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Sovereignty Conflicts and International Law and Politics

Many conflicts throughout the world can be characterized as sovereignty conflicts in which two states claim exclusive sovereign rights for different reasons over the same piece of land. It is increasingly clear that the available remedies have been less than successful in many of these cases, and that a peaceful and definitive solution is needed. This book proposes a fair and just way of dealing with certain sovereignty conflicts. Drawing on the work of John Rawls in *A Theory of Justice*, this book considers how distributive justice theories can be in tune with the concept of sovereignty and explores the possibility of a solution for sovereignty conflicts based on Rawlsian methodology. Jorge E. Núñez explores a solution of egalitarian shared sovereignty, evaluating what sorts of institutions and arrangements could, and would, best realize shared sovereignty, and how it might be applied to territory, population, government, and law.

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A Distributive Justice Issue

Jorge E. Núñez

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Preface

The idea behind this book started many, many years ago, most probably in my childhood back in Argentina. I could never understand why certain problems were not solved. Growing up I realized that the answer was very simple. Some problems are never solved because most look for more problems, problems within a problem, or just simply give up or are so self-centered they think that problem will not affect them and hence, why would they even think about it. Ergo, the answer came to me: some problems are never solved because people do not look for a solution.

Being originally from Argentina, and having always had interest in international relations and philosophy, I have always dreamt of solving the Malvinas/Falklands sovereignty conflict. Paradoxically, life took me to the United Kingdom. It was there where I had a second realization. If I am to offer a solution to that sovereignty conflict, why not to solve every sovereignty conflict on earth.

Being both an idealist and a pragmatist, I did know that I was not going to be able to put a solution to any sovereignty conflict during my lifespan. However, being a philosopher and a writer at heart, I decided to put my vision into an abstract model and that model, into words.

There were many pitfalls. The main ones had to do with the many differences that these sovereignty conflicts presented—from Malvinas/Falklands to Kashmir, Gibraltar, and even Jerusalem—and the fact that sovereignty conflicts are multilevel—territory, population, government, law. Moreover, I realized that although these sovereignty conflicts had been and were objects of study of many sciences—law, political sciences, international relations, to name only a few—these sciences did not share their developments and both different approaches and different languages were applied. Indeed, to my surprise I discovered that although multi and interdisciplinary studies are promoted in speeches everywhere, it is more a nominal aim rather than an actual reality.

My personal, familiar, educational, cultural, life-experience backgrounds positioned me in a privileged place to take the challenge as an objective dreamer. That is, I did not dare to intend to offer an actual solution to sovereignty conflicts. However, that did not stop me from trying to do it in the world of the ideas. Furthermore, the pages that follow are a very humble attempt to conduct a thought experiment drawing from legal sciences, political sciences, international

relations, and philosophy. I hope the scholars, students, and public in general see my point and main motivation: to offer a platform for discussion in order finally to be able to put all the parties in a sovereignty conflict together regardless of language, background, personal or group history, pride, and prejudices. Indeed, we may agree to disagree. That is the parties in a sovereignty conflict might agree to disagree, but they would at least finally be considering mutually as what they are: human beings able peacefully and respectfully to listen to each other, even to the point of disagreement.

In writing this book I have been graced with the help and comments of many. In a form, this book has already fulfilled its original aim since I have witnessed discussions around the world and I am forever indebted to the participants. Without any individual name, since it would be unfair to forget even one, I want to express my gratitude to staff, members, and students of the Universidad Nacional de La Plata and Colegio de Abogados de La Plata, both from Argentina; the many universities in the United Kingdom in which I delivered presentations and participated in discussions: Manchester, Liverpool, London School of Economics, Edinburgh, Durham; the State University of Saint Petersburg and the State University of Ivanovo, in Russia; the China University of Political Science and Law in Beijing; Bilkent University in Turkey; ATINER in Athens, Greece; Georgetown University in the United States of America; Universidad Nacional de México; and many others that escape my memory at the time I write these lines.

Many thanks as well to the many reviewers the original had and the many discussion groups for their insightful comments in Cambridge, Oxford, and Edinburgh. My special thanks to the participants in Juris North discussion group, the one I am one of the proud founding members and chairs too.

Valuable criticism came from both legal scientists and philosophers and political scientists and philosophers thanks to IVR, IVR Argentina, IVR UK, and IPSA/AISP.

Many persons from the non-scientific community participated too; that is, society at large. My deepest gratitude goes to them. Thanks to the comments received through emails, Twitter, my blog, face-to-face, formally or informally in Argentina, the United Kingdom, the Malvinas/Falkland Islands, Spain, México, Perú, China, Turkey, Russia, the United States of America, Brazil, Nigeria, Gibraltar, Kashmir, and Israel. These pages would have been meaningless without their input. For science and philosophy with any relevance to a positive impact on people and their lives are, for this writer, what make these pages meaningful.

Jorge E. Núñez
La Plata, Argentina
Manchester, United Kingdom
October 2016

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Part I

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1 Sovereignty conflicts as a distributive justice dilemma

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.

Introduction

It is arguably a truism in international law and politics that an ultimate sovereign, with a common legal bond or system of norms, will govern one territory with population. 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 were positive, what would the consequences be—in terms of territory, population, government, and law?

There are many cases that can be characterized 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 among 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

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In light of this obsession with absolute, and rejection of shared sovereignty, long-standing disputes still continue to be present 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. These pages propose to see these conflicts from a different yet broad perspective rather than as conflicts between separate and independent rights.⁴ Therefore, the monograph examines the problem as a distributive justice⁵ issue by applying Rawlsian methodology.⁶ That is because Rawlsian methodology is a particularly appropriate tool to address

Publishers, 1999). For an eclectic view of the topic see Neil MacCormick, *Questioning Sovereignty: Law, State, 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 monograph 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 actually to 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 project, 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 among 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).

sovereignty issues, just as it has 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 to resolve the problem. The aim is to explore if a solution that certainly is desirable can also be attained and may offer a peaceful way of solving sovereignty conflicts through the use of principles of distributive justice.

General structure

To evaluate the potential for using principles of distributive justice to resolve certain kinds of sovereignty conflicts, the monograph is divided into three parts. Part I—*i.e.* Chapters 1 and 2—includes discussion on two preliminary potential pitfalls to this project that is the use of Rawlsian methodology and the use of the concept of “sovereignty.” Chapter 1, the Introduction, presents some simplifying assumptions and the basic elements that constitute this study and in particular goes through the critical discussion on Rawls’s methodology in order to justify its application here. Chapter 2 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. This chapter follows two lines of analysis: (a) conceptual; and (b) historical.

Part II—*i.e.* Chapters 3, 4, and 5—introduces and explores the current state of affairs in international law and politics in terms of conceptual elements and potential remedies to sovereignty conflicts. Chapter 3 will focus on assessing the need for a revised “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 this chapter will review different ways in which this concept (in various versions or conceptions) and similar ones have been previously applied in legal and political scholarly literature.

Chapter 4 will examine self-ownership⁸ as a way to define sovereignty. More precisely, if it can be established that sovereignty may in theory be limited and the need of a revised “shared sovereignty” the next step will be to evaluate how sovereignty can be shared—*i.e.* how a state can limit itself by sharing its rights and obligations and still remain sovereign. Therein, this chapter will assess the concept of “sovereignty” in parallel with the concept of “self-ownership.” That is because by using an analogous concept such as self-ownership that implies supreme

⁷ *Ibid.*, p. 4.

⁸ The term “self-ownership” will be used with its full content and will be applied directly in this monograph, 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).

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authority but yet accepts limitations it becomes clearer how limitations can work in another supposedly supreme concept such as sovereignty. Chapter 5 highlights the main remedies applied at international level to sovereignty conflicts and will explore each in order to determine whether any of them could be a reasonable solution to the sovereignty conflicts object of this project. What this chapter will argue is that there is a need for a reasonable solution that the reviewed international remedies cannot offer.

Part III—*i.e.* Chapters 6, 7, and 8—will explore the use of Rawlsian methodology in order to put a solution to certain sovereign conflicts, and discuss if the outcome is a reasonable remedy for them. Chapter 6 will introduce and explore: (a) the conditions for achieving justice—toleration, peace, etc.; (b) why the “just acquisition” principle⁹ 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.

Chapter 7 will test the proposed model by working out what sorts of institutions and arrangements could, and would best, realize it. In order to do that this chapter will make use of some sovereign conflicts to show that the model can be extended from the general principles to workable institutions that realize those principles in: (a) population; (b) territory; (c) government and law; and (d) all that they imply (*e.g.* defense, natural resources, financial system). Finally, Chapter 8 will conclude by assessing the model’s potential and highlighting any possible limitations and implications.

Simplifying assumptions: 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 Transdnistria 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).

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

¹⁰ John Rawls’s 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.

Although all the above international disputes are interesting in their own way, in order to be sure the outcome of this project will generalize, some simplifying assumptions are introduced. 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 this project assumes that statehood (for whatever reason) is not possible. Consequently, because of the scope of this monograph, it is more useful to analyze 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 by method of analogy. 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:

- (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 categorization the focus will be only on disputes concerning two fully sovereign states (both *de jure* and *de facto*) over a third populated 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 book will deal with disputes between two sovereign states (*de jure* and *de facto*) over the sovereignty of a populated nonsovereign third territory (*e.g.* Falkland/Malvinas Islands, Gibraltar, Kashmir, and the Kuril Islands). That is not to say the analysis will not generalize to other disputes. In other words, although practical reasons make it impossible to include every single sovereignty

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conflict in the analysis—even if they were only seen theoretically, the principles that will be reached may be generalized in order to be applicable to cases left aside or simply not considered here.

Rawlsian methodology

The model proposed in this monograph is constructed using many theoretical elements. However, the core proposal will be based on Rawlsian methodology—*i.e.* not his theory. Therein, two main issues must be addressed before advancing this project, mainly in order to avoid tangential criticism that may have to do with elements foreign to this work. First, the tension between ideal and nonideal or realist theory in the conception of distributive justice insofar applied in this project as the obligations and duties associated with sovereignty are now interwoven with moral issues. Second, the arguably problematic application of Rawlsian methodology, in particular the original position and the veil of ignorance, in a critical enough manner, and its extension to the international level.

In what has to do with the existent and evolving tension between ideal and nonideal theory, this monograph is circumscribed to claims about ideal moral theorising only, and therefore, does not include claims about practical application. It uses the Rawlsian method to determine how states should conceive the issue as a matter of first principle, and does not claim to do more than this. To be more precise, this monograph is in effect an exercise in ideal theory, and does not claim it has applicability as a nonideal theory or really explores the relevant nonideal issues—*e.g.* lack of compliance. It follows that to discuss the practical usefulness of this project or whether this theorization of a problem in international law and politics may bring actual results and create rights and obligations for the agents¹¹ is irrelevant—*i.e. contra negantem principia non est disputandum*.

It is Rawlsian methodology that will be applied in order to explore a reasonable remedy to some sovereignty conflicts. That is to say that these pages and the outcome may agree with Rawls's theory as a whole and its outcome but does not need to. Nevertheless, even though this monograph will only make use of Rawlsian methodology—*i.e.* not Rawls's theory—it must be acknowledged that it will not be exempt from controversy and criticism. Because of the arguably very problematic application of Rawls methodology, it is necessary to consider the challenges to this idealism via this already existent criticism in scholarly literature. Thus, not only may the criticism refer to Rawlsian methodology but also to its application at international level. Indeed, there has been much critical discussion of these issues—*e.g.* Beitz, Pogge, Kuper, Caney, Buchanan, Reidy, Martin, and Reidy. Therein, in order to develop the model proposed in this monograph and devise its own angle or justification for applying Rawlsian methodology and extending it to a particular

11 Ronald Dworkin, "Justice and Rights," In: *Taking Rights Seriously* (Cambridge MA: Harvard University Press, 1977).

issue at international level such as sovereignty conflicts, there are some critical points to be noted by working through a hefty literature for that matter.

On the one hand, with regard to Rawlsian methodology, as in *A Theory of Justice* the model here is based on a hypothetical situation.¹² Hence, this original position in which the negotiations take place assumes certain features. Indeed, the content of the original position is something constructed to reflect what is thought to be morally relevant. Similar to what Rawls does at the individual level, the characteristics of the original position will be determined in order to avoid any possible interference from factors that can cause bias and that may lead to a partly unjust or unfair outcome. A redefined “veil of ignorance”¹³ will be applied at international level in order to address sovereignty conflicts. Many criticisms have been presented against Rawls’s original position and veil of ignorance:

- (a) The moral point of view.
- (b) The social contract doctrine.
- (c) The choice in the original position is indeterminate.

The moral point of view is not of Rawlsian exclusive or original application. Hume’s “judicious spectator,” Smith’s “impartial spectator,” Kant’s categorical imperative, Rousseau’s general will, Sidgwick’s “point of view of the universe” are among several examples in which the moral point of view is taken into account in order to assess a given situation.¹⁴ It is indeed a mistake to confuse moral justification with democratic political legitimacy, the latter not claimed by or argued for in this project.¹⁵ The main reason behind this choice has previously been—and it is in this project too—to secure impartial judgment once agents leave aside their interests and evaluate a given situation from what is assumed to be an impartial point of view.¹⁶ Hence, this monograph will explore if it is possible

12 For complete details about the hypothetical agreement, original position, veil of ignorance, and the negotiations see Chapter 6.

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

14 Samuel Freeman (ed.), *The Cambridge Companion to Rawls* (Cambridge: Cambridge University Press, 2003); Samuel Freeman, “Reason and Agreement in Social Contract Views,” *Philosophy and Public Affairs* 19 (1990): 122–57; Samuel Freeman, *Justice and the Social Contract: Essays on Rawlsian Political Philosophy* (Oxford: Oxford University Press, 2009); Samuel Freeman, *Rawls* (London: Routledge, 2007); Simon Caney, *Justice Beyond Borders* (Oxford: Oxford University Press, 2006), esp. p. 54.

15 Andrew Kuper, “Why Deliberation Cannot Tame Globalization: The Impossibility of a Deliberative Democrat,” *Analyse and Kritik* 25 (2003): 176–98, esp. p. 192, fn. 35.

16 For a better understanding on Rawls’s methodology see Thomas Pogge, *John Rawls: His Life and His Theory of Justice* (Oxford: Oxford University Press, 2007), esp. pp. 42–59, 63–64, and 66; Jon Mandle and David A. Reidy (eds.), *The Cambridge Rawls Lexicon* (Cambridge: Cambridge University Press, 2015), pp. 579–85; Jon Mandle and David A. Reidy (ed.), *A Companion to Rawls* (Wiley Blackwell, 2014), Part II; Samuel Freeman (ed.), *The Cambridge Companion to Rawls* (Cambridge: Cambridge University Press, 2003), esp. pp. 139–67.

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to adapt the model created by John Rawls in *A Theory of Justice* to sovereignty conflicts. Therefore, this is a theoretical exercise to focus on what factors cause bias in sovereignty disputes. Then, the task is to design a procedure that will limit the effect of these factors. It is important to clarify that the moral significance of this kind of hypothetical agreement varies with the subject matter to which this ideal platform is applied. Rawls's subject matter is different from the one analyzed here and hence, both the hypothetical agreements and their moral significance will be different.¹⁷

With regard to the social contract doctrine, many thinkers other than Rawls have applied it too. Hobbes, Locke, Rousseau, and Kant are just a few obvious examples.¹⁸ The basis of this project has to do with an agreement among two already sovereign states and a third nonsovereign populated territory in order to enter into negotiations about the sovereignty of the disputed third territory. Therefore, the use of a social contract has to do with the very nature of the negotiations and issues this project will deal with. Furthermore, it has to do with the nature of international relations as a whole. To be more precise, in the case of any conflict in international relations, if a peaceful and long-lasting solution is the desired outcome, agents should not be imposed policies but invited to discuss them. Indeed, international law and politics recognize the principle of equality as core in the interrelation, at least, among agents that are sovereign. This project follows that notion too and takes a stance on nondomination.¹⁹

It may be the case that Rawls's own original position is indeterminate.²⁰ Moreover, it may be discussed whether it is possible at all to make a rational choice without knowing primary ends, or fundamental values and commitments.²¹ That discussion is irrelevant here because the agents and the way in which the original position and the veil of ignorance are characterized in this project are different from the ones presented in *A Theory of Justice*. In fact, the representatives of these agents in the negotiations will have access to the information relevant to the sovereignty conflict at hand, everyone's desires, interests, and purposes as well as factual and historical data.²²

On the other hand, another potential controversial point in this project may have to do with the extension of Rawlsian methodology to the international arena. It is important to make it clear to the reader from the outset that *A Theory of*

17 Thomas Pogge, *John Rawls: His Life and His Theory of Justice* (Oxford: Oxford University Press, 2007), esp. pp. 60 ff.

18 *Ibid.*

19 For the discussion on nondomination see Chapter 4.

20 Amartya Sen, *The Idea of Justice* (Cambridge MA: Harvard University Press, 2009).

21 Alastair MacIntyre, *After Virtue* (Notre Dame Press: 1981); Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge UK: Cambridge University Press, 1982).

22 For more details about the information available to the representatives of the agents in the negotiations and limitations see Chapter 6.

*Justice*²³ is very different from *The Law of Peoples*²⁴ and, in many ways, constitutes a problematic²⁵—albeit not implausible—extension to the international level.²⁶ Rawls's extension of his theory to the international arena has received criticism. It is to be expected that to extend Rawlsian methodology to an international issue such as sovereignty conflicts will be target of at least these criticisms too.

In *A Theory of Justice*, Rawls provides some indications of how his general principles for *Justice as Fairness*, might find a use in international law, and *The Law of Peoples* is presented as a development of these tendencies. However, *The Law of Peoples* is also presented as a part of the program for *Political Liberalism*—i.e. principles that should guide foreign policy for a liberal people. If *The Law of Peoples* is identified as a component in some form of *Political Liberalism* while Rawls's early discussion of international law finds itself within a more comprehensive liberal perspective, and if these are two discussions, it is important to make clear how this monograph will reconcile these two perspectives or whether it will settle on one over the other or a hybrid—and, if so—along which tangent.

The answer is simple. Indeed, Rawls's thinking on international justice can be found in *The Law of Peoples* whether as a development of the tendencies from *A Theory of Justice* in the international arena or as part of a program for *Political Liberalism*. This project will explore some of its elements too. However, it is *A Theory of Justice* and in particular the method Rawls develops there that will be used here. Put it in different terms, Rawls presented a different model in

23 John Rawls's *Political Liberalism*, *Justice as Fairness: A Restatement* and *The Law of Peoples* will be also discussed in this monograph.

24 John Rawls, *The Law of Peoples* (Harvard: Harvard University Press, 1999).

25 For a detailed account on the reception of Rawls's view on international justice and relevant criticism see David A. Reidy, "Rawls on International Justice," *Political Theory* 32 (2004): 291–319, esp. fn. 2. See also Thomas W. Pogge, "The Incoherence Between Rawls's Theories of Justice," *Fordham Law Review* 72 (2004): 1739–59; Thomas W. Pogge, "Do Rawls's Two Theories of Justice Fit Together?" in Rex Martin and David A. Reidy (eds.), *Rawls's Law of Peoples: A Realistic Utopia?* (Oxford: Blackwell Publishing, 2006); Thomas W. Pogge, *Realizing Rawls* (Ithaca and London: Cornell University Press, 1989), esp. Chapter 6, pp. 240–46; Simon Caney, "Cosmopolitanism and the Law of Peoples," *The Journal of Political Philosophy* 10 (2002): 95–123; Simon Caney, *Justice Beyond Borders* (Oxford: Oxford University Press, 2006), esp. p. 100, fn. 43 and pp. 125–31; Jon Mandle and David A. Reidy (eds.), *The Cambridge Rawls Lexicon* (Cambridge: Cambridge University Press, 2015), pp. 411–16; Rex Martin and David A. Reidy (eds.), *Rawls's Law of Peoples: A Realistic Utopia?* (Oxford: Blackwell Publishing, 2006), esp. pp. 6–9; Alex Buchanan, "Rawls's Law of Peoples: Rules for a Vanished Westphalian World," *Ethics* 110 (2000): 697–721.

26 For a view on Rawls and international distributive justice see Charles R. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1999), esp. Part III, pp. 129–36; Thomas W. Pogge, "An Egalitarian Law of Peoples," *Philosophy and Public Affairs* 23 (1994): 195–224; Thomas W. Pogge, "Rawls on International Justice," *The Philosophical Quarterly* 51 (2001): 246–53; Andrew Kuper, "Rawlsian Global Justice: Beyond the Law of Peoples to a Cosmopolitan Law of Persons," *Political Theory* 28 (2000): 640–74, esp. pp. 641–45; Andrew Kuper, *Democracy Beyond Borders: Justice and Representation in Global Institutions* (Oxford: Oxford University Press, 2006), esp. pp. 7–14.

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The Law of Peoples. This monograph does not claim that its outcome is the one Rawls would necessarily come up with. It is using his methodology to arrive at its own solution in order to explore a way in which sovereignty conflicts may be solved. Therein, neither this project is a development of *A Theory of Justice* nor *Political Liberalism*.

By way of example, Rawls makes clear in *The Law of Peoples* that it is “peoples” that take the place of persons.²⁷ He makes it explicit that not persons but peoples are the units of representation.²⁸ From there, *The Law of Peoples* introduces not one but two original positions.²⁹ Rawls goes further and leaves no doubts that sovereignty is not central for his proposal.³⁰ This monograph, on the contrary, follows the traditional view that states are constituted by a population (“peoples”) and also recognizes territory, government, and law as constitutive elements, and sovereignty as an attribute. That is because this monograph is centered on sovereignty disputes, issues that Rawls himself does not address.

There are many other points that have been raised directly or indirectly related to Rawls’s work: The general conflict between cosmopolitan ideals and national sentiment,³¹ whether there is a need for a conception of international distributive justice,³² social versus cosmopolitan liberalism,³³ the moral standing of states,³⁴

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- 27 Charles R. Beitz, “International Liberalism and Distributive Justice: A Survey of Recent Thought,” *World Politics* 51 (1999): 269–96, *esp.* pp. 273–76; Thomas W. Pogge, “An Egalitarian Law of Peoples,” *Philosophy and Public Affairs* 23 (1994): 195–224, *esp.* pp. 197–98.
- 28 Charles R. Beitz, “Rawls’s Law of Peoples,” *Ethics* 110 (2000): 669–96; Thomas W. Pogge, “Do Rawls’s Two Theories of Justice Fit Together,” In: Rex Martin and David A. Reidy (eds.), *Rawls’s Law of Peoples: A Realistic Utopia?* (Oxford: Blackwell Publishing, 2006).
- 29 Charles R. Beitz, “Rawls’s Law of Peoples,” *Ethics* 110 (2000): 669–96, *esp.* p. 674.
- 30 Rawls specifically uses in *The Law of Peoples* (1999) the term “peoples” and maintains that “peoples” lack traditional sovereignty. This monograph, on the contrary, uses the terms “state” and “sovereignty” as generally accepted in legal and political sciences. *See* Chapter 2 for more details about sovereignty and state sovereignty and Chapter 6 for further discussion and analysis of *The Law of Peoples*. *See also* Andrew Kuper, *Democracy Beyond Borders: Justice and Representation in Global Institutions* (Oxford: Oxford University Press, 2006), *esp.* p. 13.
- 31 Charles R. Beitz, “Cosmopolitan Ideals and National Sentiment,” *The Journal of Philosophy* 80 (1983): 591–600.
- 32 Charles R. Beitz, “International Liberalism and Distributive Justice: A Survey of Recent Thought,” *World Politics* 51 (1999): 269–96; Charles R. Beitz, “Recent International Thought,” *International Journal* (1988): 183–204; Thomas W. Pogge (ed.), *Global Justice* (Oxford: Blackwell Publishing, 2004), for example pp. 15, 59, 62; Simon Caney, “Global Interdependence and Distributive Justice,” *Review of International Studies* 31 (2005): 389–99.
- 33 Charles R. Beitz, “Social and Cosmopolitan Liberalism,” *International Affairs* 75 (1999): 515–29.
- 34 Charles R. Beitz, “The Moral Standing of States Revisited,” *Ethics and International Affairs* (2010): 325–47.

international justice and self-sufficiency of “nation-states”,³⁵ problems about natural resources,³⁶ the empirical foundation of national self-sufficiency,³⁷ cosmopolitanism and sovereignty,³⁸ global distributive justice and the normative significance of the state,³⁹ theories of justice and representation for global institutions,⁴⁰ distinct approaches to international distributive justice,⁴¹ and whether a global principle of equality of opportunity is defensible.⁴² Arguably directly or indirectly pertinent to Rawls’s theory and its application, the previously mentioned points have little to do with the present project and to include them either in the analysis or its criticism is a misinterpretation of this work. For distributive justice principles by application of Rawlsian methodology are brought into this project only to offer a solution to sovereignty conflicts, and not to put an end to inequalities among the claiming agents’ comparative situations or to bring about a solution of global distributive justice nature. This book, 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. That is to say, the model here will make use of distributive justice principles by application of Rawlsian methodology in order to explore a potential remedy to some sovereignty conflicts. Ergo, the model does not intend to use sovereignty conflicts as an example of global distributive justice.

Conclusion

The present chapter had a Janus-faced intertwined aim. First, to introduce the core idea behind the project: To explore how distributive justice principles by application of Rawlsian methodology may help in finding a remedy to at least some sovereignty conflicts—*i.e.* the ones with two sovereign states claiming sovereignty over a populated third territory. Second, to acknowledge some potential preliminary criticisms that may have to do more with the Rawlsian theory than with the present work in order to avoid possible misunderstandings with regard to the methodology used here and the nature of this project.

35 Charles R. Beitz, “Justice and International Relations,” *Philosophy and Public Affairs* 4 (1975): 360–89.

36 *Ibid.*

37 *Ibid.*

38 Thomas W. Pogge, “Cosmopolitanism and Sovereignty,” *Ethics* 103 (1992): 48–75.

39 Simon Caney, “Global Distributive Justice and the State,” *Political Studies* 56 (2008): 487–518.

40 Andrew Kuper, *Democracy Beyond Borders: Justice and Representation in Global Institutions* (Oxford: Oxford University Press, 2006).

41 Simon Caney, *Justice Beyond Borders* (Oxford: Oxford University Press, 2006), *esp.* pp. 3–15; Simon Caney, “International Distributive Justice,” *Political Studies* 49 (2001): 974–97.

42 Simon Caney, “Cosmopolitan Justice and Equalizing Opportunities,” *Metaphilosophy* 32 (2001): 113–34.

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The following chapters will introduce and assess many conceptual elements and theories pertinent to law, political sciences, and international relations in the context of certain kinds of sovereignty conflicts and defend the conclusion that principles of just distribution provide a reasonable remedy to at least some of them. This reasonable remedy lies in viewing sovereignty conflicts as a problem of distributive justice. The first steps of this path start with the next chapter by considering the first of these issues that is limited sovereignty.

Bibliography

- Beitz, Charles R. "Cosmopolitan Ideals and National Sentiment." *The Journal of Philosophy* 80 (1983): 591–600.
- Beitz, Charles R. "International Liberalism and Distributive Justice: A Survey of Recent Thought." *World Politics* 51 (1999): 269–96.
- Beitz, Charles R. "Justice and International Relations." *Philosophy and Public Affairs* 4 (1975): 360–89.
- Beitz, Charles R. "Rawls's Law of Peoples." *Ethics* 110 (2000): 669–96.
- Beitz, Charles R. "Recent International Thought." *International Journal* (1988): 183–204.
- Beitz, Charles R. "Social and Cosmopolitan Liberalism." *International Affairs* 75 (1999): 515–29.
- Beitz, Charles R. "The Moral Standing of States Revisited." *Ethics and International Affairs* (2010): 325–47.
- Beitz, Charles R. *Political Theory and International Relations*. Princeton: Princeton University Press, 1999.
- Buchanan, Alex. "Rawls's Law of Peoples: Rules for a Vanished Westphalian World." *Ethics* 110 (2000): 697–721.
- Caney, Simon. "Cosmopolitan Justice and Equalizing Opportunities." *Metaphilosophy* 32 (2001): 113–34.
- Caney, Simon. "Cosmopolitanism and the Law of Peoples." *The Journal of Political Philosophy* 10 (2002): 95–123.
- Caney, Simon. "Global Distributive Justice and the State." *Political Studies* 56 (2008): 487–518.
- Caney, Simon. "Global Interdependence and Distributive Justice." *Review of International Studies* 31 (2005): 389–99.
- Caney, Simon. "International Distributive Justice." *Political Studies* 49 (2001): 974–97.
- Caney, Simon. *Justice Beyond Borders*. Oxford: Oxford University Press, 2006.
- Cohen, Gerald Allan. *Self-Ownership, Freedom and Equality*. Cambridge: Cambridge University Press, 1995.
- Dworkin, Ronald. *Taking Rights Seriously*. Cambridge MA: Harvard University Press, 1977.
- Fleischacker, Samuel. *A Short History of Distributive Justice*. Harvard: Harvard University Press, 2004.
- Freeman, Samuel, ed. *The Cambridge Companion to Rawls*. Cambridge: Cambridge University Press, 2003.
- Freeman, Samuel. "Reason and Agreement in Social Contract Views." *Philosophy and Public Affairs* 19 (1990): 122–57.

- Freeman, Samuel. *Justice and the Social Contract: Essays on Rawlsian Political Philosophy*. Oxford: Oxford University Press, 2009.
- Freeman, Samuel. *Rawls*. London: Routledge, 2007.
- Hoffman, John. *Sovereignty*. Open University Press, 1998.
- Jackson, Robert, ed. *Sovereignty at the Millennium*. Political Studies Association, Blackwell Publishers, 1999.
- Kuper, Andrew. "Rawlsian Global Justice: Beyond the Law of Peoples to a Cosmopolitan Law of Persons." *Political Theory* 28 (2000): 640–74.
- Kuper, Andrew. "Why Deliberation Cannot Tame Globalization: The Impossibility of a Deliberative Democrat." *Analyse and Kritik* 25 (2003): 176–98.
- Kuper, Andrew. *Democracy Beyond Borders: Justice and Representation in Global Institutions*. Oxford: Oxford University Press, 2006.
- Laski, Harold J. *The Foundations of Sovereignty and Other Essays*. London: George Allen & Unwin Ltd., 1921.
- MacCormick, Neil. "Beyond the Sovereign State." *The Modern Law Review* 56 (1993): 1–18.
- MacCormick, Neil. *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*. Oxford: Oxford University Press, 1999.
- MacIntyre, Alastair. *After Virtue*. Notre Dame Press, 1981.
- Mandle, Jon and Reidy, David A., eds. *The Cambridge Rawls Lexicon*. Cambridge: Cambridge University Press, 2015.
- Mandle, Jon and Reidy, David A., eds. *A Companion to Rawls*. Wiley Blackwell, 2014.
- Martin, Rex and Reidy, David A., eds. *Rawls's Law of Peoples: A Realistic Utopia?* Oxford: Blackwell Publishing, 2006.
- Nozick, Robert. *Anarchy, State and Utopia*. Basic Books, 1974.
- Pogge, Thomas W. "An Egalitarian Law of Peoples." *Philosophy and Public Affairs* 23 (1994): 195–224.
- Pogge, Thomas W. "Cosmopolitanism and Sovereignty." *Ethics* 103 (1992): 48–75.
- Pogge, Thomas W. "Rawls on International Justice." *The Philosophical Quarterly* 51 (2001): 246–53.
- Pogge, Thomas W. "The Incoherence Between Rawls's Theories of Justice." *Fordham Law Review* 72 (2004): 1739–59.
- Pogge, Thomas W. *Realizing Rawls*. Ithaca and London: Cornell University Press: 1989.
- Pogge, Thomas W., ed. *Global Justice*. Oxford: Blackwell Publishing, 2004.
- Pogge, Thomas. *John Rawls: His Life and His Theory of Justice*. Oxford: Oxford University Press, 2007.
- Rawls, John. *A Theory of Justice, Revised Edition*. Oxford: Oxford University Press, 1999.
- Rawls, John. *Justice as Fairness, A Restatement*. Harvard: Harvard University Press, 2003.
- Rawls, John. *Political Liberalism*. New York: Columbia University Press, 2005.
- Rawls, John. *The Law of Peoples*. Harvard: Harvard University Press, 1999.
- Reidy, David A. "Rawls on International Justice." *Political Theory* 32 (2004): 291–319.
- Roemer, John E. *Theories of Distributive Justice*. Harvard: Harvard University Press, 1996.
- Sandel, Michael. *Liberalism and the Limits of Justice*. Cambridge UK: Cambridge University Press, 1982.
- Sen, Amartya. *The Idea of Justice*. Cambridge MA: Harvard University Press, 2009.