
The state's unabandoned claim to be the center of the legal universe

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Since the period following World War I, the science of international law has endeavored to “relativize” the importance and role of the “sovereign state” in international law, understanding the state as a partial legal order in the framework of a universal legal order. However, until today positive international law hardly reflects that transformation. Instead, it has perpetuated the centrality of the sovereign state in the world of law. The present article points to a number of features concerning the legal relationships between that state and other legal communities, both subnational and supranational, in which the continued central role of the state is manifesting itself. The article concludes by reflecting on possible reasons accounting for the center stage still assumed by the sovereign state, in spite of developments like the expansion of the scope of international law or the growth of international institutions.

1. The relativization of the “sovereign state” in legal science

I will begin my brief observations on “polity nesting” from the perspective of public international law with three quotations from Hans Kelsen about the place of the (sovereign) state in a global structure of public law:

So long as there is no higher legal order above that of the state, the state itself is the highest, the sovereign legal order or legal community. [...]

But as soon as the international legal order rises above the legal orders of the several states, the state cannot any longer be conceived of as a sovereign but only as a relatively highest legal order, that is, as a legal order only subject to international law, or directly subordinated to international law.¹

The state is therefore a relatively centralised partial legal order which is directly subordinated to international law. The territorial and temporal scope of application of this legal order is limited by international law, while the material (or substantial) scope is characterised by a claim to totality only confined by a reservation in favour of international law.²

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¹ HANS KELSEN, REINE RECHTSLEHRE: EINLEITUNG IN DIE RECHTSWISSENSCHAFTLICHE PROBLEMATIK 119 (1934) (my translation).

² *Id.* at 150 (my translation).

The Pure Theory of Law (*Reine Rechtslehre*) relativizes the state. It perceives the state as a legal intermediate stage (*rechtliche Zwischenstufe*), which leads to the following understanding: There is a continuous sequence of legal structures or entities which gradually merge into each other, leading from the universal community of international law which encompasses all states to the legal communities incorporated into the state.³

The contemporary science of public international law has largely accepted these propositions of Kelsen's legal theory. Today, the "sovereign state" is regarded as a legal entity the status and competences of which are defined by international law, that is, by international legal rules made and agreed upon by the international community (of states). As part of a sequence of legal entities (whether thought of as vertically structured or not), the sovereign state is seen as the entity enjoying the relatively greatest amount of legal autonomy or self-determination. From a formal perspective, this autonomy follows from the fact that the state is only subordinate to international law (*völkerrechtsunmittelbar*, as Kelsen said in the German original), while from a substantive perspective, it follows from the breadth and magnitude of its competences in comparison with those of other subjects of international and domestic law. In that sense, a "relativization" of the sovereign state as (only) a component of a broader universal legal order has become generally accepted—a relativization which, at the time of Kelsen's writings of the 1920s and 1930s, was rejected by a clear majority of legal scholars. With a phrase coined in 1923 by one of Kelsen's students, Alfred Verdross, what has become accepted in the period following World War II is the unity of a legal view of the world based on the assumption of an international legal constitution.⁴ There is no doubt that the legal order established by the United Nations Charter strongly contributed to that fundamental change of attitude.

That change is not limited to legal scholarship. Many state constitutions today recognize, or are interpreted by courts as recognizing, a membership of the (respective) state in an international legal community, a membership the importance and meaning of which goes beyond an obligation to observe the rules of international law but extends to an acceptance of a circumscribed place and role for the state, defined by international law, in a universal legal order.

However, almost 100 years since it was formulated, Kelsen's (and others') project of "relativizing" the state—of understanding it as a *partial* legal order in the framework of a universal legal order—has had only a limited success in positive international law. Far from representing only one of several "intermediate stages" in a "continuous sequence of legal structures or entities which gradually merge into each other,"⁵ the state, to borrow language from the framework document of the Law and Polity Project, still "assumes centre stage" in the making, applying, and enforcing of law, both domestic and international. It continues to be "the overwhelmingly important form of political organisation in international society."⁶ The legal situation captured

³ *Id.* at 153 (my translation).

⁴ See ALFRED VERDROSS, *DIE EINHEIT DES RECHTLICHEN WELTBILDES AUF GRUNDLAGE DER VÖLKERRECHTSVERFASSUNG* (1923).

⁵ Kelsen, *supra* note 1, at 153.

⁶ See WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 365 (1964).

by Hermann Mosler in his 1974 lectures in The Hague has not changed: "Independent states are not only the necessary and primary subjects of the international community—one can also call them its constituent members. The constituent members of a given society [. . .] determine its political shape and thus constitute the society as a community."⁷

This continued centrality of the sovereign state in the world of law manifests itself in a number of features concerning the legal relationships between state and other, subnational and supranational legal communities, some of which are addressed in what follows.

2. The centrality of state law

Legal entities or communities within a particular sovereign state (in Kelsen's language, *die dem Staat eingegliederten Rechtsgemeinschaften*) generally continue to be legally dependent on the respective state in the sense that not only their rights and competences but also their legal existence depend on the state's will as expressed in constitutional rules or legislation. This holds true for territorially defined local communities and municipalities (including so-called mega-cities or global cities) as well as for associations of persons with a public law status. The same dependence, amounting to legal subordination, applies in general also to legal and political communities that are constitutive units of a federal or a decentralized state. Usually, the respective federal or central state constitution not only governs their legislative, administrative, and judicial competences but also decides on their very existence, as an amendment to the constitution may (typically) abolish the constitutive unit. Even if the constitution guarantees the existence of a unit, thus protecting it against its involuntary abolition by a decision at the federal or central state level, the respective constitutional provision itself could normally be amended, or, in the last resort, the constitution as such could be repealed, either in accordance with, or in violation of, its own amendment procedures. General international law does not protect a scope of competences of constitutive units of federal or decentralized states, as it does not protect their very existence. It still regards the internal organization of a state as a matter basically within the state's domestic jurisdiction.

It is still only the sovereign state which enjoys a "natural" legal personality in international law. By contrast, the existence and the scope of an international legal personality of legal entities or communities within a sovereign state, as for instance expressed in an international treaty-making capacity, depend on the will of that state, usually expressed in its constitution.⁸ Only that limited legal personality conceded by the sovereign state into which an entity is integrated may then be recognized by other sovereign states or the international community as represented, in particular, by the United Nations.

⁷ See HERMANN MOSLER, *THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY* 42 (1980).

⁸ For a comparative analysis of the respective constitutional law of the federal states in Europe, see BARDO FASSBENDER, *DER OFFENE BUNDESSTAAT* (2007).

In the same way that entities integrated into, or constituting, a sovereign state enjoy legal autonomy and legal capacity only to the extent it is granted by that state, the existence of international (intergovernmental) organizations has remained dependent on the will of states (i.e., their member states). The only difference is that in the case of entities existing within a particular state the decisive will is that of the respective state alone whereas in the case of international organizations at least two sovereign states must agree to create them and to endow them with certain rights. The states that established a specific organization are free to abolish it, the usual method being the termination of the founding treaty; this is possible even if the treaty in question does not contain a provision concerning termination.⁹ International law does not protect the right to existence of any particular organization. The same rules still apply to so-called supranational organizations, like the European Union, which, it was believed, would play a major role in overcoming the traditional state-centricity of international law.

Although there has been, in the period following World War II, an enlargement of the circle of legal persons allowed to become a subject of international law, the capacity of such persons other than sovereign states to participate in the making and changing of rules of international law has remained very limited. Intergovernmental organizations endowed with international legal personality are competent to make international treaties, albeit only within the area of their specific purposes and functions, while individuals so far have been denied such a right, notwithstanding their general recognition as persons of international law because of their entitlement to human rights guaranteed by international law. As regards international customary law governing interstate relations, states have retained complete control over its creation and amendment.

In his *Reine Rechtslehre* of 1934, Kelsen attacked the dualistic conception of the relationship between domestic law and international law as incompatible with the idea of international law as a legal order binding on states. Behind the dualistic theory, he rightly saw the political intention to assert and maintain the notion of state sovereignty, that is the notion of the state (to be more precise, of a particular state) as the absolutely highest legal community.¹⁰ Eighty years later, the constitutional law of a majority of states still sees the relationship between international law and the respective domestic law in terms of the dualistic conception, and even those states that formally acknowledge a monistic conception of that relationship in practice tend to give precedence to their own constitutional or statutory norms in the case of a conflict between such a norm and a rule of international law. As Antonio Cassese noted, “[t]he international legal system is still powerless in its endeavour to penetrate national legal systems and make its commands operative there.”¹¹

States have been reluctant to establish a working legal mechanism through which international legal obligations accepted by them could be enforced by an impartial international institution. In particular, there is still no general compulsory jurisdiction of an

⁹ See Vienna Convention on the Law of Treaties, art. 54 lit.b, May 22, 1969, 1155 U.N.T.S. 331.

¹⁰ Kelsen, *supra* note 1, at 141.

¹¹ See Antonio Cassese, *Towards a Moderate Monism: Could International Rules Eventually Acquire the Force to Invalidate Inconsistent National Laws?* in *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW* 187, 190 (Antonio Cassese ed., 2012).

international court for interstate disputes. States have retained the freedom to accept or not to accept the jurisdiction of a particular court of justice in a specific case. If, on that basis, a court issues a judgment, there is no international mechanism available to implement the judgment against the will of the state concerned, or to sanction noncompliance with the judgment.¹² As a result, the principal method of settling international disputes is still diplomacy and intergovernmental negotiations—and, in fact, the use of military force, as in the beginnings of modern international law in the sixteenth century.

Legal communities other than sovereign states still lack any guaranteed status defined by general international law. National, ethnic, or religious minorities, for instance, can only rely on rights if such rights were accorded to them by states in particular treaties to which they are not a party. In the same way, there is no agreed definition of the substance of the so-called internal right of self-determination of peoples beyond the general ideas of non-discrimination and representation in the political organs of the state in which a “people” lives. As a consequence, subnational communities striving for an internationally secured status of autonomy may seek secession from the state to which they belong as the only practicable (but highly risky) pathway.

Only sovereign states are entitled to make legally binding decisions about the distribution of the territory of the Earth. A state can acquire territory; it also can relinquish it or transfer it to another state, within rather weak limitations arising from the right of peoples to self-determination. No other subject of international law can claim or possess territorial sovereignty, that is, sovereignty in relation to a particular territory understood as “the right to exercise therein, to the exclusion of any other state, the functions of a state.”¹³ “[T]erritorial sovereignty belongs always to one, or in exceptional circumstances to several states.”¹⁴ The most comprehensive right in relation to territory which states so far have conceded to an international organization is “control and authority.”¹⁵

An individual is either a national of a sovereign state or she is a stateless person.¹⁶ Tellingly, in Spanish such a person is called *apátrida*. Every state is free to decide about

¹² U.N. Charter art. 94, para. 2 stipulates that, if a party to a case decided by the International Court of Justice fails to perform the obligations incumbent upon it under a judgment by the Court, the other party may have recourse to the Security Council. But it is entirely at the discretion of the Council whether to “make recommendations or decide upon measures to be taken to give effect to the judgment,” and so far, the Council has done neither.

¹³ *Island of Palmas Case (Netherlands/United States)*, Permanent Court of Arbitration (1928) (Max Huber, Arbitrator), 2 U.N. Rep. Int’l Arbitral Awards 829, 838.

¹⁴ *Id.*

¹⁵ See Agreement between the United Nations and the United States regarding the Headquarters of the United Nations of June 26, 1947, 11 U.N.T.S. 147, art. III, secs. 7(a), (b): “The headquarters district shall be under the control and authority of the United Nations as provided in this agreement. Except as otherwise provided in this agreement or in the General Convention, the federal, state and local law of the United States shall apply within the headquarters district.” See also *id.*, art. IX, sec. 22(a): “The United Nations shall not dispose of all or any part of the land owned by it in the headquarters district without the consent of the United States.”

¹⁶ See Convention relating to the Status of Stateless Persons of September 28, 1954, 360 U.N.T.S. 5158, art. 1, para. 1 “[T]he term ‘stateless person’ means a person who is not considered as a national by any state under the operation of its law.” The Convention, which seeks to improve the legal status of stateless persons, today has 89 state parties (compared to 193 Member states of the United Nations), 35 of which formulated reservations; it has not been amended with a view to further advances since it was adopted.

its nationality law, in particular the conditions which must be met by a person to become a national of the respective state. No political community other than a state can grant a person nationality which is the main basis for the enjoyment of civil and political rights, the movement across national borders, and diplomatic and consular protection.

Only a sovereign state has the “inherent right of individual or collective self-defence”¹⁷ in the case of an armed attack. As a consequence, a state is entitled to prepare itself for defending its territorial integrity or political independence by arming itself and maintaining a standing army.¹⁸ This is a fact of tremendous importance considering the ineffectiveness and unreliability of the system of collective security devised by the UN Charter.

3. Understanding the centrality of the state

One might ask what reasons account for the legal situation so described. Why exactly does the sovereign state still assume that kind of center stage, with a perseverance which seems to be at odds with developments like the expansion in the scope of international law and the growth of international institutions? Is national sentiment (understood as a deeply felt relation of a people to a particular state, more intense than the attachment to any other community or supranational institution) the decisive factor? It would seem that is not the case, as this legal situation was mainly brought forth, or upheld, in the last decades by “Western” states, that is the states of the Northern hemisphere, which in the era following World War II renounced nationalism in favor of a spirit of international cooperation and solidarity. Would the present situation be different had not the same group of states lost its control over the making of universal international law as a consequence of decolonization? In other words, have Western states supported traditional state sovereignty to shield themselves from an international law the substance of which they no longer could prescribe?

A different explanation could proceed from Kelsen’s description of the state as “an apparatus of officials” (*der Staat als Apparat beamteter Organe*), including the judiciary.¹⁹ Is it that apparatus, or the governing elites behind it, which defends the central role of the state as the basis of their own power? Or is that holding on to the central role of the state an expression of inertia, an unwillingness to champion a change of the law in the face of many obstacles, domestic and international?²⁰

¹⁷ U.N. Charter art. 51.

¹⁸ Global military expenditure in 2015 was an estimated US\$1676 billion. See SIPRI Fact Sheet April 2016 (Stockholm International Peace Research Institute ed.).

¹⁹ Kelsen, *supra* note 1, at 121.

²⁰ As Vaughan Lowe observed: “We speak of states acting. States do not, of course, act: people act for them. Most of the time the people acting for states are not tyrants or charismatic leaders; they are ordinary men and women holding down jobs in the civil service and hoping to be promoted, or at least not to be sacked. [...] [B]ecause bureaucracies are run by those who have been promoted for their skills at playing by the rules, there is an immense inertial attraction in all government departments to playing by the rules.” See VAUGHAN LOWE, *INTERNATIONAL LAW* 20 et seq. (2007).

But in seeking a deeper explanation for the enduring centrality of the state in the international legal order, we must take into account the close relationship between the emergence of the sovereign state and that of modern international law. At the beginning of the modern European state system, the notion of sovereignty was used, if not invented, to defend the independence of the French King from the Pope and the Emperor of the Holy Roman Empire, and to legitimize the supremacy of his orders over those of particularistic powers in what became France.²¹ Accordingly, sovereignty was supporting, on the one hand, claims made against “foreign” or external powers, and, on the other hand, claims made against “intermediate” powers within a certain territory, independent in a legal or factual sense, which an emerging “central” power sought to subjugate. The modern centralized territorial state appeared in Europe essentially due to the fact that the idea of (internal) sovereignty found favor and became accepted in state practice. The entire legal order, including the powers of “public” persons and communities subordinated to the central authority, was constructed as deriving from the will of the sovereign. The medieval concept of personal jurisdiction was augmented by a territorial jurisdiction, consolidating fragmented regal rights into a unified sovereign power as a source of comprehensive and exclusive authority.

“Statehood,” Colin Warbrick wrote, “is foundational of international law, not the other way round.”²² If modern international law, as it began in the sixteenth century, was indeed based on a system of sovereign states, and if it was the key feature of sovereignty to deny any “higher” authority of external powers and, at the same time, to subject to the sovereign’s rule formerly autonomous powers within the state, it is possible to see why, in the present day, states are still unwilling to concede a legal position similar to their own to international organizations, on the one hand, or subnational entities, on the other.

4. The endurance of the sovereign state

One must conclude that in the past 50 years or so the legal position of the “sovereign state” in international law, and its role in the creation, application, and enforcement of law, as compared to that of other legal communities within states and “above” states, has not changed in the way often implied in textbooks and proclaimed in constitutions and international documents. One is even tempted to suspect that much of the talk about the “waning of the sovereign state”²³ has been a camouflage, co-produced by politics and legal science.

²¹ For this and the following, see, with further references, Bardo Fassbender, *Sovereignty and Constitutionalism in International Law*, in *SOVEREIGNTY IN TRANSITION* 115, 116 et seq. (Neil Walker ed., 2003).

²² See Colin Warbrick, *States and Recognition in International Law*, in *INTERNATIONAL LAW* 217, 218 (Malcolm D. Evans ed., 2d ed. 2006).

²³ The phrase is taken from Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?* 4 EUR. J. INT’L L. 447 (1993).

But does it really matter that in positive international law the central position of the state has largely remained intact? Or does this state of legal affairs only obscure a real shift of power in international affairs to the benefit of non-public entities, in particular global economic actors? In part, I believe, this is true. On the other hand, there are situations in which in fact the dominant position of the state *does* matter: Scotland, for instance, can neither veto the withdrawal of the United Kingdom from the European Union nor remain in the EU against the will of the UK. Catalonia cannot become independent, or even increase its autonomy, if Spain is not in favor. The EU does not have a “right to exist” because its founding treaty, the Treaty on the European Union, can be terminated at any time by consent of the member states. A federal state can, subject only to its own constitutional limitations, turn into a unitary state, thereby abolishing the legal existence of the several units which made up the federation.

It is true that since the end of World War II states have been ready to accept many changes in international law leading to an increased role of international organizations and to limitations of their independent decision-making powers. Governments have been “pushed towards the pursuit of common needs and goals that can be achieved only by a steadily intensifying degree of international organisation.”²⁴ Nowhere has this development been as intense as in (Western) Europe. However, the legal situation described above tells us that this acceptance of change was only a qualified one, made with the reservation of reversibility. A vivid expression of that reservation in the context of the European integration has been article 50 of the EU Treaty, as amended by the Treaty of Lisbon of 2007, concerning the right of every member state to withdraw from the EU. In other words, whatever powers a sovereign state has shared with other states, or pooled in an international or supranational organization, it can lawfully reclaim and take back any time.

The founding of the United Nations in the wake of the devastating experience of World War II opened a window of opportunity which would have made possible a reconstruction of the architecture of international law to the effect that the position of the sovereign state be relativized in the sense of Kelsen’s theory.²⁵ Perhaps there was another such window, if smaller, after the collapse of the Soviet Union and the end of the Cold War. But both opportunities were missed, intentionally and unintentionally. It is unlikely that a similar occasion will arise in the foreseeable future. To the contrary, many signs point to a renationalization of political and economic affairs. More and more people see their respective nation state, and not the European Union or another international institution, as the only reliable “area of freedom, security and justice” which must be shielded against foreign or international interference or disturbance. For the time being, the sovereign state will remain the center of the legal universe. In international law, a Copernican revolution is yet to come.

²⁴ See FRIEDMANN, *supra* note 6, at 293 et seq.

²⁵ See *supra* text accompanying notes 1, 2 and 3.