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The Reflexive Relationship between Internal and External Sovereignty

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Summary

Sovereignty is deeply contested but omnipresent. The aim of this paper is not to offer a definitive conception of this multifaceted notion. It will rather identify three different dimensions that play a role in our understanding of sovereignty and use these as a basis to explain one particular aspect that has been underexplored in the academic debate: the link between internal and external sovereignty. Firstly, sovereignty describes a legal and political status; secondly, it refers to a factual condition; and thirdly, sovereignty entails a fiction that exists independently from factual or legal changes but that pervades our understanding. These three dimensions interlink and reinforce each other both internally (within the sovereign entity) and externally (in the international context).

The legal status and the factual condition usually, but not necessarily, come together. While territory, people and authority are usually considered the factual basis for legal sovereignty, there are no necessary and sufficient factual conditions that will automatically result in the legal status of being sovereign. As a fiction, sovereignty goes beyond power or legal entitlement. It grasps the deeper emotional and cultural dimension, the fear of losing control and ultimately relevance. Since popular sovereignty has replaced royal sovereignty, the internal political status is rooted in the consent of citizens. This creates a particular link of responsibility in that it aims to ensure that for any action of a sovereign entity there is ultimately an individual or a group of individuals that can be held responsible. This paper will explore to what extent this more recent understanding of internal sovereignty is and also should be relevant for our understanding of sovereignty more broadly, including external sovereignty as a condition and a fiction, but ultimately also as a legal status. Indeed, the paper argues there are pragmatic and normative arguments in favour of understanding internal and external sovereignty as a continuum. This confronts the traditional view of international law that denies this connection between the internal and external dimension of sovereignty entirely.

1. Introduction

Sovereignty is a deeply contested concept that is omnipresent in legal, philosophical and political debate. Indeed, we encounter it in legal scholarship, before the International Court of Justice (ICJ), as well as in national newspapers and party programmes. In legal practice and scholarship, it is used to justify certain rights, identify the core tasks of a sovereign entity, and explain the public monopoly of decision-making and even force. In the public discourse, it is usually deployed to ring-fence national autonomy and to argue in favour of protecting decision-making powers from external influences. Recently in the context of the

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financial and economic crisis, the EU has further made an argument that certain of its actions are necessary to ensure the survival of the political (and monetary) system, which is at least indirectly based on a Schmittian logic of sovereignty.

The aim of this paper is not to offer a definitive conception of the multifaceted notion of sovereignty. It rather focuses on one particular aspect that has been underexplored in the academic debate: the link between internal and external sovereignty. 'Internal' refers here within the sovereign entity and hence under domestic law. 'External' refers to the relationship of the sovereign entity with the outside, i.e. in international relations and under international law. For the purpose of developing the link between the internal and external further, I distinguish three different dimensions of sovereignty: firstly, sovereignty as a legal status; secondly, sovereignty as a factual (political) condition;[1] and thirdly, sovereignty as a fiction. Most examples are taken from the debates on sovereignty within the context of the European Union (EU), which offers as a compound constitutional construction a particularly fertile example for reflection on issues of sovereignty. External means in this context on the international plane, while internal refers with regard to the EU to the relationships within the EU legal order.

The paper first sheds light on the (continuing) importance of sovereignty (Section 2). It then identifies the three dimensions, legal status, factual condition and fiction (Sections 3.1, 3.2, and 3.3, respectively) and traces how the three interlink and reinforce each other both in their internal and their external direction (Section 4). Section 5 explains how this justifies that there is an inextricable link between the internal and the external direction of sovereignty. This departs from the traditional view of international law, which denies this connection between the internal and external direction of sovereignty.[2]

[1] Condition is here used with the meaning 'state', 'situation' or 'circumstances'. It does not imply that there are any factual elements that are as such necessary and sufficient to establish sovereignty. See also below.
[2] E.g. Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart, 2013).

2. Why Sovereignty?

A discussion of sovereignty requires justifying its explanatory value. I would like to do so first by conceptually distinguishing sovereignty from power and autonomy, as well as authority,[3] and highlight why it better grasps reality.

Power describes an ability to act or take a decision. It sometimes also refers to the ability to enforce decisions. As such, it forms part of the factual condition of sovereignty, but can be delegated. The latter often happens in legal arrangements. A crucial difference is that power does not have the legitimizing or emotional dimension of sovereignty, which will be introduced below as its fictional dimension. Further, even though powers can be delegated through law, power as such is not a legal concept. Autonomy is a gradual concept that is rooted in power as the ability to act or decide (relatively) free of external constraints. Autonomy equally relates to the factual condition of sovereignty and it equally misses the legal, legitimizing and emotional aspects that sovereignty captures. This is also one of the reasons why the EU and in particular the Court of Justice of the European Union (CJEU) uses the term autonomy, rather than sovereignty, for the European legal order.[4] It allows for making a point of separateness and independence without evoking either the same emotional ties between the EU and its citizens or the concept of 'original rights' under public international law that sovereignty evokes. The CJEU's avoidance of sovereignty may not surprise since evoking the deeper meanings of sovereignty would be likely to trigger resentment of the Member States.

A third concept to distinguish is 'authority of the law' or 'public authority'. Indeed, authority is probably in legal scholarship the most widely used theoretical lens to analyse the relationships of different legal contexts and contemporary developments under international law – at least in continental Europe. Authority is used as a technical concept that aims to capture factual power and legal capacity. The Heidelberg project on public

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[3] See for authority: The Exercise of Public Authority by International Institutions: Advancing International Institutional Law (Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann, and Matthias Goldmann (eds.), 2010); see also Joost Pauwelyn, Ramses Wessel and Jan Wouters, 'The Exercise of Public Authority through Informal International Lawmaking: An Accountability Issue?', *Jean Monnet Working Papers* (New York School of Law), series on Global Governance as Public Authority: Structures, Contestation, and Normative Change, No. 06/11, 2012.
[4] See for a detailed discussion of the case law: Christina Eckes, 'The European Court of Justice and (Quasi-) Judicial Bodies of International Organizations', in: Ramses A. Wessel and Steven Blockmans (eds.), *Between Autonomy and Dependence* (2013), pages 85-109.

authority for example defines international public authority as 'the law-based capacity of any formal or informal international institution to legally or factually limit or otherwise affect other persons' or entities' use of their liberty.'[5] While this may allow a certain de-coupling from law (law-based is different from law-created) the concept of public authority defined in this way does not offer any additional justification or basis of legitimacy for limiting liberty, i.e. exercising power. It takes a top-down or descending perspective, which is at least from the perspective of legal scholars usually built on a systematic and hierarchical understanding.[6] And even if authority is defined as 'power that claims to be legitimate',[7] it does not capture the bottom-up or ascending legitimacy that lies at the core of (popular) sovereignty. Authority puts the actor, or at times the norm, central (whose authority?). Sovereignty aims to connect ultimately to (groups of) individuals, as the only bearer of original rights. Sovereignty by contrast represents a social phenomenon that pre-exists the law and is presupposed by it.[8] This way it can account for the community dimension of organized power.

The choice for sovereignty or authority as a theoretical lens furthermore reflects a deeper difference in the understanding of what the law is about.[9] While in continental Europe law is a matter of universal rights and principles, from the Anglo-American perspective law is first of all an expression of popular sovereignty and closely interlinked with a narrative of self-identity.[10] Hence, while from a continental European perspective law is about rights, principles and ultimately authority, from an Anglo-American perspective and large parts of the rest of the world, it is about sovereignty and self-determination. The

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[5] This definition further develops our position taken in A. von Bogdandy, P. Dann & M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German Law Journal* (2008) 1375.

[6] See also: Martin Loughlin, 'Why sovereignty?', in: Richard Rawlings, Peter Leyland and Alison L Young, *Sovereignty and the Law – Domestic, European, and International Perspectives* (OUP, 2013), Chapter 3.

[7] Joseph Raz, 'Authority, Law, and Morality' in Joseph Raz (ed.), *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994), 194 at 196.

[8] In the context of the concept of life-world: Jürgen Habermas, *Faktizität und Geltung* (1992), 641.

[9] See in detail on the difference in perception: Paul W. Kahn, 'Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order' (2000), *Yale Law School Faculty Scholarship Series*, Paper 329, pp. 1-6.

[10] This is most apparently reflected in the American commitment to their Constitution as a sacred text, which shapes their deeply parochial imagination of the political. A recent telling example: 'Treaty modelled after Americans with Disabilities Act fails to pass as conservative Republicans argue it threatens US sovereignty', The Guardian, 4 December 2012, available at: http://www.theguardian.com/world/2012/dec/04/senate-rejects-un-treaty-disability. It is equally reflected in the British commitment to parliamentary sovereignty, albeit tempered through EU law and the ECHR.

present paper construes law as an expression of sovereignty that is also organically evolving in a decentralized fashion, rather than only hierarchically structured.[11] In this, it also aims to step out of the debate on sovereignty that is characterized by the Schmittian opposition of sovereignty and law.[12] Sovereignty, as it is here understood, is not only at the edge of law. Its relationship with law is complex and reflexive. Sovereignty for example also operates and establishes itself within and through the law. I aim to capture this complexity with the mentioned three dimensions of sovereignty (further developed below) and their interrelatedness. The particular point on the relationship between law and sovereignty and how the here proposed understanding of sovereignty relates to that debate will be equally further developed below.[13]

Furthermore, a challenge that is often brought against the continuing explanatory value of sovereignty is that globalisation 'calls […] sovereignty into question'.[14] In 1999, Stephen Krasner addressed this challenge and argued that one way of explaining what happens is to see sovereignty as 'organized hypocrisy'.[15] He explained that:

> 'Outcomes in the international system are determined by rulers whose violation of, or adherence to, international principles or rules is based on calculations of material and ideational interests, not taken-for-granted practices derived from some overarching institutional structures or deeply embedded generative grammars. *Organized hypocrisy* is the normal state of affairs.'[16]

States support the relevance of sovereignty as organising logic of international relations but also regularly depart from that logic.[17] The findings of Krasner's study supported in particular that despite great, perhaps 'unparalleled', change of the meaning of sovereignty in recent times 'both Westphalian and international legal sovereignty have always been

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[11] Compare e.g. Friedrich Hayek, *Evolution und spontane Ordnung* (Zürich: Bank Hofmann, 1983).

[12] Compare Austin Sarat, 'Introduction: Toward New Conceptions of the Relationship of Law and Sovereignty under Conditions of Emergency', p. 2 et seq, in: Austin Sarat (ed), *Sovereignty, Emergency, Legality* (Cambridge, 2010). See also: P Eleftheriadis, 'Law and Sovereignty', 29 *Law and Philosophy*, 2010, p. 535-569.

[13] See section 3 below.

[14] Eloquently: Jürgen Habermas, 'The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship', *Ratio Juris*. Vol. 9 No. 2, 1996 (125-37), at 135.

[15] Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999).

[16] Krasner, 'Organized Hypocrisy', P. 9.

[17] See for examples also e.g.: Brad Roth, State Sovereignty, International Legality, and Moral Disagreement, Updated Version of Paper Presented at the Panel on "Questioning the Aspiration to Global Justice" Annual Meeting of the American Political Science Association, September 2, 2005, available at: http://www.law.uga.edu/intl/roth.pdf.

violated.'[18] Neither of the two has 'ever been a stable equilibrium from which rulers had no incentives to deviate.'[19] Krasner gives the example of the European Convention on Human Rights (ECHR) and explains that after World War II rulers of western European countries had high incentives to limit their Westphalian sovereignty. This conclusion can even more strongly be drawn for Germany's participation in the European Union after WWII.[20] Hence, while the Peace of Westphalia, generally seen as the starting point of the current international legal system, was in its core about excluding external interference,[21] in today's globalized world, states rationally choose to restrict the Westphalian norms by allowing authoritative external norms to take force within their legal order. Yet, States continue, through their appropriate institutions, to define and control the membrane that separates the domestic legal order from international law. Core questions in this context are: What constitutes a deviation from the rules of Westphalian sovereignty? What are limits and where does compromising start? Krasner did not address these questions directly but proposed that 'contracts or conventions that have involved invitations for external actors to influence domestic authority structures'[22] constitute a deviation from the rules of sovereignty. This would hence include most if not all multilateral institutional arrangements, certainly however the constitutional and institutional arrangements of the EU. Martin Loughlin argues convincingly that Krasner's interpretation that the economic and legal restraints limit sovereignty is based on a misunderstanding of the unity and indivisibility of the concept, which is based on a confusion between the concept and its 'marks'.[23] The former expresses unity, illimitability, perpetuity, and indivisibility. Any limitation eradicates it. The latter are necessarily divided in the course of governing. In the here offered distinction between sovereignty's legal, factual and fictive dimension this would mean that

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[18] Krasner, 'Organized Hypocrisy', p. 24.

[19] Ibid.

[20] Luuk van Middelaar, *De passage naar Europa, Geschiedenis van een begin* (The passage to Europe. History of a Beginning). Groningen: Historische uitgeverij, 2009.

[21] Stephen Krasner, 'Westphalia and all that', in J. Goldstein and R.O. Keohane (eds), *Ideas and Foreign Policy* (Ithaca, NY: Cornell University Press, 1993), pp. 235–264. Stephen Krasner, 'Compromising Westphalia', *International Security* 1995/1996, 20: 115–151. Krasner, 'Organized Hypocrisy', pp. 20-25. Stephen Krasner, 'Problematic sovereignty', in S.D. Krasner (ed.), *Problematic Sovereignty* (New York: Columbia University Press, 2001) pp. 1–23.

[22] Page 220. Krasner later [225-6] develops the example of the conditionality of World Bank and IMF loans.

[23] Martin Loughlin, 'Why sovereignty?', supra fn 7, p. 38.

Krasner focuses on the factual dimension but disregards the connected legal status and fictive dimension.[24]

Abram Chayes and Antonia Chayes, after questioning whether sovereignty as complete autonomy ever existed, conclude that in today's world states, including the most powerful states, are not able to 'achieve their primary purposes – security, economic well-being, and a decent level of amenity for their citizens – without the help and cooperation of many other participants in the system, including entities that are not states at all.'[25] Indeed, states have to be players in the international game to achieve their purpose. To be a player they have to participate in numerous international legal regimes. This creates a repeated game situation where they can at any one time rely on their legal sovereignty to refuse to comply with international norms but if they rely on it too often they lose the factual capacity of acting as a recognised and hence efficient international player. Changes resulting from globalization processes that submit international entities to a tightly knitted net of international factual and legal constraints are most visible in the factual condition of sovereignty (of states), which signifies a certain 'independence of outside authorities'.[26] This independence has always been contingent rather than absolute. Externally, it emphasizes the freedom and the factual ability to act under international law. The relevant question is at what cost the entity can act as it pleases. What costs are attached to breaking a promise or acting contrary to public international law?

Within EU debates sovereignty has always played an important role, in its legal conception under public international law, in the understanding of the relationship between the EU and its Member States of national politicians and for the public. It is fair to say that the debate has become more heated in recent years, or at least that sovereignty is given a more prominent role.[27] Concrete examples are the Lisbon Treaty ruling of the German Federal Constitutional Court in 2009, in which the Court took a visible turn from human

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[24] See further below.

[25] Abram Chayes and Antonia H. Chayes. *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass.: Harvard University Press, 1995), p. 27.

[26] See Hedley Bull, *The Anarchical Society* (1995), p. 8.

[27] See for a similar conclusion with examples: Damian Chalmers, 'European Restatements of Sovereignty', *LSE Working papers* 10/2013.

rights to national identity and sovereignty.[28] In the political debate in the EU context, Jose Barroso's State of the Union Address of 2012 made repeatedly one point: the Union is a way of ensuring sovereignty in the sense of self-determination of states and citizens in a globalised world.[29] In the national media, sovereignty is either used as an often-used 'keep out argument' in the debate on 'more or less Europe'[30] or precisely to argue the opposite.[31]

Despite the fact that the meaning and characteristics of sovereignty may be changing and indeed have always been subject to change[32] and despite the fact that parties mean different things when they talk of sovereignty, it remains a vehicle of political community to imagine themselves and connects the theoretical debate to the real life experience of those governed. It remains a central currency of both theoretical and judicial, but more importantly also of public exchange.

3. The Three Elements: Legal Status, Factual Condition, and Fiction

Different understandings of sovereignty can often be related to two important strands of theory, which are represented by Carl Schmitt and Hans Kelsen.[33] Essentially, Schmitt argued that law is secondary to factual power. The opening sentence of his treatise *Political Theology* became a well-known representation of this position: 'Sovereign is he who decides on the exception.'[34] Kelsen by contrast rejected the idea that factual decision can establish a

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[28] See e.g. : C. Eckes, 'How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures', *International Journal of Constitutional Law* 2014, *forthcoming*.

[29] J. Barroso, 'State of the Union Address 2012, Speech 2012/596: 'A political union also means doing more to fulfil our global role. Sharing sovereignty in Europe means being more sovereign in a global world.'; 'A democratic federation of nation states that can tackle our common problems, through the sharing of sovereignty in a way that each country and each citizen are better equipped to control their own destiny. This is about the Union with the Member States, not against the Member States. In the age of globalisation pooled sovereignty means more power, not less.', available at: http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm <last accessed on 2 March 2014>.

[30] E.g. recently with regard to the ECHR: http://www.bbc.co.uk/news/uk-politics-25535327; with regard to the EU: news.bbc.co.uk/hi/english/.../the_countries.stm; see also the Economist's briefing 'Europe's populist insurgents – Turning rights' of 4 January 2014.

[31] E.g. recently: Aalt Willem Heringa, 'Nederlandse soevereiniteit komt best tot haar recht in Europees verband', *Het Financieele Dagblad*, 10 January 2014.

[32] Dieter Grimm, *Souveränität – Herkunft und Zukunft eines Schlüsselbegriffs* (Berlin University Press, 2009).

[33] See also: Martti Koskenniemi, *From Apology to Utopia - The Structure of International Legal Argument* (Reissue with a new Epilogue, 2005), 224-302.

[34] 'Souverän ist, wer über den Ausnahmezustand entscheidet': Carl Schmitt, *Politische Theologie –Vier Kapitel zur Lehre von der Souveränität* (Duncker&Humblot, Berlin 2004). This position is part of the same strand as Austin and Bentham, see e.g. J. Austin, *Province of Jurisprudence Determined* (Cambridge University Press, 1995) and J. Bentham, *Of Laws in General* (Athlone Press, 1970), pp. 18-30.

normative 'ought'. He understood sovereignty as defined by and within the law.[35] Politics had no privileged position from his perspective. Martti Koskeniemi lays out in great detail how the two underlying theoretical approaches, which he calls 'legal' (Kelsen) and 'pure fact' (Schmitt),[36] have determined the understanding of sovereignty of international courts and parties to legal action. The latter approach has led some to conclude that law and sovereignty stand in opposition or are even 'incompatible and mutually exclusive'.[37] Both approaches have influenced the debate on the scope of sovereignty and the relevance of recognition for statehood. Most importantly, Koskenniemi explains how they are often combined in the different strands of argument of the same party and that they are both in their pure form indefensible because both dissolve into politics.[38] The pure fact approach does not distinguish law from force. The legal approach legitimizes the legal *status quo* and the privileged position of existing states.

The here proposed conceptualisation of sovereignty as consisting of at least three dimensions, none of which can be understood, interpreted or explained without the others, aims to break free from the opposition between the legal and the pure fact approach. It combines the understanding of sovereignty as a legal status governed by law and indivisible with its factual and fictive dimensions, which take effect outside of the law, but influence our thinking including about the law.[39] These three dimensions also explain how law, while being relevant in a parallel reality of law and courts, also remains a social phenomenon that continues to evolve organically. In the end, the explanatory power of sovereignty cannot be understood by only studying the law but it can equally not be understood without the law.

Neil Walker, in a recent paper, distinguished two functions of sovereignty.[40] He argued that sovereignty works on the one hand as 'a stable frame through which the legal world as a whole is apprehended and shaped' (deep framing device) and on the other 'as the discursive form of a claim variously and sometimes speculatively or contentiously made

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[35] Hans Kelsen, *Das Problem der Souveränität* (2nd ed., 1927). This position is part of the same strand as Hart and Raz, see e.g. HLA Hart, *The Concept of Law*, 2nd ed., Oxford University Press, 1994, chapters 1-4 and J. Raz, *The Concept of a Legal System*, 2nd ed., Claredon Press, 1980, pp. 27-43.
[36] Koskenniemi, 'Apology', supra note 27, pp. 228 et seq.
[37] Pavlos Eleftheriadis, 'Law and Sovereignty', 29 Law and Philosophy, 2010, p. 535-569, at 569.
[38] Koskenniemi, 'Apology', supra note 27, p. 282.
[39] See below for more detail.
[40] Neil Walker, 'Sovereignty Frames and Sovereignty Claims', University of Edinburgh, School of Law, Research Paper Series No. 2013/14.

in respect of a state […]' (particular claim).[41] One of Walker's core claims is that in the modern state in the context of globalisation the stability of sovereignty as a framing device stands in a growing contrast with the fluidity of sovereignty as a particular claim. This correlates to Krasner's identification of hypocrisy, discussed above. Walker argues that the exclusive claim of sovereignty as a frame is undermined by the differentiation, partiality and overlap of modern law. Hence, the factual condition and the specific legal claims are subject to exceptions, differentiations, and nuances, while the indivisible concept persists and structures our reading of a differentiated reality.

The here offered distinction between three different dimensions of sovereignty can explain the tension between the fiction or ideal, the understanding of the legal status, and the factual circumstances and specific legal rights. The fiction exercises a framing function in our minds in a parallel reality of emotional expectation of belonging and having influence on our destiny, e.g. through being represented. So does the legal status – within the parallel reality created by law, in which sovereignty remains indivisible based on an understanding of the sovereign entity as one unity. Specific legal rights lead to particular claims about how the world is and how it should be. This all leads to an interpretation of the factual circumstances, which in turn influences the decision of whether or not an entity enjoys the legal status, can claim specific rights and can maintain the fiction of sovereignty.[42]

3.1 Sovereignty Through the Lens of Law

Sovereignty plays a central role both in public international and in (domestic) constitutional law. Indeed, the structuring rules of public international law presuppose sovereignty and, while other non-sovereign entities may play the game, entities that are sovereign have a different say in determining the formal rules.[43] Yet, public international law's relationship with sovereignty is paradoxical. On the one hand, it limits the rights of states to wage war and act as they please. On the other hand, sovereignty remains the dominant logic according to which disputes before the International Court of Justice (ICJ) are decided. This paradoxical relationship is perhaps best illustrated by the UN Charter: despite all legal fetters that it may impose on the classic concept of sovereignty, the concept

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[41] Ibid, p. 2.
[42] See Section 4 below for more details on the reflexive relationship between fact, law and fiction.
[43] E.g. only *state* practice and *opinion juris* form customary international law. See however: José Alvarez, *International Organizations as Law-Makers* (2005).

of sovereign equality is simply presupposed.[44] For the relevance of sovereignty before the ICJ, one can point not only to recent decisions[45] but also to contributions of judges to the public or scholarly debate. Rosalyn Higgins, judge at the ICJ between 1995 and 2009, stated in her inaugural lecture at the London School of Economics in 1982: 'States are still the most important actors in the international legal system and their sovereignty is at the core of that system.'[46] Similarly Bruno Simma, Judge at the ICJ between 2003 and 2012, emphasised in his speech at the American Society of International Law in 2013 that sovereignty is the single most relevant concept of consideration before the ICJ.[47] It creates a legal standard for the appropriateness of political action.

This emphasises the legal relevance of the concept. It does not address the content of a claim to sovereignty, e.g. what consequences or specific legal claims can be drawn from the fact that a state (or another entity) is sovereign. And indeed, law does not offer a clear circumscription of the reach of sovereignty: what sovereign states can and cannot do. Yet, what is certain is that the legal status of being a sovereign state leads to the conferral of rights under public international law, including for example under the UN Charter and the Vienna Convention on the Law of Treaties (VCLT).[48] Judge Huber of the Permanent Court of International Justice (PCIJ) explained in the *Island of Palmas* Case: 'Sovereignty in the relations between States signifies independence, independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the function of the State.'[49] Most legal disputes concern the content or scope of sovereignty, e.g. the specific rights that flow from it. This content or scope of sovereignty cannot be determined without

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[44] See in particular: Art. 2(1) UN Charter.

[45] E.g. in all decisions of 2014, either the Court or the parties refer to their 'sovereignty' or their 'sovereign rights': 03/03/2014 - NEW Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia) - Order - Request for the indication of provisional measures; 03/02/2014 - Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica) - Order - Fixing of time-limits: Reply and Rejoinder; 03/02/2014 - Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia) - Order - Fixing of time-limits: Memorial and Counter-Memorial; 28/01/2014 - Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia) - Order - Fixing of time-limits: Memorial and Counter-Memorial; 27/01/2014 - Maritime Dispute (Peru v. Chile) - Judgment of 27 January 2014, all available at: http://www.icj-cij.org/.

[46] Higgins, Rosalyn: 'The Identity of International Law', in: Cheng (ed.), *International Law, Teaching and Practice* (London, 1982), pp. 27–44., p. 3.

[47] Bruno Simma, ASIL, Washington, D.C., April 2013.

[48] Under customary international law, which works parallel to the VCLT, international organizations or subunits of states can conclude international agreements.

[49] Island of Palmas Case, II UNRIAA, p. 829.

regard to a specific context,[50] since it acts as an ordering principle between different actors. Its legal significance comes into play only when it is invoked to assert a certain right or position. This is the tension between the uniform concept and specific claims that it may entail.

Under public international law, sovereign rights are territorially defined and confined. States have a licence to govern and exercise 'national powers'[51] over their territory largely as they please. EU law by contrast takes a functional approach to sovereignty. While Member States can leave the EU at any point in time, they have to accept the functional division of sovereign rights as long as they are part of the Union.[52] As Member States of the EU the exercise of 'national powers' over their territory is in many areas predetermined or confined by EU law. Under the doctrine of parallelism of internal and external powers, Member States' actions under international law are subject to similar constraints.[53] Both the EU and its Member States exercise powers, over the territory of the latter and under public international law, either alone or shared, depending on the policy area. The EU meanders in a number of policy into what has traditionally been perceived as the core territory of state sovereignty.[54] As discussed above, sovereignty is more than power(s) or autonomy, but the EU's particular way of functionally dividing (constitutional) legal and political powers over the same territory, both when acting internally and externally, challenges the territorially defined notion of sovereignty under international law in an unprecedented manner. It creates the legal ground that could foster the factual and fictive dimensions of EU sovereignty. The best example is probably the legal creation of EU citizenship and its potential to guide citizens' imagination to think of themselves as a community.

For reasons of completeness, it should be at least mentioned that many national constitutions equally refer to the concept of sovereignty. These references remain largely

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[50] This is the conclusion of several authors in Hent Kalmo and Quentin Skinner (eds.), *Sovereignty in Fragments—The Past, Present and Future of a Contested Concept* (2011).

[51] See e.g. using this term: Robert Schütze, 'On "Federal" Ground: The European Union as an (Inter)national Phenomenon', *Common Market Law Review*, 2009, pp. 1069–1105, at 1073-4.

[52] Member States have always been in the position to leave the Union as matter of politics (this is largely uncontested) but since the entry into force of the Lisbon Treaty this is also enshrined in the law: Article 50 TEU.

[53] The doctrine of parallelism maintains that where the Union has exercised its internal competences an external competence arises that pre-empts Member States from exercising an equivalent or overlapping competence (see Case 22/70, *Commission v Council* (ERTA) [1971] ECR 263; now Articles 3(2) and 216(1) TFEU).

[54] A topical and relevant example is security policy. The now widely used concept of 'human security' rather than national security supports this development.

undefined and do not further specify the content or meaning of the term. Yet in modern democratic states sovereignty ultimately relates to the people as the sovereign behind the constitution. At times, the reference to sovereignty is related to the relationship between the national constitution and international or EU law.[55]

3.2 Sovereignty as a Factual (Political) Condition

The factual conditions of sovereign entities greatly differ. Emphasis lies on the ability and freedom of the sovereign entity to decide how to conduct its business. In modern democratic states, this takes place through meaningful democratic consent and requires the ability to make and enforce laws, and to maintain law and order. For this decision to be meaningful it presupposes certain continuity and uniformity of the polity that is subjected to the rules. Indeed, since popular sovereignty has replaced royal sovereignty, the internal political status is rooted in the consent of citizens. This creates a particular link of responsibility in that it aims to ensure that for any action of a sovereign entity there is ultimately an individual or a group of individuals that can be held responsible. Below, this paper will explore to what extent this more recent understanding of internal sovereignty is and also should be relevant for our understanding of sovereignty more broadly, including external sovereignty as a condition and a fiction, but ultimately also as a legal status.[56]

The factual condition is a conglomerate of many elements. At a more abstract level, factual powers can be combined into a 'political status' of being sovereign. This gives the impression, similar to the legal status, that a combination of factual elements justifies speaking of the political status of being sovereign. Yet, as with the legal status, the political status of being sovereign cannot be reached on a scale where more or less autonomy or independence determines whether an entity is politically sovereign. It is the result of a combination of factors, which include both law and perception, including perception from the outside.

3.3 Sovereignty as a Fiction

As a fiction, sovereignty goes beyond power or legal entitlement. The fiction grasps the deeper emotional and cultural dimension of the fear of losing control and ultimately

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[55] Article 23 of the German Constitution.
[56] See Section 5 below.

relevance. It describes an ideal or an 'excess'[57] that exists to some extent independently from factual or legal changes but that pervades our understanding.

The fiction of sovereignty catches the emotional and rational expectations and connotations connected with sovereignty. It vests power with glory and sentiment. From a traditional perspective it even connects sovereignty to *Opferbereitschaft,* the willingness to make a sacrifice for the continuing existence of the nation-state – ultimately to sacrifice one's life.[58] This also explains the link that was made between voting rights and military service. In modern democratic states the willingness to make an absolute sacrifice has been pushed to the background. Here, the fictive dimension of sovereignty, and its sense of belonging, persists in different forms. It connects sovereignty to the rule of the people, i.e. a group of which the individual in question is part. This fiction of popular sovereignty enables the few to govern the many and to challenge it would rend the fabric of our societies. Michael Naas called this the 'phantasm' of sovereignty, explaining that '[t]he power of sovereignty lies precisely in this elision of a fictional origin and its real effects, the elision of a performative fiction (as "as if", a *comme si*) and a constative observation (an "as such", or a "like that", *comme ca*)'.[59] It allows arguing 'as if' the fiction of absolute sovereignty was true and blurs the boundaries of the real and fictive qualities of the sovereign. The fiction of sovereignty is rooted in the past, yet it pervades today's use of the concept and explains its powerful force tapping into an emotion and expectation that goes well beyond its actual legal consequences.

Furthermore, both in the traditional and in the modern reading, the fiction of sovereignty presupposes a group, a 'self', constituted by some form of a shared identity. Only a self can create a fiction of self-determination. This self is defined by 'those attributes that make [the group] unique […] and different from others' or 'the way [it] see[s] or define[s] [it]self.'[60] The details of how such a group identity is shaped and to what unit it

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[57] Martti Koskeniemi, 'Conclusion: Vocabularies of Sovereignty – Powers of a Paradox', in Hent Kalmo and Quentin Skinner (eds.), 'Sovereignty in Fragments', supra note 42, Chapter 12, 223.

[58] Ulrich Haltern, *Was bedeutet Souveränität?* (Mohr Siebeck, 2007).

[59] Michael Naas, "Comme si, comme ça", in: *Derrida from Now On* (New York: Fordham University Press, 2008), p. 200; cited by: Peter Gratton, *The State of Sovereignty, Lessons from the Political Fictions of Modernity* (Albany: State University of New York Press, 2011), p. 9.

[60] Eric T. Olson, 'Personal Identity' (2002) in E Zalta et al. (eds) *The Stanford Encyclopedia of Philosophy*. Available at http://plato.stanford.edu/archives/fall2002/entries/identity- personal/ (last visited 6 February 2013).

applies are contentious.[61] It 'is an "imagined community,"[62] but not an inevitable one'.[63] To some extent this self is defined in opposition to the other; it certainly stands in a reflexive relationship with the outside, rather than in isolation. Indeed, group identity emerges by contrast to the 'foreign',[64] as a *distinction over time.* This requires a certain continuity of a formed group as an entity of political power. It is further fundamentally built on trust, which creates particular problems when the self encompasses an ever bigger group.

4. Inextricably Linked: the Legal Status, the Factual Condition and the Fiction

As discussed above, Neil Walker has claimed that the contrast between the stable framing (fiction and legal status) and claims made in reality (e.g. legal claims) is growing through globalization processes.[65] While fictions of sovereignty continue to shape our thinking, the real scope for action of sovereign entities is restricted by an ever closer knitted net of legal and economic constraints. Others have argued that external influences and intertwining claims to sovereignty are not qualitatively different today than hundreds of years ago (with the possible exception of greater economic entanglement).[66] The three dimensions support an understanding of sovereignty that confirms that a certain tension between fiction and reality is inherent in the concept and it has always existed. This does not rule out that the tensions have grown or at least have become more apparent.

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[61] David Miller, *Citizenship and National Identity* (2000); David Miller, *On Nationality* (1995); Anthony Smith, *National Identity* (Ethnonationalism Comparative Perspective) (1993); William Bloom, *Identity, National Identity And International Relations* (1993); Peter Boerner (ed.), *Concepts of National Identity: An Interdisciplinary Dialogue – Interdisziplinäre Betrachtungen zur Frage der nationalen Identität* (1986).

[62] See Benedict Anderson, *Imagined Communities: Reflection on the Origin and Spread of Nationalism* (2006). Anderson argues that the development of printed press provided the foundation for the development of national consciousness by creating a common, standardized language. This form of communication essentially allowed previously disconnected people to connect on an imaginative level and see themselves as part of a larger community.

[63] John Boli, *Sovereignty from a World Polity Perspective,* in: S Krasner (ed.), *Problematic Sovereignty – Contested Rules and Political Possibilites* (2001), 54.

[64] Anthony Smith, 'National Identity', supra note 47, 8.

[65] Neil Walker, Sovereignty Frames and sovereignty Claims, University of Edinburgh, School of Law, Research Paper Series No. 2013/14, referring to sovereignty as a stable framing device and sovereignty as specific overlapping claims (see in particular p. 11).

[66] S Krasner, referring to Luther.

Furthermore, globalisation, besides possibly creating an increasing divide between the deep framing device (fiction and legal status) and the particular (legal) claims,[67] poses a different threat to the fiction. This threat emanates from the factual limitation of influence and representation of the people in international relations. Democratic representatives, i.e. parliaments, struggle to maintain both their actual influence and their function in maintaining the fiction of representation in a globalized setting. This makes it more difficult for individuals to identify with the sovereign entity. In an increasingly interconnected world where internally relevant decisions are taken externally, parliaments are often side-lined and struggle to exercise effective influence. Furthermore, indirect influence behind the scenes and before the decision is taken, e.g. on the secret negotiation mandate, may not be sufficient to communicate their relevance to the people.[68]

The legal status, the factual condition, and the fiction stand in a reflexive relationship. Their relationship is reflexive because, while they can exist separately from each other, they influence each other. Rights flowing from the legal status for example enhance the factual condition but can also enhance the fiction. The factual condition ensures the effectiveness of the law, both internally but also in international relations. Only if entities possess a certain amount of factual sovereignty they are in the position to comply with the rules that they commit to. Legally codified symbols and traditions, such as the royal family and a currency, or even a specific symbolic act such as the Queen-in-Parliament, can internally contribute to the fiction.

Edmund Morgan explained eloquently the tension between fiction and reality in his influential book *Inventing the People*: 'The political world of [fictions] mingles with the real world in strange ways, for the [fictive] world may often mould the real one. In order to be viable, in order to serve its purpose, whatever that purpose may be, a fiction must bear some resemblance to fact. If it strays too far from fact, the willing suspension of disbelief collapses. And conversely, it may collapse if facts stray too far from the fiction that we want

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[67] See Section 3 above.
[68] On the role of the European Parliament in EU external relations and how this could influence the sovereignty debate in the EU, see: C. Eckes, 'How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures', *International Journal of Constitutional Law* 2014, *forthcoming*.

them to resemble.'[69] The definition of a fiction is that it differs from reality. However, the quote makes the point that only where fiction and reality of (self-)governance sufficiently resemble and confirm each other they are both maintainable. Where they differ to the extent that one challenges and undermines the other, a qualitative transformation is looming.

Within the EU this point came to the fore with exceptional clarity in the context of the Treaty Establishing a Constitution for Europe. While on the one hand avoiding the concept of sovereignty, the Constitutional Treaty intended to formally introduce symbols such as the EU's anthem and flag. This was contrary to the usual decoupling of law and sovereign symbolism in the EU, and was partially blamed for the failure of the project. EU citizenship may serve as an example where the EU has retained a legal construction with considerable symbolic power.

The decoupling of law and sovereignty, or politics if you will, is not new. It has been central to the development of the EU. The first well-known reminder that political integration was unpalatable was the failure of the European Defence Community and the European Political Community. This did only strengthen the conviction of the Union's builders to pursue the same goal with other, i.e. technical legal means.[70] Externally, legal representation in third countries and at summits creates a fiction of an identity towards the outside. The fiction then justifies power and vests law with authority. The Union is at present struggling to enhance its external representation both politically and diplomatically, through the permanent presidency and the European External Action Service (EEAS).[71] The latter has evoked both national and EU institutional resistance; yet, it is too early to draw conclusions as to whether the EEAS will effectively claim representation in a more visible way.

Sovereignty's relation with law and factual political power is complex. The possession of (some) factual sovereign powers is necessary for an entity to obtain legal

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[69] Edmund S. Morgan, *Inventing the People – The Rise of Popular Sovereignty in England and America* (Norton, 1988)', p. 14.

[70] Robert Schütze, 'On "Federal" Ground', supra note 46, pp. 1069–1105, at 1073-4.

[71] Christina Eckes and Ramses Wessel, 'The European Union from an International Perspective: Sovereignty, Statehood, and Special Treatment', in: Robert Schütze and Takis Tridimas (eds.), The Oxford Principles of European Union Law - Volume 1: The European Union Legal Order (OUP, 2014 *forthcoming*).

sovereignty. Being sovereign, and recognized as sovereign, then empowers the entity that can claim this status. In the words of Hent Kalmo, sovereignty roots 'law in factual power that ultimately determines the limits of its reach.'[72] This explains the 'paradoxical possibility that, when illegality becomes extreme, it can convert itself into a new standard of legality.'[73] The ultimate step towards a new standard of legality would be the creation of a new sovereign actor. Under international law, this is the question of state creation. States become states through a political process, when they indeed more or less meet the statehood criteria. The process of overcoming a competing claim to territorial integrity or of replacing one sovereign with another is only partly regulated by law. There is no clearly definable tipping point when a state comes into being. Entities do not become states automatically by meeting certain legal requirements, such as the Montevideo criteria or Jellinek's *Land*, *Volk* und *Herrscher*.[74] As a result it has been acknowledged that '[i]t is quite natural that the establishment of sovereignty maybe the outcome of a slow evolution, of a progressive intensification of […] control.'[75] The legal status is then constitutive, it applies to an entity that meets certain factual conditions and at the same time confers rights under law that enhance the factual sovereignty of that entity once it is acquired.

By way of conclusion, the legal status and the factual condition usually, but not necessarily, come together. While territory, people and authority are usually considered the factual basis for legal sovereignty,[76] there are no necessary and sufficient factual conditions that will automatically result in the legal status of being sovereign. Similarly, the fiction of belonging and determining the political course of the entity in question (being represented) do not always coincide with the exercise of sovereign legal rights and political powers. Yet, usually some degree or elements of all three are present for an entity to successfully claim sovereignty.

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[72] Hent Kalmo, 'A matter of fact? The many faces of sovereignty', in: Hent Kalmo and Quentin Skinner (eds.), *Sovereignty in Fragments*, supra note 36, Chapter 6, 114.

[73] Ibid.

[74] See Jure Vidmar, 'Palestine and the Conceptual Problem of Implicit Statehood*'*, *Chinese Journal of International Law* (2013), 1-23; this is controversial, see different e.g.: Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (2001).

[75] Arbitrator Huber (Perm. cf Arb. 1928) 2 UN Rep. Intl. Arb. Awards, 829.

[76] Georg Jellinek, Die Erklärung der Menschen- und Bürgerrechte (1895). See also: Neil MacCormick, 'Sovereignty and After', in: Hent Kalmo and Quentin Skinner (eds.), 'Sovereignty in Fragments', supra note 42, Chapter 8, 155: all conceptions of sovereignty 'in some way concern power over territory'. Criticised e.g. by: Michael Newman, *Democracy, Sovereignty and the European Union* (London: Hurst & Company, 1996) 13.

5. Inextricably Linked: the Inside and the Outside

The understanding of sovereignty, that is here put forward, aims to grasp the complexity of the concept by distinguishing not only between three different dimensions (factual condition, fiction and legal status) but also by linking the two spatial directions of sovereignty (internal and external sovereignty). This paper argues for an understanding of sovereignty as a continuum, where the internal and external directions connect to each other. This requires accepting that external sovereignty has changed along with the internal change towards popular sovereignty.[77] This means that '[t]he old Machiavellian idea of strategic self-assertion against potential enemies gains the additional meaning of an existential self-assertion of "the nation."'[78] Political autonomy of citizens is this way extended into international relations. This is crucial in a globalised world, where relevant decisions are externalized, i.e. taken outside of the constitutional structure.

Internally, the legal status of being sovereign can be translated into 'constitutional independence'.[79] It requires the legal authority to govern one's own territory, which is interlinked with the ability (factual condition) to do so. One supports and reinforces the other. Only a sufficiently effective government can claim internal legal sovereignty. By successfully claiming internal sovereignty, effectiveness is enhanced. To make a claim to external sovereignty, modern states must make a claim that they can govern their territory and their people (relatively) effectively.[80] Regularly they further claim that they represent their people.

Effective action at the international level is at the very core of external sovereignty, but in a globalized world it also necessarily enhances internal sovereignty. Some go as far as stating that the 'identity as a sovereign [entity] with legitimate and respected internal

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[77] This is a contested link, see below in this section.

[78] Jürgen Habermas, 'The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship', *Ratio Juris* 9:2, 1996 (125-37).

[79] E.g. Alan James, *Sovereign Statehood—The Basis of International Society* (London: Allen & Unwin Publishers Ltd., 1986) p.25.

[80] See e.g.: In the words of Antonio Cassese, 'it is possible to infer from the body of customary rules granting basic rights and duties to States that these rules presuppose certain general characteristics in the entities to which they address themselves.' This is first and foremost effectiveness resting 'on a firm and durable display of authority.' The entity must in any event be endowed with an original, rather than derivative legal order. It cannot be dependent on other states and must have effective control over a territory [Antonio Cassese, *International Law* (2001), 47 & 13].

authority depends upon […] participation in […] international society.'[81] Public international law hence does not only work as constraints but also serves as an enabling interface where states can govern and sovereignty does not only work as a 'keep out sign' but also serves as a means to enable those who enjoy it to take legally valid actions under public international law. Any entity aiming to become legally sovereign since WW II – often to be recognised as states – had to concede factual autonomy by subjecting itself to international rules. If one embraces the enabling or empowering capacity of sovereignty, this does not exclude conceiving it in its core as 'liberty' or 'autonomy'. It simply requires a different understanding of these terms, inspired by Isaiah Berlin's two concepts of liberty: the negative liberty to be free of constraints and the positive liberty to have the possibility to achieve certain objectives.[82]

Within the European Union, the inextricable link between the internal and the external is best illustrated by the incremental change from sovereign states to Member States of the EU, with all the constitutional consequences that this development has. It has led to EU law clauses in national constitutions,[83] the direct effect of EU law in national courts, and the – at least in practice – well-established supremacy of EU law over national law. More recently the EU has also become more explicit on the added value for states to be Member States of the EU in order to maintain greater (factual) sovereignty in the international context. In his 2012 State of the Union address, José Barroso explicated: 'A political union also means doing more to fulfil our global role. Sharing sovereignty in Europe means being more sovereign in a global world.'[84]

Joseph Weiler for example addressed the internal constitutional consequences of EU integration under the concept of 'constitutional tolerance'.[85] He considered in particular the

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[81] David Kennedy, 'Theses about International Law Discourse', German Yearbook of International Law, 361 (1980).

[82] Isaiah Berlin, *Liberty* (1969), p. 180.

[83] Article 3(1)(e) and (2) of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) of 2 March 2012 for example require its signatories to introduce the agreed budget deficit rules in national law through 'provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes'.

[84] J. Barroso, 'State of the Union Address 2012, Speech 2012/596.

[85] Joseph Weiler, 'In defence of the status quo: Europe's constitutional Sonderweg', in: Joseph Weiler and Marlene Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003), 22.

daily changes of how public administrations work at all levels and how this places constraints on the exercise of sovereign rights in mundane ways. This is also where the EU is most successful: in hidden, often boring developments of incremental change of administrative practice. As was established above, the EU works best where it does not connect to the emotional or symbolic grandness that is inherent in the concept of sovereignty and that is here understood to be its fictional dimension. Integration, while being largely based on incremental low level change, has nonetheless affected the self-conception of Member States. This is reflected not only at the legal and political level but also in the fictive dimension of sovereignty.

Externally, membership in the EU has equally imposed considerable constraints on the exercise of sovereign rights of Member States under international law. As explained above, it is generally accepted that the EU's external powers and their pre-emptive effects develop parallel to the EU's internal powers.[86] From the standpoint of EU law, this is an undeniable link between the exercise of sovereign powers of the Member States on their territory and under international law. Additionally, the CJEU has deployed the principle of sincere cooperation as a powerful tool to make Member States conform to the common (Union) interest.[87] In particular and arguably extreme cases, the Court has interpreted Member States' obligations under EU law to require them to exclude even potential future contradictions between EU law and their international legal obligations by denouncing international agreements.[88] From the perspective of EU law but also as accepted practice, the sovereignty of the Member States has been reframed.[89] Not only internally, with regard to the 'national powers' of the Member States over their populations, but also with regard to the external powers of the Member States to act as states on the international plane.

The sovereignty debate in the EU context, both in theory and in practice, has found a way of assuming a functional division of internal or 'national' sovereign powers between the EU and its Member States. This departs from the territorial understanding of sovereignty

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[86] See section 3.1 above.
[87] Article 4(3) TEU and its more specific expressions, e.g. in Article 351(2) TFEU on prior agreements.
[88] See for the most extreme cases: Case C-246/07 *Commission v. Sweden (PFOS)* [2010] ECR I-3317 and C-205/06, *Commission v Austria (BITs)* [2009] ECR I-01303 (see in particular paras 20 and 32-37).
[89] Similarly, from a political perspective and with a focus on the internal workings of the EU: Christopher Bickerton, *European Integration* (Oxford University Press, 2012), specifically p. 56.

under public international law.[90] At times, this can result in tensions. An example of where the two understandings meet is the CJEU's doctrine of functional succession.[91] Without wanting to enter into the requirements of this doctrine, the Court assumes that the EU has functionally succeeded its Member States if a full transfer of powers has taken place in an area and the EU has in practice taken over the international presence in that area. However, functional succession, while it was in practice recognised for the 1947 GATT,[92] remains an EU law concept that as such does not have any direct legal implications for the position of either the EU or its Member States under public international law. Yet again, both the EU Member States and third countries have accepted the Union's succession of its Member States for all practical purposes.

It should be added that from a traditional perspective on international law, the link between internal and external sovereignty is denied. In this view, state sovereignty is seen separate from internal (popular) sovereignty as a constitutional principle and the latter has accordingly nothing to do with self-determination of peoples under international law.[93] James Crawford for example points to state practice and explains that states are extremely reluctant to recognize unilateral secession outside the colonial context.[94] Indeed, an indication is that no state formed after 1945 has been admitted to the UN against the will of the predecessor state. Hence, one could conclude that no claim to self-determination must be allowed to infringe the principle of territorial integrity of existing states.[95] It can also be pointed to evidence that international law does not prescribe the internal organization of collectivities.[96]

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[90] See Section 3.1 above.

[91] See first: Joined Cases 21- 24/72, *International Fruit Company and Others*, [1972] E.C.R. 1219. More recently: Case C-308/06, *Intertanko*, [2009] E.C.R. I-405; C-402/05 P and C-415/05 P, *Kadi*, [2008] E.C.R. I-6351; Case C-188/07, *Commune de Mesquer*, [2008] E.C.R. I-450.

[92] This is of course a circular argument, since the EU succeeds its Member States in areas where it has in practice taken over representation (only possible if accepted by third countries).

[93] Since the right of self-determination still carries the connotation of the colonial era and the EU is illustrative not only of the post-colonial but even of the post-national era, the present discussion does not further engage with self-determination as a right under international law. See for the validity of the right of self-determination beyond the colonial context: DAVID RAIC, STATEHOOD AND THE LAW OF SELFDETERMINATION (2002), 228 et seq.

[94] James Crawford, 'State Practie and International Law in Relations to Secession,' *BYBIL* (1998) 85 at 114.

[95] Anthony Carty, Philosophy of International Law (Edinburgh University Press, 2007), Chapter 3, International Legal Personality, p. 80.

[96] E.g. the above mentioned Tinoco Claims Arbitration (Great Britain v. Costa Rica), (1923) 1 R.I.A.A. 369: no rule of international law, treaty or custom, demands a particular political system or electoral method; similarly:

At the same time, there are both empirical and normative reasons to nuance this position. The external and the internal are increasingly seen together empirically: The presumption in favour of intervention under certain circumstances (extreme forms of human rights abuse) has strengthened over time[97] and the right to democratic governance is accepted as a ground of *legitimacy*.[98] International legal principles, such as internal self-determination and the right to political participation, effectively require democratic processes. Hence, there are grounds to assume that, even though many existing sovereign states are not democracies, popular sovereignty and the resulting democratic legitimation *strengthens* an entity's claim to external sovereignty.[99] This is the continuous character of internal and external sovereignty, which is particularly vindicated if one accepts that the notion consists not only of a legal status and a factual condition but also contains a fiction that grasps a normative dimension, which serves as justification of its existence. Only when an entity is supported by a degree of internal popular sovereignty it can enjoy the support of a fiction of representation, which contributes to stability.

Furthermore in modern times, the normative dimension of the fiction of sovereignty ('this is how the world should be ordered') is difficult to defend without establishing an explicit link to popular sovereignty and legitimate self-determination.[100] This is different now than it has been in the past and contradicts historical understandings of sovereignty. Yet that as such only confirms the evolution of the notion over time[101] and rejects the

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Anthony Carty, *Philosophy of International Law* (Edinburgh University Press, 2007), Chapter 3, International Legal Personality, p. 97, on the (French) position of Jean Combacau and Serge Sur, *Droit international public*, 1st edition (1993).

[97] Consider e.g. the NATO campaign against Yugoslavia.

[98] See the debate in Gregory Fox and Brad Roth, *Democratic Governance and International Law* (2000). Consider also that East Timor, a Portuguese non-self-governing territory, was occupied by Indonesia in 1974. On 5 May 1999, East Timor and Indonesia agreed with the UN to conduct a process of popular consultation in the territory over its future; President Wilson's 'democratic requirement'; President Rutherford Hayes' popular support condition and Secretary of State Seward's criterion of ability to honour international obligations [US Department of State, DUSPIL, 1977, pp. 19, 20] – the latter examples are taken from Malcolm Shaw, *International Law* (2008), 458.

[99] In 1965, the Organization of American States recommended in a resolution that states contemplating recognition of a new government should take into account whether that government proposes to hold elections within a reasonable time [5 ILM, 1966, 155].

[100] This is not a technical reference to the international right to self-determination within the meaning of International Covenant on Civil and Political Rights (ICCPR) art. 1.

[101] Already in 1927 Hans Kelsen argued that while the historical development (*Bedeutungswandel des Souveränitätsbegriffs*) can be enlightening that it should not constrain the contemporary meaning of sovereignty [Hans Kelsen, *Das Problem der Souveränität* (2nd ed., 1927)].

potentially 'apologist' traditional position, that blurs the line between law and politics.[102] The evolution of understanding of sovereignty is in line with Francis Fukuyama's well-known end of history thesis[103] in that it argues in favour (and predicts) a universalization of liberal democracy, as an ideal that governs not only the broader understanding of sovereignty but also the interpretation of sovereignty under international law. Fukuyama for example identifies how Soviet elites had assimilated the consciousness of the universal liberal democratic state and its economic focus, even before actual change in the political deep tissue. This is similar to the very widespread acceptance that democratic governance is relevant in the perception of entities as *legitimate* international persons, even if this is not a universally accepted requirement.

Indeed, when the internal and the external directions of sovereignty are isolated to justify state rights and behaviour internationally without linking it back to actual human beings, the analogy between sovereignty and individual rights and liberties (liberalism) goes too far. Law and politics create sovereignty as a legal status and a fiction. Sovereignty is not original in the way human rights are. One of its justifications is self-determination,[104] which loses force without an internal link to a sovereign.

6. Conclusion: What is the explanatory value in distinguishing the legal status/legal rules, the factual condition and the fiction of sovereignty?

Sovereignty, despite its evasiveness, remains a highly relevant explanatory concept of modern international relations and law. This is amongst other reasons, i.e. historical reasons, the case because of its multi-dimensional nature that captures not only the factual division of power(s) and the legal rules that structure the exercise of that power, but also the fictional identification with those who exercise power in the name of the group.

Public international law works along the logic of sovereignty and is deeply penetrated by its spirit. Hence, it is not possible to understand public international without keeping in mind the concept of sovereignty. At the same time, public international law is

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[102] Martti Koskenniemi, *From Apology to Utopia - The Structure of International Legal Argument* (Reissue with a new Epilogue, 2005), 224-302.
[103] Francis Fukuyama, 'The End of History?', *The National Interest*, 1989; Francis Fukuyama, *The End of History and the Last Man* (1992).
[104] Roth, 'State Sovereignty, International Legality, and Moral Disagreement', supra fn 18.

important to understand the meaning and the consequences of sovereignty; yet, the law cannot offer a full picture because much of sovereignty goes beyond the law. The factual condition, i.e. the ability to govern, supports any claim to sovereignty under the law. It also allows the entity to establish and maintain the fiction that individuals are part of the group and entity governed by it, and can have influence on how its affairs are conducted. As we have further seen, if the fiction, the legal and the factual dimension depart from each other to the extent that they seem irreconcilable this threatens the stability of the situation.

Analysing how the different dimensions of sovereignty connect and influence each other also helps to understand the main point of this paper: internal and external sovereignty are interlinked and should not be artificially separated, including under the law. It is better to think of sovereignty in a more comprehensive way. This accurately reflects the legal and political construction of the European Union and its Member States. The latter have accepted in practice that the 'internal' functional division of powers within the EU legal order defines and confines their position as participants in external relations and under international law.

Linking external sovereignty to internal sovereignty further allows us to acknowledge that the legal status of being sovereign is politically-created and stands in a reflexive relationship with the above described condition and fiction of sovereignty. Without rooting it is empty and creates an unjustified analogy between the liberty of individuals and states. The latter are legal constructions, whose status and rights need to be justified. A link between external and internal sovereignty allows relying on political liberty of individuals in international relations as a justification. The external importance of the internal direction of popular sovereignty further promotes many core values of international law, such as human rights and self-determination. It is simply to say that popular sovereignty is a legitimizing factor of any entity that aspires to obtain a sovereign status under international law. An entity claiming external sovereignty makes a *better* case under contemporary international law if it can claim that it offers meaningful representation of those subjected to its rule.