

Sovereignty

General Principles

What is *Sovereignty*?

Under current international law, sovereignty is defined as follows:

Sovereignty in the sense of contemporary public international law denotes the basic international legal status of a state that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign state or to foreign law other than public international law¹

It is also defined as the '[u]ltimate authority, held by a person or institution, against which there is no appeal'.²

In other words, *Sovereignty* is the ultimate power, authority and/or jurisdiction over a people and a territory. No other person, group, tribe or state can tell a sovereign entity what to do with its land and/or people. A sovereign entity can decide and administer its own laws, can determine the use of its land and can do pretty much as it pleases, free of external influence (within the limitations of international law).

Sovereignty vs Land Rights & Native Title

Sovereignty is a broader concept than land rights. Land rights are rights awarded by a sovereign entity to some of its members. In other words, you can obtain land rights, but the ultimate authority rests in the hand of the sovereign power. What you can do with that land is limited by the decisions of the sovereign power.

Native Title is just one form of title over the land, it does not give ultimate authority, it does not give sovereignty. You may have Native Title, but you are not free to determine your own laws or how to use your land as you wish.

Sovereignty vs Self Determination

Self-determination is a more imprecise word for sovereignty. Sometimes, it is used as an alternative, while other times it is used to describe a form of 'limited sovereignty' under the sovereign power of someone else. In international law, sovereignty is a more precise term than self-determination.

The origin of the concept of Sovereignty

The concept of sovereignty as it is used in international law today, and as it is used by Australia to justify its authority over the land, derives from the idea of the 'sovereign', the monarch, of medieval Europe. However, today the term is used to identify the ultimate power of a state, regardless of whether there is a monarch or not.

¹ H Steinberger, 'Sovereignty', in Max Planck Institute for Comparative Public Law and International Law, Encyclopedia for Public International Law, vol 10 (North Holland, 1987) 414.

² World Encyclopedia (Oxford University Press, 2008) sovereignty

Who has Sovereignty?

At the moment, Nation-states have sovereignty. For example France, Germany and Australia are '*sovereign entities*', no one can tell them what to do internally (apart from some international law mechanisms).

Sovereign 'entities' vs sovereign 'persons'

Individual persons DO NOT have sovereignty (unless they are absolute rulers like the Pharaoh, but this is not the case anymore anywhere on the planet). They are under the sovereignty of another entity (as mentioned above, of a Nation-state). So, for example, an Australian person is under the sovereign power of Australia. **The term 'sovereign person' is thus a mistaken term and should be avoided.**

How is sovereignty recognised?

Sovereignty is recognised reciprocally. In other words, sovereign entities recognise each other's sovereignty. Currently, in international law Nation-states are members of the United Nations and recognise each other as sovereign entities. France, Germany and Australia, for example, recognise each other's sovereignty, while they do not recognise the sovereignty of other groups within their lands. Therefore, the recognition of sovereignty is related and interdependent, and it is connected to the international arena.

Sovereign 'claims'

The correct term to define who 'has' sovereignty is to say that one group or nation *asserts* or *claims* sovereignty. Another correct way of expressing the idea is to say that sovereignty *is vested in* some figure or group. This means that this figure or groups exercises sovereignty.

How is sovereignty acquired?

In international law, there are very precise ways through which sovereignty is 'acquired' (or, in other words, sovereignty is taken). The three main ones (although there are some minor ones) are:

1. **Conquest:** a territory must be conquered, after a war and subsequent *treaty* of surrender OR complete destruction of the enemy, by a sovereign entity
2. **Cession:** a sovereign entity cedes, through a *treaty*, part or all of its power to another sovereign entity
3. **Settlement:** if a territory is COMPLETELY uninhabited, then the first sovereign entity to settle there acquires that territory

Competing claims to sovereignty – who decides?

If there are two sovereign entities that claim sovereignty and their claims compete with each other (maybe because they are over the same territory), the matter can be resolved through:

- A **treaty**
- **War** (common solution in Europe until World War 2 – not accepted by international community anymore)
- A **decision** made by the *International Court of Justice* (this is the main method employed today)

‘Municipal’ or ‘domestic’ courts (courts that are internal to a sovereign entity, including the High Court of Australia) cannot ‘adjudicate’ (that is, make a decision) on sovereignty. Only international courts (the International Court of Justice) can. This is why the High Court in *Mabo (No 2)* stated that sovereignty is ‘not justiciable’ in a municipal court. In other words, the High Court does not have the authority to make a judgement (of any kind) on the issue of sovereignty.

AUSTRALIA

Who has sovereignty in Australia?

Australia as a nation-state 'claims' sovereignty over all of its territory and its peoples. In Australia, sovereignty 'is vested in' *the Crown in Parliament*. In other words, the Monarch PLUS the Parliament, together, determine and exercise the sovereign power of Australia. The sovereignty of Australia is recognised internationally by all other nation-states and by the United Nations.

ABORIGINAL SOVEREIGNTY

Currently, there are a number of Aboriginal groups and persons that challenge the idea that Australia has absolute end exclusive sovereignty in Australia. Aboriginal people have never relinquished their sovereignty, these groups argue. The consequence of these claims are that:

- Aboriginal tribes/nations 'claim' sovereignty over their traditional land.
 - Aboriginal people claim to be 'under tribal sovereignty', and NOT 'sovereign persons'.
- There are competing sovereign claims over the territory of Australia, which must be resolved (through a treaty and/or a decision of the International Court of Justice).
- The 'claim' to Aboriginal sovereignty by the tribes does not give automatic recognition of said sovereignty, neither in Australia nor in international law. The sovereign claim must be recognised both by Australia and by the international community.
- An appropriate legal argument must be presented to challenge the absolute claim to sovereignty of Australia, against the argument presented by Australia to 'assert' its sovereignty.
- A treaty is sought between the sovereign Aboriginal tribes and Australia to negotiate a solution.