

§ 1 The world order of sovereign territorial states

I. The divided planet and its rudimentary legal world order

1) The principle of the territorial state

- Imagine a group of alien legal scholars visiting Earth to study its legal system, expecting to find a beautiful, harmonious and unified legal system on this beautiful, homogeneous-looking Blue Planet. To these extraterrestrial observers, a visit in the 21st century would quickly reveal a weird *fundamental organisational principle that applies to the entire planet* and is nowhere called into question, regardless of any political, ideological, religious, cultural, economic or social divides: the *principle of the territorial state*. The image emerging from this principle is far less appealing than the beauty of the Blue Planet as seen from afar.
- Although this planet is home to an advanced civilisation with worldwide trade and high mobility, able to travel anywhere on this planet within one day, *legally, neither the planet nor the people living on it constitute a unity*. Mankind is divided into numerous distinct communities (*peoples*) which form independent (*sovereign*) governing entities (*states*). Each state is allocated a delimited portion of the earth's surface (*state territory*), over which it has exclusive power to rule (*state power*), but to which its authority is generally restricted (*territorial principle*).
The habitable surface is divided entirely amongst states - and only amongst states. Individual states may split into several states or several states may merge to form a single state. In 2026, there are approximately 197 States (incl. Taiwan and Kosovo).
- Unlike in medieval Europe and other parts of the world in the past, the concept of rule by virtue of higher law (*sovereign power/public power*), which as such will also be familiar to the visiting alien legal scholars, refers essentially to the rule of the sovereign governing entity (the state) over the territory over which it has control (the state territory). A sovereign public power (which is neither derived from nor dependent on anyone) can only be obtained by states.

2) Public international law as rudimentary legal world order

- As a consequence of the division of the planet's habitable surface amongst independent states, also the law on this planet is divided. Instead of one comprehensive, integrated global legal order there is a *plurality of coexisting heterogeneous legal orders of the individual states*.
- However, the law that constitutes this world order of states and regulates the rights, obligations and relations of the states, serves as a *rudimentary legal world order*, which is *universally recognized*, also as binding law, but essentially confined to the affairs of states and related matters. This law forms the legal basis for the existence of states on this planet and, consequently, also of their distinct legal systems. It is essentially a law of states but traditionally referred to as "public international law" ["droit international public"].
- The fundamental norms of this rudimentary legal world order are mostly mandatory norms (*ius cogens*) of customary international law. Some are also anchored in the *founding treaty* of a planetary organisation that unites almost all states (the *United Nations*). This organisation plays an important role in law-making at the global level. However, it has little own law-making power but rather prepares agreements between the states (*global international treaties*). These treaties are open to all states but binding only on those who choose to sign and ratify them. There is *no such thing as global legislation*. The alien legal scholars visiting Earth would be highly irritated by this legal chaos, which does not fit the harmonious, homogeneous appearance of the Blue Planet from a distance.

II. The prominent role of the territorial state

1) The prominent role of the institution of the state

- In the world order of states, the institution of the territorial state occupies center stage - no other kind of organisation, no corporation, not the planet, the human species, the people or the individual.
 - Traditionally, almost everything important derives from, depends on, is controlled by or at least accepted by the state.
- Public international law builds upon a dominant role of the state in law and politics
 - which is guaranteed internally by the sovereignty of the state (→ see § 2)
 - and protected externally by the *prohibition to threat or use force against a state* (art. 2 No. 4 UN Charter) and the *principle of non-intervention* in domestic affairs (customary intern. law and art. 2 No. 7 UN Charter).
- As a consequence, the state also plays an important role in the economy, society, culture and even science.

2) No guarantee of continued existence for the individual state

- However, public international law does not guarantee the existence of the individual state. Instead, it allows for dynamic development:
- In every state, the community sustaining it (the people) can establish its own state order in accordance with its political and ideological choices and its cultural and social characteristics (*right of peoples to self-determination*; cf. art. 1(1) ICCPR/ICESCR, 1(2) 55 UN Charter).
- Yet, people inhabiting a contiguous settlement area and unwilling to accept the existing order, can, by virtue of their own right to self-determination, form a new, independent community (a new people) and establish a new territorial state in their area in accordance with their own choices. This happens frequently, or there are moves in this direction (→ Aceh, Basque Country, Scotland etc.). To avoid this risk, the individual state must perform well and show consideration for the different needs, cultures and ways of life in all its regions.
 - The formation of new states can happen by *dismemberment* of a state (→ Soviet Union 1991), *secession* from a state (→ East Timor 2002), *transfer* of a territory to another state (→ Alaska 1867) or *merger* to form a larger unification state (→ USA 1788, Germany 1871).

III. Concept and nature of the state

1) The elements of a "state" in the sense of public international law

- the THREE ELEMENTS DOCTRINE of GEORG JELLINEK (Allgemeine Staatslehre, 1900, p.128 ff.)

a) State territory

- only territorial collectivities can be a state
 - no other public institutions, corporations, associations of persons or ethnic groups (tribes, nations etc.)
- the state territory must be a natural part of the Earth's surface
 - no artificial islands or oil platforms
- the problem of the *sinking island states*
 - island states in the Pacific and Indian Oceans losing their state territory by flooding caused by the rise of the sea level as a result of climate change
 - concerned states are victims but have not contributed themselves to climate change
 - ONGOING DISCUSSION, BUT GROWING CONSENSUS: no subsequent loss of the legal status as states

b) State people

- the totality of the citizens of the state
- can be but does not need to be a "nation" in the ethnical sense
- a *community of common destiny* [Schicksalsgemeinschaft]

c) State power

- must be real
- must not vanish permanently (→ failed state; in the past discussed for Somalia)

2) Sovereignty as a consequence, not precondition of the status as a state

- a state is not a state because it is sovereign but it is sovereign because it is a state
 - often confused in European legal and political science literature
 - moreover, do not confuse the sovereignty *of* the state with the sovereignty (of the people) *within* a (democratic) state!

3) The different basic understandings of the state

- totalitarian and liberal (e.g. theories of power, MACCHIAVELLI, CARL SCHMITT)
- philosophical and religious (e.g. Islamism)
- social contract doctrines (e.g. THOMAS HOBBS, JOHN LOCKE, JEAN-JACQUES ROUSSEAU)
- new approaches of the 20th century (HANS KELSEN, RUDOLF SMEND, HERMAN HELLER)
- the state as a legal person (OTTO VON GIERKE; prevailing opinion, except in UK)

4) The different forms of state according to the general theory of state

- differentiation according to the historical basic models: monarchy and republic
- differentiation according to the form of government: monocracy/despotism, aristocracy/oligarchy and democracy/ochlocracy
- differentiation according to the vertical structure: unitary state and federal state

IV. The historical relativity of the world order of sovereign states

- The world order of states is often taken for granted, but this perspective is shortsighted and ignores history:
- Although since ancient times there have always been some political entities on this planet that fall under the definition of the state, the world order of states has developed only gradually since the late Renaissance and, in particular, the Peace of Westphalia (1648).
 - Prior to that, Europe had been shaped for more than thousand years by the *feudal system*, where *rule* was not *based on a* controlled territory but on a *feudal relationship* between the feudal lord and the feudal vassal.
 - In large parts of the pre-colonial world, in particular in *Africa*, rule and law were not linked to a controlled territory but to the individual's *tribal affiliation* (ethnic affiliation).
- Only after World War II did the world order of states take on its present form
 - the present form brought some significant innovations:
 - decolonisation (→ no colonial or imperial powers recognised anymore)
 - prohibition of the threat or use of force against a state
 - protection of the state's existence and territorial integrity against external threats (→ ban on annexation)
 - principle of non-intervention into domestic affairs
- This world order relies on resilient governing entities of sedentary, locally-rooted communities that are capable to act also under difficult conditions. *In the event of* dramatic global changes that force communities to leave their inhospitable territory and cause *uncontrollable large-scale mass migration* (climate change, environmental disasters, a global nuclear war or other dystopian scenarios), this vital precondition may not be met anymore, and the presently 197 states may merge into a few larger ones, relinquish their sovereignty to powerful superstructures - or simply perish.
 - The example of the fall of the (Western) Roman Empire in 476 and the long period of chaos following it demonstrate that fundamental legal structures on our planet are not necessarily permanent.