) representatives of the ideas of the Church in this period. Aquinas does not use the words 'sovereign' or 'sovereignty'. However, he uses their meanings. The concept of sovereignty as a legal or juridical notion will come later in the evolution of Juridical Science. It is interesting to note that he considered human beings' societies as an outcome of their needs.[82] A group of people, a community or society also needed

[73] Kantorowicz, *op. cit.*, in partic. Chapter III, pp. 78 and ff.
[74] Rommen, *op. cit.*, p. 397.
[75] Kantorowicz, *op. cit.*, in partic. Chapter III, pp. 95 and ff.
[76] Otto Gierke, *Political Theories of the Middle Age* (Cambridge: Cambridge University Press, 1913), in partic. pp. 87-100.
[77] Kantorowicz, *op. cit.*, in partic. Chapter V.
[78] Opello, *op. cit.*, in partic. part. I, Chapters 2 and 3.
[79] Kantorowicz, *op. cit.*, in partic. Chapter V, p. 207.
[80] *Ibid*., in partic. Chapter V, p. 209.
[81] *Ibid*., in partic. Chapter VI.
[82] Phelan, *op. cit.*, p. 30.

according to him a guide, someone to give them a sense of direction: "Where there is no guidance, a people fall […]" he maintained.[83] The guide could be an individual or a body of representatives.[84] He analyses the different kinds of government into the positive (kingdom, aristocracy, *politeia*) and the negative types (tyranny, oligarchy, democracy) concluding that the best possible of all solutions would be a kingdom. He assigns the ruler, king, prince a principal role within a society. What is crucial to this thesis is that he recognises two kinds of sovereignties: temporal and spiritual, the latter being the superior one. In his own words: "[t]he temporal power is subject to the spiritual as the body to the soul […]. Therefore there is no usurpation of power if a spiritual Prelate should interest himself in temporal affairs."[85] In other words, the ultimate authority for Aquinas was God and among men, as his representatives on Earth, the Prelates. Two legal orders existed according to his way of thinking: the natural and the positive law. Natural law was created by God and ruled everything and everyone. Positive law was created by human beings and as a human creation it could be imperfect. In any contradiction between norms of these systems the eternal law was the valid one (though this did not always justify disobedience to the positive norms). Furthermore, for any given positive law and State the ultimate authority was the King. However, in case of a difference between diverse Kings or a King and his/her people, the Church as temporal representative of its Holiness was to uphold the sovereign role.

Church and kings (sometimes, feudal Lords) represent the Mediaeval Times. Both of them had two spheres: a natural, human, physical one and a supernatural, ideal one. In the case of the Church, the highest authority was God (on the supernatural side) who was thought to be the absolute, perpetual and unlimited power represented by one highest authority, the Pope, who was both an individual, a mortal, contingent being and a persona, an ideal construction also perpetual but not unlimited or absolute (he might not go against God's will). The King could either receive his power by delegation from the Pope or directly from God. The Roman idea of delegation of *imperium* from the people to the ruler was left behind. Whether the relationship between King or Lord and his vassals was based on loyalty and

[83] Proverbs 11:14
[84] Phelan, *op. cit.*, p. 33.
[85] D'Entreves, *op. cit.*, p. 167 (quoting *Summa Theologica*).

protection[86]or based on any other kind of bond[87], in any circumstances, and in what matters to this thesis, his sovereignty was not absolute or unlimited. Moreover, the 'king's two bodies' doctrine applied: there were both a natural, human being with a contingent reality and the ideal persona with perpetual power; however, his power was not absolute or unlimited since he was not allowed to do wrong or dictate an unjust law (a law was unjust in Mediaeval Times if it contradicted God's will, whether expressed in scripture or natural law).

A turning point in many aspects related to philosophy, law and political science of the Middle Age and the Modern World is the work of Machiavelli. *The Prince* offers another view regarding State, sovereignty and sovereign. Although the author writes his thoughts about principalities, the ideas are applicable to any form of government when considering the supreme authority in a given territory. For many philosophers and theorists sovereignty is a concept that implies two sides: represented and representative. Machiavelli observes these two subjects in reality: the Prince and the people. He adds a third group, the nobles. His addition consists in the novelty of dividing the represented into two classes with opposite interests (the nobles and the population in general—i.e. the people).[88] By following his ideas it is possible to see how the tensions in society work in relation to the government. At this point, Machiavelli incorporates sovereignty into the real world. In order to become a Prince, an individual will need and seek the support of either the nobles or the population.[89] In other words, if he became Prince due to the favour of a few, he would have to share in some way the power with them bearing in mind the population would always feel oppressed; if he did so because the general population trusted him to be their leader, he would have to make sure to keep that support. The game is double and the outcome the same: there is a representative, the Prince, and he may look as if he was the sovereign. However, in both cases (support from nobles or from people) he needs cohesion so as to reach and stay in power. Consequently, although he is the one in the leading position, he in either case must have the

[86] Opello, *op. cit.*, in partic. part. I, Chapters 2 and 3.
[87] See the ninth circle of Dante's Inferno in the *Divine Comedy* and the traitors. In particular, the second round of this circle refers to treachery within communities.
[88] G. Bull, trans., *The Prince of Niccolo Machiavelli* (Penguin Books, 1999), p. 31.
[89] *Ibid*., p. 32.

acceptance of others. What in theory may appear as unlimited sovereignty in reality is limited, according to Machiavelli's work, by the acceptance by or support of the represented. He even goes further, and, as regards the nobles and the people, Machiavelli explicitly recognises that the former may be influential but having the support of the latter is essential.[90]

What happens after the mediaeval period is crucial, because that is when the kings try to get all the power into their hands, and theories of total sovereignty are presented, like those of Bodin and Hobbes. In both cases, they fail to demonstrate their thesis of absoluteness in regard to sovereignty and their theories actually introduce limits. Moreover, sovereignty is in practice curtailed by many elements that are particular to this period in history and that are still existent: a) by the increasing power of the people—this could in principle result in a new kind of unchecked sovereignty, but is itself (as the theories from Locke and Rousseau will show) checked by; b) increased emphasis on individual rights; c) the use of separation of legislative and executive powers; and d) international agreements, some voluntary, some required.

The Modern Age

The Mediaeval Age saw sovereignty linked to moral and religious elements; modernity is mainly characterised by a secular power trying to separate itself from the Church and at the same time to obtain total control over its affairs in response to social disorder.[91] Classical Greek and Roman authors give the Modern Age the basis for supporting this enterprise.[92]

The word 'sovereignty' had been used before, but it is Bodin in France who mainly defines its characteristics as known nowadays. There are indeed limitations to power that have to do with actual circumstances. Western Europe had a struggle between Church and State; principalities and other societal organisations were

[90] *Ibid*., p. 33.
[91] Hinsley, *op. cit.*, in partic. pp. 69 and ff. and 126 and ff.; Opello, *op. cit.*, in partic. part. II, Chapter 4; Van Creveld, *op. cit.*, Chapter 3; D'Entreves, *op. cit.*, part II, Chapters 4-6.
[92] Hinsley, *op. cit.*, in partic. pp. 72 and ff.

fighting for power.[93] In response to this situation, Bodin offers his theory of unlimited sovereignty. However, even at the theoretical level he introduces some limitations on sovereignty. At first glance, Bodin's definition seems to grant unlimited sovereignty in order to stop and control that chaos:

> "*Aieltie* or Sovereignty is the most high, absolute, and perpetual power over the citizens and subjects in a Commonwealth […]"[94]

Literally interpreted, the above definition clearly states sovereignty's main elements: highest, absolute and perpetual power. However, Bodin includes in his work two kinds of limitations: first, those related to natural law; second, those related to customary law and property rights.[95] Particular examples of these limitations are the law of succession, required in order to have a perpetual sovereignty, and the prescriptions to respect private property, keep one's promises and (specifically related to private property), the sovereign's obligation to ask the consent of his citizens before imposing taxes.[96]

Similarly to continental Europe, fights for power were also present in England, arguably limiting sovereignty in actual terms. As a theoretical reaction, Hobbes gives shape to what is labelled as absolute sovereignty.[97] Nevertheless, his work also includes limitations on that supposed absoluteness. Like his predecessors he followed the Greek tradition. Like the ancient philosophers, he uses the metaphor of the human body as a representation of the city (or State for the purpose of this research).[98] He gives the idea or notion of sovereignty a key role to play "[…] in which the sovereignty is an artificial soul, as giving life and motion to the whole body […]".[99] Sovereignty is no longer just another element for him. He clearly thinks it is a necessary one in order to have a real State or city. As a body without soul is an inert thing or entity a State without a sovereign is only a group of people together in a certain land without direction or in anarchy. We could include Hobbes together

[93] Hinsley, *op. cit.*, in partic. pp. 120 and ff.
[94] Bodin, *op. cit.*, p. 84.
[95] Hinsley, *op. cit.*, in partic. pp. 122-123; García Gestoso, *op. cit.*, pp. 318-319.
[96] Bodin, *op. cit.*, Book I, Chapter 8.
[97] Hinsley, *op. cit.*, in partic. pp. 141 and ff.
[98] Thomas Hobbes, *Man and Citizen* (Humanities Press, Harvester Press, 1972), p. 188.
[99] Thomas Hobbes, *Leviathan or the Matter, Form and Power of Commonwealth, Ecclesiastical and Civil* (Oxford: Basil Blackwell, 1955), p. 5.

with Locke and Rousseau as a contractualist. However, he implies something further than a contract: a merge of wills.[100] The superman, the Leviathan, has been born. Hobbes characterises a sovereign when defining the commonwealth as:

> "[…] one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all, as he shall think expedient, for their peace and common defence. And he that carries this person, is called sovereign, and said to have sovereign power; and every one besides, his subject […]"[101]

In few words, the people have contracted to obey the sovereign (who can be one person, a few or many) since that situation is better than living in anarchy. Nonetheless, the sovereign has made no promises so he may treat them as he pleases and the population must never go against the sovereign's orders.[102] The sovereign cannot—at least logically—be unjust to the people since he is not breaking any contract and the people agreed to obey him.

Despite the fact that Hobbes' idea of sovereignty appears to be completely absolute, unlimited[103], he makes a deep distinction that arguably goes against that theory: "[f]or it is one thing if I say, I give you the right to command what you will; another, if I say, I will do whatsoever you command."[104] Although it may seem that Hobbes supported the idea of an untouchable government and absolute sovereign he is particularly keen on securing the citizens' wellbeing. In this line of interpretation, Hobbes himself limits what he characterised before as absolute sovereignty when expressly says that:

[100] Hobbes (1955), *op. cit.*, p. 112.
[101] *Ibid*.
[102] *Ibid*., p. 114.
[103] Hobbes (1972), *op. cit.*, pp. 180-181.
[104] *Ibid*., p. 182.

> "[t]he safety of the people is the supreme law. For although they who among men obtain the chiefest dominion, cannot be subject to laws properly so called, that is to say, to the will of men, because to be chief and subject are contradictories; yet is it their duty in all things, as much as possibly they can, to yield obedience unto right reason, which is the natural, moral, and divine law. […] [H]e, who being placed in authority, shall use his power otherwise than to the safety of the people, will act against the reasons of peace, that is to say, against the laws of nature […]"[105]

Further evidence supporting the argument that Hobbes' sovereign was limited is present in the Leviathan when he makes clear the subordination of human law in respect to divine natural law. Moreover, he places the immortal God above the mortal god or the Leviathan (or the sovereign). In his own words:

> "This is more than consent, or concord; it is a real unity of them all, in one and the same person […] as if every man should say to every man, I author and give up my right of governing myself, to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and author all his actions in like manner. This done, the multitude so united in one person, is called a commonwealth, in Latin *civitas*. This is the generation of that great Leviathan, or rather, to speak more reverently, of that mortal god, to which we owe under the immortal God, our peace and defence."[106]

From the previous quotations it is at least questionable how absolute sovereignty is in Hobbes' theory. Indeed, there are here substantive limitations to sovereignty. That is to say, sovereignty for Hobbes seems to be absolute but his theory includes limitations that are not part of the concept itself. Hobbes' idea of absoluteness in sovereignty has to do with beliefs, assumptions, and justifications that are a response to the events of that time and place in history. But the substance of his account does not match the purpose.

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[105] *Ibid*., p. 258.
[106] Hobbes (1955), *op. cit.*, p. 112.

Firstly, for Hobbes the power of the Leviathan is restricted, at least practically, if not absolutely, by rules of natural law. In tune with this, the fact that he recognises a super-empirical authority such as God over the Leviathan adds a constraint that is not part of the concept of sovereignty itself. In other words, that constraint is substantive in effect as it brings moral and religious values in the interpretation of what a sovereign can do. Clearly, Hobbes separates between what he calls a 'mortal god', his Leviathan and the 'immortal God'. In tune with this, the immortal God has a superior position in relation to the Leviathan. It is true that there is no precise account of this immortal God and the extent of his powers in what matters the Leviathan. But, in what is of interest to this thesis, the Leviathan sees its position limited by that of a superior.

Secondly, we have seen that people have contracted to obey the sovereign, the Leviathan, who can be one person, a few or many. There are limitations in two ways here: related to the Leviathan and related to the Leviathan and the citizens. Clearly, the Leviathan can be a parliamentary assembly, an artificial personality, so we would have reciprocal limitations amongst the assembly members, at least of practical nature. More importantly, and in what has to do with citizens' wellbeing, it has been maintained that Hobbes' theory "seems incompatible with his defense of absolute sovereignty."[107] Expressions such as 'safety of the people' that are present in the previous quotations seem at least to make us doubt about how absolute sovereignty is for Hobbes. Debates in relation to this point have existed since Hobbes' time[108] and are contemporarily seen as the Achilles' heel of his theory.[109]

There are others that develop theories of sovereignty. But in different ways from Hobbes, these theorists acknowledge limitations. In due turn, it is Locke who introduces a clearer notion of limited sovereignty.[110] His theory opposes Hobbes'. Locke's notion of the contract between the people and the sovereign implies that

[107] Sharon A. Lloyd and Susanne Sreedhar, "Hobbes's Moral and Political Philosophy", *The Stanford Encyclopedia of Philosophy* (2008), available on http://plato.stanford.edu/entries/hobbes-moral/ accessed 01/05/13.
[108] *Ibid*.
[109] *Ibid*. See also Eleanor Curran, "Can Rights Curb the Hobbesian Sovereign? The Full Right to Self-preservation, Duties of Sovereignty and the Limitations of Hohfeld," *Law and Philosophy* 25 (2006): 243-265; and Eleanor Curran, *Reclaiming the Rights of Hobbesian Subjects* (Hampshire: Palgrave Macmillan, 2007).
[110] Merriam, *op. cit.*, pp. 16-17.

both have made promises and if the sovereign violates them, then the people have a right to remove him, by force if necessary. The main objective of political power is to protect private property [111] (as he mentions several times throughout his Treatises).[112] The aim is also protection of the individuals' part of the society so as to reach a general state of wellbeing. For Locke, as a contractualist, sovereignty rests on the people's shoulders. Hence, the sovereign is a representative of the people's will.[113] So, sovereignty is limited in two ways: by the people's will and by protection of private property.

For Rousseau the particular wills that once existed independently give way to a common will and the State is born. He understands sovereignty as the active result of the union of the persons' wills.[114] Who is the sovereign according to Rousseau? He explicitly gives the answer: the people that form the State [115]. Sovereignty is inalienable because it is essential to the general will and at the same time part of it; the power may be delegated to representatives, but never the will itself. It is indivisible, since the population has to be seen as an organism with one general will; partial wills may be considered as opinions of a group or of certain individuals (e.g. magistrates) but not of the whole, because sovereign implies wholeness. [116] In consequence also for Rousseau the sovereign is a mirrored reflection between represented and representatives, and hence the representatives, though in charge, limit themselves (popular sovereignty).[117] In other words, the collective subject is the real sovereign, but each and every individual subject who is integrated into that collective has a proportional part of sovereignty; so their sovereignty is mutually limited.[118]

The three previously mentioned legal philosophers, namely Hobbes, Locke and Rousseau, understand State sovereignty as focused on the relationship between represented and representative.[119] The interesting fact is that for different reasons,

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[111] Hinsley, *op. cit.*, in partic. p. 149.
[112] John Locke, *Two Treatises of Government* (London: Everyman, 1993).
[113] *Ibid*., p. 191.
[114] G. F. H. Cole, trans., *The Social Contract and Discourses of Jean-Jacques Rousseau* (London: Everyman's Library, J. M. Dent & Sons Ltd., 1988), pp. 192-193.
[115] *Ibid*., p. 194.
[116] *Ibid*., p. 201.
[117] Opello, *op. cit.*, in partic. part. II, Chapter 5.
[118] Cole, *op. cit.*, p. 231.
[119] E. J. Lowe, *Locke* (London and New York: Routledge, Taylor and Francis Group, 2005), pp. 161-163.

they all limit sovereignty within this mutual relationship.[120] Furthermore, their theories are applied between the 17th and 19th centuries with the creation of new national legal orders worldwide with the same result: sovereignty is limited at national level. The era of the Empires gives way to that of the Constitutional Republics with the characteristic of including the idea of separation of powers. E.g. United States of America, Argentina and most of the American countries that achieved their independence adopted a Republican Constitution with separate executive, legislative and judicial powers. There is no longer only one supreme authority; or better, there is one supreme authority divided into three different areas with representatives for each office limiting reciprocally their spheres of influence, without necessarily reciprocally checking their activities. That is to say, it may appear to be one way of limiting sovereignty but in fact we find here two limitations that may work together but do not need to, namely a) the 'separation of powers'; and b) the 'checks and balances system'. As a result, 'separation of power' implies that the sovereign power of a State is divided in different branches and 'checks and balances system' that these different branches can reciprocally check the activities of the other branches in order to keep a balance of power. However, 'division of power' does not necessarily imply the 'checks and balances system'—i.e. the 'checks and balances system' may or may not be part of the legal order of a State even though that State has 'division of power'.

In that same historical period, Kant seems to concede unlimited power to the representatives once they become chosen authorities.[121] At first glance, Kant's conception of internal sovereignty appears to offer an absolute notion.[122] In some passages of his works he even identifies the notion of sovereign with head of State.[123] And that position cannot be shared since if that happened, it would imply a contradiction in itself.[124] But what at first glance may seem absolute in Kant's theory, in fact is not. He includes limits both at national and international level to sovereignty. At national level, his first definitive article in Perpetual Peace clearly

[120] For an extensive analysis of essential differences in the arguments of Hobbes, Locke and Rousseau, see Hinsley, *op. cit.*, pp. 153-154; Van Creveld, *op. cit.*, Chapter 3, pp. 177 and ff.
[121] M. Gregor, trans., *The Metaphysics of Morals of Immanuel Kant* (Cambridge: Cambridge University Press, 1998), pp. 95-96.
[122] Merriam, *op. cit.*, in partic. p. 25.
[123] *Ibid*., pp. 110-111.
[124] H. Reiss, ed., and H. B. Nisbet, trans., *Political Writings of Immanuel Kant* (Cambridge: Cambridge University Press, 2000), pp. 74-75.

highlights the necessity of a republican constitution within a representative system.[125] At the international level, it is essential to create an interstate system and hence, mutual limitations amongst States appear.[126] One extremely interesting point he makes is that he integrates the economic factor as key in the maintenance of a State's sovereignty[127], introducing another limitation to the ones the sovereign power already should have (e.g. non-interference in ecclesiastical organisation, the sovereign being forbidden to do what people are not able to do, prohibition of hereditary nobility).[128] However, and unlike other writers after Hobbes (who think the people have a right to remove the sovereign), for Kant it may be a right only to tell the sovereign to go and not to use force.

For Hegel the State is a rational idea with ethical content.[129] Therefore, he maintains that individuals have the duty to be members of it.[130] Within this theoretical construction, sovereignty appears as an aspect of the State.[131] He then analyses the meaning of the phrase 'sovereignty of the people' and maintains that they (alone) are not the sovereign.[132] From there, he supports the notion that the monarch is the one who gives the 'formless mass' of people the status of a State and sovereignty is presented as 'the personality of the whole'.[133] In other words, and at least in relation to internal affairs, sovereignty for Hegel is an attribute that characterises a State and the relationship between the population and the monarch. The two parties are mutually necessary in order for the State to exist, and so, they are reciprocally limited. In what matters to external sovereignty (or international affairs), each State's sovereignty is limited by that of its peers.[134]

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[125] *Ibid*., pp. 99-102.
[126] M. Gregor, *op. cit.*, p. 114.
[127] H. Reiss, *op. cit.*, p. 95. Kant expressly forbids the contracting of national debts if they may cause friction amongst States.
[128] Merriam, *op. cit.*, in partic. p. 25.
[129] T. M. Knox, trans., *Philosophy of Right of Georg Wilhelm Friedrich Hegel* (Oxford: Clarendon Press, 1967), p. 155.
[130] *Ibid*., p. 156.
[131] *Ibid*., p. 181.
[132] *Ibid*., p. 182.
[133] *Ibid*., pp. 182-183.
[134] *Ibid*., pp. 212-213.

Contemporary Age

With Machiavelli, Bodin, Hobbes, Locke, Kant and others, the transition between the Modern and Contemporary Ages sees a change, with the population being the origin of sovereignty. People choose their representatives in elections (a democratic type of government)[135] and these representatives hold the sovereignty of the respective State. It is a reflective sovereignty since it is not a personal attribute of the representatives as individuals. The population grants that privilege to certain people, delegating their sovereignty (Roman imperium). Then the Church comes back into the game with theories more in tune with that period and as a reaction to—mainly—contractualist visions[136] followed by patrimonial theories[137], rational explanations[138], historical analysis[139] and even utilitarian interpretations.[140]

Amongst new theories of sovereignty in the Contemporary Age, Schmitt offers a very particular insight. He accepts (as his predecessors) sovereignty as the highest power.[141] After reviewing historical conceptions of sovereignty, he concludes that it can be characterised as the power to make a certain kind of exception[142], and the sovereign is that one able to decide upon it.[143] In brief, the legal order is valid under conditions of normal circumstances in a society. But, if for whatever reason the situation turns out to be abnormal, the legal order may be suspended (hence the suspension of the legal order is exceptional). So, the one who is able to suspend the legal order—to decide upon the exception—is the sovereign, for Schmitt.

The basis on which to define the State, for Schmitt, is a certain homogeneity, which is given by dividing people into friends and enemy.[144] What defines a population as a State is then the fact that the individuals that give it shape have cohesion—friends—and are different from others—enemies. This idea characterises the relations of exclusion and, in the extreme case (war) the sovereign is the one

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[135] Technically, it is 'partial democracy' because universal adult voting is not the rule in early Contemporary Age.
[136] Merriam, *op. cit.*, Chapter Three.
[137] *Ibid*., Chapter Four
[138] *Ibid*., Chapter Five.
[139] *Ibid*., Chapter Six.
[140] *Ibid*., Chapter Eight.
[141] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (The MIT Press, 1985), in partic. pp. 6 and 17.
[142] *Ibid*., p. 5.
[143] Hidemi Suganami, "Understanding Sovereignty Through Kelsen/Schmitt," *Review of International Studies* 33 (2007): 511-530.
[144] Schmitt, *op. cit.*, Introduction.

deciding who the enemy is. In contrast, a population that decides not to defend itself, surrendering to another power, loses its sovereignty. Therefore, it is fundamental for Schmitt that a population maintains any power that is given to the sovereign. The concord between people and sovereign—or their obedience—is a must for a sovereign to remain as such. The fact that this population maintains its independence from others—the enemy—grants their sovereignty. The fact that an individual or group of individuals decide on who that enemy is grants them the character of sovereign. Hence, and in what is specific to this historical review, sovereignty is both defined and limited in Schmitt by: a) internally, the relationship between the population and the sovereign; b) externally, the determination of friends and enemies.

Kelsen mentions on several occasions the term 'absolute sovereignty'[145] referring to the highest law within a territory. In that sense Kelsen is a clear example of how legal scholars often, by defining State through one of its elements (law), maintain that sovereignty is absolute. It is for that reason that it is useful for the purpose of this Chapter to show how his works actually include limitations to sovereignty both at national and international level.

In terms of national order, for Kelsen State and law inter-define each other: the State "is the personification of a legal order"[146] and "the legal order is a system of norms."[147] Without entering into a discussion about the nature of these norms, their validity or effectiveness, whether they should be seen as dynamic or static, it is enough here to say they are legal norms, they are the law. In other words, the State is the national legal order; hence, the sovereign for Kelsen is not the people or their representatives (since they are not the State) but the law. Law does not limit the sovereign's powers but is the actual sovereign. So, as purely theoretical argument, to say the State creates obligations and duties for the sovereign would mean that the legal order creates obligations and duties for the legal order, and that is a tautology.[148]

[145] Kelsen (1992), *op. cit.*, in partic. pp. 100, 116 and 121; Kelsen (1945), *op. cit.*, pp. 383 and ff.; Kelsen (1952), *op. cit.*, pp. 108 and ff. and 438-447; Hans Kelsen, *Essays in Legal and Moral Philosophy* (D. Reidel Publishing Company, 1973), Chapter V, in partic. pp. 107-109.
[146] Kelsen (1945), *op. cit.*, p. 197.
[147] *Ibid*., p. 110.
[148] *Ibid*., pp. 197-200.

The key point, to untangle the role sovereignty plays in relation to law and to see the limitations on sovereign power in Kelsen's theory, is directly linked to the way he perceives the national and international legal orders. The difference between national and international law is the degree of centralisation in regard to the application and creation of law.[149] The State is a legal order that is centralised, with designated authorities to create and apply law; in contrast, international law lacks central authorities for the creation and application of law in respect to all international legal subjects. When Kelsen analyses the relationship between national and international law, he understands that the idea of unlimited sovereignty is incompatible with it. In a classical Kelsenian interpretation, sovereignty is one of the characteristics of the national legal orders. According to Kelsen, national and international law could be related in three different ways:[150]

a) Correlation
b) The subordination of national law to international law
c) The subordination of international law to national law

In the first scenario, the fact that both systems of norms have to be correlated would imply the existence of a third group of norms that at least stipulates the way the two previous ones should interrelate with each other. For that same reason, Kelsen decides to leave it aside since there are already two entities on which to focus, adding a new one could only result in enlarging the picture without solving the issue.

The two cases of subordination introduce interesting and different results in relation to sovereignty, depending on which is observed, but they offer the same consequence: a concept of limited sovereignty. Even if we had a strong and a weak version of interpretation in each case, the consequence would not essentially vary. On the one hand, if we assume the subordination of international law to national law: sovereignty has a starring role. The States are legally independent and totally autonomous in respect to their peers. But the principle of recognition applies. No State is considered as such if its peers do not understand this. If we decided to take this view to its logical conclusion one and only one State would be sovereign.[151] The

[149] *Ibid*., p. 325.
[150] For an extensive view see Kelsen (1992), *op. cit.*, Chapter IX, in partic. pp. 112 *in fine* and 113 *supra*.
[151] Kelsen (1945), *op. cit.*, p. 385.

others would be States in relation to the first one if and only if that first State recognised them and kept that recognition over time. On the other hand, if we assume the subordination of national law to international law, this would imply that sovereignty lacks importance (at least, it would not be absolute).[152] The international legal order would be seen as a set of binding norms no State could avoid. Legal equality would be the background and the principle of effectiveness would determine statehood.[153] In what is important to this thesis, both Kelsenian interpretations in regard to the relationship between the national legal order (the State) and the international legal order have the same consequences in relation to sovereignty: it is a limited concept. In the case of superiority of national law, only one State would be considered sovereign (hence all other States would have—at best—limited sovereignty); in the case of the superiority of international law, State sovereignty would always be limited by international binding law.

Current views on legal and political sovereignty

From the previous sections it is unquestionable that sovereignty is complex both conceptually and in substance. There are indeed two realms intertwined in all these views: politics and law; that is to say sovereignty as competence or ability to take decisions and sovereignty as law-making power. In the following, I will focus the attention on two contemporary authors that deal with sovereignty. I have to remind the reader this thesis is about shared sovereignty, and not about sovereignty *per se*. Therefore, the selection of these scholars follows strict criteria: a) pre-eminence either in law or politics as sciences; b) expertise in what has to do with sovereignty in their respective fields. In other words, both of them are leading figures in their field, legal and political sciences respectively, and in particular, in what matters to sovereignty. In addition to this, both of them acknowledge the fact that sovereignty has legal and political facets. And in what is crucial to this thesis, both of them see sovereignty as limited.

[152] Kelsen (1992), *op. cit.*, p. 121.
[153] Kelsen (1952), *op. cit.*, pp. 155-157.

Although being primarily a legal scholar, MacCormick sees sovereignty as both a legal and political concept.[154] In order to define it from a legal point of view, he borrows Dicey's idea that sovereignty simply refers to the power of law-making unrestricted by any legal limit.[155] In what matters to political sovereignty, MacCormick maintains that it "is interpersonal power over the conditions of life in a human community or society."[156] Additionally, he says that "[political sovereignty] is the ability to take effective decisions on whatever concerns the common well-being of the members, and on whatever affects the distribution of the economic resources […]".[157] In tune with these two characterisations he maintains that there is a certain relationship between them. He argues that "law is then dependent on political sovereignty"[158] in the sense that whoever holds the power in a given territory is the one that will issue commands to the population.

MacCormick goes some way towards making clear some notions we have already covered in this Chapter—e.g. internal and external sovereignty, popular sovereignty, and so on. In what is important to this thesis, and *brevitatis causa* as we already reviewed these points in previous sections, he argues against classical authors who thought the coexistence of rival supreme powers in a single legal or political order a contradiction in terms.[159] Although MacCormick does not develop this point to a great extent, he points out limitations to both internal and external sovereignty. For instance, he mentions reciprocal checks and controls internally amongst organs of the State and the existence of other States in international relations.

In what he calls "beyond the sovereign State"[160] he specifically maintains that "[S]tates are no longer fully sovereign [S]tates externally, nor can any of their internal organs be considered to enjoy present internal sovereignty under law; nor

[154] MacCormick (1999), *op. cit.*, p. 127.
[155] *Ibid.* In particular, see A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (Indianapolis: Liberty Fund, 1982), p. 27.
[156] MacCormick (1999), *op. cit.*, p. 127.
[157] *Ibid*.
[158] *Ibid*, p. 128.
[159] *Ibid*., p. 129.
[160] *Ibid*., p. 131. See also MacCormick (1993), *op. cit.*

have they any unimpaired political sovereignty."[161] However, that is different from thinking of sovereignty as lost. [162]

A similar view is presented by Krasner in political science. In tune with this he maintains that "[s]overeignty was never quite as vibrant as many contemporary observers suggest. The conventional norms of sovereignty have always been challenged".[163] The following quotation illustrates how Krasner defines sovereignty through States:

> "Sovereign [S]tates are the building blocks, the basic actors, for the modern state system. Sovereign states are territorial units with juridical independence; they are not formally subject to some external authority. Sovereign [S]tates have also *de facto* autonomy. […] An implication of *de facto* autonomy is the admonition that [S]tates should not intervene in each other's internal affairs. Sovereign [S]tates are also generally assumed to have some reasonable degree of control over both their borders and their territory."[164]

With this paragraph we can already see some of the elements that are familiar to any characterisation of sovereignty. From a conceptual point of view, he recognises four uses[165] of the term 'sovereignty':

a) Domestic sovereignty: referring to the organisation of public authority within a State and the level of effective control exercised by those holding authority.
b) Interdependence sovereignty: referring to the ability of public authorities to control trans-border movements.
c) International legal sovereignty: referring to the recognition of States or other entities.
d) Westphalian sovereignty: referring to the exclusion of external actors from domestic authority configurations.

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[161] MacCormick (1999), *op. cit.*, p. 132.
[162] *Ibid*., p. 132 *in fine*
[163] Stephen D. Krasner, "Sovereignty, Think Again," *Foreign Policy*, January/February (2001).
[164] Stephen D. Krasner, "Abiding Sovereignty," *International Political Science Review* 3 (2001): 229-251.
[165] Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (New Jersey, Princeton: Princeton University Press, 1999).

As with MacCormick, we can see that Krasner also acknowledges sovereignty as both a legal and political phenomenon. And like the legal scholar, he refers as well to some criteria we have already covered in this Chapter, which *brevitatis causa* it will not be reviewed here again.

In principle, it may seem that Krasner concedes that sovereignty is losing its preeminent place in the legal and political arenas. He specifically says that "[t]he polities of many weaker [S]tates have been persistently penetrated, and stronger nations have not been immune to external influence."[166] Nevertheless, while this may appear at first to be a concession it is not. That is because he is insightful in noticing that the challenges sovereignty has to cope with nowadays have been somehow always present. And that is indeed what our historical account has shown as well to a greater extent. In tune with this he points out that:

> "Many recent observers have argued that the sovereign-state system is now under unprecedented stress because of two developments: globalization and changing international norms with respect to human rights. […] States, however, have always operated in an interdependent international environment."[167]

Both weak and strong States' sovereignties are continuously penetrated.[168] Krasner mentions several examples that make this very clear: capital market integration, international migration rates, international trade increase, AIDS, MTV, human rights norms, etc. I include below two of his remarks in relation to this point that are indeed self-evident yet illuminating:

> "States have always struggled to control the cross-border flow of ideas, goods, and people."[169]

[166] Krasner, "Sovereignty…" (2001), *op. cit.*
[167] Krasner, "Abiding…" (2001), *op. cit.*
[168] Krasner, "Sovereignty…" (2001), *op. cit.*
[169] Krasner, "Abiding…" (2001), *op. cit.*

> "States could never isolate themselves from external environment. Globalization and intrusive international norms are not new phenomena. Some aspects of the contemporary environment are unique […]. These developments do challenge [S]tate control. […] Sovereignty's resilience is, if nothing else, a reflection of its tolerance for alternatives."[170]

As we can see, both MacCormick and Krasner offer their view with regard to sovereignty. They both follow the traditional idea of a form of authority: supreme authority. Additionally, they recognise sovereignty's two facets. Indeed, they refer to political and legal sovereignty as complex phenomena. And in what is crucial to this thesis, they highlight conceptual limitations and substantive ones too, all of which we have covered in the previous sections.

Conclusion

This Chapter examined the concept of 'sovereignty' and has shown that it is a limited one. In order to show the limitations in sovereignty we followed mainly two lines of analysis: a) conceptual; and b) historical. Firstly, we considered the concept of 'sovereignty' and some of its conceptual issues—i.e. in particular, the ones that have to do with the nature of this thesis. Secondly, we identified some theories or bodies of literature throughout history that showed how sovereignty has always had in one way or another limitations.

God, the Church, the King, the nobles, an Emperor, the people, the law, the State itself have all been considered sovereign at some point in history. Although most (if not all) of the theories that supported the idea of sovereignty have tried to show an unrestricted, unlimited, absolute concept, which is still with us, both in practice and theory sovereignty has always been restricted. And that is the main point of this review: to illustrate how a notion or a concept that has been regarded as absolute has always had theoretical and empirical limitations (at least for Western thinkers and societies). On the one hand, the limitations in practice appear at all times, either to avoid rebellion or by the actual acceptance or moral and legal limitations. On the other hand, all theories either present sovereignty as limited

[170] *Ibid*.

(Locke, Kant, Rawls, Nozick), or although they intend to introduce an unlimited sovereignty, they fail because they in fact accept limitations (Bodin, Hobbes). Modern accounts of the notion only recognise and repeat in what appear to be more elaborated theories what classical thinkers already said.

In political and legal science there are few concepts more basic and at the same time more important than State sovereignty. This thesis does not intend to reinvent the concept of sovereignty. On the contrary, it aims to make use of the concept as it has been always regarded: supreme authority. Nevertheless, this Chapter has shown that in all reviewed Ages and places sovereignty supposedly understood as an absolute concept has been limited in practice—and even in the concept—and it has been held that it should be limited. Moreover, for most people it has been seen as limited *de jure* as well as *de facto*. Therefore, sovereignty has three kinds of restrictions: conceptual; *de facto* constraints on power; and legal limitations—both by internal and international law, which in the latter although they seem to be modern realities and have increased in importance were already recognised by the Romans with their *ius gentium* coexistent with *ius civile* and *ius naturale*.

Part Two

Chapter Three

What should 'shared sovereignty' mean?

Introduction

If no sovereignty is absolute, all sovereignty is limited to an extent. We have seen in Chapter Two that one of the ways in which sovereignty is limited is the fact that it can be shared (e.g. representatives and represented, the King and the Church, etc.). However, how can sovereignty be shared when dealing with States? Unfortunately, there is no single answer but there are various ways in which sovereignty can be shared. That is to say, there are various conceptions of 'shared sovereignty'. Amongst all the conceptions of 'shared sovereignty', there is one that we can use to solve sovereignty conflicts—that is not out there yet and it is the one I intend to propose. In this Chapter I discuss a possible way of characterising 'shared sovereignty' in order to address some sovereignty conflicts.

Many scholars in legal and political theory and international relations use the expression 'shared sovereignty' and similar terminology to refer to various different realities. It is mainly for this reason, and in order to avoid unnecessary confusion, that I will make clear these different conceptions by giving each of them a specific name. The list may not be exhaustive and it does not need to be. This is because the aim is solely to illustrate the actual vast use of terms that at first glance appear appropriate in discussing international conflicts. I will then argue against these previous views so as to define negatively the features that should denote 'shared sovereignty'. As a result, this will lead to characterising the problems that a reconceived conception should address if we want both a just and possible solution for sovereignty conflicts.

Previous uses of the terminology

I will name the first conception we are going to discuss as 'neo-colonial shared sovereignty'. Advocates of this position apply the label 'shared sovereignty'

to situations in which there is one sovereign State (usually a weak one)[171] and an international organisation or another State 'helping' it in one way or another. In this case, they define it as follows:

> "[s]hared-sovereignty entities are created by a voluntary agreement between recognised national political authorities and an external actor such as another state or a regional or international organization". Moreover, "[s]uch arrangements can be limited to specific issues areas like monetary policy or the management of oil revenues."[172]

A few characteristics are immediately obvious in the above quotation: firstly, it is a voluntary actual agreement; secondly, not all the parties need to be sovereign States (they can be recognised national political authorities, regional or international organisations); thirdly, it can be limited to specific areas (the examples given are related to economy and finance).[173] Some authors assert that weak states could observe this proposal as a solution to their problems since—they maintain—"[l]eft to their own devices, collapsed and badly governed states will not fix themselves because they have limited administrative capacity, not least with regard to maintaining internal security."[174] Therefore, international organisations or strong States would be supporting the development in certain areas of States that for whatever cause were considered weak.

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[171] For a view of weak, collapsed or pseudo-States see Tanja E. Aalberts, "The Sovereignty Game States Play: (quasi-)States in the International Order," *International Journal for the semiotics of law* 17 (2004): 245-257; Stephen D. Krasner and Carlos Pascual, "Addressing State Failure," *Foreign Affairs* 84 (2005): 153-163; Paul Collier, "The Political Economy of State Failure," *Oxford Review of economic policy* 25 (2009): 219-240; and many others.

[172] Stephen D. Krasner, "The Case of Shared Sovereignty," *Journal of democracy* 16 (2005): 69-83. In particular incorporating the idea of 'shared sovereignty' as characterised by Krasner see Richard Caplan, "From Collapsing States to Neo-trusteeship: the Limits to Solving the Problem of 'Precarious Statehood' in the 21st Century," *Third World Quarterly* 28 (2007): 231-244; Brennan M. Kraxberger, "Failed States: Temporary Obstacles to Democratic Diffusion or Fundamental Holes in the World Political Map?," *Third World Quarterly* 28 (2007): 1055-1071.

[173] Analysis in respect to applications of this way of interpreting shared sovereignty can be seen in Hadii Mamudu and Donley T. Studlar, "Multilevel Governance and Shared Sovereignty: European Union, Member States, and the FCTC," *Governance: An International Journal of Policy, Administration, and Institutions* 22 (2009): 73-97; Kari A. Hartwig and others, "AIDS and 'Shared Sovereignty' in Tanzania from 1987 to 2000: a Case Study," *Social Science and Medicine* 60 (2005): 1613-1624.

[174] Stephen D. Krasner, "Sharing Sovereignty, New Institutions for Collapsed and Failing States," *International Security* 29 (2004): 85-120.

There are two main reasons why 'neo-colonial shared sovereignty' is not of use in this thesis. The first concerns its constitutive elements, since it is applicable to realities that assume two agents: a weak one (a State) and a strong one (another State or an international organisation). This thesis, however, deals with a conflict between two already sovereign States in relation to a populated third territory—i.e. it assumes three agents. Secondly, the implications of defining in such a fashion 'shared sovereignty' do not agree with a just and fair way of dealing with sovereignty conflicts. Whilst this account of 'shared sovereignty' is theoretically intended to assist weak States and hence may be considered useful—even fair—at first glance, it is both too narrow and too ample. Too narrow in the sense that the weak State sees its actions being dictated by external authorities without much internal input; too ample since the strong agent has the prerogative to be involved in affairs of the weak one without control other than its own good will. For although this model involves already 'recognised national political authorities', these scholars presuppose that collapsed or badly governed communities (weak States) cannot dictate for themselves proper policies and create efficient institutions to achieve a sustainable development. So the way to fix these realities—they propose—is to let the strong States be involved in the internal affairs of the weak ones. Yet, instead of presenting shared sovereignty this appears to be a means to dictate to another supposedly sovereign State how to proceed under certain circumstances. Furthermore, what is clear is the fact that both sovereign States—the weak and the strong one—would not have the same level of authority: the strong sovereign State would be determining the advisable actions to be followed by the weak 'sovereign' State. In other words, the 'neo-colonial shared sovereignty' is uni-directional and unequal (only one of the involved States is the real sovereign, maybe not *de jure* but, at least, *de facto*) resulting in one agent dictating the other's internal policies.

Those who are in favour of 'shared sovereignty'—so defined—maintain that humanitarian reasons support this form of international aid. Violation of human rights, natural disasters and weak economies are only examples of many actual circumstances that make the internal situation of some sovereign States highly volatile. Nevertheless, behind this aura of humanitarian aid strong States would be interfering in the internal affairs of their weak peers. In that sense other scholars have claimed that "[t]he idea of 'shared sovereignty' is a novel attempt to formulate a

foreign policy of creative intervention by strong states in weak target states."[175] By applying the 'shared sovereignty' label in this way, both States seem to be equally sovereign with one of them—the strong one—assisting the other one by being involved in its internal affairs. But although it may seem at first glance that they are equal sovereign powers, they are only equal in terms of their *de jure* sovereignty; *de facto*, one of the States is determining, or advising, or forcing, or instructing, the other State's way of addressing its internal issues. From that angle, these States are not sharing sovereignty; in fact, only one of them is the ultimate authority in regard to certain issues which are actually supposed to be in the sovereign sphere of the other one. Indeed, the 'sharing' may be, or become, involuntary.

Other authors also argue against this way of understanding 'shared sovereignty' when it is applied to particular actual cases. When referring to this approach they maintain that "[…] shared sovereignty represents a softer version of (neo-colonial) international and transitional administration […]."[176] Leaving aside the discussion about the specificities related to particular cases, the common thread is that in all instances the local governments follow policies created by authorities not part of their legal system (other sovereign States and/or regional and international organisations). Consequently, to understand 'shared sovereignty' as a way in which a strong State 'assists' a weak peer does not seem to agree with the nature of the concept itself. The whole theory has been developed so as to justify what may result in a violation of State sovereignty. In fact, to give the strong States a new legal and political device such as this way of understanding 'shared sovereignty' means simply to justify their international neo-colonial policies in relation to weaker States. Moreover, it is incompatible even with recent modified classifications of types of sovereignty.[177]

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[175] *Ibid*.

[176] Oliver P. Richmond, "Shared Sovereignty and the Politics of Peace: Evaluating the EU's 'Catalytic' Framework in the Eastern Mediterranean," *International Affairs* 82 (2005): 149-176. For another critic of Krasner's notion of shared sovereignty see Tod Moore, "Violations of Sovereignty and Regime Engineering: a Critique of the State Theory of Stephen Krasner," *Australian Journal of Political Science* 44 (2009): 497-511.

[177] Stephen D. Krasner, *Power, the State and Sovereignty, Essays on International Relations* (Routledge, 2009). Originally, Krasner sees four different conceptions of sovereignty: a) Domestic sovereignty: referring to the organisation of public authority within a State and the level of effective control exercised by those holding authority; b) Interdependence sovereignty: referring to the ability of public authorities to control transborder movements; c) International legal sovereignty: referring to the mutual recognition by States; d) Westphalian sovereignty: referring to the exclusion of external agents from domestic authority. Refer to Krasner (1999), *op. cit*.

This project—on the contrary—aims to offer all the involved agents an equal footing[178] at the outset, so as to reach a final agreement just and fair in its contents as well as in its application. For this reason, the model proposed here is based on a voluntary hypothetical agreement amongst the agents who take part in a sovereignty conflict and therefore it would be unreasonable for any party to reject its outcome. Thus, the agreement is only amongst already sovereign States with the inclusion of a non-sovereign agent such as the population of the third territory (no international organisation has any participation). Additionally, there will not be any distinction between strong and weak agents in the decision making process—i.e. no criterion will be used in order to differentiate in any way the participant agents in that respect as I will assume their representatives will be free and equal, following Rawls' method as we will see in Chapter Six. Finally, the arrangements are not limited to certain areas but they include all activities related to the third territory (not only territory, but also population and government and all that each of them involves).

A particularly interesting application of the term 'shared sovereignty' is the case of divided societies (e.g. Northern Ireland with two clearly defined sectors, that of the nationalists, mainly Roman Catholics, and that of the unionists, mainly Protestants). I will refer to this view as the 'cultural shared sovereignty'. This model "[…] is meant to apply when two ethnic or nationality groups live in the same territory or province, but neither wants to belong to a state dominated by the other."[179] Thus, it contemplates the existence of two communities within a single State (or in the case of Northern Ireland, in a single sub-State) who deal with their divisions by sharing in the exercise of political authority. Additionally, it gives a hint of how to deal with power-sharing institutions by including sharing groups and differentiating them between compulsory and voluntary.

On the positive side, the institutional scheme of the 'cultural shared sovereignty' offers all the claimants certain degree of participation. It is not easy to imagine how the institutions would work in practice but, in principle, and at least in

[178] By 'equal footing' is meant that all the participants in the model either will have equal rights and obligations before reaching the final agreement and once the agreement is in place; or that they may have different rights and obligations to which they equally agree and which are equally respected. The characterisation of the equal rights and obligations will be analysed in due course in this thesis –in particular in Chapters Six and Seven.

[179] Anthony Oberschall, "Preventing Genocide," *Contemporary Sociology* 29 (2000): 1-13.

theory, it seems a potentially just and fair solution. In spite of this, the model is constructed on the basis of a particular context that, although seemingly ideal as a whole, assumes a divided society that takes into account two populations with different ethnic or national elements that result in mutual exclusion. So, despite initial amplitude, 'cultural shared sovereignty' leaves aside cases of contested sovereignty over territories with other realities—e.g. a homogeneous population living in a geographically separated territory that does not want to integrate into a certain sovereign State.

The model developed in this thesis differs in actual and ideal terms. In actual terms, there are not two but three groups of people living in different territories. More specifically, there is a 'third party' at issue: the population of the third territory. In that sense, we may see not just two interests in conflict but three, that of each of the two sovereign States and that of the population of the third territory, which may be opposed to each other—e.g. the population of the third territory aiming for independence whereas the two sovereign States aim for incorporation. In ideal terms, this thesis leaves aside factual circumstances so as to offer a really equal starting point since it assumes diversity in each of the competing populations—e.g. ethnic background, religion, language. Even more, it leaves aside the historical arguments in relation to sovereignty the claimants often introduce in sovereignty conflicts so as to avoid endless discussion—i.e. how to agree what historical account is accurate or what principle of distribution is fair depending on considering the territory in question *res nullius* or *res communis*. Then, the conditions in which the characteristics of shared sovereignty will be agreed are guaranteed to be fair and just, with no reference to special features of any kind.

A further conception is more related to human rights and it has also been labelled as 'shared sovereignty'. I will, though, call it 'moral shared sovereignty'. Some scholars maintain that human rights, in particular those concerned with minorities, affect the concept of sovereignty. From there, they try to apply the notion of shared sovereignty in order to secure the respect for an individual as a unique human being—and all that this implies. The following quotation illustrates the point:

> "[…] minority demands have become driving forces in the process of the changing of the international framework of relations and law, because the concept of sovereignty and the notions of minorities are […] interrelated and intertwined. […] Minority demands for a change of their status, therefore, automatically means an infringement of the notion of sovereignty."[180]

This statement contains a strong claim: minorities must have right against the majority, and therefore there are some principles that the majority cannot override. Nonetheless, even if we accept that postulate, this does not necessarily mean that the State as a whole is not still sovereign. That is because although this position highlights the importance of minorities within the State, it does not add anything new. Societies are all constituted by minorities. In fact, from an extreme point of view, we all belong to different minorities. Communities are formed by the aggregation, for different reasons, of smaller societal groups, such as families. These small societal cells must have a certain level of concord among them and respect for the established authorities in order for a society to be achieved and developed (in legal theory, to have effectiveness or efficacy).[181] The normative system is only one of the elements that is added to the whole picture as a frame of rules to determine ways of behaving as a member of a social organisation. However, the key in this kind of interpretation is not the legal system but the population itself: the individuals that form the population of a given sovereign State owe each other reciprocal respect, no matter whether they are part of the majority or a minority; from there, individuals of different sovereign States and sovereign States themselves also owe each other reciprocal respect.

It is at this point in the argument that this line of thinking includes the notion of 'shared sovereignty' when affirming that "[t]he overarching idea of respect for human dignity, and its practical implications of ensuring security, identity, and a continuous and sustainable development of the individual human being in relation to the new social function of the State, forms the basis for a notion of shared

[180] Wolf Mannens, "Minority Claims and State Authority" in *State, Sovereignty, and International Governance,* ed. Gerard Kreijen (Oxford: Oxford University Press, 2002), p.157.
[181] The concepts 'validity' and 'effectiveness' are used in the present piece of writing with a Kelsenian meaning. Refer to Hans Kelsen's *General Theory of Law and State* and *Introduction to the Problems of Legal Theory*, *op. cit.*

sovereignty."[182] Once again, another well-known set of principles that could be labelled as 'human rights' are included in the legal theory. The only divergence is that in this case the author identifies 'shared sovereignty' with the attitude the global community should have in order to live in a peaceful environment.

Despite the fact that the final intention of this interpretation is worthy, the term 'shared sovereignty' defined in this manner has a meaning not suitable for the kind of conflicts approached here. This concept implies a form of shared responsibility between individuals, a State as a societal organisation, and mankind as component of a global community, which requires everyone to respect and defend human rights (in particular the rights of the people belonging to minorities—without giving a clear definition). In plain terms this conceptualisation means a universally shared moral responsibility that involves respect for diversity and aims at a global concord under the protection of human rights (quite similar indeed to Kantian principles). Although this is a desirable way to see international relations, it is not broad enough to offer a solution to sovereignty conflicts for two reasons: a) sovereignty conflicts are not only a question of human rights; b) some sovereignty conflicts may in fact leave aside the question about human rights—e.g. when the competing parties are dictatorships.

'Shared sovereignty' in the model proposed in this thesis also includes protecting the claimed rights of the competing populations, and in particular those of a minority—i.e. the population of the third territory. But, it is not limited to human rights. It aims to take into consideration the interests of all the involved agents and to offer a way of acknowledging their claimed rights. To be more precise, it is taken for granted that all of them have a right to claim sovereignty over the third territory. That is different, however, from saying that they have sovereign rights. As the evaluation of their claims and the extent of their respective sovereign rights—if granted—over the third territory will be discussed amongst the agents in the negotiations held to that effect under particular circumstances—their representatives will be free and equal, the agreement reached will have a more robust permanent feature since it would be unreasonable to reject it.[183]

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[182] Wolf, *op. cit.*, p.159.

[183] For the difference between principles 'which no one could reasonably reject' and principles 'which everyone could reasonably accept' see T.M. Scanlon, "Contractualism and Utilitarianism," in

Another concept that appears to be similar at first glance to 'shared sovereignty' is 'dual sovereignty'.[184] This concept is present in the literature of the United States of America. It refers to the phenomenon of having both local and national authorities and legal orders and to the way they interact with each other. But this concept is not appropriate for this thesis. Despite the fact the states (or provinces in other countries) reserve certain prerogatives in some instances (e.g. natural resources, local administration, regional services) the ultimate authority remains in the central government (President, Congress and Supreme Court) for some other issues (e.g. to declare war, to hear extraordinary appeals). Consequently, there are not two equal sovereigns but always one real ultimate authority, though which it is depends on the issue. For instance, the state or province may have ultimate authority over its natural resources and the central government may have ultimate authority over citizenship. In both cases, if another sovereign State wanted to achieve an international agreement about natural resources it would have to deal with the representatives of the states or provinces; if only citizenship issues were involved, the State's central government would be playing the main role. In neither of the cases would the decision be a joint one. It may be objected that the state or province could use its power over natural resources to force the federal government to do what it wants on immigration—or vice versa; however, if that happened it would only prove that there is one and only one sovereign in regard to the issues in federal organisations—either the states or the central government. So, if any of them wanted something to be done in relation to an issue out of the scope of their sovereign powers, they would need the actual sovereign in regard to that specific issue to act upon it.

This seems only a semantic issue related to the meaning of concepts rather than what the legal institutions imply. Thus, even if it was accepted that this type of sovereignty was dual, it would only be dual internally—at national or municipal law level. The duality might be between two parts of the same national legal system: state

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Utilitarianism and Beyond, ed. Amartya Sen and Bernard Williams (Cambridge: Cambridge University Press; Paris: Editions de la Maison des Sciences de l'Homme, 1982).

[184] Richard E. Levy, *The Power to Legislate: A Reference Guide to the United States Constitution* (Greenwood Press, 2006), pp. 35-38; John J. Parker, "Dual Sovereignty and the Federal Courts," *Northwestern University Law Review* 51 (1956): 407-423; and many others.

or province law and federal law. In contrast, this thesis focuses on the relation between two national and independent legal systems as a whole in what matters specifically to law. Thus, it contemplates many other elements that characterise the sovereign States involved and the populated third territory.

A different combination of terms that could also mislead the interpreter is the expression 'bi-polar sovereignty'.[185] Although it does refer to sovereignty it is in relation to the division of powers, the sovereignty a State has between its legislative and judicial powers. For this research, such analysis is not relevant, because it is only concerned with the sovereignty of only one given State—internal sovereignty. There is no sovereignty conflict in the sense of an international issue but only in adjudication of domestic or national law. This thesis, on the contrary, is focused on an external conception in the sense that outside parties are always involved.

The meaning of 'shared sovereignty' in this thesis

Having explained what 'shared sovereignty' as I am using the term is not, it is now time to focus on what a reconceived conception should learn from the previous section. It is clear now that 'shared sovereignty' does not mean the decision of only one of the agents—uni-lateral—or imply an unbalanced situation between them or unequal sharing—only one agent is *de jure* and *de facto* sovereign.

It is the centre of the model under analysis that provides the answer: the third territory. Contrary to what is required in other sovereignty conflicts, the model of shared sovereignty proposed here has to deal with a territory that does not have sovereignty over itself, but with two already sovereign States arguing over their claimed rights. So, their sovereignty over their respective spheres of influence is not discussed in any way; only their claimed rights over the non-sovereign territory. Ergo, the agents will have to take one of two options: exclusive or shared rights over the territory. And following the latter option, if they decide to share their claimed rights over the third territory, then all of the agents will have a portion or share of its sovereignty.

[185] C.J.S. Knight, "Striking Down Legislation Under Bi-polar Sovereignty," *Public Law* (2011): 90-114; C.J.S. Knight, "Bi-polar Sovereignty Restated," *Cambridge Law Journal* 68 (2009): 361-387; Richard Mullender, "A State of Distress? The Judiciary, the Executive, and the Constitution," *Bracton Law Journal* 28 (1996): 7-26.

In the remainder of this Chapter I will highlight the criteria that the conception of 'shared sovereignty' should fulfil in order to provide a plausible solution to sovereignty conflicts. These criteria are based on the weak points that we have seen other conceptions of 'shared sovereignty' present, and are to be used to solve them. I will discuss the content of the model later in this thesis when we see in particular how the agents would operate should they go into negotiations.[186]

First, the model should guarantee that both claiming sovereign States do genuinely share their rights and obligations over the third territory, and that they do so on an equal footing. This postulate can either mean that all the agents will have both at the onset and once the agreement is reached equal rights and obligations—in relation to the third territory—or that although they may have different rights and obligations in either or both cases—the starting point and the reached agreement—they equally and freely agree upon them and are willing to respect the final decision. This indicates that the agreement must not be merely actually but hypothetically voluntary too—so that all the parties not only do agree but also they would agree if they were free and equal agents, even if in fact they are not.

Secondly, the model should respect the classical non-intervention [187] approach related to sovereignty. In fact, the notion of sovereignty as supreme authority remains unfettered—although sovereignty is not absolute, as we have seen in Chapter Two. Yet, the sovereign States will accept limitations in respect to their sovereignty over the third territory so as to let the other agents also secure their interests. That is to say, no State would be interfering with the internal affairs of its peers in the conflict or of the population of the third territory—unless expressly agreed in the hypothetical negotiations that will define the content of the shared sovereignty model. In order to attain that goal, the aim is to develop the idea that

[186] I refer here to the hypothetical negotiations the agents would have and that are developed in Chapter Six.

[187] It refers to the non-intervention principle in international public law. In brief, a State should not interfere in any way in the internal affairs of any other sovereign State. See UN Charter, art. 2.7: "Nothing contained in the present Charter shall author the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." Also stated in the UN General Assembly Resolution 2625 (XXV): "(a) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations" and "(c) The duty not to intervene in matters within the domestic jurisdiction of any State […]"

through a convention States could agree to share their authority and control over a territory and its population on equal terms[188], without this involving any kind of interference in their respective spheres of sovereignty.

Third, it should be assumed that sovereign States are internationally equal.[189] Without going into detail about the meaning of this expression, scholarly legal and political literature commonly understands that sovereign States have the same rights and obligations at international level. There are a few exceptions such as the ones created by bi- or multi-lateral agreements and States' particular factual circumstances (e.g. littoral versus inland States).[190] For the purpose of this thesis equality has a double meaning: first, what we define as 'equal footing', in the sense that the third territory, as the 'object' to be distributed, grants to the sovereign States involved equal rights to claim a share of the sovereignty over that piece of land (and all that this entails in terms of population and government). However, that does not mean that they will be granted a share of the sovereignty by default or, in the case the sovereign States were granted a shared of sovereignty, that the shares will be exactly equal—the meaning of this equality and the content of the shares is analysed elsewhere in this thesis. Second, the sovereign States will be considered as equal in their mutual relations both because of international customary law and international public law and because of the way they will be characterised in the negotiations and how these are conducted in a frame of peaceful international relations—e.g. the claimants will have equal bargaining power in the negotiations, they will not use force, economic threat or any other form of coercion in their mutual relations, the decisions will be taken by consensus rather than by majority, etc.

Fourth, the distribution and allocation of the shares of sovereignty will be decided following Rawls' ideas concerning principles of justice and fairness. But, there will be no distinction between weak and strong States in what is referred to as the decision making process since I consider their representatives free and equal agents. The reason to proceed in this way is twofold: 1) to grant the involved agents real equal footing in the negotiations in which they decide the extent and contents of

[188] This line of argument has influence from Rawls' works, mainly inspired in his *Theory of Justice*.
[189] UN Charter art. 2.1: "The Organization is based on the principle of the sovereign equality of all its Members." United Nations General Assembly Resolution 2625 (XXV): "(f) The principle of sovereign equality of States."
[190] Hans Kelsen, "The Principle of Sovereign Equality of States as a Basis for International Organization," *The Yale Law Journal* 53 (1944): 207-220.

the shares of sovereignty—i.e. the agents will have the same bargaining power; and 2) also to secure a permanent feature in the agreement reached since it would be unreasonable to reject its outcome. That is because the agreement will be just and fair in the sense that the interests of all the agents will be secured, so that all of them will be willing to respect its content—or at least, it would be unreasonable not do so.

Fifth, the population of the third territory will have representation in the hypothetical negotiations in which the principles governing the shared sovereignty paradigm will be agreed. Their participation must be granted through their representatives. This is not because they are a minority or because they are human beings and as such they have human rights.[191] This is not a question of human rights or whether they will have the same status as the sovereign States. They will have representation in the negotiations because whatever decision is made will have non-trivial impact on their way of life and therefore gives them moral standing to object. In the first place, the model I intend to develop may be used even in situations in which human rights are blurred or non-existent—e.g. if the two competing sovereign States are dictatorships. In the second place, to grant participation to the inhabitants of the third territory in the negotiations does not mean that they are recognised as a sovereign political organisation. In contrast, they must be accepted as a community of human beings without any actual sovereign status but with a potential one. This only means that their right to claim acknowledges either the fact that they actually live in the territory under dispute or they have a relevant title to claim, what I refer later in this thesis as a 'colourable claim'. Consequently, the inhabitants of the third territory would have a right to participate in the decision making involving their interests either directly or through their representatives.[192] The consequences of this will be spelt out when we introduce in detail the negotiations later on in this thesis.

From the above notes, we see that the term 'shared sovereignty'—in the context of this thesis—can be characterised as a fair international remedy to be used

[191] The Universal Declaration of Human Rights (UDHR), full text available on http://www.un.org/en/documents/udhr/index.shtml accessed on 19/04/12.

[192] The International Covenant on Civil and Political Rights (ICCPR), full text available on http://www2.ohchr.org/english/law/ccpr.htm accessed on 20/04/12. Art. 21.1 UDHR states that "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives"; Art. 25.a ICCPR declares that "Every citizen shall have the right and the opportunity […] To take part in the conduct of public affairs, directly or through freely chosen representatives […]"

in sovereignty conflicts when two sovereign States agree to share in just terms the sovereign rights and obligations over a populated third territory—i.e. the sharing may not be exactly equal, but that sharing is such that reasonable parties could not reasonably object to it. Therefore, I will call this particular conception 'egalitarian shared sovereignty'. Yet, the actual content of this model has to be determined.

Conclusion

This Chapter examined different conceptions of 'shared sovereignty' and similar terms. In all cases there are issues that make these conceptions not viable for the kind of sovereignty conflicts reviewed in this thesis. To be more precise, these conceptions have characteristics that make them fail to embrace what this thesis aims for: a fair solution for some kind of sovereignty conflicts.

By reviewing these conceptions we obtain however several positive learning outcomes. Indeed, by having acknowledged what 'shared sovereignty' as this thesis needs the term is not, we draw some partial conclusions in order to understand what issues the new conception should address. So, there emerge criteria which enable us to identify when shared sovereignty is just.

In the remainder of this thesis we will see if it is possible to construct a new conception of 'shared sovereignty' that satisfies the aforementioned criteria. However, in order to do that we have first to see if: a) sovereign States may cooperate together and limit their freedom without sacrificing their sovereignty; and b) other international remedies for sovereign conflicts may be desirable for the kind of conflicts that are object of this thesis.

Chapter Four

How far can sovereign States cooperate together and limit their freedom without sacrificing their sovereignty?

Introduction

We demonstrated with Chapter Two that although sovereignty means supreme authority, that authority always accepts limitations—i.e. sovereignty is not absolute. Consequently, sovereignty is always—to an extent—shared. However, we have just seen in Chapter Three that the way in which sovereignty may be shared is not always just, fair, or offering the participant agents the same relative situation—e.g. if there is unbalanced or unilateral sharing, when only one of the agents is actually dictating how to proceed. So, it is necessary for the success of the 'egalitarian shared sovereignty' model to demonstrate how these limitations work, and also, that they do not imply involuntary interference with the sovereignty of any of the participant agents. Therefore, before defining the model of 'egalitarian shared sovereignty' in detail we need to examine how multiple agents can cooperate together, limit their freedom without negative consequences either *de jure* or *de facto*, so that none of the agents dictate to the other parties what to do or not to do. This problem arises because sovereignty is mainly seen as a concept that implies a single agent, limited in one way or another. However, this thesis assumes the existence of multiple agents that will have an equal relative position in respect to the third territory—i.e. a plurality of agents that have equal power, that are simultaneously at the same level—legally speaking, that are sovereign at the same time over the same territory and population.

In order to demonstrate how two sovereign States can share their sovereignty—i.e. how far sovereign States can cooperate together and limit their freedom without sacrificing their sovereignty—it is convenient to see how a concept with similar features operates. Self-ownership[193] is such a concept. As in the case of sovereignty, self-ownership establishes a particular relationship between an agent and something: supreme authority. Unlike sovereignty, this supreme authority is

[193] Self-ownership or property in one's own person, also defined as individual sovereignty. For a thorough analysis see Cohen (1995), *op. cit.*

present at the individual level. In other words, self-ownership defines the supreme authority an individual has over himself; sovereignty defines the supreme authority a State has over a territory and people. Thus, at first glance both self-ownership and sovereignty appear to be supreme, singular and hence not shareable.

The main advantage in proceeding this way is that both these concepts (sovereignty and self-ownership) are similar in respect to their peculiarities (at least those peculiarities that are key in developing this project); and most important, there is a vast literature in regard to self-ownership that discusses how this concept accepts limitations and these limitations are in tune with its nature. It is for that reason that we will see how self-ownership works at the individual level, what it means, how its limitations do not change its nature and in what way these limitations make cooperation possible. The argument to support this theoretical enterprise is simple: if we use an analogous concept such as self-ownership that implies supreme authority but yet accepts limitations it becomes clearer how limitations can work in another supposedly supreme concept such as sovereignty to make the 'egalitarian shared sovereignty' model possible. More explicitly, self-ownership has the same kind of relation to an individual that sovereignty has to a State: both self-ownership and sovereignty are essential characteristics in defining a free individual and a free State, respectively. Then, if limitations in the form of self- or external constraints can be applied to self-ownership, limitations in the form of self- and external obligations can be applied to sovereignty. In consequence, as self- or externally imposed limitations in regard to self-ownership allow any individual to cooperate with any other individual, so self- or externally imposed obligations on sovereignty enable a State to cooperate with other States too without diminishing its sovereignty.

From the smallest to the largest societal organisation

In the previous Chapters we have seen that sovereignty is limited (Chapter Two) and that these limitations may result in different conceptions of shared sovereignty (Chapter Three). The main obstacle for the kind of conception of shared sovereignty we need in sovereignty conflicts is that sovereignty, even conceived as being limited, is mainly assumed to imply a singular supreme authority. But the model I intend to propose needs a plurality of sovereign agents seen as supreme

authority over the third territory that somehow cooperate together, limit their freedom, and still remain sovereign.

At the individual level there is already a similar situation and that situation has been solved by the way in which individual sovereignty is understood. It is for that reason that in the following paragraphs I will introduce two different kinds of agents: a) individuals; and b) States. Although at first glance they may appear different, they are similar in what is important for this thesis. Both individuals and States have supreme authority over themselves. Furthermore, both individuals and States have relationships of different kinds with their respective peers. Therein, by working out in parallel the way in which individuals may cooperate together with other individuals, limit their freedom, and still be considered to have supreme authority over themselves, in the same manner we will see that States may cooperate together with other States, limit their freedom, and still have supreme authority.

We have just introduced the idea that an individual and a State are different in many ways yet similar in some important aspects. In what is specific to the social, legal, political and moral spheres, an individual offers four different levels of analysis: a) in their individuality (I); b) in their relationship with their peers (you and I); c) in their relationships as part of a community or society (us, from an internal aspect); d) as a member of a community or society that has relations with other communities or societies (us, from an external aspect). Sovereign States can be analysed in the same way: a) in their individuality (internal affairs); b) in their relationships with their peers (bi- or multilateral agreements); c) in their relationships as part of the international community (from within their boundaries); d) as members of the international community (not only related to other States but also to other international agents). A conflict of interest between individuals or States can only happen when more than one agent is involved. Sovereignty disputes are a conflict of interest. We will see how a conflict of interest at the individual level may be solved. From there, we will apply the same procedure—by method of analogy—to States' interrelations.

At this point, I introduce a hypothetical situation to show how human interrelation implies shared values and actions in order to fulfil certain goals. The starting point in this hypothetical situation is a world inhabited by two participants named Alpha and Beta who have particular features. The participants of this abstract

situation are sovereign individuals who may or may not relate to each other, be pure individuals in solitude or create a joint context, this depending only on their free will. If we see the participants of the story from a Nietzschean perspective[194] of a sovereign individual, these characters are free beings. They each have free will and each stand by their word. In consequence, they are autonomous and independent free beings with the free will to decide to remain in solitude without any kind of interrelation, to join in any kind of enterprise or to remain in solitude but being opposed to each other. So, there are three possible options for them to choose:

a) To become enemies
b) To become neither enemies nor allies
c) To become allies

In the first scenario, if Alpha and Beta became enemies they would not only compete with each other and each need defence from the other one, but also have no allies against other external dangers. Moreover, as they were the only ones of their species, the whole species would be condemned to extinction—assuming they were from different gender.

The second option would see Alpha and Beta in a situation of neutrality. From this standpoint each would not compete or attempt to damage the other one; so they would not be a mutual threat. If we also assumed there were enough resources for both of them to cover their subsistence necessities, they would not suffer from scarcity or starvation. However, as in the previous scenario, if total neutrality was the background there would not be any mutual advantageous activities—e.g. commerce, trade, sexual intercourse, reciprocal protection from outsider threats; hence they would be the object of other species' needs, they would have to endure the environment on their own, and their species would again be condemned to extinction. It is true that they might meet and separate after sexual intercourse like some animals do or choose to do certain other activities for a particular reason and over a period of time. However, the key feature in this situation remains the same: although they may agree to do certain things together, there will be no constraint on either Alpha or Beta to fulfil any obligation in respect to the other.

[194] Friedrich Nietzsche, *On the Genealogy of Morality* (Indianapolis/Cambridge: Hackett Publishing Company Inc., 1998), pp. 36-39.

To be allies is the third option: two people may decide to be together for several different reasons and possibilities. If we had in mind an extreme scenario in which there were only two human beings on earth, what is obvious is that—even in the case of conflicts of interest—by having an agreement and staying together they would be able to join forces so as to defend themselves from common threats and attacks, to obtain and mutually provide food and shelter and finally to propagate the species. It may be argued that in this case—alliance—the agreement could be pursued as a game of chicken, that is, a mixed game of conflict and cooperation. There might be more than one way to cooperate and, these ways might offer differing payoffs, so that one player is better off under one method of cooperation and the other player is better off under the other, even though both are better off under either of the two than if they refused to cooperate. It may be even the case that although the participants are both better off if they cooperate, each is better off still if the other cooperates by being subservient. In one case or the other, both sovereign individuals are together in the enterprise. Indeed the task is to define the extent of the agreement—e.g. equal or unequal rights and obligations—and that will be discussed in due turn in this thesis. However, the point has been shown: it is advisable for them to limit their individual sovereignty—which does not mean to diminish it. In other words, by giving up some autonomy both Alpha and Beta would have a more ample range of possibilities from which to choose. Similarly, we can have a situation where we can give ourselves more options now by limiting our options in the future.[195]

If we extended the picture by adding more participants, they would basically have the same options open to them; the difference would be given in terms of who their enemy or ally would be. Individuals would group together (for whatever reason) in what we may call aggregations.[196] These groups of people or aggregations would at the same time have interrelations with other peers in three possible ways: as enemies, neutral or allies. Social contract theories follow this line of reasoning.

Bearing in mind the notion of 'sovereign individual' sketched at the beginning of this section (free beings with free will who stand by their word) if an

[195] See Mark R. Reiff, *Punishment, Compensation, and Law: A Theory of Enforceability* (Cambridge: Cambridge University Place, 2005), pp. 49-50; Thomas C. Schelling, *The Strategy of Conflict* (Cambridge: Harvard University Press, 1960), pp. 21-52, in partic. p. 43; Charles Fried, *Contract as Promise* (Cambridge: Harvard University Press, 1981), pp. 13-14; Jon Elster, *The Cement of Society* (Cambridge: Cambridge University Press, 1989), pp. 272-273.
[196] See Nozick, *op. cit.*, in particular Part I, Chapter 2.

individual decides to have an alliance of any sort with another individual rather than being enemies or remaining neutral to each other, they are both accepting the limit of part of their sovereignty for the achievement of an agreement—they accept limitations so as to live together in concord with other individuals, whether the agreement is for mutual or individual benefit. They still seem to be fully sovereign individuals; they can at any time and in any case withdraw from being part of the agreement; they decide freely to have interrelations with other individual under certain circumstances. Then, to what extent is the individual sovereignty curtailed in joint enterprises?

Mutatis mutandis the same reasoning can be followed at States' level. In the hypothetical situation in which there were only two sovereign States in the world they would have the same options open to them. *Brevitatis causa*, these States as the individuals in the previous example are sovereign in the sense they have supreme authority over themselves—i.e. free 'beings' with free will to choose to do or not to do. Ergo, the same questions can be asked in regard to the State and its interrelation with its peers and other international agents. Any State has always the option to develop any kind of relationship in the international arena, whether as enemy, neutral or ally. Thus, any State can always exercise its sovereignty in regard to any issue in a joint venture with its peers. Whenever a sovereign State agrees upon a certain matter and frames that agreement in an international accord, it is only exercising its sovereignty. At the same time and exactly because it is a sovereign international agent, it can withdraw its participation from such an agreement. In other words, States may find themselves committed because of previous agreements but they may resign unilaterally, make new agreements, or even violate the agreements' original terms. Indeed these actions may cause consequences for its international prestige, but this is independent from the fact that they still are fully sovereign.

From the previous paragraphs it is clear that individuals—and on a larger scale, States—are sovereign in the sense they have autonomous free will to choose to act or not to act. However, due to the fact there are different individuals/States with different strengths and necessities, it may be convenient for them to associate with other peers. And this implies relationships that somehow limit their sovereignty. The challenge now is to demonstrate how these limitations do not change the nature of sovereignty at individual and State levels.

Self-ownership, sovereignty and different types of constraints

The hypothetical situations developed in the previous section sketched how individuals—in large, States—can have relationships of different kinds with their respective peers. So far we can draw a first preliminary conclusion: both sovereign individuals and sovereign States may cooperate together with their respective peers; they may even enter into commitments and 'somehow' limit their freedom. But how far can their freedom be limited?

I aim to show that a) the limitations on sovereignty are inevitable—i.e it is not just that up to now sovereignty has always been limited, but that for States to operate together it must be; and b) that there are limitations on sovereignty which do not mean that the State is no longer sovereign.

In the following I will show how different sorts of constraints or limitations operate in relation to sovereign individuals and sovereign States. There are many ways in which these constraints or limitations may be classified. I will propose a classification of these constraints or limitations based on a very simple and broad criterion: by whom they are imposed. My only goal at this point is to better illustrate with a simple classification how these limitations or constraints operate and differentiate from each other. Once we have a general understanding of the kind of limitations we are dealing with I will focus on their meaning in legal and political sciences.

In general we can see that sovereign individuals and sovereign States may have two kinds of constraints—i.e. their freedom can be limited by: a) self-imposed constraints; b) externally imposed constraints.

The first group of constraints can be characterised as those by which a sovereign individual—or a sovereign State—voluntary curtails his/its freedom. For instance, the case in which an agent enters voluntarily into commitments with others—in our examples, to become allies. Indeed, relations between sovereign States would be impossible without these agreements.

The second group of constraints are those imposed either by: 1) other sovereign individuals or sovereign States; 2) the context or, in our examples, the

environment they are part of—specifically for this thesis, the national or international scenario they are members of.

The first sub-group of externally imposed constraints refer to what sovereign individuals or sovereign States can legitimately do in relation to their peers or what others can legitimately do to them. The second sub-group of externally imposed constraints have to do with facts and rules that either sovereign individuals or sovereign States have to deal with only because they are members of a certain national or the international community—e.g. States find themselves subject to international public law and newly formed States have to comply with pre-existing international law; an individual is born in a certain country and has to comply with the pre-existing law of that country.

A common feature that the two examples in the previous section have is that the sovereign individuals and sovereign States were part of imaginary situations. From there, it is relatively easy to recognise the first group of constraints—i.e. the ones that either sovereign individuals or sovereign States impose on themselves. Indeed they are voluntary and self-imposed since sovereign individuals and sovereign States limit their freedom without any external imposition—i.e. they freely decide to cooperate with each other.

A different scenario is given when either a sovereign individual or a sovereign State 'accept' a limitation. That is because 'accepting' implies external interference, whether from another agent or the context.

Ergo, I will understand that in the case of self-imposed limitations the freedom of sovereign individuals and sovereign States is limited in their individuality—i.e. I. In contrast, in the case of externally imposed limitations the freedom of sovereign individuals and sovereign States is limited in matters relating to their peers—i.e. you and I; or in their relationship with the context—i.e. I, us, the nation, the international community.

In the following paragraphs we will review the way these different types of constraints operate in relation to sovereign individuals and sovereign States.

The first kind of limitation that does not destroy sovereignty is one that is self-imposed—e.g. by voluntary entering into an agreement. In fact, relations between sovereign States would be impossible without these agreements. That is,

self-imposed limitations do not jeopardise sovereignty. In fact, they may be seen as examples of it.

The second kind of limitation is externally imposed since it either matters the relationships with peers or the context. The first subgroup of externally imposed limitations only exists because there are other agents. Hence, they are imposed by the mere presence of other individuals or States when they somehow limit their freedom. It is true that individuals and States may limit their respective peers in different manners. In order to show more clearly how this kind of limitations work—i.e. externally imposed because of the mere presence of others—I will focus on what happens in instances in which either individuals or States have their freedom limited by their respective peers.

One of the ways to understand the relationship between an individual and himself, other people and all that surrounds him is self-ownership (also called property in the person).[197] In self-ownership, each individual owns both morally and legally his person and natural talents and is free to use them and is morally obliged not to invade someone else's sphere of freedom—like a negative liberty.[198] However, even if limitations imposed by others are justified—for whatever reason—how can limitations to negative liberty be tolerated and still feel like self-owners?[199] I refer here to republican liberty that, unlike negative liberty, understands freedom as non-domination.[200] Then, a free man, rather than a slave, may accept a certain level of limitations—negative liberty; and still be a free man. That is because freedom—i.e.

[197] The expression 'property in the person' is from Carole Pateman, "Self-ownership and Property in the Person: Democratization and a Tale of Two Concepts," *The Journal of Political Philosophy* 10 (2002): 20-53. For a relation between self-ownership and property see Lloyd P. Gerson, "Who Owns What? Some Reflections on the Foundation of Political Philosophy," *Social Philosophy and Policy* 29 (2012): 81-105; Alan Ryan, "Self-ownership, Autonomy, and Property Rights," *Social Philosophy and Policy* 11 (1994): 241-258; Eric Mack, "Self-ownership and the Right of Property," *The Monist* 73 (1990): 519-543.

[198] Liberty can be defined –in principle- as the ability to decide upon ones' actions and omissions. Negative liberty can be seen as the absence of interferences, freedom of restraints (e.g. constraints, barriers, etc.); positive liberty is the freedom to form and make actual a rational and reasonable plan of life. For further analysis see Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969). For interpretations on the topic see Matthew H. Kramer, "On the Unavoidability of Actions: Quentin Skinner, Thomas Hobbes, and the Modern Doctrine of Negative Liberty," *Inquiry* 44 (2001): 315-330; Philip Pettit, "A Definition of Negative Liberty," *Ratio* 2 (2006): 153-168; and many others.

[199] See Quentin Skinner, "A Third Concept of Liberty," in *Proceedings of the British Academy 2001 Lectures* (Oxford: Oxford University Press, 2003); Carl K.Y. Shaw, "Quentin Skinner on the Proper Meaning of Republican Liberty," *Politics* 23 (2003): 46-56; and many others.

[200] There may be different accounts of republican liberty. See Mark R. Reiff, *Exploitation and Economic Justice in the Liberals Capitalist State* (Oxford: Oxford University Press, 2013), pp. 288-289, in partic. fn. 24 and 25. For a view on republican liberty as non-domination see Frank Lovett, *A General Theory of Domination and Justice* (Oxford: Oxford University Press, 2010), pp. 155-156.

republican freedom—understood as non-domination means independence from unwanted arbitrary and unreasonable restrictions. Therefore, a State can still be sovereign and be subject to some limitations; it just cannot be subject to domination by another State. To be more precise, it is not that non-domination and freedom are different conceptions. For the purpose of this thesis non-domination is the way in which republican freedom will be understood.

Before I continue with the analysis, I will clarify further the meaning of non-domination. Without intending to be an exhaustive revision of the concept, and bearing in mind the nature of this thesis, I will provide a preliminary sketch of the idea of non-domination. Because my main purpose is to offer a reasonable solution to some sovereignty conflicts through the application of distributive justice principles, I will merely attempt to conceptualise how non-domination will be understood here, leaving its full assessment for subsequent research. Having made that clear, I will understand that domination "[…] refers to the relatively unrestrained and systematic (even if unexercised) ability of a group or individuals to exert power over others in pursuit of their own interests at the expense of those subordinate to them."[201] Consequently, non-domination means for this thesis the capacity for someone's affairs not to be arbitrary interfered with by someone else.

The previous paragraphs showed that individuals—and on a larger scale, States—are sovereign in the sense they have autonomous free will to choose to act or not to act. Nevertheless, sovereign individuals and sovereign States have relationships of different kinds with their respective peers that somehow may limit their freedom. So the issue here is whether these limits to their freedom are arbitrary restrictions or not—i.e. whether there is domination or non-domination in their interrelation.

In the case of sovereign individuals, to conduct their interactions or interrelations under the idea of non-domination means that no sovereign individual is entitled to limit someone else's freedom in an arbitrary manner. That is to say, interactions amongst sovereign individuals happen in any society and they may imply restrictions with regards their individual freedom. However, none of these

[201] Cecile Laborde, "Republicanism and Global Justice: A Sketch," *European Journal of Political Theory* 9 (2010): 48-69. For a more detailed account about republican freedom and non-domination see Lena Halldenius, "Building Blocks of Cosmopolitanism: The Modality of Being Free," *European Journal of Political Theory* 9 (2010): 12-30; and Philip Pettit, "A Republican Law of Peoples," *European Journal of Political Theory* 9 (2010): 70-94.

restrictions can be unilaterally and arbitrarily imposed. Therefore, the issue of inequalities amongst sovereign individuals—e.g. poor and rich—that could lead to abuse of power and control is avoided.[202]

Similarly, in the case of sovereign States, to conduct their interactions or interrelations under the idea of non-domination results in no sovereign State being entitled to restrict the freedom of any other sovereign State in an arbitrary manner. In other words, interactions amongst sovereign States happen as part of global relationships in the international scenario and they may bring about restrictions in relation to States' freedom. However, as I have made clear before when dealing with sovereign individuals, none of these restrictions can be unilaterally and arbitrarily imposed. So, the potential problem of disparities amongst sovereign States—e.g. resources and power—is neutralised.[203]

The significance of understanding freedom as non-domination for our thinking of sovereignty is crucial because a State which freedom was limited would still be considered sovereign since any limitation would have had to be either accepted by such State, or not unreasonably or arbitrarily imposed. A State can still be subject to other kinds of limitations, both internal and external, and still be sovereign within the notion of republican freedom, just as an individual can be subject to some limitation, and still be a self-owner in terms of republican freedom.

For example, in the case of an individual, self-ownership implies that "[…] every person is morally entitled to full private property in his own person and powers."[204] From there, the notion can be extended to the environment and things and objects related to. In other words, an individual owns himself, his actions and omissions, and the product of his labour—to discuss here how the individual obtains the property of any object is out of the scope of this thesis. If that same individual was not fully free to decide his way of action in relation to himself or things that belonged to him, his self-ownership would be somehow diminished. By way of example "[m]y land is not fully mine if someone else has a right of way over it, or a claim to a portion of the income it generates."[205] Similarly, an individual is not fully the owner even of himself if someone has the right to dictate the way he has to

[202] For more details about individuals and non-domination see Laborde, *op. cit.*, in partic. pp. 51-52.
[203] *Ibid*., in partic. pp. 54-ff.
[204] Gerald Allan Cohen and Keith Graham, "Self-ownership, Communism and Equality," *Proceedings of the Aristotelian Society, Supplementary Volumes* 64 (1990): 25-61.
[205] *Ibid*.

proceed—or omit to proceed—or has a certain right over the benefits he generates—i.e. my liberty is infringed in a negative form.

The same way of reasoning can be replicated when dealing with States: a State is sovereign—as an individual has self-ownership—if and only if its representatives are free to decide how the State acts or omits to act both internally and internationally. If that same State was not fully free to decide its way of action in relation to its internal or international affairs, its sovereignty—self-ownership—would be somehow affected—as it happens to pseudo-States, failed States, etc. But like self-ownership, this does not mean it is not still sovereign. Indeed, while States' sovereignty limits one another's negative freedom, it does not obviously limit their sovereignty at all.

In brief, sovereign individuals or self-owners are not alone. There are other sovereign individuals or self-owners in a community and they have relationships of various kinds. Similarly, sovereign States are not alone in the international community. There are—amongst other international agents—several sovereign States and they have relationships of various kinds as well. In both cases any interrelation a sovereign individual or a sovereign State have with their peers may imply limiting their freedom, respectively. Indeed, their sphere of freedom is somehow interfered with.

In both cases self-ownership and sovereignty there seem to be limitations. In the following paragraphs I will review the ideas of some authors in order to show why it is a common mistake to see these limitations as contrary to self-ownership and sovereignty. In addition to this, I will also show that these same authors understand these limitations in tune with self-ownership and sovereignty.

In self-ownership as well as in sovereignty, supreme authority appears to be threatened by other individuals or States. How do we incorporate constraints in self-ownership without blurring its essence? How do constraints operate in relation to supreme authority or sovereignty? Locke, the author behind this theoretical development of self-ownership, gives a hint that can be used to understand limitations in sovereignty. The basis of his theory is, as it was for most of his predecessors, the free will. Locke maintains that:

> "[t]o understand political power right, and derive it from its original, we must consider what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions, and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man."[206]

It is a prerequisite of his paradigm that men are born free to decide whatever they want to do/not to do. Moreover, he highlights this feature by expressly neutralising external interference from any other individual. If there is such interference from an external subject in relation to one's free will—in terms of actions or omissions—then freedom is limited. From here it seems—at first glance—that self-ownership must be supreme and singular.

By way of analogy, it would be a pre-requisite for a State to be sovereign that it was free to decide whatever it wanted to do or not to do. If there was external interference its freedom would seem to be limited. Indeed, sovereignty is thought and assumed by many to be supreme and singular too.

Van Duffel offers a contemporary view explaining that in the current legal and political scenario "[p]roperty is fundamental to libertarianism in that it defines the boundaries that people must not cross."[207] Applied to international relations, it fits perfectly with a classical view in regards to sovereignty: it is the characteristic that defines the boundaries that States must not cross. It defines the ownership any State has over its territory and all that it entails. Van Duffel links later the concept of free will with the idea that every human may be a small-scale sovereign. In what is relevant to this thesis, he maintains that:

> "Small-scale sovereignty is the meaning of "freedom" in libertarian theories of natural rights. People are adjudged free if they are able, within certain confines, to decide what is to be done—that is, to have normative control over a part of the world. Not to have one's freedom violated means not to have anything done in one's domain that goes against one's will."[208]

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[206] Locke, *op. cit.*, p. 6.
[207] Siegfried Van Duffel, "Libertarian Natural Rights," *Critical Review* 16 (2004): 353-375.
[208] *Ibid*.

So far, a sovereign State and a small-scale sovereign (an individual) seem to possess sovereignty and self-ownership, respectively. Locke tells us about free will and its relationship with self-ownership; Van Duffel labels the individual as a small-scale sovereign. In other words, a free being has the free will to act and refrain from acting in relation to himself, his labour and the things he owns and is thus a small-scale sovereign, able to determine his way of acting and act upon that decision. If a spectrum of options was to be considered in terms of self-ownership, one of the extremes would be given by the fully free being and the other one, by a slave: anyone bound to limit his actions or omissions upon someone else's volition by way of following his orders, even arbitrary, or prohibitions without being able to disagree—without being able to exercise his free will and hence, there is domination.[209] He who is sovereign has self-ownership of his own acts and omissions, labour and belongings. He who cannot decide freely upon his own acts and omissions, labour and belongings does not have self-ownership and, hence, is not a small-scale sovereign.

The same can be said about political communities such as sovereign States. Any sovereign State has exclusive ownership of the territory it is based on. In consequence, the population of that sovereign State through their representatives has the exclusive prerogative to act upon that ownership and decide freely what to do or not to do in relation to that territory. And that is what we usually see as a sovereign State. If we had a scale of sovereignty grades, one extreme would be given by a fully free State and the other one, by an enslaved one—e.g. a colony. But this does not mean that a sovereign State cannot have limitations from others. So, a State may have its freedom limited with and still remain sovereign. That is because even though there may be limitations, it still has exclusive prerogatives to act (or not) upon its territory and population—i.e. there is no imposition, there is no domination. The crucial element seems to be that one State, implicitly or explicitly, gives another the permission to impose limitations or simply accepts them—analogous in some ways to becoming a slave, as opposed to agreeing to serve another individual in specific ways.

The issue at stake here is that if we were to see them on a scale, external limitations would represent one extreme and domination the other. In the former case,

[209] For a view on domination see Lovett, *op. cit.* For a detailed account about positive and negative liberty and domination, see in partic. pp. 152-154. For a conception of republican liberty defined as "the absence of domination", see in partic. pp. 155-156.

external limitations only mean—at least for this thesis—the existence of several agents—either individuals or States—and the fact that their actions and omissions are voluntary and may have an effect on others. In the latter case, domination has to do with the fact that the limitations are being imposed to one agent by another agent. To be more precise, the imposing or dominating agent limits the freedom of its peer as much and however it wants. Therein, the recipient agent has no other choice but to accept the imposition or go against it by means of confrontation.

Coincidentally, in what has to do with limitations, Van Duffel expressly includes in his characterisation of small-scale sovereign the phrase "within certain confines."[210] In tune with these words, it may seem that Locke has something to add to the idea of self-ownership; he refines this conceptualisation by distinguishing between freedom and licence:

> "[b]ut though this be a state of liberty, yet it is not a state of licence, though man in that state have an uncontrollable liberty, to dispose of his person or possessions, yet he has no liberty to destroy himself, or so much as any creature in his possession […] no one ought to harm another in his life, health, liberty, or possessions."[211]

In other words, he who has free will to do—or omit to do—whatever he pleases with himself is limited by other individuals' free will, in that he ought not to come into conflict with them or their interests. Human conduct involves inter-subjective conduct: the acts and omissions of one individual may interfere with the acts and omissions of any other individual, to the extent that both are still free beings able to conduct their actions—and omissions—free from external constraint. This is a cornerstone in Locke's theory that separates it from Hobbes'. The natural state is not a state of war for Locke; it is a state of freedom limited by mutual respect, and, resembles the international scenario in that States share the same principle.

We can identify the same notion with sovereign States. As part of the international community sovereign States' conduct implies interrelations: the acts or omissions of one sovereign State may interfere with those of another. So, each

[210] *Ibid*.
[211] *Ibid*., p. 117.

other's freedom is limited reciprocally. But in no way these limitations can necessarily imply domination—i.e. the principle of non- intervention is core in international public law.

In short, sovereign individuals in a community have self-ownership. Being a member in a community implies interrelation with others that can limit (interfere with) their freedom. But that does not imply *per se* sacrificing it. Similarly, States in the international community have sovereignty. As part of a community, they have interrelations with others that may interfere with (limit) their freedom. But that does not mean that *per se* they sacrifice their sovereignty.

Thereby, we can see that in the case of sovereign individuals as well as sovereign States the interrelation with peers may limit their freedom. These are externally imposed constraints—i.e they exist because both sovereign individuals and sovereign States are part of communities and hence they interrelate with others' freedom. Nevertheless, are these the only constraints they have?

In addition to self-imposed limitations and externally imposed limitations in what matters relationships with peers, there is still a second subgroup of external limitations to consider: external limitations because of the context or environment. In tune with the previous paragraphs, I will show how these limitations work at the individual level and at the level of States.

At the individual level, when men live together, Locke reminds us that this is choice made by them by their free will. In his words:

> "Men being, as has been said, by nature, all free, equal and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby anyone divests himself of his natural liberty, and puts on the bonds of civil society is by agreeing with other men to join and unite into a community, for their comfortable, safe, and peaceable living one amongst another […]"[212]

In any kind of social organisation men are part of (families, villages, communities, States) their members have a choice that only depends on their free

[212] *Ibid*., p. 163.

will to be part—or not—of them. It is true that we are all born in certain States or families so we cannot simply choose to join or to leave them and join some other group. In that respect, for Locke, it is free will that gives legitimacy to any societal organisation: an individual has both the right to be part of a community and to leave it, depending only on his decision. Nevertheless, for an individual even to leave a community is no longer possible (hence certain limitations exist by default). In Locke's days some people could find uninhabited parts of the world. But now, a) most people cannot leave the State they find themselves in; and b) if they can, they have to go to some other State. These are also constraints externally imposed but in virtue of the environment they are in.

To a similar extent, it may be said that States do not have the option of leaving the international scene. So there are some limitations that are now compulsory, because there is no other option. Every sovereign individual in every society is actually affected by the same compulsory constraint. The same can be said about sovereign States: even if not having the choice to leave the international scene is the case in international relations, it applies to every sovereign State. In other words, all of them have these external constraints because they are members of a community with pre-existing facts and rules.

Both sovereign individuals and sovereign States are obliged to accept the constraint of being part of a larger society (national or international), but they are still in the same relative situation to that of their peers. That is to say, the starting point for all of them is the same, a state of things that could not be abandoned. So, the fact that sovereign individuals and sovereign States had an actual possibility to leave their respective societies (national or international) or not does not change the prerogative they have in order to impose self-constraints or accept external ones in regard to their self-ownership or sovereignty respectively. That is because the basic freedom both individuals and States have is equal freedom, not total freedom. More precisely, they have equal moral and legal freedom but this does not necessarily imply physical or economic equality.

Sovereignty: supreme authority and limitations

We have learnt from the previous section that a sovereign State may have two kinds of limitations: a) self-imposed limitations; b) externally imposed limitations. Thus, the externally imposed limitations may be because of other sovereign States or because of the context or environment.

Undoubtedly, the model I intend to construct will mainly be centred on the second group of limitations, in particular the ones that have to do with other sovereign States. So as regards 'egalitarian shared sovereignty', in order for the model to work, it is a must that sovereignty includes limitations. But these limitations have to be of a special nature, they must not imply domination: they have to allow the two sovereign States to be at the same time sovereign over the same territory to the extent they do not interfere with the interests of the other or that of the population of the third territory. In tune with this, Walker puts all the pieces together when he says: "Jellinek presented a more cautious version of the concept [of sovereignty]. He believed that the State can undertake obligations and limit its freedom without losing sovereignty. For him, sovereignty was the 'ability of exclusive self-determination and thus self–limitation' […]."[213] This theory fits within the one proposed here; it follows Locke's idea and most recently, the ones developed by Van Duffel. However, this theory needs elaborating. Jellinek's theory of self-imposed obligations has received much criticism[214], mainly concerning the idea that a State as well as having the power to self-limitation can then at any time cancel self-imposed obligations—i.e. the final agreement may not offer stability.

As we have just seen, any free State has different kind of limitations and is still considered sovereign. Though, that does not mean that a sovereign State is dominated by any other agent—a sovereign State is a free State, not an enslaved one. In other words, what matters here is not how much a State can limit other States' freedom but the fact that the first State interferes with the freedom of the second State as much and however it wants.

By way of example, let us think of a sovereign State A and a colony B. Even in the event the sovereign State A had the most benign policies and law

[213] Neil Walker, *Sovereignty in Transition* (Oxford: Hart Publishing, 2003), p. 369.
[214] Hans Wheberg, "Pacta Sunt Servanda," *The American Journal of International Law* 53 (1959): 775-786; D. M. McRae, "Sovereignty and the International Legal Order," *Western Ontario Law Review* (1971): 56-86.

towards the colonial population, they would still be a colony. Therefore, the colony would be governed unilaterally by the sovereign State A. Indeed, that would only mean domination—i.e. the power State A has over colony B is discretionary and may as well be arbitrary.

Let us assume now that the colonial population exercised their right to self-determination and became independent. In addition to this, their newly elected and independent authorities created a less benign system.

At first glance, there is less freedom for the population with the newly acquired independence. Indeed, at first glance it seems counterintuitive. Should not they have gained 'more' freedom?

The key in capturing the lesson behind the example is to view it as a whole rather than only the outcome. This example shows that by understanding sovereignty as non-domination the new sovereign State (former colony B) cannot be subject to the arbitrary discretionary power of any other agent. That is because, and at least for the purpose of this thesis, arbitrary means without a reason whereas discretionary means there are numerous reasonable choices and one can pick from among these options as one wishes without further reasons. Therefore, while sovereignty in this thesis is seen as non-domination and hence implies a certain degree of discretionary power, it does not embrace any kind of arbitrariness.

How do we define arbitrary discretionary power in order to determine when a party is dominating another one? In other words, how much can a State limit its freedom or accept its freedom to be limited and still be sovereign? The answer to this question is given later on in this thesis when we examine whether and how the claiming parties may share sovereignty over the disputed third territory. However, we have already learnt that sovereign States have limitations and though they restrict their freedom in some ways, not all limitations imply a diminishing of each State's sovereignty. On the contrary, joint ventures may result in bettering every agent's relative position. These limitations, as well as being a duty to others, greatly increase one's overall freedom of action—e.g. by refraining from injuring others, one makes co-operation with others possible, and can then make possible all kinds of things that were previously impossible. This is true of States as well as individuals. In consequence, if limitations are in tune with self-ownership and in fact broaden its sphere of action, self- and externally imposed constraints are in tune with sovereignty

which means that a State is able to achieve results that may be impossible, more complex or economically disadvantageous if they were done individually.

We have also learnt that domination is a particular kind of limitation that implies arbitrary discretionary power over someone else—in this case, another State. So although limitations will be part of our model, none of them can be a subterfuge for domination.

Sovereign States are the main agents in the international community, but they are not the only ones, and there are many of them. A State should have the exclusive ability to determine and limit itself in order to be politically and legally sovereign. But, to be part of a wider network, such as the international system, does not mean that sovereignty is eroded or ought to be redefined. Besides, it is in fact a concept that perfectly plays its part in the international arena, also when relating to non-sovereign agents. Even with the assumption that sovereignty means supreme authority, the situation does not change. Each and every State would still be an ultimate law maker within its boundaries; but it may use this exclusive prerogative to allow some kinds of limitations. Certainly at first glance, self-limitations do not offer more guarantee than the good will of the involved agents to fulfil what they agreed to do or not to do. But, it is a fact also that there are external obligations that may restrict States both nationally and internationally, as does customary law, and may have a stronger reason to be respected—e.g. international sanctions, international prestige when applying for financial aid. Some of these external obligations come in hand with the globalization process and are particularly useful for this thesis. As a result, there are different types of restrictions in relation to any sovereign State, to name a few: a) plural jurisdiction; b) agreements; c) actions by other equally free States. In consequence, sovereign States can have restrictions that may be either voluntary and able to be cancelled or may impose equal restrictions on all. It is the combination of both the self-limitations and the external limitations that will secure the success of ‘egalitarian shared sovereignty’.

Conclusion

To recapitulate, sovereignty is a complex concept. It assumes supreme authority and for some, that means single non-shareable authority. But this Chapter has shown that sovereign States accept internal and external limitations and therefore States may cooperate together, limit their freedom and still be considered as being sovereign. Whatever the duration of the limitations, the dependence on the good will of the participants in any agreement, and any other elements that may jeopardise the strength of any joint international enterprise, the point has been demonstrated: limitations do exist and they can be internal (self-imposed) or external (e.g. imposed by international custom, exceptional circumstances, other States). In one or the other case, a sovereign State has restrictions that in theory and practice may either limit its choices or enhance them. But, none of these limitations are—or can be—a subterfuge for domination. That is to say, in no case will these limitations entitle or enable a party to do as much as it wants and in whatever way it wants.

From that stand point, we need to determine what limitations each State is willing to—and can—accept. It is for that reason that we will examine the question through lenses of just distribution theory, so as to determine a just and fair way of allocating actual and potential benefits and burdens. The task will be to base the 'egalitarian shared sovereignty' paradigm on the concept of self-ownership, which allows limitations and at the same time applies principles of just distribution in order to allocate the respective portions of sovereignty. The reason is that the final agreement must secure stability for shared sovereignty over time, maintaining a peaceful interrelation between the participants and avoiding any form of domination.

Chapter Five

Why is shared sovereignty desirable?

Introduction

Like any other conflict, sovereignty disputes can be addressed in different ways. The alternatives go from secession (with or without partition) in the form of self-determination and independence to continuing with the *status quo*. The task is now to evaluate when and why shared sovereignty is more desirable than any other international remedy. In other words, there are several ways of dealing with sovereignty conflicts. Some of them have proven to be effective, others are only theoretical solutions and some are—for whatever reason—not desirable. We will see some of them in this Chapter and assess if it is reasonable—at least—to doubt the value of their application. That is because I assume we want a peaceful solution that acknowledges—to an extent—the claims of all the agents. So, solutions that imply ignoring claims, unfair policies, use of force or any action that may go against basic human rights will be not viable.

Indeed, shared sovereignty may not be 'one way fits all'. But I am not suggesting that shared sovereignty is 'the' solution to all sovereignty conflicts. What I propose is a reasonable way to approach some of them. Therefore, by addressing the pitfalls of other international remedies that so far have proven to be inadequate in solving the types of sovereignty conflicts we are interested in, we identify both the need of a peaceful solution and an opportunity to offer another way of dealing with them.

Possible solutions in sovereignty conflicts

As there are three agents involved in sovereignty disputes of this kind, the possible solutions can be grouped depending on how they interact amongst themselves: a) unilateral solutions; b) international-multilateral solutions; c) bilateral solutions.[215]

[215] This section is inspired by Peter Beck's works. He analyses the Falkland/Malvinas Islands conflict in detail and offers a clear way of presenting different approaches. In particular, refer to Peter Beck,

Unilateral solutions

This group of solutions is centred on one of the agents. The decision regarding sovereignty is taken by one of the agents involved, whatever the consequences to the others. The opposition of the other party or parties is not taken into account, and the rights they claim are either reduced or completely ignored. This could happen in three different ways: 1) the successful party denies that the other party has these rights at all; 2) the successful party admits these rights but claims that other rights overrule them; 3) the successful party admits these rights but chooses as a matter of realpolitik to ignore them.

a) Fortress

This term was used in particular in relation to the Falkland/Malvinas Islands, which were called 'Fortress Falkland'.[216] After the 1982 war, the United Kingdom decided to strengthen the defence system of the Falkland/Malvinas Islands. Thus, this policy appears to be an actual reality in the British international agenda.[217] Without entering into specific details in relation to the Falkland/Malvinas Islands case[218], this approach is characterised by a unilateral decision of one of the sovereign agents to secure the non-sovereign territory against its international rival in the conflict (and any other aggressor). Although the preeminent feature is the defence system, this approach has direct consequences for the economy of both the third territory and the sovereign State providing the means to defend it.

The Falkland Islands as an International Problem (London and New York: Routledge, 1998). See also Peter J. Beck, "The Future of the Falkland Islands: A Solution Made in Hong Kong?," *International Affairs, Royal Institute of International Affairs* 61 (1985): 643-660; Peter J. Beck, "Looking at the Falkland Islands from Antarctica: the Broader Regional Perspective," *Polar Record* 30 (1994): 167-180; Peter J. Beck, "Britain's Falkland Future-the Need to Look Back," *The Round Table* 73 (1984): 139-152; and many others.

[216] Cyril Pickard, "Fortress Falkland? The Real Lessons of the Franks Report," *The Round Table* 72 (1983): 233-237.

[217] Recent tension between Argentina and the United Kingdom in relation to the Falkland/Malvinas Islands resulted in militarisation of the South Atlantic. See The Telegraph 08/02/12 http://www.telegraph.co.uk/news/worldnews/southamerica/falklandislands/9068315/Argentine-president-to-appeal-to-UN-over-Falkland.html accessed on 13/02/12 and The Guardian 08/02/12 http://www.guardian.co.uk/uk/2012/feb/10/falkland-islands-argentina-formal-protest-un accessed on 13/02/12.

[218] The Falkland/Malvinas Island case will be reviewed in more detail in Chapter Seven.

A direct negative result of this solution is that the basic problem related to sovereignty remains unresolved. Sovereignty is not granted either to the third territory or the sovereign State in charge of the defence. Indeed, the *de facto* sovereignty may rest on the agent that defends the third territory; however, no *de jure* sovereignty is recognised by these means. Moreover, the consequent costs of—mainly but not only—defence and diplomacy are substantial and have to be supported only by one of the agents—the one intending to defend the third territory. Finally, although this approach offers a short-term solution, the long term overall situation is uncertain in two ways: first, the sovereignty issue remains unresolved as discussed; secondly, the defence of any territory is a mutable feature (e.g. the United Kingdom defence power is a factual variable that depends on many factors, one of them being its economy, currently affected by the international financial crisis). In addition to the previously mentioned practical consequences, there is no reason to think this approach is just.

b) Integration and free association

Both integration and free association[219] are in essence ways in which individual political organisations join in a larger whole. The difference depends on the degree of sovereignty they are willing to surrender. For instance, integration implies tighter links between the agents: one of the given political communities becomes part of another one. In contrast, free association does not imply full integration but close links in regards to specific areas (e.g. economy, security, etc.) usually after independence is achieved from another sovereign State (e.g. Cook Islands and New Zealand, Federated States of Micronesia and the United States, etc.).

[219] Integration and free association are both defined in the Res. 1541 (XV) of UN General Assembly. In what is of interest to this thesis Principle VII declares that: "(a) Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes […]. (b) The associated territory should have the right to determine its internal constitution without outside interference […]." Principle VIII declares that: "Integration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms […]." And Principle IX states that: "Integration should have come about in the following circumstances: (a) The integrating territory should have attained an advanced stage of self-government with free political institutions […]; (b) The integration should be the result of the freely expressed wishes of the territory's peoples […]."

In these cases, independence is either assumed as a starting point or as an ultimate goal. In what is specific to the kind of sovereignty conflicts that are the object of this thesis, at least one of the agents is always against this solution (e.g. Argentina has been and still is opposed to Falkland/Malvinas Islands' independence). That is because it is common in any sovereignty dispute that the third territory has tighter links with one of the involved sovereign agents in, for example, cultural background, ethnicity, historical links or geographical location. The direct consequence is that the State that is more distant, in whatever way, from the third territory will see its position worsened in comparison to its opponent. When the dispute is still in place none of the sovereign States is in a better position to make use of their intended rights over the third territory (at least in terms of *de jure* sovereignty). However, if the third territory becomes integrated with or associated to the sovereign State with which it had previous tighter links, this State will be in a better position than the more distant one, since now the newly integrated/associated territory will not need to consider the more distant sovereign State.

Indeed, there are cases where this may work. For instance, the proposal for some of Israel's West Bank settlements is integration in Israel with compensation in the form of land to Palestine. But, although integration either in its pure form or as free association may encourage equality between the populations participating in the process, this international institution has been designed bearing in mind situations in which there are only two agents—the one being integrated and the one welcoming party. In the cases contemplated here, the agents are three, so integration would mean leaving one of them out of the equation. Ergo, it would be opposed by that one agent unless they agreed to withdraw, with or without compensation. The consequence is an unbalanced relation amongst the agents. At least in a *status quo* all of them are in a similar position; with integration, one of the sovereign States might be completely left outside the picture.

c) Independence

This is the extreme unilateral view, since it entails the absolute separation of the third territory as an autonomous political organisation. The third territory would

become a new sovereign State. There are several reasons both to support independence and to oppose it.

The main problem is the constant opposition of at least one of the already sovereign States (e.g. Argentina in the case of Falkland/Malvinas Islands). Against this position it may be argued that the claims of one of the agents should sometimes be overridden. This could be because of: a) the legal position (e.g. the 'New Territories', later part of Hong Kong's territory, had to be returned to China because they were on lease, and the lease came to an end); b) the desires of the inhabitants in a territory that is viable economically and for defence might be enough to make independence the best option (e.g. the wish of the overwhelming majority of the inhabitants of the Falkland/Malvinas Islands to be British).[220]

Undoubtedly, there would be different inhabitants under different circumstances so the question about the legitimacy of which group of inhabitants counts will arise—e.g. past, current of future generations. As a result, there is at least an argument for saying that these desires do not count fully or without certain controversy. In addition to this, in one or the other case—the legal issue or desire of the inhabitants—the key point that makes independence neither a useful nor a realistic solution is its viability. Although in most cases the third territory may appear viable on its own to some extent, it cannot be to the extent necessary to be granted the condition of fully independent political organisation (e.g. both Hong Kong and Falkland/Malvinas Islands do not have a defence system and must depend upon another agent in case of threat or attack, China[221] and the United Kingdom[222]

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[220] See Falkland Islands government position available on http://www.Falkland.gov.fk//International_Relations.html (accessed on 14/02/12) where it is stated that: "The Falkland Islands Government (FIG) is content for relations between Britain and Argentina to strengthen, on the basis that its right of self-determination is not compromised"; and Chapter I, art. 1 of the Falkland Islands Constitution Order 2008 states that "[…] all peoples have the right to self-determination and by virtue of that right they freely determine their political status."

[221] The Basic Law of Hong Kong states in its Chapter II, article 14.1: "The Central People's Government shall be responsible for the defence of the Hong Kong Special Administrative Region." The complete text of the Basic Law is available on http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text.pdf accessed on 25/04/12.

[222] According to Chapter II, art. 25 of the Falkland Islands Constitution Order 2008 "The Governor shall consult with the Commander British Forces before exercising any function which appears to the Governor to relate to defence or internal security […]." For an argument related to British cuts in regard defence system for the Falkland/Malvinas Islands see The Guardian 10/11/10 http://www.guardian.co.uk/uk/2010/nov/10/falkland-islands-defence-cuts accessed on 13/02/12 and the Daily Mail 19/02/10 http://www.dailymail.co.uk/debate/article-1252149/Its-bitter-truth-We-send-task-force-Falkland-today.html accessed on 13/02/12. For an insight of the British defence plan of the

respectively). In addition to the defence system, sovereignty disputes usually concern a third territory without enough resources, means or development to support their existence in the international arena as a fully autonomous entity (hence, independence is usually replaced by integration or limited by free association).

Against the argument about the viability of the third territory as a fully independent political organisation, it is true that there are sovereign States that do not have their own defence system or a strong economy and possess a small territory and population (e.g. San Marino, Monaco, Vatican City), but are still respected as sovereign. Nevertheless, the similarities they share with the territories whose sovereignty is disputed are only superficial: they are all small pieces of land with a small population, but strong local authorities and law, and this makes this counterargument irrelevant. Also, although these sovereign States would not be independent political communities without aid from another sovereign State, there are historical, geographical, demographical reasons why this is provided. Moreover, in none of these cases is there a third party (or even a second party) disputing sovereignty. But, in sovereignty conflicts that are the object of this thesis there are several claimants. Thus, the fact that the third territory has usually tighter links with one of these claimants may imply the consolidation of these bilateral relations if full independence was achieved, leaving aside that sovereign State that was in the first place against it. So independence would be a subterfuge and not a real solution.

One of the ways in which contemporary political literature addresses independence is through the theory of secession. Secession[223] and partition in the context of a sovereignty conflict imply the separation from another sovereign State. The immediate consequence is the birth of an independent political organisation that—if recognised by its peers—may be a new sovereign State. It does not imply a revolution as it does not mean the validity of the central authority of the sovereign State is challenged. What is challenged is the fact that the given population that wants to secede understands for whatever reason the necessity of having an independent government.

Falkland/Malvinas Islands see House of Commons Library, British Parliament available on http://www.parliament.uk/briefing-papers/SN06201 accessed on 13/02/12.

[223] Although secession as a concept has been treated in Mediaeval and Modern Ages, it has been more developed–at least in legal and political fields-contemporarily. For instance, see Beran's *A Liberal Theory of Secession* and Buchanan's *Toward a Theory of Secession*.

There is a subtle difference between secession in general and secession in the particular case of sovereignty disputes object of this thesis. In the first case, secession in general, the ones wishing to secede are actually part of the sovereign State they claim independence from (e.g. Croatia and Slovenia seceded from the Socialist Federal Republic of Yugoslavia in 1991). In contrast, the cases we are analysing have a third territory whose sovereignty has been (and still is) under dispute. Hence its respective population is not actually seceding or separating itself from any sovereign (since there is no uncontested sovereign, either *de jure* or *de facto*, for the third territory yet recognised).

Is secession justified in sovereignty disputes? Is secession justified at all? If so, under which conditions is secession justified? As in the general case of independence, there are both arguments that justify secession and arguments that oppose it.[224] Some authors consider secession can be a right to be presumed. Some others think it is not permitted unless some requirements are fulfilled. And some others have an eclectic view.[225]

For an extreme interpretation, secession should be applied as a 'rule' in the sense "[…] any territorially concentrated group within a state should be permitted to secede if it wants to and if it is morally and practically possible […]."[226] But, even if we understood secession as a 'rule', the sovereignty conflicts analysed in this thesis make it an unreasonable choice: the populations are not large; as a direct consequence of having a small population, they are not able to allow sub-groups to secede—it would simply be unrealistic for, at the most, a few hundreds of people reach an international status of statehood; there is no population wishing to exploit or oppress the minority (at least in the cases of Falkland/Malvinas Islands, Gibraltar, Kashmir and the Kuril Islands); the third territories in all disputes are key for the sovereign States at different levels (highly rich in natural resources, geopolitical location and its relation with strategic defence, cultural and historical homogeneity).

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[224] Allen Buchanan, "Toward a Theory of Secession," *Chicago University Press* 101 (1991): 322-342.
[225] See Robert W. McGee, "A Third Liberal Theory of Secession," *The Liverpool Law Review* XIV (1992): 45-66. McGee analyses Beran's *A Liberal Theory of Secession* and Birch's *Another Liberal Theory of Secession*, arguably the first two publications in contemporary times that refer to the idea of secession in detail. In particular, Beran mentions previous ideas on the topic with names like Grotius and Pufendorf. Refer to Harry Beran, "A Liberal Theory of Secession," *Political Studies* XXXII (1984): 21-31; and Anthony H. Birch, "Another Liberal Theory of Secession," *Political Studies* XXXII (1984): 596-602.
[226] Beran, *op. cit.*, p. 30.

Although it may be argued that the population of the third territories have continuously refused to be part of—at least—one of the sovereign States, in all these cases at least one of the governments (usually the one with *de facto* sovereignty) protects the population of the third territory against human rights' violations; there is no danger for the population of the third territory in terms of their local authorities; their economic interests are only jeopardised to the extent they cannot be fully exercised due to the *status quo* that characterises this kind of sovereignty conflicts; none of the national governments ignores the population of the third territory—they do not recognise their right to self-determination but accept a certain degree of autonomy.[227]

In situations in which there is a sovereignty dispute but the agents do not have any other issue between them except that they argue in regards to their claimed rights over a given piece of land—and all that it entails—to grant its supreme authority to one of them appears to be a radical decision that guarantees several negative outcomes: the opposition of at least one of the agents; the violation of the principle of territorial integrity; unsettled multilateral relations; unbalanced power given by the fact the third territory—now independent—may give special priority to only one of the sovereign States who took part in the original conflict (e.g. in allowing it to exploit natural resources), and many others. Secession is indeed a contested notion with practical and moral reasons both in favour of and against it. Nonetheless, even if it was considered as a positive international solution for certain conflicts, it does not follow that is the desirable one for the kind of cases analysed in this thesis. Otherwise stated, the solution I propose is designed for situations when secession is either nonviable or not just.

d) Self-determination

Although it is often thought to be intrinsically linked to independence, self-determination[228] deserves a separate section because: a) there is a vast quantity and

[227] Falkland/Malvinas Islands are considered in Argentina as one of the autonomous provinces (its official name is Province of Tierra del Fuego, Antarctica and South Atlantic Islands); in the United Kingdom they are considered a British Overseas Territory.

[228] See Chapter 1, Article 1, part 2 of the UN Charter states amongst its purposes: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace"; and UN General Assembly Resolution 1514 Article 2: "All peoples have the right to self-determination;

variety of documents related to this international institution[229]; b) there are many populations around the world at least considering it as an option for their political status; c) we need to make clear that it may lead to solutions other than independence. In international relations, self-determination can be understood as a principle that allows a certain group of people who live in a given territory to have the right to decide who will govern them. Although both are legal and political concepts, sovereignty gives priority to the State whereas self-determination gives preeminent place to the people.[230] It is not uncommon in sovereignty conflicts that the population of the third territory seeks independence by applying the principle of self-determination. However, the fact that the third territory is granted self-determination—and hence, may become independent—implies always a negative response from at least one of the agents involved in the original conflict (e.g. Argentina in respect to the Falkland/Malvinas Islands).

The point we need to make clear is that independence is not the only way in which self-determination may evolve. Indeed, the population may vote to be administered by, or integrated into, one of the States claiming sovereignty (e.g. Puerto Rico, where the battle is between statehood and independence). Then self-determination may lead to different results since the population might decide: a) to be independent; b) to be administered by or be part of one party—i.e. integration or free association; c) to have shared sovereignty.

If self-determination leads either to independence or to integration/association, there are reasons why to avoid it is—at least—advisable. First, in cases such as the ones which are object of this thesis, to grant self-determination to the third territory would imply an unbalanced situation amongst the involved agents as we have seen in this Chapter. The fact that the third territory was

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by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"; UN General Assembly Resolution 2649 Article 1: "*Affirms* the legitimacy of the struggle of peoples under colonial and alien domination recognised as being entitled to the right of self-determination to restore to themselves that right by any means at their disposal"; UN General Assembly Resolution 2625 Article e: "The principle of equal rights and self-determination of peoples"; and others.

[229] The list of books and articles referred to self-determination is cumbersome. For an overview about self-determination in the context of Falkland/Malvinas Islands see H. E. Chehabi, "Self-determination, Territorial Integrity, and the Falkland Islands," *The Academy of Political Science, Political Science Quarterly* 100 (1985): 215-225; Denzil Dunnett, "Self-determination and the Falklands," *International Affairs, Royal Institute of International Affairs* 59 (1983): 415-428.

[230] P.H. Kooijmans, "Tolerance, Sovereignty and Self-determination," *Netherlands International Law Review* XLIII (1996): 211-217.

sovereign would mean that its inhabitants had exclusive ownership of the third territory including consequent rights and burdens; the rest of the international agents involved in the dispute would not have any actual or future right or obligation to intervene in its internal or international affairs. So, the sovereign State that had closer relations with the third territory before the self-determination would see its position both *de jure* and *de facto* improved as reviewed when independence as a remedy was discussed before in this Chapter. The same can be said about integration and free association.

To leave aside self-determination as a solution does not have to do with the international institution itself but with the way it may be applied in the sovereignty conflicts that are object of this thesis. It might have been useful in historical specific cases due to their own characteristics (e.g. Kosovo). But to use the same international institutions in the same manner in cases in which the interrelation amongst the involved agents is already peaceful—apart from the sovereignty difference—adds an unnecessary element of discord that goes against peaceful international relations.

To recapitulate, self-determination may imply secession from an already sovereign State. In fact, self-determination can be one of the ways to secede but not the only one.[231] However, to obtain independence through self-determination is not a solution that can be taken automatically in sovereignty issues. It is an *ultimum remedium*[232] in situations in which a given sovereign State has a certain tension with a group of people, this group of people is large enough, their human rights are not acknowledged, and they have a common identity and decide to be independent; otherwise, their existence within the sovereign State could be compromised. But secession in the form of self-determination is an extreme remedy that may do more harm than good, in some cases.

To be more precise, this view does not change even if we consider the argument that self-determination is a right, overruling utilitarian considerations. Indeed, this thesis is not against this interpretation either. The crucial issue is how we 'weigh' self-determination—even considered as a right—against public good, general welfare, a fair and just environment for all (not only the majority or any minority). Then, it is not that self-determination is good or bad as a right or as an

[231] Beran, *op. cit.*, 22 *in fine* and 23 *supra*.
[232] *Ibid*.

international remedy per se. Yet, because of the specific situation in which it is applied and the way in which it is used may be.

Therefore, in the case of sovereignty conflicts like the ones we are dealing with, a solution between *status quo* and complete independence should be reached. Some scholars have tried to re-define the idea of self-determination making it more inclusive but somehow giving shape to an eclectic international institution, and that agrees with shared sovereignty:

> "[…] the right to national self-determination must go beyond self-government but to stop short of statehood, and thus I introduce a modified right to self-determination, which states that all national groups have an equal right to self-determination provided that the realization of the right does not require the acquisition of independent statehood as a necessary condition."[233]

Hence, if the relationship between a sovereign State and a large group within its population is already problematic, self-determination leading to independence may in fact be a viable solution. However, in the specific case of sovereignty conflicts in which the involved agents have a peaceful relationship apart from the argument about the sovereignty of the third territory, to apply self-determination in the form of independence or integration/association appears as an inadvisable way of dealing with it. It goes against that relationship and threatens an otherwise peaceful environment. Nevertheless, if self-determination is understood as the collective right a group has to determine their political status[234], and this group is willing to accept the claims of other agents, it can be an institution that may offer a positive outcome. Besides, it may lead to shared sovereignty.

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[233] Anna Moltchanova, *National Self-determination and Justice in Multinational States* (Springer, 2011), in partic. p. xvi and Chapter 5.

[234] *Ibid*., in partic. Chapter 2 and Moltchanova's interpretation of Hart's condition for the existence of moral rights. Refer also to Herbert L. A. Hart, "Are There Any Natural Rights?," *The Philosophical Review* 64 (1955): 175-191.

International-Multilateral approaches

This type of solution involves the inclusion of agents other than the ones originally involved in the dispute. Thus, even regional or international organisations may participate in the negotiations. As the aim is usually to produce peaceful relations amongst the participants in the conflict, they mainly involve a freeze in regard to the sovereignty dispute (usually a step previous to full independence); so no real ultimate solution is obtained. For these reasons, they are usually opposed by at least one of the claimants.

a) A NATO-based Multilateral Security approach

In the hypothetical case of the North Atlantic Treaty Organisation (NATO) intervening in the Falkland/Malvinas dispute, this would be opposed not only by Argentina but by all Latin-American sovereign States, as creating an external threat to the region.

The Monroe, Calvo and Drago doctrines apply here.[235] According to Monroe's doctrine the principle of non-intervention is part of the sovereignty of every State. However, before this policy amongst sovereign States appeared in the 19th century, intervention or mutual interference in internal and foreign affairs of other States was not uncommon. In that period, and with European States trying to recover their colonies in America, the President of the United States proclaimed in one of his speeches (02/12/1823) what later on would be considered basic principles of international public law: a) no colonization; b) non-intervention of European States in the affairs of America; c) reciprocal non-intervention in European affairs. The Calvo and Drago's doctrines are similar in the sense they forbid the intervention of a sovereign State if the purpose of that intervention is only to oblige that State to fulfil its international financial obligations. In these cases, they are also referred to

[235] See Elihu Root, "The Real Monroe Doctrine," *American Society of International Law* 8 (1914): 6-22; Mark T. Gilderhus, "The Monroe Doctrine: Meanings and Implications," *Presidential Studies Quarterly* 36 (2006): 5-16; Amos S. Hershey, "The Calvo and Drago Doctrines," *The American Journal of International Law, American Society of International Law* 1 (1907): 26-45; Luis M. Drago and H. Edward Nettles, "The Drago Doctrine in International Law and Politics," *The Hispanic American Historical Review, Duke University Press* 8 (1928): 204-223; Crammond Kennedy, "The Drago Doctrine," *The North American Review, University of Northern Iowa* 185 (1907): 614-622; and many others.

European intervention in American countries and their internal affairs (specifically, Venezuela and its international public debt in 1901).

The main problem with this approach is that the organisation that may be involved is both alien to the sovereignty issue and also to the region in which the disputed territory is located. As a result, it is also usually the case that only one of the involved sovereign States is a member of such an organisation which leads to the opposition of its counterpart in the conflict because of the resultant unbalanced situation in terms of bargaining power.

It may happen though that both claimants might be members and the organisation might be geographically involved—e.g. E.U. Nonetheless, at the moment, in most places where there are disputes, no such organisation exists.

b) United Nations Trusteeship

According to international law, a trusteeship[236] requires the consent of all the involved agents. [237] Originally conceived for territories under specific circumstances after the First and Second World Wars and under the League of Nations, this model can also be used by voluntary agreement and implies that the United Nations Organisation (UN) supervises the administration. The ultimate goal is the autonomy of the territory in question or its integration with another already sovereign State.

As it implies direct interference from UN in internal affairs of the third territory, the agreement of all the agents involved is difficult to obtain (in particular, that of the already sovereign States) in situations like the ones analysed here. Two main problems immediately arise. First, as discussed when dealing with unilateral approaches, final independence of the third territory could be contrary to the interests of at least one of the agents. Moreover, although UN aims to grant sovereign equality amongst the States[238] its own system reveals a contradiction: veto power in the

[236] For more details about the Trusteeship Council refer to http://www.un.org/en/mainbodies/trusteeship/ and http://www.un.org/en/decolonization/its.shtml

[237] Art. 79 UN Charter: "The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85."

[238] W. Michael Reisman, "The Constitutional Crisis in the United Nations," *The American Journal of International Law* 87 (1993): 83-100.

Security Council is only granted to certain sovereign States. This may be translated—in the perception of at least one of the sovereign States—as an unbalanced and unfair starting point to have negotiations, and with a predictable result: final independence of the third territory and tighter links only with the one sovereign State that supported the independence process. Not only does the Security Council present these problems but also other UN organisations. Even the UN General Assembly, at first glance a fair environment for sovereign States to participate in, has been regarded as ineffective[239] or irredeemably biased because of the different bargaining powers of its members. Also, in cases of contested sovereignty over populated territories, stateless people are not UN members.

c) Is the Antarctic Treaty a possible model?

The Antarctic Treaty[240] mainly refers to scientific exploration of the Antarctica leaving the recognition of territorial sovereignty undecided.[241] In what is important here, the basic sovereignty conflict remains unresolved.

In addition, one of the main differences this case presents in comparison to the sovereignty disputes is the fact that there is no settled population in Antarctica. Although it may be argued that somehow the rights mankind as a whole has over Antarctica are affected—e.g. with regard to exploitation of natural resources and consequent effects in the environment—the fact that there is no settled population means any issue related to human rights is not actual but potential and not related to a particular population. On the contrary, the conflicts contemplated by the model of

[239] Jack E. Vincent, "Predicting Voting Patterns in the General Assembly," *The American Political Science Review* 65 (1971): 471-498; Axel Dreher, Peter Nunnenkamp and Rainer Thiele, "Does US Aid Buy UN General Assembly Votes?," *Public Choice* 136 (2008): 139-164; T. Y. Wang, "U.S. Foreign Aid and UN Voting: an Analysis of Important Issues," *International Studies Quarterly* 43 (1999): 199-210; and many others.

[240] For a complete version of the Antarctic Treaty see http://www.ats.aq/documents/ats/treaty_original.pdf

[241] Article IV of the Antarctic Treaty refers to territorial claims: "1. Nothing contained in the present Treaty shall be interpreted as: (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica; (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise; (c) prejudicing the position of any Contracting Party as regards its recognition or non recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica. 2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty shall be asserted while the present Treaty is in force." See J. Peter A. Bernhardt, "Sovereignty in Antarctica," *California Western International Journal* 5 (1975): 297-349.

shared sovereignty assume there is a population living in the third territory, who has certain minimum human rights, so that any decision some or all of the agents take in relation to the third territory will affect them.

d) Could one appeal to the International Court of Justice?

The International Court of Justice (ICJ) has international jurisdiction and is multi-competent. However, two main problems make sovereignty conflicts of the kind that are object of this thesis difficult to be acknowledged by the ICJ: that there are not only legal but also political issues involved and that the agreement of all the parties in the conflict is needed.[242] Sovereignty entails several different elements that are not only legal (e.g. society, economy, etc.). Even though sovereignty claims as a right may be resolved—for example—by granting sovereignty to one, several or all the involved agents, the questions related to specificities in regard to government, population and territory remain unanswered. The solution, even if it was considered to an extent fair and just, cannot comprehend the whole complexity a sovereignty conflict offers; rather, it deals just with one of its components. Also, to obtain the agreement of all the claimants to its decision—as has been shown to be the case with other proposed remedies—would be very difficult. Even if was obtained, it would be very limited.

Bilateral approaches

Here, the two sovereign agents involved are included in the negotiations (the population of the third territory is not necessarily represented). Arguably, at the starting point they are equal international agents in relatively equal comparative circumstances in relation to the third territory. Although this may not be translated into real terms (i.e. one of the sovereign States may be considerably more powerful, making its bargaining position stronger and giving it an advantage in the

[242] See ICJ Statue, in particular art. 36: "1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. 2. The states parties to the present Statute may at any time declare that they recognise as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation […]."

negotiations), the main problem with this approach is the fact that the population of the third territory may see their interests being completely overlooked. A bilateral approach of any kind—in its narrow sense—will only bear in mind the interests of the two sovereign States; hence, to acknowledge those of the population of the third territory would be left to the good will of these sovereign States. To see this we will consider possible bilateral 'solutions'.

a) A condominium

International condominium implies that two or more sovereign States share their respective dominium over a specific territory. There are several examples of this international institution.[243] Although dominium under these circumstances is interpreted by some as equivalent to sovereignty, its real meaning is much narrower. Dominium appears to be similar to sovereignty but is only linked to one of the elements that characterise a State: its territory. Despite the fact that sovereignty in modern and contemporary legal and political literature is also mainly related to the territorial element, it has a broader content so as to include population, government and law—and all that each of these elements implies. That is to say, the sovereignty conflicts that we are interested in present a populated territory under dispute. Therefore, an international condominium would be a very inadequate way of addressing these conflicts, dealing with the territorial element but leaving aside all the other elements. So, to use an international condominium may be a reasonable solution for those particular cases in which the dispute is only related to a non-populated territory or one that although being populated, has certain characteristics that makes the territory the only element actually to be shared—e.g. it may be economically advantageous for two States to share the sovereignty over a river that acts as a natural border since they both have inhabitants in either side and there is a strong commercial interchange.

Moreover, some of its particular features make this model either not stable or not feasible specifically for the type of sovereignty conflicts analysed here. There

[243] Lake Constance (Germany, Austria and Switzerland, however there is no agreement in place), Paraná River (Argentina, Brazil and Paraguay, with many bi-lateral and multilateral projects and agreements in place), Sudan (Egypt and the United Kingdom between 1899 and 1955), and many others. See The New York Times 23/01/12 http://opinionator.blogs.nytimes.com/2012/01/23/the-worlds-most-exclusive-condominium/ accessed on 14/02/12.

are several reasons to avoid it: first, sovereignty may not be shared simultaneously but alternately (e.g. Pheasant Island, an uninhabited river island condominium between Spain and France, alternating sovereign every six months); second, condominiums are mostly temporary (e.g. the Anglo-Egyptian Sudan 1899-1956); third, in most cases, they cover a territory—land or maritime—without a settled population (e.g. Paraná River, Lake Constance); fourth, the condominium has to do with special geographical circumstances (e.g. Gulf of Fonseca, part of the coastline belonging either to Honduras, Nicaragua or El Salvador).

In brief, although at first glance international condominiums and shared sovereignty appear to be similar institutions with similar consequences, they are not. International condominiums have further characteristics that make the model an undesirable solution when applied to a populated third territory claimed by two sovereign States. There are many issues that international condominium cannot deal with. First, it is mainly referred to uninhabited territories. Additionally, even though the territory is inhabited, a crucial pitfall is that sovereignty changes every few years. And this variable feature has several negative consequences: it does not offer a solution for many implications (e.g. law applicable in case of a crime); it is in fact a temporal way of addressing the problem which translates in avoiding the ultimate discussion about sovereignty; it is a volatile approach because it depends on factual variables (e.g. the co-owned river changes its course, the portion of land granted to one claimant becomes useless due to environmental change); it is easy to see how it may work in cases in which the claimants are territorial neighbours but it is hard to see how it could work in those in they were distant—geographically speaking. All these reasons make international condominiums an unstable solution for most—if not all—the involved agents in the conflict and in particular for the inhabitants of the third territory.

b) Leaseback with guarantees

This model involves a sovereign State that agrees to transfer the sovereignty over a territory to another sovereign State and leases it back for a certain time—i.e. the licensor will have the right to 'use' the territory until the agreed time finishes. It is often the case that the State that is granted the final sovereignty offers certain

guarantees, in particular if the territory in question is populated—e.g. language of the inhabitants, applicable law, nationality, etc. Also known as the Hong Kong model of 'one country-two systems'[244], this formula is in between a sovereignty conflict and final full independence or integration as part of another sovereign State. In other words, it does not offer a definitive solution. It is a stage towards a definitive solution—whether final independence or integration, but one which overrides one of the States in dispute (unless, like the United Kingdom, it had accepted this final solution in advance).

Once again, this particular remedy does not guarantee either an equal starting point or result: as detailed, it is the usual case the third territory has tighter links—for whatever reasons—with one of the sovereign States and its final independence or integration would simply be a way to legitimise *de jure* that situation. Besides, to agree upon the length of the leaseback and the way in which the guarantees will be fulfilled is often very controversial.[245] Also, the population of the leased territory rarely gets a say.

c) A Sovereignty freeze

This institution is similar to the one analysed under the heading 'Antarctic Solution' (when discussing international-multilateral approaches before in this Chapter). The only difference is that the dispute between the two original sovereign claimants remains. However, the negative consequences are the same. No other international agent has a right to a claim or involvement in the dispute, the original participants are the only ones involved, the third territory is assumed to be populated, but sovereignty is not given to any of the agents, it is not shared amongst them or distributed in any way.

At first glance it may be argued that a peaceful relationship amongst the agents is achieved. However, at what cost? First, none of the agents is allowed to put into practice any claimed right over the third territory. Second, even if they intended to put in practice their claimed rights, they would need to agree upon each and every

[244] Lorenz Langer, "Out of Joint? –Hong Kong's International Status from the Sino-British Joint Declaration to the Present," *Archiv des Volkerrechts* 46 (2008): 309-344.
[245] For the specific case of the Falkland/Malvinas Islands and the application of the leaseback with guarantees see Guillermo A. Makin, "Argentina 1983: Elections and Items for Negotiations with the United Kingdom," *Bulletin of Latin American Research* 3 (1984): 110-118.

action, since this would imply a break in the sovereignty freeze. Third, the population of the third territory would remain in a legal and political limbo, with both local and international implications (e.g. defence, representation in international organisations, etc.).

d) Abandonment

The two sovereign States would withdraw their claims in regards the sovereignty of the third territory. An immediate consequence for the third territory seems to be either a political and legal limbo or independence. In either of these cases, this solution offers negative outcomes not only for the third territory but also for the sovereign States. In the case of the third territory, its internal and international position would be precarious (e.g. defence, international credit, etc.). For instance, in the best case scenario, the third territory could be fully independent, or associated with or integrated in another sovereign State (several negative consequences have been already analysed in each case). In the worst case scenario, the third territory could be left in a legal and political limbo, making it an easy target for any other State. In what is of interest to the sovereign States, each would withdraw any actual or potential claim. So, its peer in the conflict, and any other agent, would have a free path to act as they wished in relation to the third territory.

e) Titular Sovereignty and autonomy

The case of the Aland Islands[246] is the leading example: a non-sovereign autonomous territory under the umbrella of an already sovereign State. This self-governing community has a separate and independent administration from that of Finland. This includes having a separate executive power and an autonomous parliament. Yet, they are under the sovereignty of Finland. This solution is possible and desirable for the third territory and for one of the involved sovereign States. However, the other State sees its claimed rights disappear. It is for that reason this type of solution appears to be—at least—not desirable for the kind of conflicts

[246] Tore Modeen, "The International Protection of the National Identity of the Aland Islands," *Scandinavian Studies in Law* 17 (1973): 176-210; Holger Rotkirch, "The Demilitarization of the Aland Islands: a Regime 'in European Interests' Withstanding Changing Circumstances," *Journal of Peace Research* 23 (1986): 357-376; Finn Seyersted, "The Aland Autonomy and International Law," *Nordisk Tidsskrift International Ret.* 51 (1982): 23-28; and many more.

analysed in this research. It assumes one sovereign State and one populated territory arguing about sovereignty. Hence, the starting point is different from the one of shared sovereignty.

The *status quo*

As this is both theoretically possible and what often actually happens in sovereignty conflicts, I will briefly focus on the possibility of simply maintaining the *status quo*. Obviously, this would mean only postponing the decision; the main question in regard to sovereignty would remain unanswered. A further problem under these circumstances is that none of the involved agents are able to put their rights fully into practice. On the one hand, even in the best possible scenario, if the relations amongst the agents were peaceful it could only be expected they continue to be that way. On the other hand, reality shows that more often than not the *status quo* is broken by at least one of the agents trying to put their claimed rights into action—e.g. by exploitation of natural resources. So, the *status quo*'s main feature is contradictory: volatility. Since rights and obligations are not clearly defined for any of the agents because sovereignty remains undefined, none of them has the actual power to make use of them fully, but at the same time they do not have any more legal restrictions than those of international public law, or any more political ones than those caused by the presence of the other agents.[247]

Conclusion

The first lines of this Chapter made clear that our goal was to see if any of the current proposed international remedies for sovereignty conflicts could be a reasonable solution to the ones we are interested in here. We have seen that in all cases there are reasons that make their application somewhat controversial—if not more problematic by threatening an otherwise peaceful relation between the claimant States.

Precisely, we have seen that here are various possible solutions for sovereignty conflicts. We have reviewed independence, self-determination, the

[247] In the case of Falkland/Malvinas Islands, it is common practice for Argentina to protest in international forums when the United Kingdom acts upon natural resources.

Antarctic solution, and many others. Although they may be the answer for some sovereignty conflicts, they present—for the reasons shown in this Chapter—a certain degree of uncertainty that make us doubt about the value of their application.

Indeed, I have not claimed that these other remedies are of no use. In fact, if the parties accept them and they result in a peaceful understanding amongst them, there is no question about their reasonableness. What I have argued and this Chapter demonstrates is that there is a need for a peaceful solution that the reviewed international remedies cannot offer. What we need is a solution that no party may reasonably reject, whereas what we have is existing solutions that one or more parties may reasonably reject. It is time now to see if such a reasonable solution can be offered to these parties. Therefore, in the following Chapters I will attempt to reach a solution that no reasonable party may reject.

Part Three

Chapter Six

How can shared sovereignty be just?

Introduction

The aim now is to present a conception of shared sovereignty that can lead to an abstract model in which the claimants in a sovereignty conflict leave aside reasons that may work against a final and peaceful solution. In this Chapter we are going to explore if it is possible to adapt the model created by John Rawls in his *Theory of Justice*[248] to sovereignty conflicts. The idea is to present an argument for hypothetical agreement by coming up with principles that cannot be reasonably refused. Therefore, this is a theoretical exercise to focus on what factors cause bias in sovereignty disputes. Then, the task is to design a procedure which will limit the effect of these factors. As well as highlighting these pitfalls on the way to a peaceful solution, I will explore a hypothetical agreement amongst the claimants. If such an agreement is reached, it must be one that people could not reasonably reject later on, and so to do this we must eliminate bias.

As in *Theory of Justice* the analysis we are going to conduct is based on a hypothetical situation. In consequence, the only thing we need is that all three parties are motivated to obtain a reasonable solution. Therefore, I presuppose that we assume that they have appointed free and equal negotiators to achieve this. Hence, this original position in which the negotiations take place assumes certain other features that will be discussed here. Within this environment, the negotiators will examine a series of principles and see if any of them secures their respective ends as representatives of the claimant populations—the two sovereign States and of the third territory.

Indeed, Rawls' thinking on international justice can be found in *The Law of Peoples*. I will explore some of its elements too. Yet, it is mainly his *Theory of Justice* and the method he develops there that I am more interested in using here. The main reason to proceed this way is that Rawls makes clear in *The Law of Peoples* that it is 'peoples' that constitute the relevant moral units of international society

[248] The design of this Chapter is mainly inspired by Chapter III of John Rawls' *Theory of Justice*.

leaving aside States *per se*. In addition to this, he emphasises that sovereignty is not central for his proposal.[249] This thesis, on the contrary, follows the traditional view that States are constituted by a population ('peoples') but also recognises territory, government and sovereignty as constitutive elements. That is because this thesis is centred on sovereignty disputes, issues that Rawls himself does not address.

In other words, Rawls was involved in a different project in *The Law of Peoples*. What I am doing is not trying to argue that my solution is the one Rawls would necessarily come up with or what Rawls would have wanted. I am simply using his method to arrive at my solution.

Setting the stage for the negotiations

Any community or population consists of individuals who are different in many senses—pluralism, as Rawls says[250]—is a permanent feature that cannot be ignored. The international community does not escape from this, since it includes several agents of very different natures. Therefore, as in the case of civil societies in Rawls' *Theory of Justice*, I assume that the international society is constituted by several different agents who in their relations recognise some 'rules of conduct' and act upon them.[251] However, only one kind of them, the State, has a specific characteristic: sovereignty. And even if the international community was only composed by sovereign States, they are different in many ways—e.g. strong and weak, developed and non-developed, populated and not populated, insular, peninsular, etc. It is for that reason that I also suppose that their interrelation is for 'mutual advantage'.[252] That is because I assume States are only interested in maximising their own interest, but they realise they can only do that by taking opportunities for social cooperation available if they act as a well-behaved member of the international community—as we have seen in Chapter Four when discussing how far sovereign States can cooperate together without sacrificing their sovereignty.

[249] Rawls specifically uses in *The Law of Peoples* (1999) the term 'peoples' to distinguish his thinking from that about political States as traditionally conceived. In addition to this, he maintains that 'peoples' lack traditional sovereignty. This thesis, on the contrary, uses the terms 'State' and 'sovereignty' as generally accepted in legal and political sciences. See Chapter Two for more details.
[250] Referred to Rawls's idea of pluralism as a 'permanent feature of a democratic society'. See John Rawls, *Justice as Fairness* (Harvard: Harvard University Press, 2003), in partic. p. 84.
[251] Rawls (1999), *op. cit.*, p. 4.
[252] *Ibid*.

But, as in any circumstances in which we have agents of different kinds—so the same is true of a community of States—relations amongst international agents introduce also identity and conflict of interests[253]—and sovereignty conflicts are one of them. As a result, some criteria are needed for choosing the principles that can put a peaceful end to these conflicts.

Although Rawls' *Theory of Justice* offers an insight on how to address conflicts of interest, it is one that deals with them within civil societies and at an individual level and, hence, is not totally appropriate for international issues—at least not to the extent needed in this thesis. That is because our principles will be concerned with a special case of conflicts: sovereignty disputes. Consequently, we need specific principles that determine how to assign sovereign rights and duties over a non-sovereign and populated territory. So, we need to adapt Rawls' approach from individual to State level. Thus, we have to make clear how the elements that Rawls proposes in his *Theory of Justice* at the individual level are also present in sovereignty disputes.

As in any negotiation concerning different agents with a conflict of interest, we need to address a particular feature—pluralism—if we want to strive for a solution, even more if that solution is intended to be just and fair so as to secure a binding and respected agreement. Addressing this feature at the individual level, Rawls defines the 'circumstances of justice' as "the normal conditions under which human cooperation is both possible and necessary."[254] Then, he proceeds to divide them in objective characteristics—i.e. characteristics of the environment, physical and mental features of the participant individuals, their capacities and a state of moderate scarcity; and subjective characteristics—i.e. even though individuals may have similar needs and interests, each has an individual plan of life.

One of the first points that Rawls makes is that questions of distributive justice arise only under certain 'circumstances of justice', that is to say limited resources and limited altruism. In what is crucial for this thesis, there is also a common interest that is the cause of sovereignty conflicts and there are some

[253] *Ibid*. In what matters here Rawls says that "[t]here is an identity of interests since social cooperation makes possible a better life for all than any would have if each were to live solely by his own efforts. There is conflict of interests since persons are not indifferent as to how the greater benefits produced by their collaboration are distributed, for in order to pursue their ends they each prefer a larger to a lesser share […]."
[254] Rawls (1999), *op. cit.*, p. 109.

'circumstances of justice' that are particular to them. The territory under dispute—and all that it implies—is the one element around which the dispute is centred. In other words, what Rawls labels at the individual level as moderate scarcity or limited resources finds its parallel in sovereignty disputes in the non-sovereign third territory—i.e. the only 'thing' all the agents are claiming exclusive sovereignty over. To be more precise, what is scarce is the rights and obligations that sovereignty entails, in this thesis, over the third territory. Thus, what Rawls refers to as an individual's plan of life we may call a 'State plan of life'—each State's interest as a group is also represented by the exclusive rights it claims over the same piece of land.

In order to avoid confusion about what I propose to see as a 'State plan of life', it is important to distinguish between an individual or personal interest—the one that Rawls refers to—and the interest of each claiming party as a whole—the one I refer to in this thesis. Each of the claimants—the two sovereign States and the population of the third territory—is a community of people who live in a certain territory and have common authorities and law.[255] The individuals in these claiming parties have both common and conflicting interests.[256] But although each claiming party is formed by many different individuals with different interests, each of these claiming parties has as a collective group a common interest for the purpose of this thesis: sovereignty over the third territory. Thus, this same element—the third territory—is the centre of this particular conflict of interest.

In brief, there is a situation in which three populations coexist (two sovereign States and one non-sovereign group of people) and argue about their rights and obligations over the same territory. There are limited resources or there is a moderate scarcity given by the claimed territory that each of them exclusively wants. While these claimants could work together in a mutually advantageous way, they each have, as different groups of people, respectively their own collective 'plan of life' that is currently preventing them from doing this: their respective 'plans of life' in relation to the claimed territory are blocked by the other claimants, resulting in a zero sum game.

[255] For a notion of society see Rawls (1999), *op. cit.*, p. 4.
[256] *Ibid*.

Formal constraints. A 'colourable claim'

Before going into the negotiations to solve the sovereignty conflict we need to decide who will be able to be part of them—who is a legitimate claiming party. Therefore, both the claiming agents and the 'original position' as a whole are subjected to certain limitations. The agents will be limited in such a way that the right to claim is restricted to those who fulfil certain criteria, while other constraints secure the reasonableness of the procedure.

The agents should have what I call a 'colourable claim'.[257] That is to say, the represented populations must have a valid reason to claim sovereignty over the third territory—e.g. effective occupation[258], consent by the other agent in the dispute[259], consent by other States[260], and/or consent by the international community.[261] That reason should be 'colourable' enough to prove that their intended rights are at least sufficiently plausible to be acknowledged, and they can be based on any reasonable circumstances—e.g. political, historical, legal, geographical arguments to name a few. For example, in the case of the Falklands/Malvinas Islands dispute it would be unreasonable for Russia to participate in the negotiations in

[257] A 'colourable claim' (in American English a colorable claim or colorable argument) is an expression used in the law of the United States to refer to a claim strong enough to have a reasonable chance of winning—i.e. the claim need not actually result in a win. It is a non-frivolous argument either supported by reference to law or facts that may be proven in Court. The distinction between 'colourability' of a claim and a winning claim has to do with two different steps in a judicial procedure. The colourability of the claim is related to admissibility—i.e. 'X' has a reasonable, non-frivolous ground to claim. It is only when the right to claim is acknowledged (it is admissible) that the Court will consider facts and law and decide upon the case. There are many cases that can be quoted to illustrate the use of this expression in Courts of the United States—e.g. Jones v. Barnes, 463 US 745, Supreme Court 1983; Arbaugh v. Y & H Corp., 546 US 500, Supreme Court 2006; Richardson v. United States, 468 US 317, Supreme Court 1984; and many others. In the United Kingdom Criminal proceedings, for example, it is equivalent to the "is there a case to answer?" standards. See Regina v. Galbraith (1981) WLR 1039. See as well Section 97, Criminal Procedure (Scotland) Act 1995 and the "no case to answer" standard.

[258] The Island of Palmas Case (or Miangas), United States of America vs. The Netherlands, Permanent Court of Arbitration (1928), available on http://www.pca-cpa.org/upload/files/Island%20of%20Palmas%20award%20only%20+%20TOC.pdf accessed on 19/04/12 and The Legal Status of Eastern Greenland Case, Denmark vs. Norway, Permanent Court of International Justice (1933), available on http://www.worldcourts.com/pcij/eng/decisions/1933.04.05_greenland.htm accessed on 19/04/12.

[259] The Temple of Preah Vihear Case, Cambodia vs. Thailand (1962), its merits available on http://www.icj-cij.org/docket/index.php?sum=284&code=ct&p1=3&p2=3&case=45&k=46&p3=5 accessed on 19/04/12.

[260] The Legal Status of Eastern Greenland Case, Denmark vs. Norway, Permanent Court of International Justice (1933), available on http://www.worldcourts.com/pcij/eng/decisions/1933.04.05_greenland.htm accessed on 19/04/12.

[261] Quincy Wright, "The Goa Incident," *The American Journal of International Law* 56 (1962): 617-632.

relation to their sovereignty since they do not have any colourable claim over that territory.

To put it in other words, a party will have a colourable claim if *prima facie* they have the right to claim, that is to say they appear to have a probable cause to support their intended right to claim. That is different from saying that they have a right to sovereignty. In the latter case, there is indeed an argument that has weight but that may be later overcome by another more pressing one. So, to have a colourable claim means having at least an argument that offers surface legitimacy—that may or may not translate in the negotiations into granting sovereignty because it only secures the participation in them.

Because a colourable claim recognises surface legitimacy to claim sovereignty to a party, it does not need to be the case that the sovereign States or the population of the third territory have claims sufficiently equal in strength to give them roughly equal claims in respect of the third territory. In fact, one sovereign State could have a claim that entitled it to double the weight of the other sovereign State or that of the third population. That is because a colourable claim refers only to the right to claim sovereignty, and that is prior to any negotiations. It is indeed in the negotiations when the parties may discuss the weight of their claims. And that will be reviewed in due course in this thesis.

Each particular ground for a colourable claim needs exploration. In broad terms, a colourable claim can be based on: 1) historical entitlements; 2) the legal status of these claims; and 3) moral considerations. Note that this list is not exhaustive and only includes some of the most common examples in sovereignty conflicts. That is because, as I have made clear before, a colourable claim refers to surface legitimacy and hence can be based on any *prima facie* reasonable circumstance related to the sovereignty over the third territory. Indeed, to have a colourable claim, the claim cannot be an undifferentiated one to the third territory—i.e. there must be some connection between the claimant and the third territory other than, for example, the claimant simply having an interest in the third territory.

Firstly, a colourable claim is based on historical entitlements when any of the claiming parties bases its right to claim on past facts related to the third territory and their intention to be its sovereign. These past facts can be related to actual occupation—for instance, effective occupation. But they do not exclude claiming

parties that do not currently occupy the third territory. However, in the event they did not occupy the third territory, their continuous intention to do so would be enough to grant them a colourable claim. That is because they may have been removed or expelled from the third territory. But in one or the other case, effective current occupation or past occupation and continuous intention to occupy the territory, they may have a basis strong enough to have a reasonable chance of being sovereign of that third territory. In other words, the facts they use to support their right to claim sovereignty may be proven in the negotiations. That is different, nevertheless, from saying their claim will actually be granted in the negotiations. Indeed, the historical claim can be controversial and disputed—but it cannot be frivolous. It is the same kind of test used in British law to determine whether there is a possible cause to move forward—i.e. if there is a case to answer.

It is important to make clear once again that the colourable claim refers to the right to claim sovereignty—and not to the right to sovereignty itself. Therefore, the historical entitlement is viewed here in order to prove surface or *prima facie* legitimacy. The historical claim will be reviewed in particular and in detail elsewhere in this thesis when discussing the right to sovereignty.

Secondly, a colourable claim is based on the legal status of these claims when any of the parties use or may use law to support their right to claim sovereignty. In this case, they may use international customary law or treaty law to support their position. For instance, the case of one of the parties that did not have effective current occupation of the third territory but had continuously claimed sovereignty in international forums such as United Nations following international public law regulations.

Thirdly, a colourable claim is based on moral considerations when any of the claiming parties based their right to claim sovereignty on moral grounds—i.e. they have moral standing. That is because the claim has to relate to the sovereignty of the third territory and the decision that the parties will arrive at in the negotiations may make a difference, morally, on how that party may be treated.

There is indeed a linked question to the idea of moral standing: who counts? In general, there can be many answers, from the narrowest by only granting certain populations participation—e.g. only human beings that fulfil a certain criteria; to the broadest—e.g. any human being, and hence any population may potentially have the

right to claim sovereignty anywhere. For example, would Zimbabwe have a right to claim sovereignty over the Falkland/Malvinas Islands based on a humanitarian reason such as famine? The answer we give to this question depends on the frame of reference. This thesis, although seeking for a just and fair outcome, is not about global justice or morality but about particular sovereignty conflicts—i.e. those with two sovereign States claiming sovereignty over a populated third territory. Thereby, the moral considerations will be seen and analysed within this context in order to decide whether these three parties have a colourable claim, if they *prima facie* have moral standing to a right to claim sovereignty—i.e. the claim has to relate to the sovereignty over the third territory and the final decision may make a difference on how the party may be treated.

In this respect, mention should be made of the participation in the negotiations of the inhabitants of the third territory. Some questions may arise and must be answered before any allocation of sovereignty can be proposed: on the one hand, would it be fair for the population in the third territory to share the use and ownership of the territory they are inhabitants of? On the other hand, do we need some minimum criteria here to help us determine when the residents of the disputed territory get a vote?—e.g. what if these residents were brought there by one of the competing parties?

It may appear as if we run into some difficulties because of the dissimilarities between the cases to which Rawls applies his method and the cases to which I apply it. One such a difference, the one *sub-examine*, seems to be that the three parties presented in the negotiations appear to be different sorts of party. It may seem as if the kinds of claim that are relevant to the two sovereign States are different from those that are relevant to the third population.

That is not true. Besides, it is an oversimplification. That is because all three parties are somehow claiming sovereignty or at least claiming a legitimate interest in deciding how the bundle of rights and obligations that constitutes sovereignty are distributed. The sovereign States are claiming exclusive sovereignty based on whatever reason. But the third population is claiming sovereignty too. Let us remember that sovereignty both seen as rights and obligations has an inward and outward facet as we have previously made clear in Chapter Two. So, it is over simplistic to think the third population has different kinds of claims that are relevant

for them and hence suggest they are a different sort of party and use that reason not to include them in the negotiations. Their claims have to do with sovereignty too. It may be argued that the sovereign States give relevance to the external sovereignty whereas the third population gives relevance to the internal sovereignty. Yet, they all are claiming different facets of the same group of rights and obligations. Moreover, in all the cases covered by this thesis—i.e. Falkland/Malvinas Islands, Kashmir, and Gibraltar—the third populations have expressed their clearly that they want a measure of self-government and to be able to determine under whose State authority they should fall.

In tune with this, the above questions are indeed interlinked as well as their answers. Although at first glance it may seem unfair for someone to share what is supposed to be his own, the reality is that the sovereignty—or ownership—of exactly that object—in the case under study, the third territory—is the centre of the whole dispute among two sovereign States and that non-sovereign territory. The starting point is a piece of land populated by certain people whose sovereignty—ownership and/or use of the land—is being argued over by several parties. These inhabitants do live there, but their right to do so is under discussion. However, it must be highlighted that they are rational beings and human beings and hence they have human rights, even though sovereignty disputes are not an issue of human rights only.

Precisely, there are reasons that support the inclusion of the inhabitants in the negotiation that go beyond that of human rights. Indeed, they have a colourable claim. That is because they either occupy the territory and have been there continuously—historical entitlement, or because they have moral standing—i.e. any decision with regard to sovereignty will have a non-trivial impact on their lives since they are there, or a combination of both. They live in the territory and their lives—and that of their future generations—will be affected more than any others by the arrangements that are adopted in the negotiations. In other words, presence gives one a colourable claim. It is true, that it may encourage occupation. But as long as the people have been there long enough to establish roots, whether their occupation is rightful or wrongful, they at least should have the right to participate in the negotiations. How much weight their claim gets is something to be discussed. So it would be unfair to ask them to leave or not to take their claimed rights into consideration. I must stress here that I am looking for a just solution.

For example, it is true that Argentina could acknowledge the right of the population currently living in the Falkland/Malvinas Islands to be self-determining but deny their right to be self-determining on Argentinean land—if they want to be self-determining they should go and do it somewhere else, most obviously the United Kingdom. But once again, this would be a practical approach that does not grant a just and fair outcome. The islanders would have their right to self-determination made conditional on being under Argentinean sovereignty—i.e. 'you can decide your future if and only if it is within my power.' Indeed, this would literally imply that they were moved from the British sovereignty umbrella to that of Argentina with consequences for them and their future generations in terms of many aspects directly related to their lives and way of living—e.g. law, financial situation, defence, political stability, and so on.

Therefore, to give them participation in the negotiations may have to do with a backward looking justification—i.e. colourable claim as historical entitlement—but it is mainly because of the effects any decision in relation to sovereignty will have on their lives, and that gives them moral standing to count—i.e. colourable claim based on moral considerations.

With all these elements within the same frame, to ask the population of the third territory to share the sovereignty and consequent benefits and burdens with other populations is fair, provided that their right to own and use the land is welcomed by all the involved agents—i.e. they have a colourable claim. The extent of that right is one of the matters under discussion and that will be reviewed in the negotiations when analysing the different principles involved.

Some may wonder whether fourth parties' humanitarian needs—e.g. in cases of disaster, famine, etc.—are sufficient for a colourable claim and whether fourth parties should be distributed some of the burdens and benefits of sharing sovereignty in this context. There are two issues at stake here, both related to the participation or not of a fourth party: a) if humanitarian reasons can be seen as a base for a colourable claim; and b) in the case they were considered a colourable claim, if the fourth party should also be distributed contributions and returns.

The answer has to be divided in two parts: a) humanitarian reasons related to any of the three original claiming agents, that is to say either the two sovereign States or the population of the third territory; and b) humanitarian reasons only

related to a fourth party. In the first case scenario, I have made clear before that this thesis assumes a peaceful understanding amongst the parties. Therefore, secession, self-determination that leads to independence, and so on have been reviewed elsewhere and discarded.[262] In other words, and for the sake of simplicity, I am bracketing these claims for the purpose of the present discussion since claims of humanitarian needs or global justice are out of the scope of this thesis. In the second case scenario, there is a misinterpretation of this proposal. For distributive justice principles are brought into this thesis solely to offer a solution to sovereignty conflicts, and not to put an end to inequalities amongst the claiming agents' comparative situations or to help them in achieving equal level of welfare. In the examples covered by this thesis we have sovereign States that already possess wealth and who are likely to hold unequal amounts of wealth. But that is not an issue for this thesis since I am not asking what constitutes a fair allocation of additional resources amongst sovereign States that already have unequal holdings. I am only interested in these inequalities in as much as they have consequences for the agreement reached as we will see in the following sections of this Chapter. In consequence, the issue of global justice is set to one side as this thesis is not concerned with it and therefore the discussion is limited here to the claims of the three major parties—i.e. the two sovereign States and the population of the third territory.

The core elements of this thesis have to do with three international agents that argue in relation to the sovereignty over the same territory. This thesis is not about offering a solution to humanitarian needs' cases. Therefore, in the event that a fourth party based their claim on humanitarian needs, they would not have a colourable claim. They have in these cases other international remedies—e.g. humanitarian intervention, international aid, etc. This is but a tangential argument, that is to say it has only an indirect connection that has nothing to do with the essence and aim of this thesis. To give an example, we are not discussing here if it would be fair to consider the natural resources in the Falkland/Malvinas Islands as worldly owned or not. This thesis explores the possibility of solving some international issues related to sovereignty by means of distributive justice principles. And not the other way around—i.e. to solve distributive justice issues through sovereignty. This means that the right of a fourth party to take shelter is itself

[262] Refer to Chapter Five.

something that may be decided only after the parties with pre-existing claims to the territory have decided how to allocate sovereignty.

A particular mention has to be made in relation to some external populations that might be seen as a fourth party. For instance, Palestinians and Jewish people living abroad. It is true that Jews outside Israel had to be considered in drawing up the institutions and legal code—Israel would not make sense without the Law of Return. But these people were not involved in the actual process of drawing up the code. Interestingly, the same is true of the Palestinians. If there is a peace treaty and the setting up of a Palestinian State, the Palestinians outside the West Bank and Gaza will have to be considered. So, what kind of claim, if any, do these external populations have in this thesis? They are not a fourth party as that would be a misconception, at least for this model. Rather, they would be considered as part of the third territory and therefore their voice would be part of that of the third party's.

Alternatives for the negotiators. Principles for the allocation of sovereignty

So far we have several international agents—two sovereign States and the population of the third territory—with a colourable claim in regard to their sovereign rights over a territory, who decide to go into negotiations in order to solve in a peaceful manner their differences. Having decided the 'who', it is time to define what the competing parties will discuss.

They need to find principles or conceptions which are general, universal in application, public, able to put an order on conflicting claims and with finality.[263] They should be general in the sense they can be applicable to every agent claiming rights over the third territory and without distinction; universal in respect to their compliance—i.e. every party should be able to comply with them; public as a defining note of any social conception of a just institution that concerns the people as a whole and not in their individuality; they should be able to put an order on conflicting claims as sovereignty disputes are in essence characterised by exclusionary and competing demands; and they should be final because the decision or agreement reached in the negotiation may offer a principle that, if respected, secures a reasonable and conclusive successful solution.

[263] For specific details of each feature see Rawls (1999), *op. cit.*, pp. 113-117.

Therefore, we need to examine several principles and conceptions in order to choose the one that is—as Rawls makes clear—"[…] general in form and universal in application that is to be publicly recognised as a final court of appeal for ordering [their] conflicting claims […]."[264] These constraints have a twofold function: first, they take for granted that the dispute is only amongst agents with a colourable claim; second, the final decision will not be biased by the particular interests of any of the claimants.

Indeed, one of the first things to decide in order to start the negotiations is which options will be available to the representatives. It would be ideal to present the negotiators with all the possible choices available. However ideal this would be, to do it introduces a series of difficulties.[265] Because of the nature of sovereignty conflicts, the many levels they have and the possible options they may present, the choices the representatives will have will need to be previously delimited. The aim here is, in Rawls' own words, "[…] not try to say what principles they would think of as possible alternatives. To do so would be a complicated business […]. Rather, simply [to] hand the [representatives] a list of principles, a menu, as it were. […] The [representatives] must agree on one alternative on this menu."[266] In other words, the representatives in the original position will review a series of principles and see if they are applicable—and how in the case they are—to allocate the sovereignty of the third territory. A first limitation will be given by the principles they will review as they will be offered a list, a menu.[267] The main reason for this methodological decision is instrumental: to cover every possible principle applicable to distribution would be simply cumbersome and, at the same time unnecessary. Then, the selection will be based on principles that in some instances are self-evident—here in the form of common knowledge or what people with general knowledge would apply in any sovereignty conflict of the kind we see in this thesis—and those used in classic distributive justice scholarly literature and which Rawls has previously reviewed.[268]

Some may question why the parties in the original position would not choose other leading alternative ways of distributing burdens and benefits in this

[264] *Ibid*., in partic. p. 117.
[265] For specific difficulties related to the original position and the alternatives available to the parties see Rawls (1999), *op. cit.*, pp. 105-106.
[266] *Ibid*.
[267] *Ibid*.
[268] For Rawls' list of principles and conceptions refer in particular to his *Theory of Justice*, p. 107.

context. However, we have to remind them that the discussion here is of a global nature and not a domestic one; even more, not just any global nature issue but sovereignty conflicts. What Rawls says in the case of the first original position is fully applicable here. In that respect he maintains that "[i]mplicit in the contrasts between classical utilitarianism and justice as fairness is a difference in the underlying conception of society."[269] In tune with this, implicit in the selection of the alternatives that will integrate the menu available to the negotiators in the original position as designed in this thesis is the underlying issue they will discuss—i.e. to leave aside some alternatives has to do with the nature of this thesis. Precisely in that respect, as Rawls himself says "[n]o people will be willing to count the losses to itself as outweighed by gains to other peoples; and therefore the principle of utility, and other moral principles discussed in moral philosophy, are not even candidates [here]."[270] Thereby, the negotiators will not consider them as part of the menu listing the alternatives to be reviewed.

The solution that will be achieved then may not be the best one but a reasonable one. That is because the representatives are required to choose one of the available options unanimously. Hence, the decision which they agree upon will be the result of careful reasoning and comparison of the proposed list of available options. Then, the selection of conceptions that we are going to explore is as follows:

a) The entitlement principle: principle of just acquisition.
b) The 'best interest of the child' principle.
c) Rawlsian principles of justice: 1) the difference principle; and 2) the principle of equality.

Two clarifications must be made at this point before advancing with the negotiations. Firstly, although in some cases the principles of justice are designed to be applied in the allocation of benefits and burdens related to economy, we will examine if they can be applied here in the allocation in terms of shares of sovereignty over a territory, in particular power and wealth and consequent actual and potential benefits and burdens. Secondly, two details that are interlinked must be kept present when reviewing each principle: fairness in distribution should be the end product assuming all the agents want the agreement to be respected by the three populations.

[269] *Ibid*., p. 29. For a more detailed view of the contrasts between utilitarianism and justice and fairness see in partic. pp. 24-27.
[270] Rawls (1999), *The Law of Peoples*, *op. cit.*, p. 60.

Original position

Introducing the 'veil of ignorance'

To recapitulate, we made clear why the competing parties are going into negotiations—i.e. they have a conflict of interests in relation to a non-sovereign territory and want a just and fair way of solving it. Afterwards, we determined the conditions that should be fulfilled to be considered a claiming party and to take part in the negotiations—i.e. colourable claim. Then, we detailed the list of available options the negotiators will have to discuss. Now, what principles of distribution would the representatives of the three populations choose in relation to actual and potential rights and burdens over political, economic, legal, social and cultural aspects of the third territory? Would they opt for equality or for a difference principle for their distribution? Would they choose some other principle? The answer to these questions will depend upon the information the representatives will have, and in fact, they could be misled by such knowledge—hence the importance of defining the characteristics the original position in which the negotiations will be conducted.

The content of the original position is something we construct, and we construct it to reflect what we think is morally relevant and morally right—which is precisely what Rawls does. In tune with this, as Rawls does at the individual level, we have to define the characteristics of the original position in which the negotiations will happen in order to avoid any possible interference from factors that can cause bias and that may lead to a partly unjust or unfair outcome. Hence, we must use a procedure to eliminate the effect of these factors. The 'veil of ignorance'[271] that Rawls uses at the level of individuals will be applied in the international scenario, being the populations of the sovereign States and the non-sovereign third territory—all through their respective representatives—the subjects of such a model.

The fact that we follow Rawls and assume that the principles agreed on the first level—i.e. principles relative to certain institutions within a society—are just and fair does not mean that they will be automatically useful or even applicable in international relations. As Rawls himself points out: "[o]ne should not assume in

[271] Rawls mainly develops the veil of ignorance in his *Theory of Justice* but it is also present in his *Justice as Fairness, A Restatement* and *Political Liberalism*.

advance that principles that are reasonable and just for the basic structure are also reasonable and just for institutions, associations, and social practices generally."[272] From there, if it cannot be expected that principles that are considered to be just and fair for some institutions are also applicable to other institutions within the State, to intend to automatically apply the ones decided for societies in relation to their internal institutions into a larger scale such as a sovereign conflict is simply naïve. It is crucial to remember that the selected principles of justice that we are going to examine will focus this time on a global justice dilemma (applicable to international conflicts) and not to local or domestic ones.[273]

At the individual level, Rawls tells us that "[t]he principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances."[274] Moreover, he makes it even clearer that "[…] the parties are symmetrically situated in the original position."[275] That is to say, they are in equal terms in relation to the knowledge they have about themselves, their circumstances, their societies and any other information. In other words, "[i]t is assumed, then, that the parties do not know certain kinds of particular facts" [276] and they know some others, but in any case, they all know the same circumstances and have access to the same information. But, what are the particular facts the parties do not know in these negotiations? To be more precise, what is the information that is going to be available for the negotiators?—i.e. how does the veil of ignorance work in sovereignty disputes?

Finally, it is important to make explicit that any decision made will be taken purely with reference to the rights and obligations in relation to the third territory. The agreement reached will have a target: the third territory and all that it implies in terms of rights and obligations. As has been made clear elsewhere in this thesis, the principles that we will review are brought in solely to offer a solution to sovereignty conflicts, and not to put an end to inequalities amongst the claiming agent's comparative situations or to help them in achieving equal level of welfare. In fact, I am not claiming I will design a completely just society for those in the third territory;

[272] Rawls (2003), *op. cit.*, p. 11.
[273] *Ibid*.
[274] Rawls (1999), *op. cit.*, p. 11.
[275] Rawls (2003), *op. cit.*, p. 18.
[276] Rawls (1999), *op. cit.*, p. 118.

merely that I am going to design a solution to the issue of sovereignty. Moreover, because the participants in these negotiations represent parties with colourable claims that are equal in respect to the third territory no party has any obligation to sacrifice its equal claim just because the others are least advantaged.

Adapting the 'veil of ignorance' to sovereignty conflicts: rationality of the parties and their representatives

Before the negotiations take place, I need to clarify how the theory on which they are based (Rawls) is applicable here—how the 'veil of ignorance' works in sovereignty conflicts. Therefore, we have to address the following points:

- Difference between individuals and their representatives.
- How they should be chosen.
- Necessary qualities of the representatives.

From a general point of view, and in respect to the necessary qualities, clearly not all members of society are free or rational. Therefore, I assume the individuals of the three populations in this thesis are free and rational beings[277] because our objective is to come up with an agreement that free and rational beings could not reasonably reject. Each and every individual has free will "[…] that is has also the idea of freedom and acts entirely under this idea."[278] In other words, in order to have an individual morally and legally speaking acting in any of these spheres it is a necessary condition that he is a rational being with understanding of his actions and omissions and his will is free from any external constriction. Moreover, they are reasonable beings in the sense that they "[…] understand they are to honor [the principles they choose], even at the expense of their own interests as circumstances may require, provided others likewise may be expected to honor them."[279]

A further clarification is in relation to the way they interact with each other. In general individuals may be good intrinsically so they may want to help each other or they may be bad intrinsically so their decisions will be purely self-centred. Nevertheless, I will assume they are mutually disinterested.[280] Therefore, they intend

[277] *Ibid*., p. 10.
[278] T. Meyer Greene, ed., *Selections of Immanuel Kant* (London: Charles Scribner's Sons Ltd., 1929), p. 335.
[279] Rawls (2003), *op. cit.*, p. 7.
[280] *Ibid*., pp. 12 and 131.

to accomplish their individual aims but without interfering with those of others. This is particularly important in sovereignty disputes because these are often highly emotional, with the participants taking the view that 'victory for us is to see you suffer'.[281]

In order to have negotiations the three involved agents will have to select representatives within their communities. Then, each of the three populations would elect their representatives following internal—national and/or local—legal and fair procedures without any interference from any outside party, involved or not involved in the sovereignty dispute. I assume then that in due turn the individuals of these three populations have agreed internally their national and local institutions to follow principles of justice. Now, the representatives of these individuals will use the same procedure[282]for the just and fair allocation of sovereignty.

I will not dwell longer on detailing how the representatives are selected since for our purposes this process is irrelevant. The important point is that as the individuals comprising each of the three populations are rational and free—hence their consent has moral force—their representatives will also be free rational beings. Accordingly, the three populations—and their respective representatives—consist of free and equal rational beings who are mutually disinterested and who will honour the principles chosen in the negotiations regarding the sovereignty over the third territory, since they stand by their word.

As I mentioned before, we need to neutralise certain elements that may make the negotiators choose options for the advantage of those whom they represent. It is for that reason I assume an imaginary exercise so that we (like Rawls) can treat the original position as a purely imaginary condition that although no-existent, gives a fair platform.

In tune with this, it is assumed that the representatives do not know certain features. In other words, two limitations in relation to the representatives must be applied in order for the negotiations to start: firstly, for the negotiations to be just and fair the representatives will not know whom they represent but they know everything

[281] Philip C. Winslow, *Victory for Us is To See You Suffer: in the West Bank with the Palestinians and the Israelis* (Beacon Press: 2007).
[282] Rawls (1993), *op. cit.*, p. 41. In what is of interest here Rawls maintains: "As before, the parties are representatives, but now they are representatives of peoples whose basic institutions satisfy the principles of justice selected at the first level."

else—the history involved—who the three parties are, the difficulty of resolving sovereignty conflicts, and so on. By acting in this way they ensure that none of the agents is more or less advantaged or disadvantaged when choosing the principles upon how sovereignty will be allocated.

Secondly, concerning the representatives in their individuality, they are pure rational beings and as such they "are not allowed to know the social positions or the particular comprehensive doctrines of the persons they represent. They also do not know persons' race and ethnic group, sex, or various native endowments such as strength and intelligence […]."[283] Ergo, the representatives have to fulfil two necessary conditions—i.e. the veil of ignorance applied to sovereignty conflicts means that: a) they do not know whom they represent; and b) they do not know a series of characteristics in respect to their own individuality. But they will have information available in respect to the two sovereign States and the third territory under dispute.

Reasons leading to the principles of justice: The rule of *maximin*

We assumed that three populations have selected representatives who will participate in negotiations to allocate the sovereignty over a territory. These representatives do not know which of the three populations they represent and certain characteristics about themselves; they only know of the existence of the territory which sovereignty has to be allocated, that the populations they represent have somehow a right to claim it—i.e. colourable claim—and the nature of the negotiations they are involved in. Then, in order to allocate the sovereignty of the third territory they know they have to decide which principles are applicable. For that reason, they will analyse the implications certain principles may have in such allocation. However, the first thing the representatives will have to agree upon is the procedure they will follow in the negotiations, the applicable rule.

In terms of the rule the representatives will apply in the negotiations it is highly possible they will choose "the *maximin* rule for choice under uncertainty."[284] According to Rawls, it can be defined as follows:

[283] Rawls (2003), *op. cit.*, p. 15.
[284] *Ibid*., p. 132.

> "The *maximin* rule tells us to rank alternatives by their worst possible outcomes: we are to adopt the alternative the worst outcome of which is superior to the worst outcome of the others."[285]

Bearing in mind how the original position in which the negotiations will take place has been characterised, it is reasonable that the representatives will have a prudent view making their choice—at least—conservative.[286] They apply *maximin* because it maximises the position of the worst off party, and since they may be the worst off party, that is what they would want to do. That is to say, the negotiations present a particular note: uncertainty—i.e. the uncertainty is not only with regard to outcomes but also with regard to who they are. Indeed, sovereignty disputes are under an umbrella of incertitude since all of the agents start with a *status quo* and any decision in the negotiations may imply actions on either side that may result in gains but also losses for any of them. For instance, when the representatives see each of the proposed principles—just-acquisition, the best interest of the child, equality, difference—they know that in any case they will be deciding how to allocate the sovereignty over the third territory. However, they will also consider in their decisions that sovereign rights imply obligations. Thus, the representatives have to bear in mind that, although they may have information about the third territory, they do not know its factual features in the future and that they do not know whom they represent.

Indeed, *maximin* is not a general rule in cases of uncertainty. However, it is the desirable one in situations of high indeterminacy[287], when the stakes are high and the worst position is tolerable. And the original position applied to sovereignty conflicts has features that translate in such a level of uncertainty that makes the *maximin* rule the option the representatives will choose. In brief, Rawls made clear that the rule of *maximin* is applicable in cases in which uncertainty of choice is present when the following features appear:

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[285] *Ibid*., p. 133.

[286] Decision theory principles under conditions of risk: expected value (the individuals discount the maximum payoff of each option depending on its probability and then they choose the highest one); *maximax* or 'wishful thinking' (the individuals choose among options depending on which one offers the best of all possible result); *maximin* (the individuals choose under a pessimistic or conservative approach so they opt for the best worst outcome). For a more detailed view about *maximin* and its application in conditions under uncertainty see Rawls (1999), *op. cit.*, in partic. pp. 130 and ff.

[287] *Ibid*., p. 133.

First "[…] it is unreasonable not to be skeptical of probabilistic calculations unless there is no other way out, particularly if the decision is a fundamental one that needs to be justified to others."[288]

Second "It is not worthwhile for him to take a chance for the sake of a further advantage, especially when it may turn out that he loses much that is important to him."[289]

Third "[…] the rejected alternatives have outcomes that one can hardly accept. The situation involves grave risks."[290]

By reviewing the original position in which the negotiations will take place in light of the previous mentioned three features it is clear the representatives will be choosing under uncertain conditions that make the rule of *maximin* the option to be taken. That is because firstly, it is reasonable the representatives will be sceptical in relation to probabilistic calculations since their decision may literally imply the populations they represent to be immensely well off or completely disadvantaged. Hence, their decision will have to be justified not only amongst them in the negotiations but the agreement that is reached also in relation to the represented three populations. Secondly, although the best possible scenario may see the allocation of only one of the agents with sovereignty as a successful result in many ways—e.g. wealth, geostrategic location—it can as well worsen its comparative situation. Third, and in tune with the last idea, an extreme scenario could see the least advantaged of the populations being granted the sovereignty of a useless third territory that may potentially make their comparative situation even worse—e.g. more inhabitants for the already deficient health system, larger international debt.

Why is then the *maximin* principle the reasonable rule to be applied in sovereign disputes? Individuals—and hence their representatives—in this model are (as Rawls maintains) mutually disinterested. Each and every agent in a sovereignty dispute intends to maximise their position in regard to the third territory following what we called 'State plan of life'. At the same time, they all intend to avoid worsening their situation or that of the population they come from. Then, if to

[288] *Ibid*., p. 134.
[289] *Ibid*.
[290] *Ibid*.

allocate sovereignty to only one of them may mean to improve their situation as well as to worsen the reality of either of the populations, the choice implies high risk. Thus, that high risk linked to the uncertainty of the choice will have effects in any case on a whole population. Therefore, in a certain situation in which there is something to be allocated amongst several claimants and neither the characteristics of the object nor of the claimants are fully known, the same individual granted the allocation may see his position either worsened or bettered, there is a bargaining position. In situations like the ones under analysis, when the full allocation of sovereignty may translate into complete gains as well as total losses, joint ventures may result in bettering off everyone's relative position or—at least—not worsening it , so that the joint venture would be the conservative choice or *maximin*.

In any event, as the representatives would act not knowing whom they represent, even in the worst scenario—if they represented the less advantaged agents in relative terms—they would still obtain a fair share. In tune with this reasoning Gauthier gives an interesting insight of mutual interaction when referring to "Hume's example, of two persons rowing a boat that neither can row alone, is a very simple example of beneficially co-ordinative practice."[291] Sovereignty conflicts are just in the same situation: if none of the agents is willing to cooperate and start negotiations in order to leave the zero sum game, 'the boat may remain static'. It is true that if the situation remains a zero sum game it might be better for some parties. But, the main question is whether it would be just.

Whereas the *status quo* or the exclusive ownership of the third territory by one of the agents are valid options, they could literally result in either a loss of claimed rights for one or several claimants or permanent interference when deciding issues with consequences to all of them. If they wanted to have actual use of their claimed rights over the third territory they would have to make mutual concessions; in essence, they would have to 'slice' their rights into different portions or shares. It is possible that the agents in the conflict would prefer to be sure of sharing the benefits and burdens in respect to the third territory and the *maximin* rule would be the chosen one for the distribution of benefits and burdens—i.e. to share sovereignty. The issue now is to determine the nature and size of each particular share. It is for

[291] David Gauthier, *Morals by Agreement* (Oxford: Oxford University Press, 2003), Chapter I.

that reason that in the following it will be reviewed how different principles can be applied to sovereignty disputes.

Finally, for the case of the third population it would be possible for us to use the reasoning of the original position and *maximin* to derive some conclusions about the kind of provisions that should be made for them. The parties in the original position do not know whom they represent and they have to accept that they might be representing the third population rather than one of the sovereign States. They would have reason to provide some degree of autonomy for the third population since the agreement under which that population lives will affect their lives in a way that it does not affect the lives of the domestic populations of the two sovereign States, as we have seen when we introduced the colourable claim before in this Chapter. So, representatives who are driven by *maximin* would have reason not to subordinate the third population entirely to the decision-making of the two sovereign States.

The negotiations: choosing a principle to allocate sovereignty

The representatives in the original position will review a series of principles in order to allocate the sovereignty of the territory. A first limitation is given by the principles they will review as they will be offered a list or menu.[292] Before examining the principles of just distribution—as proposed by Rawls—I will focus the attention on the principle of 'just acquisition'. First, because it is usually the one presented by every agent involved in any sovereignty conflict to support its claim; second—as we will see, because it is the main reason why this kind of conflict remains in a legal and political limbo. After reviewing 'just acquisition', I will examine the 'best interest of the child' principle. The main reason in proceeding this way has to be with the fact that—at least at first glance—the 'best interest of the child' principle offers several elements that are similar to the ones present in sovereignty conflicts.

[292] Rawls (1999), *op. cit.*, p. 118.

Why 'just acquisition' cannot work

Most—if not all—individuals—and any sovereign State—would think it obvious to apply Ulpian's maxim *Suum cuique tribuere*[293]—to give to each his due or to distribute to each one his share—in the case of any type of distribution. What can be fairer than to give everyone what is due to them? However, to give to each his due is not a task without difficulties. Thus, it does not necessarily mean that to try to do this automatically produces the most just solution, because it may be hopelessly unclear what each person (or State) is entitled to.

Faced with the idea of applying any kind of principle based on a historical entitlement will confront the representatives with two main problems. First, they would need to agree upon a historical account—i.e. what actually happened, who was the first one to discover the territory, or to have a population there, etc. Second, they would need to decide what type of act makes their claimed rights just—i.e. the first one setting foot on the territory, the first one to have a permanent settlement, etc. Thus, in relation to the second problem, they would have to choose the theoretical background to decide what is just: *res nullius* or *res communis*—i.e. the originally uninhabited territory belonged to no-one or everyone had a certain right over it. Besides, if there were conflicts in the past we would need to decide whether they were just or not and whether the just side won.

In relation to the first issue—the agreement on the historical account—each sovereign State taking part in a sovereignty conflict is certain that it has ultimate and highest right over the disputed territory, and the use and ownership of the third territory is due to them. As a consequence, sovereignty disputes do not move from a zero sum game. That is because, in order to determine the initial acquisition, we have to go back and resolve old historical claims only resulting in a practical matter: the competing agents are never going to agree on the 'correct' historical version of the events—i.e. the historical account is fundamentally controversial. Thus, it is common to observe in sovereignty differences that the involved agents usually support their claims through historical, legal, political, cultural or geographical arguments—even a combination of many of them. In other words, not only will be the dispute over what the facts are but also what the relative moral significance of those facts is. For example, one party will claim that whoever was the first one in the third territory is

[293] Ulpian, *Digest*, 1.1.10.

its owner and hence, its sovereign, and they were there first. But the opposite party disputes this, supporting their case with historical, legal, political, cultural and geographical evidence, and arguing either a) that they were there first, or b) that being first is not what makes acquisition just, but, e.g., being first to exploit its resources, or establish a community. Because all the parties argue they were the first to do what gave them a right to the third territory, an approach based on a historical account is futile for providing a solution to sovereignty disputes and the conflicts continue endlessly—e.g. arguments about the rightful sovereign of Jerusalem and surrounding areas have been present for generations.[294] Should we go back to Biblical times in order to prove the current legitimate occupancy of the territory?

In addition to the historical account, even though we assumed the representatives finally agreed on the facts, it is not easy to see an agreement on how what is due to someone be determined, which way to acquire something is just and fair, and whether a certain way of acquiring the sovereignty over the third territory can be just and fair at the same time for two different agents. For instance, they may apply the just acquisition principle. But even with the application of the just acquisition principle sovereignty disputes produce endless conflict as we will see below.

The just acquisition principle has been previously related to territorial sovereignty since it has been maintained that "[a]mongst the objects to which this principle is meant to be capable of applying are portions of the Earth's surface, that is, areas of land."[295] And that is exactly the aim of this project: to find a peaceful way of allocating sovereignty over non-sovereign areas of land. However, the principle of just acquisition is not the answer to resolve these issues. Its main pitfall is that the information required to apply this principle is not epistemically accessible in sovereignty conflicts—e.g. how far back would we need to investigate so as to determine who the first inhabitants of the Falkland/Malvinas Islands were? What would happen in the case of extinct civilisations? What about cultures that were in Ancient Times nomadic?

[294] See for example Genesis 14: 18-20 in which Jerusalem (or Salem) has already enemies. Since Biblical times the region has been centre of disputes in relation to the rightful settlement of different populations.
[295] David Conway, "Nozick's Entitlement *Theory of Justice*: Three Critics Answered," *Libertarian Alliance, Philosophical Notes* 15 (1990).

To have a better understanding of the principle of just acquisition Nozick comes into play, offering his 'entitlement theory'. But, though his theory is a more subtle revision of just acquisition theory, examination of it will demonstrate that this principle is not workable in sovereignty disputes.[296] In Nozick's entitlement theory just acquisition becomes the first of three principles (we are not concerned with the other two):

> "An individual A acquires at time t a full property right in an object O which has not previously been the property of any individual if and only if:
> (i) A mixes his labour with o at time t; and
> (ii) as a result of O becoming A's private property, no one else is made any worse off than he or she would have been, O having being left unappropriated by anyone and had everyone in consequence been free to use O without appropriating it."[297]

To establish if any object O has not previously been the property of any individual is one of the main issues in Nozick's model—and that is also the main issue in sovereignty disputes. Although theoretically attractive and practically difficult to demonstrate, in the specific case of sovereignty dilemmas the enigma to be unravelled is precisely to determine which of the involved agents was the first one chronologically—historically—to have something to do with the third territory.[298] Furthermore, even if that was somehow demonstrated, there will also be disputes about the justice of conflicts that result in the seizure of territories by force.

Nozick's model introduces many other issues. Indeed, while Nozick relies on Locke's labour theory of property, his approach raises various questions. For instance, what are the borderlines here? We only labour on parts of objects—similarly, the claiming parties only 'labour' on parts of the third territory, so why does that give us the right to the whole object? In addition to this, why does mixing

[296] Nozick, *op. cit.*, in particular Part II, Chapter 7, Section I.
[297] *Ibid*.
[298] The expression 'having something to do' is used here since there are many different theories on how a piece of land can become part of a sovereign State –e.g. first inhabited, first seen, etc. In that sense, all the possible variables are included with the use of the previously mentioned expression to avoid tangential arguments. The aim is to discuss how the just acquisition principle implies endless conflict and not the nature of such a concept or the concept itself.

your labour with property cause you to own the property rather than lose the labour? Is there some threshold you must meet in order to own the property?—e.g. if I pour a glass of wine in the ocean do I own the ocean or have I wasted my wine? In tune with this, why are you entitled to more than only the added value your labour has created? And even if the labour theory of property may give you ownership of property you have created, why should it give you ownership, for example, of natural resources? Natural resources are not brought into existence by labour, although labour may be necessary before they can be used.

As a result of this, the idea of determining who mixed their labour with the territory first and to a sufficient extent to acquire ownership is always going to be controversial, even if all parties accepted that this was the right test. And even if this works, as pointed out before, we would then have the issue of whether later seizures of the property from indigenous peoples by force were just.

The principle of just acquisition may work for individuals. For States, it may solve one problem, what one has to do, i.e. mix one's labour. But leaves several other issues unresolved—e.g. a) who did it first? b) how much do you own? (new problem, e.g. if you dig, can you claim that plot, the field or the whole island?), and c) who inherits the property—the inhabitants or their 'mother community'?

Any version of just acquisition will have the same problems: people will never agree on the relevant facts and the relevant test, and therefore all this principle would do is guarantee endless conflict. So, the representatives in the original position would reject it. Furthermore, the original position in which the representatives have to decide how to allocate the sovereignty over the third territory neutralises any argument in that respect—i.e. as the representatives do not know which population they are representing they would not be able to use historical entitlement as an argument; then, they would not have access to historical records[299] or they would hypothetically not know how to apply them. Therefore, the theoretical device finishes with one of the main issues every sovereignty conflict encounters: endless discussion concerning historical entitlement that in most—if not all cases—is highly difficult to be demonstrated. Thus, since they would not agree to rely on a principle that guarantees endless conflict, it would be rejected as the principle to resolve these

[299] Rawls (1999), *op. cit.*, p. 160.

disputes. At the same time, it leaves all the agents with an equal footing to continue the negotiations since none of them can argue a better or more robust right over the claimed territory.

The 'best interest of the child' principle[300]

With recognition in International Law[301] the 'best interest of the child' principle is a particular variant of the 'best interest of the third party' principle. Many courts around the world use this principle to decide the fate of children—e.g. who will be their legal guardian in the case of divorce, adoption, criminal offences, etc. If we wanted to use the 'best interest of the child' principle in sovereignty conflicts, the role usually given to the adults—parents, legal guardian—would be played by the two competing sovereign States and that of the child would be given by the non-sovereign third territory. The idea is that the third territory is like a child, and therefore its interest in ultimate self-determination and self-realisation are paramount. So, it is possible—someone may put forward—the claim that whatever custody (sovereignty) arrangements are chosen these should be in the best interest of that territory.

At first glance, the adapted principle would secure the situation of the inhabitants of the third territory. Thus, it would limit the rights of the two sovereign States—the extent of these limits would have to be agreed. Moreover, the two sovereign States would have to fulfil certain obligations towards the third territory so as to secure the inhabitants' well-being—e.g. as they would be considered in a better situation than that of the third territory, they might provide the means for its defence.

There are critics of the 'best interest of the child' principle[302], but the main issue in this case is not the principle itself but its application to situations that, although having certain similarities, offer substantial differences that make it

[300] I use the expression 'child' rather than 'third party' intentionally. That is because it is usually assumed or thought of sovereignty disputes as having one of the parties—in general, the third territory—in an *immature* state as an international agent and hence, in a weaker position in comparison to sovereign States—i.e. very similar to that of a child in relation to his parents. From there, to use an expression such as 'third party' defeats the point since it does not offer necessarily the same connotation.

[301] Art. 3 of the UN Convention on the Rights of the Child states "[…] the best interests of the child shall be a primary consideration."

[302] Lynne Marie Kohm, "Tracing the Foundations of the Best Interest of the Child Standard in American Jurisprudence," *Journal of Law and Family Studies* 10 (2008): 337-376, 370.

inappropriate. For instance, as the negotiators would not know which of the groups are representing, they would not choose a principle that could be translated in the best interest of only one of them—i.e. that would go against the *maximin* rule, since they may not be that party. Thereby, there is no reason to give one group priority over another. Moreover, the application of this principle does not always guarantee a just solution for sovereignty conflicts since it can be the case that the least advantaged or most vulnerable agent is one of the claiming sovereign States and not the population of the third territory—i.e. in family cases, the child is the most vulnerable subject always dependent on his parents or any other legal guardian.

Finally, the application of the 'best interest of the child principle' in sovereignty disputes denies that the rights of the other two parties are of equal importance to the right of the third territory. And unlike the case of parental right, these rights are at least as strong—arguably stronger—than the right of the third territory to self-determination.

In summary, the representatives of the involved agents in the conflict are agreed that the third territory does not belong to its inhabitants (no matter why) and that they will not argue from their supposed historical rights over it. They do not know which group they represent and therefore do not know which set of historical arguments to believe. So they recognise that making the resolution of this kind of dispute central is hopeless. In consequence, they accept that each of them has a right to some sovereignty over the third territory—which is not the same as a right to be the actual and only sovereign. In addition to this, none of the representatives can obtain any special advantage for whoever they represent or can put them in a particular disadvantageous situation.[303] Consequently, the agreement should offer such a solution that not only is in the 'best interest' of just one of the parties but embraces—in a way or another—those of all the claimants. Therefore, they have realised that to share sovereignty is the best option for all of them (by application of the rule of *maximin*). Similarly, it is also the case that this is just under Rawlsian principles. That is because of the nature of the parties and the fact that each has a colourable claim, which we assume give them some legitimate interest in the sovereignty over the third territory. Then, and as they now need to work out the

[303] Conf. Rawls (1999), *op. cit.*, p. 130.

details of how to share sovereignty, they will explore the possibilities of applying these principles into the negotiations.

The difference principle

At first glance, the difference principle states that whoever is a potential recipient in any distribution will receive an unequal share of whatever will be divided. It applies a prioritarian rule—that inequalities are unjustified unless they work to the advantage of the worst off members of a society. To put it in clearer terms, Rawls tells us that "[i]njustice, then, is simply inequalities that are not to the benefit of all."[304]

However appealing, the difference principle presents us with a main obstacle. It is designed to apply to social and economic inequalities, so it does not lend itself well to sovereignty inequalities because of the particular characteristics of sovereignty conflicts and sovereignty itself as we will see in this section. It remains to be seen, though, whether the difference principle has any application in specific cases. In the following paragraphs I will review some considerations I believe the parties would have with regards the difference principle in the negotiations. To be more precise, the following considerations are meant to be understood as the reasoning of the parties. However, for stylistic reasons and in order to keep the coherence with the rest of the thesis, they will be expressed in the third person.

First, as the types of inequalities that can be permitted are not restricted[305], some of them may go against the interests of the represented populations. To be more precise, the citizens amongst whom Rawls distributes hold nothing in advance of the distribution and the basic structure that comes out of the original position is meant to distribute all of their wealth and income fairly—the difference principle operates in advance of citizens holding anything. In our case, we have sovereign States and a third population who already possess wealth and who are likely to hold unequal amounts of wealth. In addition to wealth, all these parties will possess several other elements that are also likely to be unequal amongst them—e.g. power, geographical location, etc. Indeed, sovereignty is not merely a matter of wealth. So, when we think about dividing up whatever the third territory entails, we potentially have to think

[304] *Ibid*., p. 54.
[305] Rawls (1999), *Theory of Justice*, *op. cit.*, p. 55.

about what constitutes a fair allocation of additional wealth and any other elements that are attributes of sovereignty amongst parties who already have unequal holdings. In that context the difference principle would seem to have a quite different import than it does for Rawls' domestic case. It would seem to require that all of the additional holdings should go to the least advantaged party up to the point at which its situation equals the one of the better off party, whatever the criteria we use to judge—e.g. judged perhaps in terms of average *per capita* wealth. The difference principle is an offspring of *maximin* and giving everything to the poor party and nothing to the rich party, up to the point of equality, is the way to maximise the minimum.

But the original position in this thesis is slightly different from the one Rawls uses. As we have made clear before in this Chapter, the original position is set up in such a way that the agreement reached has a target: the third territory and all that it implies in terms of rights and obligations, benefits and burdens. So, suppose that the two sovereign States are A and B and the third territory is C, and State A is relatively much wealthier than State B and third territory C. Therefore, if A, B and C are equal joint claimants to the third territory and all that it entails, the fact that B and C are poorer than A is an irrelevant consideration. Why should it be a relevant consideration if it is not relevant independently of the third territory? For example, if Argentina, the United Kingdom and the Falkland/Malvinas Islands have no responsibility for one another's material wellbeing simply as three international agents, why should they suddenly acquire that responsibility when it comes to their shared sovereignty over the islands? We are working with the assumption that A, B and C have equal claims and that A has no obligation to sacrifice its equal claim to B or C just because they happen to be poorer. A simply does not have that sort of special responsibility to either B or C.

Second, Rawls argues the more advantaged will accept the principle because they need the cooperation of the least advantaged. But that is not true here. It fails to explain why the most advantaged population should agree to lower its benefits only because the least advantaged one needs to see its position improved. It may appear that this claim contradicts the veil of ignorance and the *maximin* but it does not. That is because once again we have to remember that sovereignty conflicts and sovereignty itself are complex. Indeed, the most advantaged would distribute the

benefits with the least advantaged. And that seems fair, at least in Rawlsian terms. But what about the burdens? This is a pitfall in the application of the difference principle and not in relation to the veil of ignorance or *maximin*. Since it would imply that the inequalities in the distribution would be fair if they benefited the least advantaged, then the most advantaged party not only would have to share the benefits but also contribute more in terms of the burdens. And that seems unreasonable again.

For example, consider the case of a third territory rich in natural resources but small in population and hence with no defence power and one of the claiming sovereign States with no natural resources, a small territory, large population, wealthy and developed means of defence. By application of the difference principle, that sovereign State would explore and exploit the natural resources in the third territory, would share the resultant benefits and would defend the third territory in case of attack. It is hard to see how or why the sovereign State would accept such an arrangement.

Consider one of the examples Rawls himself provides[306] but adapted to this thesis. There are two sovereign States and the population of the third territory at the same level of wealth, with barely the same size population and means of defence. One of the sovereign States and the third territory decide to industrialise, save and invest in defence. The other sovereign State does not. Some decades later both the first sovereign State and the third territory are twice as wealthy as the second sovereign State. Should then the first sovereign State and the third territory assist the second sovereign State by application of the difference principle?

Third, when we use the expression 'least advantaged' in sovereignty conflicts it is not clear in which sense or which criteria we would have to apply—e.g. less economically developed agent, less human rights acknowledged, smaller territory, smaller population, less developed legal system, etc. We have two problems here: a) which feature or element we consider to determine the least advantaged; b) variability.

In the case of the feature or element to be considered in order to determine the least advantaged, we have already said that sovereignty conflicts and sovereignty

[306] In *The Law of Peoples* (1999) Rawls refers to two examples in which two countries have a similar starting point but, for different reasons, they develop in different ways. See in partic. pp. 117-118.

itself are indeed complex. It is true that Rawls himself applies the difference principle for material goods but not to rights and freedoms—i.e. the claim that different sort of features are at stake may not be conclusive. However, even in the case we only considered these features as material goods, sovereignty conflicts are still highly complex in the sense most of their features —if not all—imply both benefits and burdens.

Consider, for instance, the previous example of a third territory rich in natural resources with small population and no means for defence and one of the claiming sovereign States with the completely opposite reality. We would have natural resources (and their ownership, exploration and exploitation), consequent benefits, defence (and its means and their maintenance), consequent burdens. The most advantaged in terms of ownership and/or possession of natural resources seems indeed the third territory in this example, but they cannot explore or exploit them. In addition to this, the most advantaged in terms of exploration and exploitation of natural resources may be any of the other claiming parties. The same could be said about defence.

So, what would be the feature to be counted as relevant to define the least advantaged? If it was natural resources and their ownership and/or use, indeed the third territory would have to share them with the other two parties. Thereby, the one sovereign State in a better position in terms of exploration and exploitation would contribute with a larger share of burdens though—i.e. as they would be the most advantaged party in terms of means and wealth for exploration and exploitation of natural resources. This arrangement seems indeed fair. But, what would happen with the defence of the third territory? If we understood the difference principle as applicable to one feature or element, it might jeopardise the whole arrangement. In this case, the third territory would contribute with a larger share of natural resources in what is related to their ownership and/or use. And the better off sovereign State would contribute with a larger share towards their exploration and exploitation and, in addition to this, to the defence of the third territory. Indeed, when we see the same example as a whole rather than as particular features or elements only in their individuality, it may result in an unbalanced outcome—i.e. benefits distributed evenly but burdens allocated mainly to one of the claiming parties.

Thus, even if we agreed on the feature to be considered, to be the least and the most advantaged agent is a factual feature so it can vary in time. Then, the means and outcome would be variable in time too; so a question of amending the distribution would arise once the original position changed. Would that imply a change in the shares of sovereignty too?

To recapitulate, the difference principle does not imply that the worst off must be compensated, but that an unequal distribution is just, if it makes the worst off better off than they would be if no such distribution existed. Thereby, suppose the disputed territory has natural resources, but no means of extracting them. It will be just to allow either or both of the other parties access to those resources provided: 1) the inhabitants of the third territory have a sufficient share of those resources or the profit on them to make it worth their while to allow others to extract them; and 2) the other party(s) retains enough of the resources or the profits to make it worthwhile to extract them. But this is an over-simplistic view. Indeed, the principle can still be applied. This thesis does not claim that the principle cannot be applied. However, it is unsuited to sovereign inequalities. This thesis argues that if it is applied it may generate results not in tune with the justice and fairness aimed for.

In that sense, the complications are numerous: a) it is problematic to determine who the least advantaged is and hence, there will be always two parties who are worst off, in different ways, in relation to the third claiming party; b) different parties will be the least advantaged with regard to different aspects of sovereignty because sovereignty and sovereignty conflicts are complex and imply both benefits and burdens in many different areas; c) the least advantaged will vary over time; and d) why would any of the parties be motivated to let everything work to the advantage of the least advantaged?

The equality or 'equal shares' principle

Strictly speaking, the principle of equality would see each individual with an equal share of whatever is to be divided. There is no consideration of their relative situations—i.e. it is not taken into account if they are the least or the most advantaged individuals in the society. From there, each and every agent in the

dispute would have the right to the same relative portion of sovereignty. Everyone would be benefited equally, as well as having equal burdens, regardless of their State's internal or international situation, the level of effort put in, or the needs they may have. In the following paragraphs I will present some considerations I believe the parties would make in relation to the equality principle. As in the case of the difference principle, and purely because of stylistic reasons, I will be referring to the reasoning of the parties in the third person.

What appears to be an easy solution—what is more just and fairer than to give to everyone the same share?—offers immediate complications. A problem to be expected is that we have to distribute different goods. For instance, sovereignty covers several different aspects of any territory, population, government and law that imply both rights and obligations. Then, it seems not possible to go with equal shares *stricto sensu*. Moreover, even if that is what we wanted to do, in itself attractive, the term 'equal' has hermeneutic problems: what is an equal division? More specific to this project: what is an equal division when dealing with sovereignty issues? There is an extensive literature on the topic. As a way of example, the following quotation summarises some interpretations:

> "Some would say that shares are equally good if they are such that none would prefer to trade her bundle of worldly resources with anybody else's [Dworkin's view]. Others would say that shares are equally good if they are such that none would prefer to trade the sum of her bundle of worldly resources and personal resources. And others would say that the shares are equally good if they are such that each is able to attain the same level of welfare […]"[307]

There is then the first issue of how to interpret what is an equal share. However, that is not the only problem with the principle of equality applied in sovereignty conflicts. Even if we agreed upon criteria on how to define an equal share, as we have just pointed out, sovereignty implies an extensive range of rights and obligations that are difficult to be distributed following the same pattern—i.e.

[307] Michael Otsuka, "Self-ownership and Equality: a Lockean Reconciliation," *Philosophy and Public Affairs* 27 (1998): 65-92.

defence system and natural resources, financial system against law, civil rights versus political rights, and more basic goods and services. Therefore, the principle of equality *stricto sensu* would not be enough.

A way to solve the difference amongst criteria to characterise an equal share can be defining them within the negotiation. That is, the representatives in the original position allocate equal shares of sovereignty to each of the three populations determining what they mean by the term 'equal'. Let us suppose that we considered sovereignty as constituted by 'lumpy goods'—i.e. sovereignty would be seen as composed by different 'goods' in several different areas such as territory, population, government, and law. Indeed, sovereignty might be also seen as composed by different goods that are qualitatively different in a way that makes some of them incommensurable rather than lumpy—i.e. the goods that form sovereignty lack a common quality in order to make a comparison or at least not all of them offer a common element or characteristic so as to be measured or compared. In any case, considering sovereignty as constituted either by lumpy goods or qualitatively different goods, we would need the parties to agree on determining what equal division means in this context.

For the purpose of the negotiations let us suppose they accept that "[n]o division of resources is an equal division if, once the division is complete, any [agent] would prefer someone else's bundle of resources to his own bundle."[308] Indeed, Dworkin proposed this test (the 'envy test'[309]) as a criterion for distributive justice. Furthermore, this test could be a solution for the lumpy goods or qualitatively different goods problem. That is because a distribution of resources is not equal if after it an agent envies someone else because of the bundles of resources any of the other agents has received. However, an immediate problem arises: as the representatives would not know which populations they represent, how can they determine their preference? So this solution is inconsistent with the whole procedure being used here, because it requires knowledge of actual preferences and actual preference might even be internally disputed. Moreover, how could each individual know the preferences of those he represents? The Dworkinian system can only work if everyone represents themselves, i.e. whose preferences should count? Although

[308] Ronald Dworkin, "What is Equality? Part 2: Equality of Resources," *Philosophy and Public Affairs* 10 (1981): 283-345.
[309] *Ibid*., for the characterisation of the envy test see in partic. p. 285.

they are representatives of the populations, it is over simplistic to anthropomorphise populations' preferences.

Let us suppose that we accept each population has defined preferences. Even if we forget they do not know who they represent, how do we deal with the envy test? The pitfall could be resolved by including an auction in which all the participants received the same amount of money—i.e. each participant is able to bid for the resources available. But as fair as the auction appears to be, a new problem is introduced as well. The envy test with the addition of the auction would work if there were no great differences amongst our agents in relation to their particular situations—i.e. in an individual, talents and abilities so in a population, for example, level of development, industrialisation, and so on. Therefore, we would need a new addition in order to foresee great differences amongst our agents only because of their particular situations. But again, they could only bid on packages in the auction if they knew their preferences, and they cannot know this, so the auction does not solve anything.

Evidently, this way of understanding equality is not the most simplistic one and seems to require foreseeing a myriad of difficulties. Thus, they might not prefer anyone else's bundle but might prefer some other arrangement entirely.

There is still a further problem with the principle of equality and it is that of its application—i.e. the actual utilisation of the share of sovereignty. It is often the case that the veil of ignorance leads to equality, but its application presents several issues—e.g. a) division of economic benefits; b) fulfilment of obligations; c) what to do with things or areas that—in principle—may not be shareable—like aspects of the law. In other words, and assuming that we solved the issue of determining what an equal division is, to apply equality *stricto sensu* would mean that unequal parties in many aspects received equal shares of the sovereignty over the third territory and all that it implies in terms of rights and obligations. Therefore, some of these claiming parties would find themselves with a share of sovereignty that did not provide them any benefit—e.g. let us imagine the equal division of the defence of the third territory in the case sovereign State A was able to fulfil its duty but sovereign State B and third territory C had no defence power. Or the case of distribution of natural resources amongst State A that had the wealth and means for exploration and

exploitation and State B and third territory C without even a chance to use their respective shares. Indeed, the application of equality *stricto sensu* is—at least—problematic and may result in an unfair outcome.

Preliminary requirements for a fair distribution

To recapitulate, we have rejected just acquisition, the best interest of the child, the difference principle, and equal shares. In one way or another, the difference principle and the principle of equality offer both pros and cons. To be more precise, the principles are rejected not because of the principles themselves but the particular characteristics of sovereign conflicts and sovereignty itself and the way in which the original position has been set up. Indeed, sovereignty implies many aspects of many different levels. Not only is this translated in benefits but also burdens. We have just seen in the previous section that a cautious choice would acknowledge both that sovereignty indeed is complex and that it implies benefits as well as burdens in different areas. So, to choose one principle either the difference principle or that of equality across the board would be an over simplistic decision that may result in grave consequences for the represented populations.

The solution reached must be one that, apart from being intuitively appealing in the negotiations under the veil of ignorance, can be applied when the veil is lifted in such a way that the three populations want to respect the agreement reached. Then, the solution must be somehow beneficial to the three agents, must recognise—to an extent—their claims and the result is not detrimental to any of the agents.

We tend to think and assume that the population in the third territory is the least advantaged or in a more precarious situation in comparison to that of the two sovereign States. But that is not necessarily true in all cases, both theoretically and in reality as we have seen in some of the examples used in this Chapter and in cases such as Gibraltar or the Falkland/Malvinas Islands in which it is not easy to point out the least advantaged party. Thereby, and in order to succeed in choosing a principle to be applied for the allocation of sovereignty we must bear in mind some circumstances: a) when the veil of ignorance is lifted it is more possible than not that the claiming parties will be in very different situations in many areas; b) that the least

advantaged party may be but does not need to be the population of the third territory; c) that sovereignty conflicts and sovereignty itself are complex—i.e. they imply both benefits and burdens in many different areas.

In order to address the issue of complexity we must first make clear how the parties will not use any agreement reached for their benefit only—i.e. the agreement must not be a subterfuge for any form of domination from one or more claiming parties in relation to the other(s). That is because by application of the *maximin* rule it is plausible to think the representatives will have a cautious view in regards to the outcome. So, it is consistent with the veil of ignorance and the *maximin* that they may want some safeguards in order to secure their respective populations against any form of domination once the veil of ignorance is lifted.

Bearing in mind the previous discussions, it is reasonable for the representatives in the original position to agree on two basic points in order to share sovereignty before deciding how to do it:

First, each agent will respect the liberties of the three populations; so no agreement reached can be interpreted in a way that curtails the basic non-political liberties[310] of any of these populations. This point means that none of the agents is allowed to interfere in any way with the basic non-political liberties of the inhabitants of any of the other parties.

Secondly, the agents will conduct their mutual relations in light of the principles recognised by the law of peoples.[311] I will show that, following Rawls, it is

[310] For a further analysis of basic liberties and its characterisation see Rawls (1999), *op. cit.*, p. 53. For Rawls the basic liberties of citizens are "[…] political liberty (the right to vote and to hold public office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and freedom from arbitrary arrest and seizure […]." Although this section is defined in Rawlsian terms, I intentionally refer to basic non-political liberties rather than basic liberties. To leave aside political liberty has to do with the nature of this research as sovereignty is indeed a political liberty. That is because, if we did include political liberties amongst the basic liberties in the first pre-requisite, it would not be possible to construct the model I propose. It is true that some scholars may see freedom of speech as a political liberty. But Rawls specifically separates political liberty (referred to vote and run for office) from freedom of speech and other civil liberties. Thereby, the basic non-political liberties I mention include all civil liberties, even freedom of speech.

[311] As stated in the introduction to this Chapter, it is not that the thesis embraces Rawls' *The Law of Peoples* fully. In this case, it focuses on his understanding of "familiar and traditional principles of justice among free and democratic peoples." Some of the principles are State equality, right to self-defence, duty of non-intervention, etc. For a more thorough account of the principles of the *Law of Peoples* see Rawls (1993), *op. cit.*, p. 46; Rawls (1999), *op. cit.*, p. 37.

reasonable to believe that the negotiators will agree on certain familiar principles already recognised by conventional and customary international law.

With these two pre-requisites agreed in this hypothetical situation, once the veil of ignorance is lifted the negotiators secure both that the individuals of each population safeguard their basic non-political liberties and that the three agents are free and autonomous from each other—i.e. in the case of the third territory—that does not mean independence, hence the use of the word 'autonomous'.

The 'egalitarian shared sovereignty'

The question at issue now is to decide, by respecting these two pre-requisites, how to share sovereignty. So, the issue is what would constitute a reasonable allocation of sovereignty over the third territory amongst sovereign States A and B and the third territory C as equal claimants, whose equality of claim is in no way affected by whatever other situation they already have; and that allocation has a target: the third territory and all that it implies in terms of rights and obligations. When we applied the difference principle to the issue constructed in that way, the question is whether there could be a division of the third territory amongst A, B and C that would be accepted by the three parties. Therein, in the disputed sovereignty case, the difference principle would seem to demand straightforward equality. However, we have also seen that equality *stricto sensu* presents several problems too.

Instead of the difference principle and the principle of equality, what about working out the solution with all we have learnt so far? By acknowledging the circumstances in sovereignty conflicts—that is, different agents and an ample concept such as sovereignty—and the way in which the original position has been set up, a revised principle may offer comparable advantages that may make it a reasonable option.

Firstly, we must remind us of the fact that the representatives of the three parties are behind the veil of ignorance—as characterised before in this Chapter. Hence, they are deprived of knowledge in regard to which party they represent. So, it is reasonable for them and likely to agree that each party has a right to participate in each aspect of sovereignty, regardless of their particular circumstances—i.e. their development or ability—because no one would want to be left out. In other words,

they would agree that ideally they would have 'equal' shares of sovereignty over the third territory, which means that the three claimants would have equal standing or status. Therein, all three parties would have a right to participate and the decision making process in each case would be subject to egalitarian consensus—i.e. all the three parties should be granted an equal input into the decision making process. They all have the opportunity to present, and amend proposals in relation to every aspect of the sovereignty of the third territory.

A second point has to do with factual circumstances. The representatives would acknowledge that it would be hard to see how after lifting the veil of ignorance all the three parties had the same relative situations—e.g. economic development, defence system, means for exploitation of natural resources, law, and so on. So it is reasonable to think that the representatives would agree that the degree of each party's participation would vary according to each party's ability to contribute. We also said in the previous paragraph that it is also reasonable to suppose that each party would as well have an interest in each aspect of sovereignty. Therefore, and bearing in mind these two circumstances—i.e. equal right to participate and different ability to contribute—it is reasonable to maintain that each party would have an interest in each aspect of sovereignty being handled in the most efficient manner.

A third point would be to determine the level of input and output of each party with regard to each objective/area/activity related to the sovereignty over the third territory. In principle, the representatives may think of distributing what benefits or rights each party would enjoy depending on the level of contribution that the party makes. Indeed, they acknowledge that some parties will be able to make a bigger or larger input than others. However, an immediate problem arises. The representatives would realise that by making the output dependant on the level of each party's input this could result in a subterfuge for domination. That is to say, the better off party contributing more towards one or more areas and therefore securing a larger stake while the other two parties were unable to make the same level of contribution that would be translated in an *ad eternum* share of benefits.

But if we added a proviso in order to make sure that the party with greater ability—and therefore greater initial participation rights—would have the obligation to bring the other two parties towards equilibrium, the proposal becomes reasonable.

That is because it ensures the most efficient current distribution of rights and obligations but also ensures the party that currently benefits most has an obligation to bring the other two parties up to a position where they can contribute equally—i.e. it has the burden to assist the other two parties to acquire the ability to contribute equally to that particular objective/area/activity of sovereignty over the third territory. Therein, the party with the greater ability in whatever area would agree to this because there is no other way of having the cooperation of the other two, and the other two parties would agree because this arrangement requires they receive something immediately and will eventually gain the ability to have an equal share, and they would otherwise get nothing.

It is true that the obligation is potentially onerous: what justifies the ascription of that obligation to the better off party? For example, if A is the stronger, and B and C are the weaker parties, is A obligated to raise the standards of B's and C's economies so that they can afford to invest in the exploitation of natural resources; or is it enough that A gives B and C a specific sum equivalent only to what B and C need to exploit resources on terms equal with A? If A gives that sum to B and C, are they obliged to spend it on exploitation, or can they spend it on something else and so forfeit any future claim to be assisted with the exploitation of natural resources? Why cannot B and C simply issue leases to commercial companies to exploit the resources on their behalf; why do they have to rely on help from A? What does the obligation imply in relation to unalterable inequalities, such as one state's being geographically closer to the third territory than the other?

The way in which the parties fulfil the final agreement or how the parties use the outcomes of the exploitation of their shares have to do with either practical matters that depend on each real scenario or with decisions pertaining internal sovereignty and therefore are out of the scope of this thesis. Similarly, to think of every possible factual difference amongst the parties—e.g. geographical proximity—would be out of the scope of an academic writing of similar nature, in particular when this is only a theoretical exercise. However, I intend to demonstrate—to a degree—how the egalitarian shared sovereignty may be applicable in some circumstances in the next Chapter.

In what matters the justification for the obligation owed by the more advantaged claimant, two clarifications must be made. Firstly, I do not claim that any

obligation is *prima* facie owed amongst the parties and the egalitarian shared sovereignty does not claim that either. I believe the most advantaged party would accept the agreement or—better said, it would be unreasonable for this party to argue it is not fair to accept it. Whether the most advantaged party actually accepts the arrangement or not is a different matter. Secondly, it is reasonable to believe that if the three parties in the original position agree on: a) equal standing; b) making the nature and degree of participation dependent on efficiency; and therefore c) at first the party with more 'input' will receive more 'output'; the more advantaged claimant—whoever that turns out to be—will accept to have an obligation to bring about equilibrium in the shares since, in the absence of that equilibrium, the more advantaged claimant would or could dominate the other claimants so there would be hardly a good reason for the other two parties to accept any other arrangement that somehow did not contain a degree of equilibrium. That is because anything less than shares in equilibrium would potentially imply a smaller share in comparison to those of the other parties. Therein, the bigger the share, the riskier the case for any of the parties to have more control on a particular issue pertaining sovereignty or the sovereignty of the third territory as a whole. This is directly linked to the idea of non-domination presented in Chapter Four since the possible monopoly of power with regards a particular issue pertaining sovereignty or the sovereignty of the third territory as a whole could degenerate into arbitrary power by the decisions being made mainly—only?—by the strongest party or in benefit only of the strongest party. In consequence, the freedom of the least advantaged parties with regards the choices they could make with their shares and the originally agreed equal standing could potentially be reduced to the 'rubber-stamping' of the decisions made by the strongest claimant. Therein, it is reasonable to believe that the representatives of the parties would find the equilibrium proviso a fair solution to safeguard the interests of the three populations involved.

This way of approaching sovereignty conflicts like the ones discussed in this thesis I will call egalitarian shared sovereignty and can be stated as follows:

1) Equal right to participate (egalitarian consensus principle)

2) Nature and degree of participation depends on efficiency of accomplishing the particular objective/area/activity at issue (principle of efficiency)

3) Each party receives a benefit (in terms of rights and opportunities) that depends on what that party contributes with (input-to-output ratio principle).

PROVISO:

But the party with greater ability and therefore greater initial participation rights has the obligation to bring the other two parties towards equilibrium (equilibrium proviso)

The egalitarian shared sovereignty solves sovereignty conflicts because it simply acknowledges the facts, a) that sovereignty conflicts and sovereignty are complex issues; b) that complexity is given by these issues being constituted by activities and goods that imply both benefits and burdens; and c) that the claiming agents are—most probably—in very different comparative situations in many senses.

We do not have the problem of defining equality because we are not referring to the parties but to the target, the third territory. All the parties receive equal shares of sovereignty since these shares are ideal (they only represent their right to equal benefits and the obligation to equal contributions and only in what is referred to the third territory).

Thereby, if they can make equal contributions, they will receive equal benefits. We do not even think of their relative situations as members of the international society. They are equal or not in as much as it is referred to the target, the third territory.

Coincidentally, if they cannot fulfil their obligations to the same extent, their returns will be affected. It is when the qualitative differences come into play. And they are referred to the situation of each of the parties in relation to a specific good in what matters only to the third territory.

To give an example, if a party A cannot defend the third territory because it does not have any means of defence, then it cannot contribute (so its return will be lessened). As we have two pre-requisites and a targeted agreement, the other two parties B and C will have to assist party A in as much as their assistance is needed to let party A have a similar contribution in regards to that specific good or activity (in the example, parties B and C will assist in the development of the means of defence of party A, but only in as much as it is necessary for the defence of the third territory).

Indeed, the egalitarian shared sovereignty provides for the legitimacy of initial differences in the benefits and burdens of the parties in a way that the equality principle does not. So when we reach the ultimate egalitarian shared sovereignty goal of equilibrium amongst the parties, there will be no problem in knowing what 'equal shares' require since these will be similar shares of each of the goods relevant to sovereignty (output) amongst three agents with similar level of use of their respective shares (input). I use the term 'similar' rather than 'identical' when I refer to the final shares since there will be obviously some elements that because of factual restrictions or limitations cannot be equally or identically used, or at least not to the same extent in the literal meaning of these expression—e.g. geographical proximity.

Following the previous paragraphs, I will now introduce a hypothetical situation in order to show how the egalitarian shared sovereignty works in the context of a sovereignty dispute. The aim of this example is to demonstrate how by acknowledging certain features and by applying the criteria mentioned before, a shared sovereignty model can work, at least in theory.

Imagine a group of people living on an island named Khemed. The majority of Khemedians are Muslims and there are some other minor religions represented as well. Although the territory is small in size, it is highly rich in a very rare metal only found there. However, they do not possess the means for its exploration and exploitation. Therefore, their main source of income is the exportation of basic products obtained from fishing and farming. They do not have any means to defend

the island. Finally, the sovereignty of the island has been continuously claimed by two sovereign States, Syldavia and Borduria.

Syldavia is a medium size sovereign State with a large population, mainly Muslims. This country is situated in another continent and although not having natural resources, it is immensely wealthy mainly because of its financial services. Syldavians have one of the most developed means of defence in the world.

On the contrary, Borduria is one of the largest sovereign States in the world in terms of territorial size, but not densely populated. Bordurians are mainly Hindus and their economy is based on agriculture. It is a non wealthy country with heavy international debt, high rates of unemployment and inflation and governmental corruption. They do not have any means to defend their territory. Geographically, they are located in the continent adjacent to Khemed, so mainland Borduria shares with Khemedians part of the continental shelf.

The following table gives a more visual account of the example:

	Khemed	Syldavia	Borduria
Territory	Island	Mainland	Mainland
Religion	Muslim	Muslim	Hindu
Territorial size	Small	Medium	Large
Population size	Small	Large	Medium
Wealth	Average	Wealthy	non wealthy (indebted)
Defence	No	Yes	No
Natural resources	Yes	No	Yes
Geographical proximity	Yes	No	Yes

Khemed is the most advantaged in natural resources (difference in Khemed's favour), the least advantaged in territorial and population size, and less advantaged than Syldavia in wealth and defence.

Syldavia is the most advantaged in terms of wealth and defence (differences in Syldavia's favour), the least advantaged in terms of natural resources, and less

advantaged than Borduria in relation to territorial size and their geographical proximity to Khemed.

Borduria is the most advantaged in terms of geographical proximity to Khemed (difference in Borduria's favour), but the least advantaged in terms of wealth. It is less advantaged than Syldavia in terms of defence.

Before reviewing how the egalitarian shared sovereignty may work in this hypothetical situation, let us see briefly how the principle of equality and the difference principle result when applied *stricto sensu* in this imaginary case.

If we applied equality strictly, they would all receive equal benefits and contribute equally towards the burdens. How would Borduria fulfil its duty to defend Khemed? How would Khemedians defend themselves? The same could be said about natural resources because although Khemedians, Syldavians and Bordurians would receive the same share in terms of ownership, Khemedians and Bordurians would not have the means to exploit them. Several other implications could be drawn but we have already made a point. It is both unreasonable and unfair to expect three parties with different comparative situations in many different areas to contribute in an equal manner or to receive an equal return.

Nevertheless, to apply the difference principle in the same form may have similar consequences. Syldavia is the least advantaged in terms of natural resources, so they will receive a larger share. Khemed is less advantaged than Syldavia in terms of defence, so the latter will provide the means to defend the third territory. But Borduria is the least advantaged in terms of wealth, the natural resources in its territory are not part of the agreement so they are not under discussion, and they do not have any means to defend the third territory (Bordurians cannot even defend themselves). Would they have to receive a larger share of the benefits resultant from the exploitation of natural resources in Khemed with means provided by Syldavia? Indeed, this seems unacceptable.

To recapitulate, we have two sovereign States Syldavia and Borduria claiming sovereignty over Khemed, a third populated insular territory. The three populations through their representatives agreed on sharing sovereignty over Khemed. They understand that they are dealing with many issues—i.e. activities or

goods, and these many issues imply both benefits and burdens. So, to ask all of them to contribute equally and receive an equal return is not the solution. Neither is it for the better off in any given activity to contribute more and the least advantaged in any other activity to receive a larger benefit. They may either lead to domination or to continuous assistance. And because they do also know that they will maintain the agreement under the second pre-requisite, they keep their reciprocal non-interference and consider themselves reciprocally equals. In addition to this, they know it is a targeted agreement only referring to the third territory—i.e. this is not an agreement based on humanitarian reasons, domestic or global justice.

In order to make the egalitarian shared sovereignty work by acknowledging the many differences amongst the parties, we have to foresee the possibility that one party (or some of them) may contribute more and the other parties considerably less, so it would imply an unbalanced relationship that may indeed lead to a) domination or neo-colonialism; or b) continuous assistance.

It is important to differentiate the fact that one party is not willing to contribute from the fact that party cannot contribute—i.e. it is not the same to say 'I will not help because I do not want to' than saying 'I will not help because I am not able to/cannot.' The former case is out of the scope of this thesis—i.e. the representatives have realised that they will work together by application of the rule of *maximin*. But in the latter, if one party cannot fulfil its part of the agreement, the other claiming agents should seek a similar level of participation in terms of benefits and burdens. The party in a better position in regards to a qualitative difference will assist in the development of the less favoured one(s) in as much as it is needed to achieve a similar level in relation to that relevant difference and only in what has to do with the third territory (targeted agreement).

Thereby, egalitarian shared sovereignty understood as a balancing principle amongst Khemedians, Syldavians and Bordurians bearing in mind their differences implies:

Khemedians, Syldavians and Bordurians have all the same right to participate in every aspect of the sovereignty over Khemed. That is to say, they all have the opportunity to present and amend proposals in relation to every aspect of the sovereignty over Khemed (egalitarian consensus principle). Khemed shares in equal portions natural resources with Syldavians and Bordurians. Syldavia shares in

equal portions the means for their exploitation with Khemed and Borduria. And Borduria, because of their geographical location, will grant special privileges for both Khemedian and Bordurian enterprises only related to the exploitation of natural resources in Khemed (or any other activity but it must be related to Khemed).

Indeed, either Khemed or Borduria may have issues in exploiting at the same level of efficiency as Syldavia their shares of natural resources. Hence, Syldavia must make sure that both the other agents reach the same level of exploitation or divide the benefits resultant amongst the three parties equally in the meantime—i.e. it is a targeted shared model.

The principle can be seen in a larger picture across the board with different activities. At first, the smaller and the larger the contribution, the smaller and the larger the return respectively. But as the agreement aims to avoid domination (secure non-interference) and has a target, it is to be expected a more evenly shared contribution-return relationship amongst the parties will emerge in the long term. That is to say in the example, at first Khemed would be defended by Syldavia, and the latter would as well contribute to the exploitation of the natural resources in the island (principle of efficiency). In principle, Syldavians would receive a larger share of the resultant benefits—i.e. the larger the contribution, the larger the return, and let us remember that Syldavia is contributing towards both defence and exploitation of natural resources in a larger manner than the other two agents (input-to-output ratio principle). This covers the burdens-benefits part.

But, as we have a targeted agreement, Syldavia must make sure both Khemed and Borduria reach relatively the same level for the defence of the third territory and the exploitation of natural resources (equilibrium proviso). It is then when the contributions amongst the three will be more even as well as the returns.

Meanwhile, and in order to lessen the gap between contributions and benefits, Bordurians could use the difference they have in their favour—i.e. geographically proximity means a more accessible bilateral commerce with Khemed, faster and possibly more effective response in case of international threat or attack, etc., things that Syldavia cannot offer.

Moreover, as the first pre-requisite grants non-political liberties, different religious beliefs between Khemedians and Bordurians could not be used for the advantage or disadvantage of any of the populations. That is because they are in a

certain order of priority. This principle is applicable only to sovereignty over the third territory and to what concerns the third territory (and all that this implies). Moreover, the principle and the pre-requisites are lexically ordered[312] both mutually and in relation to the 'egalitarian shared sovereignty' principle. In other words, no transgression of: a) the basic non-political liberties; and b) the principles recognised by the law of peoples, is allowed under any excuse or reason even if that means not fulfilling the 'egalitarian shared sovereignty' principle.

The lexical order dictates the priority amongst both pre-requisites and the principle if there is a conflict in practice. Indeed, the pre-requisites and the 'egalitarian shared sovereignty' are intended as a single conception and not to work individually. However, reality may show instances in which to apply the principle could go against one or both pre-requisites. Therefore, the lexicographic or lexical preference ordering applies. That is because the agents will have multiple criteria motivating their choices (as we will see in Chapter Seven). As they will have a ranking of priorities, the choice amongst the different alternatives will follow the highest criterion. Inversely, by respecting the egalitarian shared sovereignty we know the agents will take into account both pre-requisites.

The main reason to proceed this way is to secure a real 'equal footing'. Indeed, as a result of the lexical order basic rights will only be compared with other basic rights, powers and prerogatives with other powers and prerogatives, and so on. Thereby, arrangements that could imply trading basic non-political liberties for, for example, the exploitation of natural resources, could be avoided. So, none of the agents could use their relative better position at the expense of any of the other parties.

Conclusion

Clearly, this Chapter has shown that there are several factors which impact negatively on the resolution of sovereignty conflicts—i.e. just acquisition, differences of various kinds amongst the parties, and so on. In tune with this, it has also shown that by application of the method created by John Rawls in his *Theory of Justice* these factors can be eliminated.

[312] Rawls (1999), *op. cit.*, pp. 53 *in fine* and 54 *supra*.

In transferring Rawls' method to sovereignty conflicts we had to confront several dissimilarities to cases to which Rawls himself applies it—i.e. Rawls applies it to a domestic liberal society in which he can take for granted that the citizens amongst whom he is distributing are free and equal and whose status as citizens and as legitimate claimants is not in question. Rawls also applies his method to international society in *The Law of Peoples* in which he similarly takes for granted that 'peoples' (the moral units of international society) have a free and equal status; their standing as peoples is not in doubt. However, in the disputed sovereignty cases, the status of the various parties in relation to the dispute is very much in doubt.

Indeed, these dissimilarities did not foreclose the use of the original position and the veil of ignorance but both had to be adapted accordingly. Thereby, the idea of a colourable claim was introduced in order to define who has the *prima facie* right to claim sovereignty, a list of options in tune with sovereignty conflicts was presented for revision as possible solutions, the necessary conditions for the representatives in the negotiations were listed, and so on.

Specifically, a main outcome emerges from the Chapter, that is to say the egalitarian shared sovereignty: a) this way of understanding shared sovereignty is egalitarian since the three agents start the negotiations on an equal footing and the agreement reached must grant that they remain free and equal autonomous international subjects; b) sovereignty so defined is shared since the agents agree on distributing the sovereignty of the third territory amongst them, being all simultaneously supreme authority; and c) sovereignty in this model has a twofold meaning. First, the three agents will all be seen as sovereign, although not all of them are sovereign States. Hence, the population of the third territory will have the prerogative to decide freely and autonomously in relation to its share of sovereignty. Secondly, because what is distributed in shares is the sovereignty—i.e. supreme authority—over the third territory.

Chapter Seven

How could shared sovereignty work in practice?

Introduction

The previous Chapter showed that shared sovereignty is a fair way of dealing with sovereignty conflicts and that it is unreasonable to reject it as a way of solving them. That is because the fairness of the outcomes of our original position was secured by the conditions of uncertainty under which the choice was made. It is now time to evaluate if the general principles of egalitarian shared sovereignty can be extended to workable institutions that realise these principles. That is the aim of this Chapter, to work out what sorts of institutions and arrangements could, and would best, realise the egalitarian shared sovereignty.

In order to work out the institutions I will make use of some actual sovereignty conflicts. These conflicts will fulfil the criteria defined at the beginning of this thesis—i.e. two sovereign States and a populated third territory. Moreover, I will focus the attention on some of the elements that constitute these particular sovereignty conflicts and that are constitutive of any political society, national or international—i.e. population, territory and government. Indeed, as it would be theoretically impossible and practically cumbersome for a thesis to aim to cover every single aspect of the third territory, I will decide upon criteria to select those elements that will be reviewed.

Thereby, I aim to examine if the general principles of egalitarian shared sovereignty can be extended to workable institutions in population, territory and government in some specific sovereignty conflicts and how the egalitarian shared sovereignty could be best realised.

A further point must be made clear before working out what sort of arrangements and institutions may best realise the egalitarian shared sovereignty. Although this Chapter will explore the applicability of the egalitarian shared sovereignty in some real cases they are only used as part of a theoretical exercise. Ergo, relevant non-ideal issues—e.g. lack of compliance—will not be considered. I assume that all parties are reasonable and rational and want to resolve their conflict without violence. To put this another way, this thesis only claims it would be

unreasonable to reject its outcome—i.e. the egalitarian shared sovereignty—should all ideal and assumed conditions were present.

Delimiting the range of application

We need to make two clarifications prior the application of the principles reviewed in Chapter Six. First, in order to apply these principles we will use three actual sovereignty conflicts—namely, Kashmir, Falkland/Malvinas Islands and Gibraltar. There are many reasons to proceed in this way, in particular because we can actually see how these principles work in real states of affairs rather than in an only theoretical environment. However, as the selected conflicts have all the elements essential to the model which is the object of this thesis, the conclusions will be fully applicable to similar disputes.

Second, the principles reviewed in Chapter Six have to be applied in a sovereignty conflict; more specifically, they have to be applied to a populated third territory and all that it involves. However, what does exactly the third territory involve? In order to answer this question, there are some points that must be discussed beforehand: first, to define the constitutive elements of the third territory; and second, to select which of those elements will be analysed through the proposed principle. The reason to proceed this way is mainly pragmatic. To do an exhaustive analysis of every component of the third territory would be out of the scope of a doctoral thesis. However, to demonstrate how the selected principles work is essential in order to prove the usefulness of this research.

In order to define the third territory and its elements it is convenient to remind ourselves of the definition of a State. A classic view of the sovereign State identifies its constitutive elements, which is ideal for the purpose of the present section. International public law offers a definition in article 1 of the Montevideo Convention of Rights and Duties of States (1933) that declares: "The [S]tate as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states." In tune with this definition the Oxford Dictionary of Law says that "[t]o qualify as a State the entity must have: (1) a permanent population […]; (2) a defined territory […]; (3) an effective

government."[313] What is clear from these two definitions is that a State consists of—at least—four basic elements: population, territory, government and sovereignty. By analogy, it can be said that the third territory offers three of these elements: population, territory and government. However, its sovereignty rests in the hands of the two sovereign States.

Although population, territory and government can be seen as essential elements in order to establish a societal political organisation—sovereign or not—they presuppose others that give flesh to them: currency, market, defence, language, religion, etc. What are the elements or sub-elements to which the agreed principles are going to be applied? To answer this question, different criteria can be followed. Some of these elements are necessary in order for the third territory to exist, some others sufficient and most of them only desirable. Some of them can be divided; some cannot. From this account it can be maintained that the elements that constitute the third territory can be characterised and classified from different angles. However, there is a common feature to all of them and to sovereignty conflicts in general: controversy—i.e. the fact that every involved agent wants a larger share, even an exclusive one, over elements or sub-elements considered valuable. Even if some of these elements may be necessary, but not controversial—i.e. if the parties are not in dispute about what should be done about them—no negotiation is necessary. However, some others, if they are only desirable, may be matter of controversy. It is to these that the principles we have reached will be applied.

The 'egalitarian shared sovereignty' applied to actual cases

We will consider the elements that constitute the third territory and some of their respective sub-elements, discussing which of these sub-elements are controversial in a chosen actual case. Therein, the principles we have reached will be applied using the selected cases, specifically the sub-elements which may be the cause of controversy amongst the involved agents in the dispute.

[313] Martin and Law, *op. cit.*

Population

It is true that issues related to population may seem at first controversial but when looked into detail, sovereignty conflicts are more often than not centred on problems related to territory and government and law. That is not to say, however, that issues related to population are not controversial at all. In fact they might be controversial, as we will see, but not necessarily to the same extent as territory, government and law ones are. So, to avoid the analysis of population as an element because we think it might not contribute enough in the discussion is, at this stage, too premature. Indeed, there are cases around the globe in which populations impose upon each other custom, religion, language, and so on resulting in social tension with many negative outcomes—e.g. discrimination, human trafficking, precarious employment conditions for those who are not part of the same societal group, etc. How would the egalitarian shared sovereignty deal with the issue of having different populations within the same model?

A dispute that offers several elements attractive for the analysis when reviewing population is the case of Kashmir.[314] The valley of Kashmir has been a centre of conflict since Ancient times.[315] Some trace the presence of kingdoms in this territory as early as the times of Herodotus and Alexander.[316] Also, from early periods there have been influences from India and China, and different religions such as Hinduism and Buddhism[317], whether Kashmir has been part of an Empire or an independent kingdom. For instance, around 1586 the valley was taken by the Mughals, whose centre of power was Delhi.[318] In the early 18th century, the Persians invaded Delhi. In 1751 the Afghans took over Kashmir.[319] After that period, the British presence is significant in Asia. In 1809, the British authorities signed a treaty

[314] Victoria Schofield, *Kashmir in Conflict, India, Pakistan and the Unfinished War* (London: I.B. Tauris & Co. Ltd., 2000); Sunil Chandra Ray, *Early History and Culture of Kashmir* (New Delhi: Munshiram Manoharlal Oriental Publishers, 1970); H. H. Wilson, *The Hindu History of Kashmir* (Calcutta, India: Susil Gupta Private Ltd., 1960); Mridu Rai, *Hindu Rulers, Muslim Subjects, Islam, Rights and the History of Kashmir* (London: C. Hurst & Co. Ltd., 2004); Balraj Puri, *Kashmir Towards Insurgency (Revised and Updated)* (India: Orient Longman Ltd., 1995); Prem Shankar Jha, *Kashmir, 1947, Rival Versions of History* (Oxford: Oxford University Press, 1996); Josef Korbel, *Danger in Kashmir* (Princeton: Princeton University Press, 1954); Sumantra Bose, *The Challenge in Kashmir, Democracy, Self-determination and a Just Peace* (New Delhi: Sage Publications India Pvt. Ltd., 1997).
[315] Schofield, *op. cit.*, p. 1.
[316] Wilson, *op. cit.*, p. 76.
[317] *Ibid*., p. 77.
[318] Schofield, *op. cit.*, p. 3.
[319] *Ibid*., p. 4.

of 'Amity and Concord' with Kashmir.[320] The valley was useful for British international agenda because of its geostrategic location against Russia, Afghanistan and China.[321] In 1846, the British authorities signed the 'Treaty of Amritsar' with the Dogra King of Kashmir, transferring authority to the Maharaja in exchange for compensation.[322] But this treaty, that was meant to be 'for ever' lasted only about a century until British foreign policy changed and decolonisation started[323]; indeed, in 1947 the British left India.

There are often two versions of history.[324] That is mainly because the region presents traces of different and opposed ethnic and religious features.[325] The two main groups are the Hindus and the Muslims. Thus, the Hindus are divided into three main sub-groups—Gors, Karkuns and Buhers[326]—and the Muslims into others—Saiyids, Mughals, Shias, etc.[327] The differences are notorious not only between Hindus and Muslims but also amongst the sub-groups.[328]

In this historical context and with this socially divided background, Kashmir was incorporated to the Indian Union in 1947. Tension between the social groups increased and Hindus and Muslims looked to India and Pakistan respectively for help.[329] Since then, the debate as to whether it should belong to one or two nations persists.[330] The region has been divided into two separate administrations, that of India (Jammu and Kashmir) and that of Pakistan (Azad Kashmir).[331]

The Kashmiris are in our theoretical model the people inhabiting the third territory. They will have certain features, like any other group of people that constitutes a nation. Do any of these features need to be specifically dealt with under the principles reached in the negotiations?

In the following paragraphs we will focus the attention on some of the sub-elements that constitute the population of the third territory using the example of Kashmir.

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[320] *Ibid*., p. 5.
[321] *Ibid*., p. 10.
[322] Bose, *op. cit.*, p. 23.
[323] *Ibid*., p. 24.
[324] Jha, *op. cit.*, p. 1.
[325] Ray, *op. cit.*, p. 26.
[326] Rai, *op. cit.*, p. 37.
[327] *Ibid*., pp. 38-39.
[328] *Ibid*., p. 39.
[329] Puri, *op. cit.*, pp. 4-6.
[330] Korbel, *op. cit.*, pp. 28-ff.
[331] For simplicity in the analysis, I will leave aside the region under Chinese administration.

a) Numbers

A large or a small group of people can be consolidated as a State, from China and India with more than one billion inhabitants each to Vatican City with less than one thousand individuals. So, there is no minimum or maximum number of inhabitants to constitute a State. And the same can be said in regard to the third territory. It may seem that numbers matter if we consider that for people to have a voice they have to have 'occupied' the land. For instance, if there were five people living in Antarctica that would not give them a voice. But, if there are five people living on an island that is small in size that may be enough. Although this argument appears convincing, it is not relevant here for several reasons. First, it may seem like numbers do matter, but not absolutely. Secondly, we defined in this thesis which populations will have a right to sovereignty by characterising the 'colourable claim'—i.e. the number of people is irrelevant. Thirdly, we also clearly indicated when a certain group of people had the right to decide upon their political status as a group according to international relations—when we reviewed self-determination. Finally, to use Antarctica as an example is not valid since it has a special international status also reviewed in this thesis—that makes it impossible for any group of people to become an independent State. Thus, there are other historical cases in which populations obtained independence by settling in large territories although being small in number—e.g. the United States, Argentina. Consequently, this element does not generate controversy, i.e. there is no need to discuss the size of the population.

But, what about immigration? How many people should be allowed to immigrate to Kashmir and under what conditions? How many people should be allowed to emigrate from Kashmir and under what conditions?

b) Ethnicity

An ethnic group can be defined as one whose members identify themselves with each other through a common background or heritage (real or assumed) that may involve any or all of the language, culture, religion, race, etc.

Is to be black or white a requisite to be part of a community? Is an African or Asian background necessary? Once again, there are several examples that have a direct answer to the question. In today's world, most (if not all) States have their populations constituted by individuals from various races and many different cultural backgrounds. Our vocabulary has even a word for such a phenomenon: cosmopolitan. Although tolerance is pushed to its limits under these circumstances, multi-ethnic societies are a reality. It appears that a common ethnicity is not fundamental to constitute a nation. Indeed, multi-ethnic societies are a widespread reality—i.e. there is no point in discussing if a mono or multi-ethnic society will be the one living in the third territory. In principle, this element does not imply controversy at theoretical level. However, it is time now to focus our attention on some of the elements that constitute the ethnicity of any nation and, in particular, those that appear controversial in the case of Kashmir: language and religion.

c) Language

To have one language, official or not, or to have one or more languages officially recognised, is not an indispensable requisite for a group of people to be a nation. However, languages are directly linked (at least sociologically) with national identity. Is linguistic homogeneity a requirement for a unified population? If so, is that a necessary or a sufficient condition? The answer to the previous questions is both simple and complex. Language as a tool to enable inter-subjective relation results is necessary. However, the use of the same language does not. On the one hand, there are States around the world that show linguistic diversity, for example, by having two or more official languages (e.g. South Africa, Montenegro, Israel, and Switzerland). On the other hand, to have one common linguistic element as a way of interacting evidences a desirable option (at least from a theoretical point of view). It would help in the cohesion of any group of people (hence, nation); it could be seen as a common bond (as part of their culture or ethnicity); it is a very easy aspect to identify. Indeed, it may be even possible to argue that language is indispensable for any individual living as a member of a group so as to be able to communicate with the others. However, caution must be applied since although having a language as a tool for communication is an essential requisite for an organised population, to have

only one is not. From there, linguistic homogeneity could be considered as a desirable element but neither is it necessary nor sufficient. Hence, if to have a language is by default a requisite in any societal organisation but homogeneity is not, there is no point in including in the negotiations this sub-element. The population of the third territory will have a language which can be either of the sovereign States' languages or a third one, or they may use all three. In theory, this element does not generate controversy.

According to the art. 343 of the Constitution of India Hindi in Devanagari script is the official language, and according to its art. 345 each state can adopt any one or more languages. According to art. 66 of the Constitution of Jammu and Kashmir, Urdu is the official language of the State. Thus, the official language of Azad Kashmir is also Urdu. However, an interesting element is given by the fact that the Kashmiri language is different from Hindi or Urdu.[332] Is the *status quo* to remain, or is a language to be added?

d) Religion

There are States with official religions (e.g. Argentina, Monaco, and Vatican City). There are several that are considered secular States or—in other words—without any official State religion (e.g. Bolivia, France, the United States). Moreover, those States that do have an official religion usually recognise in their Constitutions freedom of conscience; so, although there is an official religion, inhabitants of these States are able to profess the religion of their choice. From there, a particular religion—or even to uphold one—cannot be seen as any kind of condition for a group of people to be recognised as a nation. Thus, the particularities of the original position and the agreed first pre-requisite secure equal liberty of conscience.[333] This element cannot imply controversy *per se*. Nevertheless, religious tension has been often the cause of social struggle in Kashmir when one dominant group has oppressed the minorities. In actual percentages, the Muslims represent 67% of the population whereas the Hindus represent almost 30%.[334] The following

[332] Schofield, *op. cit.*, p. 1; Puri, *op. cit.*, p. 9.
[333] Rawls (1999), *op. cit.*, pp. 180-185.
[334] Census India 2001.

chart[335] shows in detail how heterogeneous the picture is in Jammu and Kashmir in terms of religious belief:

Religious Communities	Persons	Males	Females
All Religious Communities	10,143,700	5,360,926	4,782,774
Hindu	3,005,349	1,647,533	1,357,816
Muslim	6,793,240	3,525,446	3,267,794
Christian	20,299	12,733	7,566
Sikh	207,154	114,524	92,630
Buddhist	113,787	58,610	55,177
Jain	2,518	1,357	1,161
Other Religious Communities	97	51	46

From the above paragraphs we can see that the sub-elements that constitute the population of a State are not, in principle, controversial *per se*. However, all these can in fact be controversial if one party, or more, may wish to impose language, religion or cultural domination—the case of Kashmir. So, it is not that there is no controversy, but that: a) this form of imposition is not necessary; b) a just approach must resist and exclude it.

Several solutions have been proposed in order to untangle the dispute in Kashmir.[336] However, in all cases at least one of the parties is left outside the picture. To grant the sovereignty to Pakistan would be opposed by some minorities—Hindus and Buddhists. The opposite solution, sovereignty handed over to India would have the opposition of most of the Muslim population. Then, neither of these two solutions is welcomed by the Jammu and Kashmir or by Azad Kashmir inhabitants.[337] But, even though independence is what the majority of the inhabitants of both Kashmirs want[338], it is threatened by both India and Pakistan because it would imply losing claimed territories, consequent rights over them and could result in a possible improvement of their peers' situation.

[335] *Ibid*.
[336] For an insight see BBC News "The Future of Kashmir?" available at http://news.bbc.co.uk/1/shared/spl/hi/south_asia/03/kashmir_future/html/default.stm accessed on 22/05/12.
[337] Robert W. Bradnock, *Kashmir: Paths to Peace* (London: Chatham House, 2010), pp. 15-17.
[338] *Ibid*., pp. 15-16.

Indeed, the inhabitants of Jammu and Kashmir and Azad Kashmir seem opposed to joint sovereignty.[339] However, the model proposed here introduces features that make it a more attractive option also for them. That is because, if Kashmir, India and Pakistan decided to share their sovereignty over the territory under dispute, by applying the egalitarian shared sovereignty, all the involved parties would respect the basic non-political liberties of the three populations—Kashmir, India and Pakistan—by fulfilling our first pre-requisite. Thus, they would conduct their mutual relations according to the principles recognised by the law of peoples—our second pre-requisite. These two features have positive consequences as we will see.

We agreed that the allocation of sovereignty will be given by: a) equal right to participate (egalitarian consensus principle); b) the nature and degree of participation depends on efficiency of accomplishing the particular objective/area/activity at issue (principle of efficiency); c) each party receives a benefit (in terms of rights and opportunities) that depends on what that party cooperates with (input-to-output ratio principle); and d) provided the party with greater ability and therefore greater initial participation rights has the obligation to bring the other two parties towards equilibrium (equilibrium proviso). How is that translated into Kashmir's reality and its population? We can divide the answer in two parts: a) the qualitative differences amongst the parties; b) the real concerns of the inhabitants of Kashmir.

As we have several agents in this particular dispute with various features in terms of population, there are undoubtedly several differences amongst them. In what follows, I will make use of some of these differences to show how the egalitarian shared sovereignty works. For example, India presents the largest of the three populations with the biggest economy as the following chart shows:

[339] *Ibid*., p. 18. The study in question does not define 'joint sovereignty' so its content and what has been explained to the people participating in the study remains unclear.

	India	Pakistan	Kashmir
Population	1,210,193,422[340]	132,352,279[341]	12,548,926 (Indian admin.)[342] 4,567,982 (Pakistani admin.)[343]
Nominal GDP per capita[344]	1,389	1,201	No official figures

By combining the features shown in the above chart, it is easy to see that India is both larger in terms of population and nominal GDP per capita in comparison to Pakistan, and this offers a difference in this conflict that can help to achieve a solution. That is because in relation to the inhabitants of both parts of Kashmir (under Indian and Pakistani administration), although they do think the dispute is important for them personally, for a very large majority the main concerns are other issues. Unemployment, government corruption, poor economic development, human rights abuses are what the Kashmiris are really interested in.[345]

In general, by applying the egalitarian shared sovereignty, as Kashmiris would be citizens of both sovereign States, they would have a common passport—a Kashmiri passport—valid in both Pakistan and India. In relation to their language, it is a fact the three main spoken ones are Kashmiri, Urdu and Hindi; so they all can be made official. In religion, as our first pre-requisite recognises basic non-political liberties, freedom of belief would be adopted at a constitutional level, so that no one may be discriminated based on religion. All this is controlled by the lexically prior prerequisite of non-political liberties.

In particular, as the difference in this example is given by the larger society and stronger economy in India, this State would have a stronger constraint in being a welcoming party for the Kashmiris (input-to-output ratio principle). In that sense, the main concern for them—unemployment—would be acknowledged (principle of efficiency). That is because, although Pakistan would also have the obligation to welcome Kashmiris as its citizens in its territory, the Kashmiris would have the right

[340] Census India 2011.
[341] Census Pakistan 1998 (the only official figure so far). There was a more recent Census conducted in 2011 but the official result will not be released until 2014. The estimated population is 182,614,855. For more details see http://www.census.gov.pk/ accessed on 25/03/13.
[342] Census India 2011.
[343] Est. from Census Pakistan 1998.
[344] International Monetary Fund estimates for 2011–in U$S dollars.
[345] *Ibid*., p. 5.

to opt to be nationals of both States—i.e. they have the right to relocate to either State. Thus, even though it is a fact that both populations, that of Pakistan and that of India are large in comparison to Kashmir, they would not be a threat to local employees since in order to work in Kashmir restrictions on nationals of either States would apply—because they would be nationals of either India or Pakistan, but not Kashmiris.

In regard to governmental corruption and threats to human rights, reciprocal control amongst the three parties (egalitarian consensus principle) could secure an improvement in the present situation—a point to be discussed when dealing with government in this Chapter. In particular, employment opportunities generated within the boundaries of both Kashmir because of the exploitation of natural resources, could be the result of a joint enterprise, details of which will be discussed when considering territory.

To recapitulate, shared sovereignty would involve recognising the sovereignty over Kashmir of both India and Pakistan. In terms of population, the only ones affected would be the Kashmiris, who would be nationals of both States. Moreover, their basic non-political liberties must be respected by both India and Pakistan. Hence, they would have rights in both States, as nationals. They would be equal before the law with any Pakistani or Indian citizen and no discrimination on any grounds would be permitted. As a direct consequence, they would have the right to work in any of the three territories—respecting local regulations. The status of Kashmiri national, its acquisition and retention would have to be agreed amongst the parties. Finally, there would be immigration controls to prevent people from moving to Kashmir in order to obtain rights in India or Pakistan that they could not obtain directly. The particulars in relation to law will be reviewed later in this Chapter when dealing with government.

This example shows that divisions of religion, language and ethnicity are not obstacles to shared sovereignty, provided that India, Kashmir and Pakistan respect our two pre-requisites: a) non-political liberties; and b) principles of the law of peoples. Furthermore, shared sovereignty offers a viable way to do it when these three parties acknowledge their qualitative differences—e.g. larger population, stronger economy, only to name a few. Moreover, it secures a permanent feature

because of mutual controls and reciprocal concessions, both things that aim for equilibrium amongst all the parties.

Territory

The Falkland/Malvinas Islands international dispute has all the elements for the type of conflict this thesis discusses, namely two sovereign States (Argentina and the United Kingdom) and a non-sovereign third territory (Falkland/Malvinas Islands). Indeed, it has features that are often the main cause of controversy in sovereignty conflicts. A very brief historical account[346] will put this into context. There is doubt about who first sighted the islands and about the first landing (Ferdinand Magellan and/or Amerigo Vespucci or the English sea captain John Davis) in the 1500s. British and Spanish settlements appear afterwards. Argentina declared its independence from Spain (1816) and then claimed rights over the islands as they were part of the region previously under Spanish dominion (1829). The United Kingdom and Argentina have had continuous presence and/or claimed exclusive sovereign rights over the islands since then, both bilaterally and internationally with a climax in 1982 with a war between the two. According to the 2012 census[347] the islands had 2841 inhabitants.[348] Most of them (59%) considered themselves 'Falkland Islanders' and a large percentage identified themselves as British (29%).[349] Bilateral relations have been re-established after the war. However, the sovereignty dispute over the islands continues nowadays. Commerce and trade between the islands and Argentina have been an issue. Because of the lack of negotiations, Argentina has threatened an economic blockade[350], an idea supported by other Latin-American States[351] with visible immediate negative results for the islanders.[352] In

[346] For a more detailed historical account see http://www.Falkland.gov.fk//Historical_Dates.html (UK) and http://www.mrecic.gov.ar/portal/seree/malvinas/homeing.html#link1 (Argentina).
[347] Falkland/Malvinas Islands Census Statistics 2012 http://www.falklands.gov.fk/headline-results-of-2012-falkland-islands-census-released/ accessed on 27/03/13.
[348] As non-residents, military personnel were not included in the census. Excluding contractors at Mount Pleasant Airfield (MPA), the true population figure of the Falkland Islands is 2,563
[349] Falkland/Malvinas Islands Census Statistics 2012, *op. cit*.
[350] The Guardian 01/02/12 http://www.guardian.co.uk/uk/2012/feb/01/argentina-Falkland-economic-blockade accessed on 13/02/12; The Telegraph 02/02/12 http://www.telegraph.co.uk/news/worldnews/southamerica/falklandislands/9055913/Argentina-planning-economic-blockade-of-the-Falkland-diplomats-warn.html accessed on 13/02/12
[351] The Guardian 06/02/12 http://www.guardian.co.uk/uk/2012/feb/06/Falkland-argentina-britain-blockade accessed on 13/02/12.

March 2013 the Falkland/Malvinas Islanders voted in a referendum whether they wanted (or not) to remain as British Overseas Territory. By a large majority (99.8%) they made clear their wishes to remain British.[353]

It is true that the islanders are predominantly British because the United Kingdom has controlled the islands for years—does this weaken the resident's claims? The answer is negative for various reasons—at least in our model. First, they have a 'colourable claim'. Secondly, we neutralised the historical arguments—in Chapter Six. Thirdly, in tune with this, we are conducting a hypothetical analysis to see the feasibility of a joint solution so I assume they will have right to self-determination. And because of the hypothetical negotiations, they have realised that self-determination will lead to shared sovereignty because it settles the conflict—by application of the rule of *maximin*.

The Falkland/Malvinas Islands are the third territory in our model. Territory, in principle, can be defined as an area owned and possessed by the population (in land, water, space and, perhaps, cyberspace).[354] Like population, it is a necessary but not sufficient condition of a State. Like population, it may have features that could cause controversy. Some of the features that constitute territory will be reviewed using the Falkland/Malvinas Islands conflict as an example. Those that introduce controversy will be analysed using the model proposed in this thesis.

a) Extension

From Vatican City or Montenegro to Australia or Russia, the worldwide context has an ample spectrum of States in terms of their territory size. No particular size is necessary, sufficient or even desirable to produce a State. Most third territories are in fact small pieces of land highly rich in natural resources or geographically strategic—e.g. Falkland/Malvinas Islands, Gibraltar. But their size is not in any way a matter of controversy amongst the parties in this kind of conflict.

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[352] La Nación 07/02/12 http://www.lanacion.com.ar/1446528-ya-se-sufre-en-malvinas-el-bloqueo-comercial accessed on 13/02/12; and Clarín 07.02.12 http://www.clarin.com/politica/Malvinas-aseguran-bloqueo-afecta-pesca_0_641935837.html accessed on 13/02/12.

[353] Official Press Release 12/03/13 http://www.falklands.gov.fk/results-of-the-referendum-on-the-political-status-of-the-falkland-islands/ accessed on 27/03/13.

[354] I will not discuss here whether cyberspace should or not be considered as part of the sovereignty of a State–as it is out of the scope of this thesis. However, for a further insight on this topic see Patrick W. Franzese, "Sovereignty in Cyberspace: Can It Exist?," *Air Force Law Review* 64 (2009): 1-42.

b) Borders

This could be a matter of controversy. For instance, if Jerusalem came under shared sovereignty, boundaries between Palestine, the joint territory and Israel would have to be determined (perhaps similarly with Kashmir). In the particular case of the Falkland/Malvinas Islands, although it may seem that borders are not an issue—as they are islands—the exclusive economic zone often creates tension between Argentina and the United Kingdom. For instance, who has the right to explore that exclusive sea-zone? What happens in the zone in which Argentina and the Falkland/Malvinas Islands overlap? As this point is intrinsically linked to natural resources, I will examine them together after introducing the latter.

c) Defence

National defence will be seen here as the protection of each and every interest a State has—e.g. possessions, territory, and population—through different means—e.g. military, economic, and diplomatic. The international scenario offers very diverse realities, from large States in terms of territorial size, with formidable military power—e.g. the United States—or almost none—e.g. Argentina—to small or medium size ones with a well equipped and trained army and navy—e.g. the United Kingdom—or with none—e.g. Costa Rica, Andorra or Vatican City. Although it may seem desirable for a State to have its own means of defence reality shows it is not a necessary requisite. There are several States in which the army and navy are not big, well equipped or trained enough in order to defend their territory or population but they are still respected as States. There are others that in fact do not have military defence at all, their defence being the responsibility of another country or an international organisation—e.g. OTAN.

There seems to be no problem with defence. The territory being defended is obviously desirable although the task is one which can be shared. However, what would happen if another party—i.e. a sovereign State with no part in the conflict—decided to invade the third territory? In the hypothetical scenario that Chile decided to invade the Falkland/Malvinas Islands, who would defend them? The ways in which the situation may develop are as follows: a) both sovereign States may remain

neutral; consequently the new agent would take over ownership and use of the third territory if the inhabitants were unable to defend themselves; b) one of the sovereign States may respond to the invasion and defend the third territory; c) both sovereign States may respond to the invasion and defend jointly the third territory.

Is defence a right or an obligation? International public law assumes self-defence as a right against attack.[355] At the same time, States have the right and are obliged to defend their own interests and their population. Consequently, any act of defence is fair and just as long as it is a result of an illegitimate threat or attack. However, in a sovereignty conflict, it seems difficult to determine the one who could/should be defending the third territory in the event of an attack on what appears to be a common interest for all the involved parties: the third territory. In theory, both sovereign States are free international agents able to determine their actions independently. Moreover, they can decide their action plan without having their peers in the conflict in mind. Nevertheless, in terms of their interests it is desirable that they defend (jointly or independently) the third territory; if they did not do so, the invader could gain a better position in terms of sovereign rights over the disputed territory (at least at factual level).

In addition to the way in which the parties would defend the third territory, there are two other crucial elements that need to be agreed—even if joint defence was the case: a) the extent to which the burden can be made proportionate, with those with more of the appropriate resources taking the larger share—if they can be trusted not to turn their forces against the other two parties, which is a serious consideration; b) and the extent to which one considers what combination of contributions will be the most efficient, using, e.g., both the local knowledge of the people in the territory, and the equipment best adapted to defending it. Indeed, if they take on sovereignty, they must take on the obligation to defend. On Rawlsian principles, they should all choose combined defence. However, how would Argentina, the Falkland/Malvinas Islands and the United Kingdom share the defence?

The egalitarian shared sovereignty addresses the three elements that seem to be crucial in order to have shared defence: a) Resources; b) Training and

[355] See UN Charter art. 51 "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations […]." See also UN General Assembly Res. 3314 for a definition of aggression.

opportunities; c) Safety of the other two parties—how to avoid misuse of power. By respecting the first and second pre-requisites (basic non-political liberties and principles of the law of peoples), the fulfilment of the requirements that constitute the egalitarian shared sovereignty will secure the distribution in terms of the defence of the third territory. Then, the permanent character of the agreement is granted through the involvement of all the agents, since none of them will be in a better position in respect to the others. Thus, all of them are interested in protecting the third territory that is shared amongst them.

The egalitarian shared sovereignty states that the allocation of sovereignty is given by: a) equal right to participate (egalitarian consensus principle); b) the nature and degree of participation depends on efficiency of accomplishing the particular objective/area/activity at issue (principle of efficiency); c) each party receives a benefit (in terms of rights and opportunities) that depends on what that party cooperates with (input-to-output ratio principle); and d) provided the party with greater ability and therefore greater initial participation rights has the obligation to bring the other two parties towards equilibrium (equilibrium proviso). In what is specific to its defence, this means all the agents will have an equal responsibility to defend the third territory (egalitarian consensus principle). But, how is this translated into terms of means of defence if the agents have different level of development?

The differences in the case of defence are numerous—e.g. geostrategic location; economic resources; level of military development; training and facilities; number of troops; etc. But a combination of contributions can make these differences work together in an efficient form, taking into account that these may be things which one agent can provide but which cannot be provided by any other agent.

As in the Falkland/Malvinas Islands' case, it will be highly probable that the parties have a different level of development in terms of their respective defence systems (input-to-output ratio principle). Then, the egalitarian shared sovereignty can be fulfilled in two ways: a) following the most efficient combination in terms of contribution (principle of efficiency)—e.g. using both the local knowledge of the people in the territory (Falkland/Malvinas Islands), the geostrategic location (Argentina), and the equipment, resources and any means best adapted to defending it (the United Kingdom); b) the agent with the better comparative situation—in whatever aspect—may contribute in developing the other parties or granting them

exclusive privileges (equilibrium proviso)—e.g. the United Kingdom could train Argentinean and Falkland/Malvinas troops in exchange for the use of locations in any of them.

It is clear that the egalitarian shared sovereignty aims only to achieve the same level of opportunity and development for all the involved parties so they are able to defend the third territory (not the territory that is already part of the sovereign States). Thus, even if there were variations in the future in terms of wealth status and defence development among the involved participants, the reciprocal obligation would always be the same for all the agents, i.e. to combine to produce the most efficient result.

It is important to say that all the agents would participate in the decision process and in the administration of means for the defence of the third territory in the event of an attack. As a consequence, the agents would have reciprocal checks so none of them could become 'too powerful' and threaten an otherwise peaceful understanding. The details of the joint administration of the forces involved in the defence would be reached in a new agreement that does not contradict in any sense the principles agreed in the original position.

d) Natural resources

Natural resources are any material in raw condition present in the territory, organic or mineral, that is not initially a product of any kind of human activity. Some States are rich in natural resources, others are not: no particular amount of natural resources defines a State. But the distribution of natural resources is usually one of the main problems when dealing with sovereignty disputes even though the involved sovereign States may already be wealthy ones; it is a feature that always presents controversy.

Leaving the discussion about natural resources in already sovereign States aside—as it is outside the scope of this thesis—I will focus the discussion on the ones that are part of the third territory. Following our model, I assume the parties decided to distribute them. But this does not solve the controversy either. That is because, even though the parties agreed to distribute natural resources, other highly controversial issues remain. This is not only a matter of distribution because the

resources have to be farmed, or mined, or piped, and someone has to do the work, and someone, whether a private individual or the State, has to own the farms, mines, pipes, etc.

A Rawlsian solution may rule out extreme situations, that ownership, public or private, should be totally in the hands of the territory where the mines, etc., are situated, without regard to the needs of the two sovereign States, or that it should be totally in the hands of the sovereign States. It would also rule out the idea that existing ownership should automatically continue, or that everything should be left to the market. In brief, if we want to acknowledge the controversial features that natural resources present and still apply a Rawlsian solution and hence distribute them, we will need to address the following points: a) just distribution as the aimed outcome; b) the ownership system of natural resources; c) the exploitation system; d) the gains and losses of the involved agents; e) the needs and capabilities of all three parties.

Equality *stricto sensu* and the difference principle do not work in relation to the distribution of natural resources because the question here is not just of a distributive nature. Natural resources have to be owned, explored and then exploited. But that exploitation must also be efficient if a solution is going to be reached and respected. The egalitarian shared sovereignty offers a reasonable result. The first pre-requisite secures the respect of the individual ownership rights which the inhabitants of the third territory may have at the time of the original agreement. Then, whatever they owned at the onset will still belong to them (as private owners). Respecting the second pre-requisite, the fulfilment of the requirements that constitute the principle will secure a fair allocation of natural resources and all that this implies.

The egalitarian shared sovereignty says that the allocation of sovereignty is given by: a) equal right to participate (egalitarian consensus principle); b) the nature and degree of participation depends on efficiency of accomplishing the particular objective/area/activity at issue (principle of efficiency); c) each party receives a benefit (in terms of rights and opportunities) that depends on what that party cooperates with (input-to-output ratio principle); and d) provided the party with greater ability and therefore greater initial participation rights has the obligation to bring the other two parties towards equilibrium (equilibrium proviso). The differences in relation to natural resources implies several different aspects—e.g. means for the exploration and exploitation, geographical location, relevant

knowledge, etc. It is for that reason that the shares will be represented as bundles of rights and obligations, benefits and burdens. However, in terms of property rights, all the agents will have the co-ownership of the natural resources (minus the ones originally owned by the inhabitants of the third territory, as per the first principle), and this will involve both rights and obligations—i.e. egalitarian consensus principle. A combination of elements may fit in the aim of the egalitarian shared sovereignty if and only if the combined elements or resources that an agent may exploit could not be exploited to the same efficient extent in any other way (principle of efficiency)—e.g. joint ventures. However, two points must be made clear: because we want to safeguard the interests of all the parties, the different combinations of natural resources in the bundle is in terms of their exploration and exploitation—not their ownership or the distribution of consequent benefits; and as this requirement is defined by bundles, each bundle may be constituted of diverse elements that taken together offer the same outcome: an efficient exploitation. Therefore, we have a solution by means of an efficient model with safeguards for all the participants.

The egalitarian shared sovereignty has a twofold application. First, we need the most efficient combination of exploration and exploitation of natural resources bearing in mind the differences amongst the parties. Second, an agent better off in relation to a given difference will make sure the other parties are able to exploit their respective share of natural resources to the same extent—when possible—or compensate the inequality. Then, even if variations appeared in the future in terms of either natural resources—e.g. drought, scarcity, lack of trading value—or the level of development or wealth of any of the agents, their ownership rights would still be the same for all of them as well as their rights and obligations in terms of exploitation and the way benefits were allocated (equilibrium proviso).

From the previous paragraphs it is clear that by agreeing on various sorts of divisions of labour amongst the parties, the resources are exploited to full advantage. But, it may be not that clear what the differences are and how the principle may work. Thereby, let us apply the idea to the conflict *sub-examine*. In the case of the Falkland/Malvinas Islands, the three parties could be considered as co-owners of the natural resources located in the territorial sea and the exclusive economic zone. Undoubtedly, there are several differences amongst Argentina, the United Kingdom and the Falkland/Malvinas Islands if we think of natural resources that have to do

with these islands. Therein, I will make use of some of these differences to show how the egalitarian shared sovereignty could be realised.

The first difference is given by the fact the islanders possess the total of natural resources at stake (100%).[356] By applying the egalitarian shared sovereignty, each party receives the rights to the same ideal portion—i.e. 33% of the ownership of natural resources, minus original ownership of the inhabitants of the third territory. As we have seen in the previous Chapter, it would be either over simplistic or naïve to imagine Argentineans or Falkland/Malvinas Islanders to be able to explore and exploit to the same level their shares of natural resources in comparison to the United Kingdom (second difference). However, both Argentineans and Falkland/Malvinas Islanders have some elements that put them in a better position in relation to that of the United Kingdom—e.g. local work force, geographical proximity (third difference).

With all these differences in mind, and with regard to the exploration and exploitation of the natural resources in these areas—e.g. hydrocarbons, it could be completed by the United Kingdom (as they are the party most developed technically and economically to do it), and both the islanders and Argentina could offer the work force for the joint venture and grant privileges in terms of location to British companies. Thus, Argentina could also offer the United Kingdom certain exclusive rights in the sea-zone that overlaps with the Falkland/Malvinas.

In order to avoid continuous assistance from the United Kingdom to Argentina and the Falkland/Malvinas Islands that may be translated in a permanent feature—i.e. it may lead to domination or an unbalanced relationship, the United Kingdom would have to help Argentina and the Falkland Islands in developing their means of exploration and exploitation to relatively the same level they have. From there, at the beginning of the agreement the United Kingdom indeed would be contributing more towards the exploration and exploitation and hence have a larger return. But, these uneven distributions of burdens and benefits amongst the parties would only be in the short term. Let us remember that the natural resources and all that they imply in terms of rights and obligations are part of a wider agreement that has a target: the third territory as a whole. Thus, it respects non-political liberties—first pre-requisite—and principles of the law of peoples—second pre-requisite.

[356] The figures and percentages used are assumed and for illustrative purposes only.

Hence, no unbalanced relation or continuous assistance leading to domination is permitted.

Finally, the way in which each party redistributes the benefits of this shared model within each population is entirely a matter of national or local distribution and hence may have various forms. So we can see in general that the egalitarian shared sovereignty gives the basic structure of the solution; the details are subject to actual rather than hypothetical negotiation. As an example only—without claiming it is the way they will choose, the resultant revenues of some or all the joint activities could be destined to a distribution fund.[357] For instance, at first, the larger the contribution towards the exploration and exploitation, the larger the return. From there, the United Kingdom could receive a larger percentage, Argentina and Falkland/Malvinas Islanders proportionally smaller ones, and leave part of the total for securing the development of the means for exploration and exploitation for both Argentina and the Falklands/Malvinas.

To put it in simple terms, and assuming the larger and smaller contributions, 40% of the revenues for the United Kingdom, 25% for Argentina, 15% for the Falkland/Malvinas Islanders, and 20% to be invested only in Argentina and the Falkland/Malvinas islands and only for the development of means for exploration and exploitation of natural resources. I intentionally show different percentages between Argentina and the Falkland/Malvinas Islands because of another difference—i.e. population size.

The final outcome, the revenues obtained from the exploitation of natural resources could indeed be destined to a distribution fund. That is to say, each party would take a certain part of the revenues for reinvestments—e.g. 5% of their shares in terms of revenues, and the rest would be distributed amongst the inhabitants of each of the claiming parties. In the example, the United Kingdom received 40 % of the total revenues and hence 5% of this 40% would be reinvested by the British government in exploration and exploitation of natural resources; the rest would be destined to a distribution fund for British nationals. With Argentina and the Falkland/Malvinas Islands we would have the same procedure, but with their respective percentages. And 20% of the total would have to be invested in both

[357] Actual examples of this proposal are the Oil Revenue Distribution Funds (ORDFs) in Alaska (oil-royalty investment account) and Norway.

Argentina and the Falkland/Malvinas Islands for the development of their means for exploration and exploitation of natural resources in the third territory. It is important to make clear again this is but one way in which the parties may distribute the benefits within each of their respective populations.

Two clarifications: firstly and ideally, both Argentina and the Falkland/Malvinas Islands would reach a point in which their means for exploration and exploitation of natural resources in the third territory were similar to that of the United Kingdom. So, the 20% destined to develop them would be lowered until it was not necessary at all. From there, that 20% would integrate the total to be distributed amongst the parties—i.e. now they would be able to offer similar contributions so they would roughly have similar returns. Secondly, in this example we have been dealing with just a few differences in relation only to natural resources for simplicity in the demonstration. But as we are dealing with sovereignty and all that it implies, Argentina, the United Kingdom and the Falkland/Malvinas Islands would have to take into account all the various contributions—e.g. defence, geographical location, financial system, and so on; and the differences in each case in order to determine the qualitative content of the shares. As stated before, the egalitarian shared sovereignty gives the parties the basic structure of the solution; the details are subject to actual rather than hypothetical negotiation.

The details of any joint enterprise as well as the ones referred to the joint administration of the exploration and exploitation and compensation procedures (in case they were necessary) would be reached in a new agreement that cannot contradict in any sense the one reached in the original position.

Government

The last case of sovereignty conflicts we will use for the analysis is Gibraltar. That is because, we will now focus the attention on government, and Gibraltar has already taken the first steps for what may be a future joint solution. Gibraltar prior to modernity was occupied by the Spaniards, Arab and Muslim Kingdoms and some other cultures.[358] It is in 1713, after a war between Britain and

[358] George Hills, *Rock of Contention, a History of Gibraltar* (London: Robert Hale & Company, 1974). For more details about the early history of Gibraltar–official version-see

Spain, that Spain ceded Gibraltar in perpetuity to the United Kingdom under the Treaty of Utrecht. However, after this agreement the dispute in regard to the peninsula has continued, with Spain claiming sovereign rights. The Gibraltarians rejected Spanish sovereignty in referendums twice (1967 and 2002). In the last referendum, the Gibraltarians rejected shared sovereignty between the United Kingdom and Spain.[359] However, shared sovereignty in this case did not consider the Gibraltarians in the negotiations. Currently, and under the Gibraltar Constitution Order (2006), Gibraltar remains part of the United Kingdom's dominions. But, the British government cannot enter into arrangements with other States in relation to the sovereignty of Gibraltar against the Gibraltarians' wishes. The Constitution recognises the right to self-determination. Although Gibraltar is in charge of its internal affairs, the United Kingdom deals with foreign affairs and defence. In relation to Spain, a trilateral process of dialogue started in 2004 allowing finally the principle of 'two flags, three voices'.[360]

Government can be defined as a person, group of people or body that create and apply the law for the population in a given territory. Together with population and territory, it completes the necessary elements that constitute a minimal political and societal organisation. Government offers also some controversial features that will be reviewed in the following paragraphs using the case of Gibraltar to show their implications.

We will focus our attention first on the financial system and later on specificities about power share. The main reason to proceed this way is because power sharing has, as we will see, many different implications. We will have to deal amongst other sub-elements with law. Thereby, and in order to have a clear picture it is advisable to deal with one issue at a time, review it, see how egalitarian shared sovereignty could be best realised and only then move on to another sub-element as we have done with others in this Chapter. But, in the specific case of government, as we will be centred on two main areas—i.e. wealth and power, we will review an

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http://www.gibraltar.gov.gi/history and for a contemporary account see in particular http://www.gibraltar.gov.gi/political-development

[359] The Guardian 26/07/02 http://www.guardian.co.uk/politics/2002/jul/26/foreignpolicy.uk accessed on 24/05/12.

[360] Peter Gold, "The Tripartite Forum of Dialogue: Is this the Solution to the 'Problem' of Gibraltar?," *Mediterranean Politics* 14 (2009): 79-97.

account of wealth through autarchy and financial system first; and only after, we will review how it may be possible to share power and the many implications that egalitarian shared sovereignty may have.

a) Autarchy and financial system

Finance in the context of a sovereign conflict means the monetary policy, market system, taxation system and way of dealing with debts (internal or international) of a given State. Autarchy is the economic independence a State—in this case the third territory—must have in relation to other States; the ability a State has to balance its gains and losses without external aid.

The fact that a population is not able to meet its needs and has to appeal to its peers to achieve a certain balance in its account may militate against its sovereignty. It is not that autarchy is a necessary condition for a State to be sovereign. However, it can be seen as a desirable feature in order to avoid any possible interference in internal affairs. In the particular case of sovereignty disputes, as in any conflict in which there are two sovereign States, it is more than possible that they do not have the same strengths in terms of their financial system. It is often the case that third world countries or—more modern—emerging economies borrow large amounts of money. Even developed States do so for very different reasons—e.g. to cover overdrafts in their expenses, to stimulate international trade, to soften bilateral relations. Therefore, the result is usually an unbalanced relationship that may be translated into different relative positions in any bargaining situation. Indeed, this presents consequences to the least advantaged populations that are far from being just, fair or even desirable—e.g. special priority in the exploitation of natural resources, local corruption, human trafficking, arms trafficking, etc. The third territory is open to the same problems and may have either a solid or a weak economy which may have an impact on its bargaining power and international standing. In the particular case of Gibraltar, we can easily identify three parties with different levels of welfare. Although all of them have been affected by the recent worldwide financial crisis, the Spanish economy has evidently deteriorated. The financial system is a feature giving rise to much controversy, and so it will be

analysed through the proposed model. Therein, what financial system do we use for Gibraltar?

The possible choices that could be taken in relation to the third territory and its financial system are many: a financial system anchored to one of the sovereign States, an independent financial system or one linked flexibly to both sovereign States. As it is highly improbable that any of the sovereign States would agree to the third territory having its financial system anchored or linked flexibly to only one of them, these options would be discarded for instrumental reasons—ruling out extreme options. However, it is possible that they would accept a more conservative scenario in which the third territory could either have an independent financial system or one linked flexibly at the same time to both sovereign States.

The main point to be addressed here is what combination will be the most efficient for a robust financial system. Therefore, we will examine how the egalitarian shared sovereignty addresses these problems. That is to say, how by respecting the first and second pre-requisites and compliance with the requirements that constitute the egalitarian shared sovereignty the financial system that is most developed and efficient.

The egalitarian shared sovereignty states that the allocation of sovereignty is given by: a) the equal right to participate (egalitarian consensus principle); b) the nature and degree of participation depends on efficiency of accomplishing the particular objective/area/activity at issue (principle of efficiency); c) each party receives a benefit (in terms of rights and opportunities) that depends on what that party cooperates with (input-to-output ratio principle); and d) provided the party with greater ability and therefore greater initial participation rights has the obligation to bring the other two parties towards equilibrium (equilibrium proviso). In the case of Gibraltar, there are several differences in relation to the financial system of the parties—e.g. strength of the currency, international credit rating, international debt, etc. As in all the previous elements and sub-elements, the shares will be represented as bundles of rights and obligations, benefits and burdens. Therefore, all the parties have both the right and obligation to participate and support the financial system of the third territory (egalitarian consensus principle).

The egalitarian shared sovereignty will work in two ways: first, following the most efficient combination in regard to contribution (principle of efficiency): e.g., the currency of the third territory could either be anchored to the one currency that was stronger (input-to-output ratio principle) or anchored to a basket of other currencies. Second, as the application of the principle does not imply any investment from the two sovereign States in the third territory, the latter has no obligation to divide with them any internal or international revenues—unless a form of compensation was agreed, e.g. investments, exclusive privileges. So, we do have efficiency in the financial system but without allowing any form of domination (equilibrium proviso).

What is specific to regulating the financial institutions will be dealt when law as an element is analysed. It may imply either the creation of a higher financial institution that regulates the third territory with equal representation granted to the three agents; or a procedure in which the financial institutions of the three agents will have the opportunity to be equally involved in the creation, amendment or cancelation of financial policy.

b) Forms of government

Following the classical tradition of classifying according to the number of representatives (one, a few or all) we find: monarchy, oligarchy and democracy. Without entering into an analysis of 'forms of government' (not the object of this project) we can simply highlight the existence of actual States fulfilling different models, from States that claim to have absolute monarchies (e.g. Brunei, Oman, Qatar), through constitutional ones (e.g. the United Kingdom, Denmark, Spain) to representative democracies (most cases). The globe offers a wide spectrum of examples in which although the form of government differs, in all cases they are still States. There is no controversial feature at this point.

In the particular context of this thesis, this sub-element does not offer controversy either. That is because the first pre-requisite reached in the negotiations secures basic non-political liberties, so that some forms of government would be immediately disqualified—e.g. tyranny. However, there are other sub-elements that constitute any government which may not be so straight-forward. If sovereignty is

not shared, then it is clear who elects representatives and chooses them—the inhabitants if the territory is independent or the inhabitants as part of a sovereign State. But what happens when sovereignty is shared? Then, there are two different issues: a) representatives and administration; and b) law. It follows from this that the two most challenging practical issues raised by shared sovereignty in relation to government seem to be:

(i) what sort of governmental arrangements shared sovereignty requires; and

(ii) how governmental authority can be shared and yet be workable.

In general terms and at first glance, we can agree that the third territory will have certain authorities and institutions to govern its population. If we want to work out the principles of egalitarian shared sovereignty through these authorities and institutions—i.e. the government of the third territory, it seems reasonable to think of either granting participation in all the institutions to every claiming party or to divide the institutions amongst them. In other words, the two ways in which sovereignty may be shared, in principle, are:

(1) The relevant parties are all members of an institution that possesses some form of sovereignty, e.g. legislative sovereignty. They 'share in' that sovereignty by participating in its exercise. For example, they are all members of the legislature. This form of shared sovereignty does not divide sovereignty itself—i.e. the sovereignty of the institution remains undivided. The 'sharing' is a sharing in the exercise of the institution's sovereignty.

(2) The relevant parties divide sovereignty amongst them; i.e. they 'share it out'. They might do so by each having sovereignty over a different sphere. Or they might have overlapping authorities or identical authorities.

In the following sub-sections we will review these two options to consider their respective viability, take note of any conflicts and either accept or reject them. I will argue in defence of the 'sharing in' option and against the option of 'sharing out' sovereignty. Only after this careful consideration I will make use of the egalitarian shared sovereignty.

c) Division of powers: to 'share in' sovereignty

There are States around the world with different degrees of separation of powers. Consequently, to have only one central power or to have it divided into branches does not alter the existence of a State; and cannot condition the third territory either. This feature does not offer controversy. Yet, division of powers is a way to embrace the shared sovereignty paradigm and may secure the success of the shared sovereignty model by recognising the participation of all three parties. So in the following, the model will be applied in order to give shape to a possible organisation of the government of the third territory.[361]

In choosing the way in which power will be divided in the third territory, the possibilities are various. In this section the representatives of the population are divided into a political trinity: executive, legislative and judicial power. Then, this choice offers an ample spectrum. Thus, it assumes the third territory would have representatives divided in different functions and levels to create, interpret and apply law.

The territory in which both sovereign States will have equal sovereignty will already have its own government and administrative organisation (as in the case of Gibraltar). Depending on the size of the territory and the population it may administer a few basic functions or a whole range of them. The choices in relation to a government and authorities in the third territory are either to create a whole new administrative organisation; or to leave the administrative organisation as it is at that point in time. The main problem for a shared sovereignty paradigm to be developed and accepted by all the involved agents and, at the same time, to avoid conflicts of law, is to grant all of them a certain level of participation in the law making process (in particular for Gibraltar, the principle of 'two flags, three voices'). In that sense, the model here opts for an eclectic vision by combining elements of the classical legal systems and the fact that the source of law is multiple rather than singular—i.e. the ultimate authority in terms of the creation, execution and application of law will be plural. In any case, the legal system for the third territory would be autonomous in relation to those of the sovereign States part in the original dispute. They would only participate through representatives in certain areas to grant them equal presence and control over the issues pertaining the third territory.

[361] Based on the Constitution of the Principality of Andorra.

There could be many models that may respect the principles reached—i.e. there may be many ways in order to realise the egalitarian shared sovereignty in what has to do with government. The one offered below is only an example of its application. Therefore, the agreement guaranteeing basic non-political liberties and democratic institutions will have the face of a constitution, and it will be alterable only with the consent of all the three parties—only this meets Rawls' requirements. From there, and following a classical division in regards to how the law is created, executed and applied in a given territory, an option to develop a feasible model in respect to sovereignty disputes is:

A compound executive power constituted by several representatives designated in equal number by each sovereign State, and at the same time a government elected by the population of the third territory. In other words, two—or more—co-governors—to give them a name—would be head of the third territory and would have joint and indivisible authority with equal powers. On the one hand and out of theoretical interest only, they would symbolically represent the shared values of the enterprise. On the other hand and in more practical terms, they would secure an actual balance in the relationship between the sovereign States. Together with the co-governors there could be a governmental body of authorities that would secure a fair and just representation for the population of the third territory. They would be in charge of the third territory administration.

A legislative power or council, that would be responsible for the creation of applicable law, could either be elected by only the population of the third territory or have also representatives from the two States. In the former case, this body would have representatives elected directly by the population of the third territory by universal, free and equal vote. To that extent, the population would have their interests protected and the two sovereign States would be equally situated, since neither of them would have any participation in the legislative process. In the latter case, the population of the third territory would still elect their representatives but the two sovereign States would designate also delegates to participate in the legislature.

In any of the previous cases—with or without participation of the States in the legislative power, their rights and obligations over the third territory accepted in the original agreement could not be altered or lessened in any way—by granting benefits and burdens the agreement offers stability to the two sovereign States. Any

norm against the agreement reached in the original position would be totally invalid to secure the superiority of the shared value of the model, the individual and collective interests. In order to secure this feature, a ratification process by all the three parties could be put as a requirement for the validity of any norm that may be related to the interests of any of the parties or may go against the original agreement.

A judicial power elected as per internal procedures with lower and upper magistrates and a Higher—and multi-competent—Court of several members, being designated in equal number by each sovereign State and the third territory. As the ultimate authority within the legal hierarchy in the third territory, the Higher Court would secure the representation of all the involved agents—namely, the two sovereign States and the population of the third territory. Nevertheless, all the judges, lower and upper ones—including those in the Higher Court—would be independent in the sense they would not defend or support any specific interests that the agents in the original conflict could have.

With this model the equal participation of the two sovereign States and the defence of the interests of the population in the third territory are granted. Administratively, the third territory would be fully autonomous. However, the sovereignty would remain with the two sovereign States who, by participating at the same time and with equal prerogatives and representation in the legal system of the third territory, would have an equal status.

A general question (or concern) may arise and has to do with how the three parties would make decisions within the institutions. That is because simple majority voting raises the prospect of two of the parties joining forces to outvote the third. In consequence, it would seem that the model proposed here would be acceptable to them only if it included some kind of safeguards. As a general rule, none of the norms, at any stage—creation, execution or application—could be or intended to be against the content of the agreement reached in the original position. In the event there was a contradiction between a norm of the third territory and the original agreement, derogation would be applied resulting in the invalidation of such a norm. A further and complementary safeguard would be given by the veto power granted to the three parties (or their representatives in each institution) when their wishes were being systematically overridden in the decision-making process used in the institution.

From the above paragraphs, it is clear that the egalitarian shared sovereignty is fully operating with the first and second pre-requisites (basic non-political liberties and the law of peoples). In what matters the principle itself, all the parties receive an equal valuable share as they all participate in each and every governmental power and hence each and every instance in the creation and the application of the law of the third territory.

d) Two legal systems and one territory: to 'share out' sovereignty

Let us consider now a different arrangement to share sovereignty. So, instead of having institutions in the third territory in which all the parties 'share in' sovereignty by participating in them, this time they decide to divide sovereignty amongst them. To put a specific example, let us assume the United Kingdom was in charge of the judiciary, Spain was in charge of the executive power and Gibraltar selected its own Parliament or Congress. Is this a viable option? What conflicts can arise, in particular in terms of law? If there were conflicts, what would be the way of dealing with them?

Clearly, we would have not one but at least two legal systems with this way of institutionalising the egalitarian shared sovereignty—in the example, the legal system of Spain and that of the United Kingdom. To have two legal systems devised from two different and sovereign States operating in the same territory will involve conflicts of law. Indeed, this is the crucial problem with shared sovereignty—seen by many as fatal. What legal system will be valid in the third territory? To what extent is it possible that two legal systems are valid at the same time over the same territory and in regard to the same population? And what about the existence of a new set of norms specially created for the third territory? Should Gibraltar have a legal system that combined British and Spanish law? Should it only follow British tradition? Controversy is clearly present here.

Although a conflict between two norms within the same legal system can be avoided, by having rules of precedence—e.g. the later law overrules the earlier one, or statute overrules precedent, conflicts between norms of different and independent legal systems appear to be normal. In relation to conflicts of law Kelsen tells us that:

> "[a] conflict exists between two norms when that which one of them decrees to be obligatory is incompatible with that which the other decrees to be obligatory, so that the observance or application of one norm necessarily or possibly involves the violation of the other. The conflict can be bilateral or unilateral. […] The conflict can be total or only partial […]"[362]

Following this quotation, the simplest option to avoid any potential conflict of law in our model appears to be a separate administration of each other's interests in the third territory. Another option could be given by the establishment of a common centre to take decisions that concern vital or important issues related to the third territory—safeguarding the interests of all the parties. Then, the agents may choose one of several possibilities: an independent legal system (Gibraltarian law), a legal system anchored to one of the sovereign States (British law for Gibraltar), one anchored to both of them (British-Spanish law), or to a third State not involved in the conflict.

In addition to the choice of the legal system that has to be valid in the third territory, it will be necessary to define the procedure to follow in the event that a specific case has to be revised by a superior authority—e.g. extraordinary appeal. Which of the two sovereign States' body of authorities—e.g. Supreme Court, Higher Court, etc. —would be the competent one to revise such a case? Once again, there is a possible conflict of law.

So, there are two major issues to decide when dealing with law in a sovereignty conflict of the kind analysed in this thesis: a) what legal system is to be valid; b) who are to be the superior authorities in the event of further revision in a particular case. In the following, classical solutions for conflicts of law will be considered. The aim here is to review if any of these classical solutions for conflicts of law can help in making two different legal systems work together in the third territory. That is because if the parties decided to 'share out' the sovereignty of the third territory, assuming each party had sovereignty over a different sphere—executive, legislative and judicial powers—we would be in presence of more than one legal system with consequences to the same population—in the example, the

[362] Kelsen (1991), *op. cit.*, p. 123.

Gibraltarians. So, conflicts of law can be expected. It is then that by reviewing classical ways of dealing with conflicts of law we may find a solution. From there, the one that best responds to the interests of all the agents will be selected. Then, the egalitarian shared sovereignty will be applied.

d.1) Derogation

If a conflict between two norms arises in a particular legal system, derogation is usually the remedy—e.g. *lex superior* and *lex inferior*, *lex posteriori* and *lex anteriori*, etc. However, it does not need to be the solution to every conflict of norms and it only happens when a given norm determines it.[363] More particularly, it does not work when the conflict is between two systems of law, in that no rule (or no obvious rule) can be given. That is to say, even if derogation was the rule in solving conflicts of law, it cannot be the solution in the context of this thesis. Although it may seem obvious that derogation can only be used within a single normative system[364] when comparing the relationship between legal and moral normative orders, the same principle is applicable if a conflict between two norms of two different and independent legal systems arises. Letting one of the norms of one of the legal systems override another norm of another independent legal system would simply mean that the second legal system would be inferior in respect to the first one and hence non-sovereign. In the case of the model developed here, the solution must guarantee the equal sovereign level of both legal systems even in the case in which one of the conflicting norms belonged to one of the sovereign legal systems and the other one, to its peers. Derogation, however simple and straight forward, is not a solution for conflicts of law in sovereignty disputes.

In the example, we said that the United Kingdom was in charge of the judiciary, Spain of the executive and Gibraltarians of the legislative power. Then, in the event a Judge from the United Kingdom had to apply the law in a case in Gibraltar, would he apply the British legal system? Or that of Spain? Let us assume that Spanish law was more benign and hypothesise that for a murder British law still considered death penalty as a possible sanction while Spanish law did not. In addition to this, the British Judge understanding in the case in which someone

[363] *Ibid*., p. 125.
[364] *Ibid*., p. 126.

murdered another individual in Gibraltar, after considering the facts, found the accused was guilty. Should the Judge sentence the criminal to death? Or should he consider the British law overridden by the Spanish law in this case? But, he would know that if he did so it would mean recognising the supremacy of Spanish criminal law over British law. And that is unreasonable. As stated before, derogation may be simple but it is not the solution here.

d.2) Coordination

Kelsen may give a hint towards the solution of the dilemma when incorporating the international legal system in the context of his analysis about norms. The following quotation makes the point clear:

> "Let us assume [Kelsen says] that there is not just one state legal system, but that many state legal systems are valid, and that they are coordinated, and thus, legally separated from each other in their spheres of validity. If one recognises […] that it is positive international law that accomplishes this coordination of state legal systems and the reciprocal separation of their spheres of validity, then one must conceive of international law as a legal system above the state legal systems, bringing them together in an universal legal community […]"[365]

Why would coordination between two legal systems imply that the selected system of coordination had to be above the sovereign States? How could both legal systems be coordinated so as to be applied to legal issues within the third territory and still be seen as hierarchically equal and sovereign, without recognising, implicitly or explicitly, an order superior to them?

In the example, the United Kingdom, Spain and Gibraltar have indeed what we may see as a third coordinating legal system, European Union law. But although promising, it is not the solution either. That is because, both the United Kingdom and Spain delegate to a certain degree their sovereignty on the European Union (vertically) but they do not do so reciprocally (horizontally). Therefore, even though

[365] Kelsen (1992), *op. cit.*, p. 71.

the legal system may act as coordinator between the two in the example, it does not to the extent needed to make the law in Gibraltar workable—at least if they 'share out' sovereignty and have two independent legal orders to be coordinated.

d.3) Principles to solve conflicts of law applicable in coordination of legal systems

Admittedly, coordination of two sovereign legal systems is a non-satisfactory way to proceed. For the time being, however, let us go further in its analysis. By going back and forth we may still find the solution. Although there are differences between conflicts of law happening within the same legal system or between two legal systems of states belonging to Federal nations (e.g. United States), the approach taken in both cases could be applied to conflicts of the kind analysed here, bearing in mind its particular characteristics. So, I will revise a series of general concerns when in presence of conflicts of law. That is because conflicts of law in Federal nations are resolved by means of coordination. Thereby, we may as well try this path. I will consider if some of the general concerns could be used as criteria from which to select a way to avoid conflicts of law but specifically in sovereignty disputes. The main concerns when dealing with any conflict of law seem to be:

> "(1) The needs of the interstate and international system; (2) The state's interest in having its courts apply its own local law unless there is good reason for not doing so; (3) The state's interest in having its courts effectuate the purpose of its relevant local law rule in determining a question of choice of law; (4) Certainty, predictability, and uniformity of results; (5) Protection of justified expectations; (6) Application of the law of the state of dominant interest; (7) Ease in determination of applicable law, convenience of the court; (8) The fundamental policy underlying the broad local law field involved; (9) Justice in the individual case […]"[366]

In the following, I will review each individual concern and its implications in sovereignty conflicts so as to draw some preliminary conclusions:

[366] Robert A. Leflar, "The Nature of Conflicts Law," *Columbia Law Review* 81 (1981): 1080-1095.

"(1) The needs of the interstate and international system."

The States involved in the conflict and the population of the third territory will have different interests and a different experience of a legal system. We need a system that protects the interests of the population in the third territory—since the legal system in question will apply to them—and, at the same time, a system that does not lessen the sovereign States' respective positions in relation to that third territory, their actual and potential benefits and burdens. To opt simply for one of the three existing systems does not seem advisable. In fact, it seems reasonable to opt—amongst many other choices—for an independent legal system with independent or shared superior authorities—i.e. an independent legal system with parties that 'share in' or 'share out' their sovereignty.

"(2) The state's interest in having its courts apply its own local law unless there is good reason for not doing so."

The parties will have to decide between the two sovereign States legal systems, a combination of both, a coordination of both or the creation of a third new legal system only applicable in the third territory and for its population. Although this particular point refers to courts that already have a given legal system to interpret, it highlights the importance of its determination: once chosen, that legal system must be used by the judges only for the third territory. This implies a third system, however based.

"(3) The state's interest in having its courts effectuate the purpose of its relevant local law rule in determining a question of choice of law."

In this case, the concern is related to conflicts of law within the same legal system and does not have much to do with this project. Only once the legal system was determined for the third territory, would this concern have relevance in the event that there was a conflict between/among its norms.

"(4) Certainty, predictability[367], and uniformity of results."

This is a common goal in any conflict of law, internal or international. It is of ultimate importance to decide the legal system with its principles, rules and procedures that will be applied in legal issues within the third territory so to let its population—and foreign individuals, States and the international community—have

[367] The word 'predictable' is used here as per the notion developed by Oliver Wendell Holmes in *The Path of Law*.

a sense of legal security. In other words, anyone wishing to invest, exploit, work or simply live in the third territory will want to know what is permitted, prohibited and obligatory within its boundaries and the consequences of the violation of those permissions, prohibitions and obligations. Moreover, once the norms were acknowledged and the judges had applied them, it would be possible to reach a certain level of predictability in decisions when similar cases arose. And this is expected of any legal system. This implies one system, whatever it is.

"(5) Protection of justified expectations."

With regard to the previous points, any individual—or group of individuals—has expectations. A legal system does not escape people's expectations. They expect the rules or norms and decisions to be certain, predictable and uniform, if that legal system is to be fair and just. It is for that reason that the selection of a legal system must fulfil people's expectations—those who are inhabitants of the third territory and whoever wants to deal with them.

"(6) Application of the law of the state of dominant interest."

Which State has the dominant interest in the case of sovereignty conflicts? The concern mentioned above refers to the usual case of conflicts of law between states who are part of a federation (e.g. when someone from one state commits a criminal offence in another state part of a federation). However, there will be here a sovereign State more powerful and with probably more interest in the third territory—hence, dominant—that will prefer its law to be the law valid also in the third territory. Yet, the interests of any of the sovereign States must be left aside—apart from those rights and burdens actual and potential settled in the original agreement. In addition to regular conflicts of law when dealing with foreign individuals in a foreign territory, alien companies, multinationals, etc., in the particular case of sovereignty conflicts the main interest is given by the population of the third territory who will in any event be the one that actually experience fully the chosen legal system.

"(7) Ease in determination of applicable law, convenience of the court."

The fact that the applicable law is easy to be determined within the third territory not only is convenient for the local courts but also for its population. Not agreeing on the law to be valid in the third territory and, at the same time, granting shared sovereignty to both sovereign States, conflicts would undoubtedly arise. The

selection of a legal system or—at least—principles or procedures to achieve that goal is imperative to avoid endless argumentation.

"(8) The fundamental policy underlying the broad local law field involved."

There is the matter of the broad nature of law to be determined. In any territory there will be the necessity of acknowledging the existence of public and private law—in general terms. In both cases there will be special principles and procedures, different set of concepts and ways of addressing cases. However, the common fact in all these instances will be given by the unique characteristic of having two sets of sovereign authorities.

"(9) Justice in the individual case."[368]

The ultimate goal in any legal conflict is to arrive at a just and fair decision. Although an interesting matter, the main object of this project—hence, of the negotiations—is to reach agreement in determining a valid legal system for the third territory. Ultimately, justice in the individual case will depend upon that legal system and its interpretation by the respective judges.

d.4) Approaches in conflicts of law within a sovereign dispute

We can already draw a few partial conclusions from the previous paragraphs: a) There has to be one system of law; b) It cannot simply be one of the existing three systems; c) To construct such a system of the existing three ones is like dealing with a conflict. What is the best and fair way of dealing with conflicts of law in sovereignty disputes if a shared sovereignty model is applied? However, before going into this analysis, there is a prior question that has to be answered: is this to be settled by legislation or by the judges?

To recapitulate, we are trying to work out how governmental authority can be shared. In this subsection we agreed that the claiming agents would try to 'share out' their sovereignty over the third territory in terms of government. From there, one claiming party would create the law—Gibraltar would have the legislative power; another party would execute the law—Spain would have the executive power; and one party would apply the law—the United Kingdom would have the judiciary.

[368] Leflar, *op. cit.*

Coincidentally, these parties would have to decide a linked issue: the law applicable in the third territory. In tune with this, we have seen that if we decided to work with two legal systems—the United Kingdom and Spain, we would reject derogation and coordination as solutions.

Nevertheless, we advanced on the discussion by revising how federal States deal with a similar issue at national level—i.e. coordination of overlapping legal systems—and concluded that one system is advisable.

Yet, even if we accepted one legal system for Gibraltar, we would still have to make a further decision. Indeed, there are different ways to apply and create the law—i.e. in the particular case of Gibraltar, we have two main ones, 'common law' system based mainly on Judges' decisions and 'Roman law' system based on legislative creation. As a result, we have to decide who will settle the one legal system: judges or legislators.

In order to decide whether judges or legislators are the answer, and as guidance for those drawing up the new system, we will review five major approaches when dealing with conflicts of law.[369]

a. Single concepts or principles.

This option gives the judges—or those who interpret and apply law—a set of concepts and general principles to be used in the event that a conflict of law arises. The reasons detailed later with regard to each of the other possible solutions show this one is the most practical. To mention a few basic principles[370] the following are good examples:

"Legal rules of a jurisdiction have effect only within that jurisdiction's territorial limits; or apply only to citizens of that jurisdiction."

In other words, once the law for the third territory is determined, that will be the law to be applied. Even in the case that the third territory's law is similar to—if not the same as—one of the sovereign State's legal systems, a coordination of both or a third legal system, in actual terms the third territory will have an autonomous and independent set of norms and jurisdiction with its own judges to interpret and apply it.

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[369] For the idea of approaches to the conflicts of law see William Tetley, "A Canadian Looks at American Conflict of Law Theory and Practice, Especially in the Light of the American Legal and Social Systems (Corrective vs. distributive justice)," *Col. J. Transnat'l L.* 38 (1999): 299-373.

[370] Quotations from Tetley, *op. cit.*

"All nations […] are equal and independent. Each of them may therefore legislate freely as sovereign entities."

This is the characteristic that defines the central problem when dealing with conflicts of law in sovereignty disputes. The model has two equal and independent States and each of them legislates freely as sovereign entities in respect to their own territory. However, in the case of the third territory they will have to share that sovereignty; thus, they will have to share the right to create, execute and apply law in regards to its population. To determine in which way and to what extent they will share that right becomes both desirable and necessary.

"The laws of each nation exclusively govern all conduct within that nation's territory"

In the context of this project, many of the issues will be decided among the representatives of the three populations. In reference to the law, that system of norms that will govern the conduct of the population of the third territory, is one of the many issues to be determined by them. However, once determined, it will only govern the conduct of the individuals of that population and that population will only be governed by that system of norms.

"Each state possesses exclusive jurisdiction over its territory, so that no state can bind persons or property located outside that territory."

This point has been treated before when discussing all nations are equal and independent. The legal system may be a compound one with elements from both involved sovereign States, a third different one or similar to only one of the sovereign States but in effect it will have its own jurisdiction. In practice, it would and should be compound.

The previous paragraphs settle the question—by the legislator, not the judges. That is because the concepts and principles applicable in the third territory must be general, applicable only within its boundaries but to all the citizens in that jurisdiction.

b. Multiply numbered rules.

This particular option tries to give the judges choices for every possible—or imaginable—case. Although some general rules could be accepted, this solution does not depend on principles or general conceptualisations—as the one observed before. Different possible solutions are to be presented to the judges in order for them to

interpret the law and apply it to the particular case. Despite the fact that in theory this is an attractive idea, to anticipate every possible—or imaginable—conflict of law case would be both intolerably cumbrous and in every way not feasible.

c. General texts, commentaries and essays.

This option seems helpful in order to ease the interpretation of the law in any given case—with or without conflict of law. It would not be obligatory to research into the opinion of specialists in the subject matter, but it would be advisable in general terms to do so in any given conflict of law, since scholarly doctrine could be observed as another interpretative tool the judges will have in order to apply the law.

d. International conventions and national legislation.

It is exactly this case that may be the object of this project in regards to conflict of law, its outcome. Once the representatives have decided how to resolve conflicts of law, the law that will be valid within the boundaries of the third territory and the legal authorities that will revise the case in the event of extraordinary revisions, they will have to accept these terms through an agreement, a convention.

e. A methodology.

Since the law to be applied and the legal authorities that will understand in the event of extraordinary revisions have to be determined, the question of methodology seems appropriate at this stage of the negotiations. The representatives will have to agree on substantive law and once these questions are settled, let the designated authorities develop their own methodology.

As we can see, the legislators are indeed the ones that will settle the question. Nevertheless, it is also clear that they could act in several ways. However, what is best way to choose the best laws? That is to say, we may agree that the legislator will create one legal system for the third territory. But in 'sharing out' sovereignty that would mean that one party would create the law for the third territory and another party would apply it—e.g. Gibraltarian Parliament would create the law and British Judges would apply that law to particular cases. And it is here when we face a wall again. How do they coordinate the creation of law in Gibraltar with its application by British Judges to Gibraltarians? It does seem unreasonable.

However unreasonable, it does not mean that we have not learnt something. Firstly, we know now that the advisable way to proceed would be one legal system

however created. Secondly, that it cannot be just one of the existing ones. Thirdly, that we can avoid conflicts of law between sovereign legal systems by adopting a third and different legal system for the third territory. Fourth, that the legal system will be settled by the legislator. And fifth, that to 'share out' sovereignty does generate problems.

I suspect we can work out how the egalitarian shared sovereignty could be realised because it does embrace the previously mentioned five outcomes. But before doing that, I will briefly consider some minimum standards the law in the third territory should follow in order to offer the population law that would best fulfil the egalitarian shared sovereignty goals.

d.5) Better and best law

What is the difference between a better law and the best law? In what way any of them is possible? How can the best law be defined? When is a given law better than another one? How is it possible to determine the best legal system for the third territory? Among the options of coordination, selection of only one of the sovereign legal systems or the creation of a new legal system only valid for the third territory, which one is the best choice—if any?

To develop a broad comprehensive response to the previous questions in relation to the value of a whole legal system does not appear realistic. The immediate answer points to the particular case that is being analysed. In other words, for a given case there are a limited number of possible solutions depending on the norm to be applied. For one line of interpretation, among these solutions there will be one better than all the others: the best solution for that particular case. However, to choose the best legal system for a whole population is a matter of different nature. Then, the same question arises again: how can the best law—or the best legal system—be determined?

The best law for the third territory—like in any other case—will be that one that follows the procedures to be created by the competent authorities—formal validity—in consonance with any superior law—material validity—and that is respected by the community is intended to be addressed to—effectiveness. Although this formulation is correct, a critical eye would point out that only once the law was

applied to the case and the consequent conduct of the community was observed, we would be in a position to describe that law as just or unjust, the best one or not for the matter in question—and in large, the best legal system or not for the third territory. Indeed, the analysis and the determination of the best law would be then a posteriori, once the case was decided, once the discussion was settled, once the legal system was already valid in the third territory—and this seems futile. The key here—as in all the previous sections—not only is to choose the abstractly best law for the third territory but also a reasonable legal system that can actually be put in place. But this cannot be just any legal system. It needs to be a legal system in tune with the content of the original agreement.

As we have to deal with three parties that have—at least—two different legal systems, I assume first that these legal systems are of a different nature—e.g. in the case of Gibraltar, common law of the United Kingdom and Roman based law in Spain. Hence, they follow different substantial and procedural legal norms. Secondly, I presuppose that the parties have decided to have one legal system for the third territory—for the reasons previously reviewed in this Chapter. The task now is to 'make' these two legal systems work as one, the best one for the third territory.

What appears to be the main problem—various legal systems to choose from—is not. That is because there are some minimum principles of law recognised by all nations—either implicitly or explicitly by customary international law and/or international agreements—that we may call 'general principles of law' and they can be used as the minimum requirements for the determination of the best law for the third territory. In consequence, bearing in mind 'general principles of law' and justice and fairness as our main aim, any solution in terms of law should—at least—consider acceptability (by the three parties), humanity (respect of the basic rights of the inhabitants of the third territory), effectiveness (actual respect of the legal system by the inhabitants of the third territory), simplicity and justice. Besides, that is in tune with this thesis. So, the best legal system for the third territory will be that one with the best elements from any of the legal systems of the sovereign States, provided they respect 'general principles of law' and the conditions agreed in the original position.

e) The egalitarian shared sovereignty applied to government and law

We started this section with the aim of proposing a way in which governmental authority could realise the egalitarian shared sovereignty. We reviewed two ways in which sovereignty may be shared: a) the claiming agents 'share in' sovereignty by each of them participating in all the institutions in the third territory—i.e. executive, legislative and judicial powers; and b) the claiming agents 'share out' sovereignty by each party having sovereignty over a different sphere.

Indeed, we discarded the latter but we draw some positive conclusions along the analysis: 1) the third territory will have one legal system; 2) this legal system will not be one of the existing ones; 3) it will be created by the legislator; 4) the agents will 'share in' sovereignty; 5) the legal system will have certain notes—i.e. acceptability, humanity, effectiveness, simplicity, and justice.

What is clear is that the question related to law is a matter not of equality but of acceptability to all parties by using Rawls' principles. As in the previous cases, the egalitarian shared sovereignty addresses the controversies introduced when selecting the applicable law. It must be highlighted once again compliance with the first and second pre-requisites is understood in order to deal with the requirements of the egalitarian shared sovereignty. So, the allocation of sovereignty is given by : a) equal right to participate (egalitarian consensus principle); b) the nature and degree of participation depends on efficiency of accomplishing the particular objective/area/activity at issue (principle of efficiency); c) each party receives a benefit (in terms of rights and opportunities) that depends on what that party cooperates with (input-to-output ratio principle); and d) provided the party with greater ability and therefore greater initial participation rights has the obligation to bring the other two parties towards equilibrium (equilibrium proviso). In what is specific to government and law it means:

Firstly, the third territory—Gibraltar—will have an independent legal order based on all three systems, in the sense it uses what is best—so defined by its acceptability, humanity, effectiveness, simplicity and justice, provided it coheres with the rest of the system (egalitarian consensus principle and principle of efficiency).

Secondly, that all parties are involved in the administration—i.e. they 'share in' sovereignty. Therefore, the shares will be represented as bundles of rights and

obligations. In this case, the three agents have equal rights and obligations to participate in every step in the creation, application and execution of the law—i.e. what Kelsen calls formal validity. Thus, as the first pre-requisite must be respected, the liberties of the inhabitants of the third territory are protected—i.e. what Kelsen calls material validity. Following the general aim of the model proposed here, we agreed on a legal order divided into three branches—one for each step in relation to the creation, application and execution of law. Thus, each branch should secure the representation of the three agents. Besides, in case of conflicts of law there would be a Superior Tribunal or Higher Court with representatives of the three agents. The details in respect of the election of the authorities and their internal procedures would be reached in a new agreement that cannot contradict in any sense the principles agreed in the original position. They may also agree on keeping the current institutional organisation of the third territory with the addition of representatives of the two sovereign States—as long as the original agreement is complied with.

Thirdly, the rights of all the parties must be respected. Then, as all the agents will participate in the making and decision process—i.e. what Hart called rule of adjudication and rule of change, the elected authorities of the third territory would create, execute and apply law with the only limit being the principles agreed in the original position. Therefore, in any instance in which there was a contradiction between a norm and the agreement reached in the original position, the contradictory norm would be automatically invalid—safeguarding the interests of all the parties. For instance, in the case of the Gibraltar Constitution Order the first paragraphs would be immediately affected as they refer to Gibraltar as a dominion of the United Kingdom. And, as we have already pointed out, the agents (through their representatives in the institutions of the third territory) would have a further safeguard given by the veto power should their wishes were being systematically overridden in the decision-making process used in the institution.

In summation, the previous paragraphs demonstrate how it is both possible and advisable to deal with conflicts of law in a sovereignty dispute as a way of solving the difference. By recognition of equal actual and potential rights and burdens over the third territory (egalitarian consensus principle), each agent would be in a relative similar situation—including the inhabitants of the third territory. In

particular, in regards to the law, among several options, the establishment of an independent legal system appears as a reasonable choice since it would secure the interests of the population of the third territory (in Gibraltar, the principle of 'two flags, three voices') and, at the same time, the presence and equal relative position of both sovereign States. Although it would be an independent legal system, it would be recommendable that the authorities in charge of the creation, execution and application of law had representatives of the three involved agents—namely, both sovereign States and the population of the third territory. By doing so, we shift from equality to acceptability. Therefore, it would give the legal system a permanent feature that would support its predictability and would result in the stability of the model as a whole since it would embrace the interests of all the parties and would not leave any of them in a comparable disadvantageous situation (equilibrium proviso). Indeed, the combined working of the legal system, and in some ways the political one, seem to require less use of the egalitarian shared sovereignty than other areas and more use of choosing and combining elements from existing systems in order to maximise and have a more efficient running of the system. But, these are still parts of the solution proposed here, the egalitarian shared sovereignty in the form of a) egalitarian consensus; and b) principle of efficiency that result in c) equilibrium amongst the parties.

Conclusion

This Chapter has focused on showing how the egalitarian shared sovereignty could be extended from general principles to workable institutions and how these institutions may realise these principles. In order to do that we considered three sovereignty conflicts—i.e. Kashmir, Falkland/Malvinas Islands, and Gibraltar, because they offer all the elements required by our model; that is to say two sovereign States and a populated third territory.

Each of the three sovereignty conflicts has been reviewed individually through one of the elements that constitute the third territory. Thereby, we discussed population using the example of Kashmir; territory with the Falklands/Malvinas' case; and government with Gibraltar. In all instances, despite the fact of having a myriad of sub-elements, we centred the attention on those that are controversial in sovereignty disputes.

In each case it has been considered how the egalitarian shared sovereignty could be realised. The Chapter has then addressed a number of significant issues in sovereignty disputes—e.g. immigration, natural resources, law, defence, and so on. All these controversial sub-elements in sovereignty disputes show that all the parties' good reasons to accept egalitarian shared sovereignty and its implications can be extended from general principles to workable institutions.

Chapter Eight

Conclusive remarks, implications and limitations

It is time to bring together this thesis so as to assess if it fulfils its aim—i.e. if the model is just and viable, what we have learnt and point out any possible limitations either theoretical or in what concerns to its application.

We started this thesis aiming to achieve a peaceful solution to sovereignty conflicts by the application of principles of distributive justice. In order to do that, we had to evaluate a series of problems and examine possible ways of addressing them. For instance, what at first glance seemed the main obstacle for the shared sovereignty model, that is to say, that sovereignty appeared to be absolute—hence, unlimited, not shareable—is in fact a wrong belief. We demonstrated that sovereignty, still being defined as supreme authority, is a limited concept. So, as limitations can be applied to sovereignty, all sovereignty is—to an extent—shared. Therefore, we then showed how these limitations work by applying the method of analogy and illustrating how a similar concept such as self-ownership was in tune with limitations. We also compared other ways of conceptualising shared sovereignty—and similar expressions—and made clear why they fall short in solving sovereignty conflicts of the kind approached in this thesis. In addition to the conceptual analysis, we showed why in realpolitik other international remedies are not reasonable either in these cases—or at least, that they are solutions that present controversy. At this stage, we introduced a theoretical exercise to evaluate if it is possible to apply distributive justice as developed by Rawls in sovereignty disputes. By comparing different principles under particular circumstances that secured a just and fair outcome—one that cannot be reasonably rejected—we reached the 'egalitarian shared sovereignty' principle. Even though it was just and fair in theory, we needed to assess its viability. Therefore, we applied it to different real cases. By doing this, we proved that the 'egalitarian shared sovereignty' proviso is potentially useful to offer a solution to sovereignty disputes should all ideal and assumed conditions were present.

However promising, there are some limitations on this thesis that should be mentioned:

First, and although we showed that the model can work in the real world, the 'real word' cases used to work out the institutions that may realise the egalitarian shared sovereignty were reviewed with certain assumptions. Thereby, this thesis has not explored non-ideal issues that may undermine its actual applicability. For instance, we still need to examine if the three populations would actually accept such an agreement. In order to do that, a referendum or a similar procedure has to be followed. But that is an issue to be carried out in the future should any of the parties in these conflicts agreed upon it. In fact, as we have seen very recently one of the cases used in Chapter Seven was object of a referendum—i.e. Falkland/Malvinas Islands.[371]Therefore, it would be interesting in the future to have the opportunity to do both: a) to give voice to the islanders through a referendum; and b) to make clear what shared sovereignty could embrace.

Second, there is the question whether the model may be extended to other situations. Indeed, sovereignty disputes are on a very extensive spectrum. We focused on some of them, the ones that fulfilled certain criteria. Nevertheless, it remains the possibility of applying the procedure designed in this thesis to disputes that present a different scenario.

Third, even if the model of 'egalitarian shared sovereignty' was accepted by referendum by the three populations, and consequently applied, its continuity in time may still be somewhat weak. As the only definitive constraint the agents would have to respect their agreements would be their good will, the model assumes certain features that are ideal. Nonetheless, this thesis was mainly a theoretical exercise to show that it would be unreasonable not to respect the model of 'egalitarian shared sovereignty'. To that extent, we showed that the aim of the thesis is feasible. Either to put it into practice or to grant its actual continuity once accepted are some of the many implications the model presents.

We proved that different States—hence different populations—can work together towards common goals even in a conflict of interest such as a sovereign

[371] For details about the Falkland/Malvinas Islands' referendum, dates and questions refer to http://www.falklands.gov.fk/dates-and-question-set-for-the-referendum-on-falkland-islands-political-status-2013/ accessed on 01/05/13.

dispute. Thus, by working together and—at first glance—limiting reciprocally their spheres of sovereignty, they can do things that before were impossible, more difficult or disadvantageous in many ways—e.g. defence, finance, etc. Then, their actual range of possibilities is extended.

Another implication is toleration. The case of sovereignty conflicts does not necessarily imply either resignation, indifference, curiosity or enthusiasm but a different form of toleration.[372] All the agents have the power to act upon the third territory, the knowledge of the existence of that third territory and their opponents and they refrain from fully exercising their claimed rights. Without entering into a discussion about the reasons why they omit to fully exercise their respective argued sovereignty over the third territory (e.g. avoiding a military conflict, lack of resources, economic implications, etc.), they simply omit to act fully. In consequence, in every actual case of sovereignty conflicts there is a certain level of toleration amongst the agents. What kind of form or level of toleration is then needed to move from the zero sum game and start negotiations in relation to sovereignty? One of the outcomes of the 'egalitarian shared sovereignty' proviso is indeed toleration. That is because toleration not only would include the *status quo* cases but also those in which the agents involved in sovereignty issues were willing to negotiate their differences. A first step in solving sovereignty conflicts is to acknowledge each other's presence within the dispute; from there, to accept the fact that each and every agent has certain claims over the third territory; and finally, to start negotiations in regard of those claims with the aim to reach a solution—all three steps covered in order to achieve the 'egalitarian shared sovereignty'. Similarly, these steps are also covered by the umbrella of toleration both in a negative and positive way: negative, since the non-interference principle is still part of the agents' interrelation; positive since these same agents accept and recognise other participants in the dispute and are willing to start negotiations and respect the outcome.[373]

We started with a disagreement or a conflict of interest amongst three agents—two sovereign States and the population of the disputed territory—and

[372] Different forms of toleration as proposed by Michael Walzer, "The Politics of Difference: Statehood and Toleration in a Multicultural World," *Ratio Juris* 10 (1997): 165-176.
[373] For a view of toleration in a positive and negative sense see Anna Elisabetta Galeotti, "Contemporary Pluralism and Toleration," *Ratio Juris* 10 (1997): 223-235.

offered a way to solve the difference. The ‘egalitarian shared sovereignty’ model is useful in solving sovereignty conflicts because it provides the parties a reasonable agreement that secures their individual interests, let them put in practice their claimed rights and offers a range of possibilities that otherwise would be—at least—difficult to have, fostering a peaceful international approach that other international remedies cannot duplicate. Although ideal, these conflicts will remain—at best—stagnant in a *status quo* should no action is taken. But that action cannot be just ‘any’ action. It must be appealing for all the parties to make them realise that not only is feasible but also the most reasonable for their respective populations The ‘egalitarian shared sovereignty’ offers a answer to these disputes that is just, fair, reasonable, and beneficial to all which no one could reasonably reject. It rests in the decision of the representatives of each claiming party—in large, each population—to leave aside egoistical or personal reasons and work collaboratively towards—what may be—the beginning of a worldwide peaceful and tolerant *civitas maxima*.

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