



## UNIT 6. THE STATE AS AN INTERNATIONAL SUBJECT

1. The State and its constitutive elements
2. State sovereignty and its corollaries: equality, non-intervention, and sovereign immunity
3. The dynamics of the State
4. The state bodies in charge of international relations: The Head of State, the Head of Government, and the Minister of Foreign Affairs

# THE STATE AND ITS CONSTITUTIVE ELEMENTS

- A. General aspects
- B. The constitutive elements of the state

## A. GENERAL ASPECTS

- **The state is a complex reality that can be examined from various perspectives: sociological, political, and legal.**
  - Form of political organization arose with the European monarchies of the 15th and 16th centuries and its emergence is historically linked to the birth of international law.
  - Since Treaty of Westphalia, the sovereign state is the fundamental element of international society and the quintessential subject of international law
- **Doctrine definition:** the state is "an entity endowed with a territory, a population and a government, which is sovereign and independent, in the sense that it is not subordinate to any other state or entity, depending directly on international law".
- Matter of fact not of law: principle of effectiveness important role. The birth of states is a relatively constant process that continues to occur in a variety of ways in today's world: because of a resolution of an international organization; by virtue of an international agreement; because of the dismemberment or dissolution of a state, or because of a series of armed conflicts through the exercise of the right of self-determination of the peoples; or through unilateral declaration of independence supported by the major powers.
- Diversity of states but they have the same legal status under international law as entities endowed with sovereignty and defined by the principle of sovereign equality.

- Primary subject of international law and occupies a central place in this order, since it is the pivot of most international law.
  - Primitive conception: only subject. Excessively dogmatic and narrow.
  - Today's reality: the state is not the only subject of international law. In today's world, alongside states, the primary subjects of international law, there coexist other established subjects, international organizations, which we might call "secondary" (created by the states themselves). These have specific problems.

## **B. THE CONSTITUTIVE ELEMENTS OF THE STATE**

- For international law, the existence of a state results from the concurrence of three constitutive elements: territory; population; and political-legal organization.
  - Example: German-Polish Mixed Arbitral Tribunal stated in its Judgment of 1 August 1929: "For a state to exist, it requires as indispensable a territory, a human collectivity and a public power exercised over this collectivity and this territory".
- **The territory:**
  - Territorially based entity (IO do not possess territory): the territory constitutes the support or physical base on which the population is settled and over which it exercises its sovereignty. IL is indifferent to dimensions or configuration of the territory (micro-states).
  - It comprises:
    - Terrestrial space delimited by its borders.
    - Marine spaces subject to its sovereignty.
    - National airspace.
  - The territory is delimited by borders, which must be well determined and have a certain firmness. International jurisprudence has pointed out that for the existence of a state "it is sufficient for the territory to be of adequate consistency, even if its frontiers have not yet been precisely delimited, and that the state is currently exercising its independent public power over that territory".

- The territory of the state is inviolable against any external action.
  - UN Charter of the United Nations prohibition on the use or threat of force.
  - Resolution 2625 (XXV) of 24 October 1970.

### ➤ **Population**

- Definition: The human community established on the territory of the state and over which the state exercises its authority. The number, density, homogeneous character, or the sedentary or nomadic character of the inhabitants of the state is immaterial in IL.
  - Example: ICJ 1975 Advisory Opinion on Western Sahara.
- Composition: Persons politically linked to the state by the nexus of nationality (the citizens) and, in a broad sense, it also includes foreigners residing in the territory.

### ➤ **The political and legal organization:**

- A state must have a governmental and administrative structure that makes possible the effective exercise of state functions in the internal and international order.
  - It must also have a legal system capable of establishing the rights and obligations of citizens and of effectively ensuring the exercise of these rights and obligations.
- The form of organization of the state (unitary, federal, autonomous, etc.) is irrelevant for international law, which recognizes the principle of self-organization of the state.

- Example: ICJ Advisory Opinion 1975, concerning the Western Sahara case
- However, the political organization and its exercise ad intra and ad extra must be effective and guarantee the fulfillment of the state's own functions.
  - ❖ Art. 4 UN Charter: The membership requires a state "able to carry out" the obligations set out in the charter.
  - ❖ Doctrine: authority in its territory and over the state's population;
    - the government must guarantee:
      - ✓ the necessary organic mechanisms to maintain relations with other states and with the other subjects of the international order.
      - ✓ the necessary organs to exercise the legislative, executive, and judicial functions.
      - ✓ to ensure the control of its economy, national security, and other public services.
      - ✓ capable of ensuring the stability of international relations vis-à-vis the other states.
- Traditionally, the political status of the government was indifferent to international law: Resolution 2625 (XXV) of 1970: right to choose freely the form of government as an essential element of the principle of sovereign equality and non-intervention in internal affairs.

- Today, there is universal consensus on the protection of human rights, political democracy, and the rule of law: but it cannot yet be affirmed that the democratic character of government is a condition for the existence of the state.

# STATE SOVEREIGNTY AND ITS COROLLARIES: EQUALITY, NON- INTERVENTION, AND SOVEREIGN IMMUNITY

- A. General remarks
- B. Content of sovereignty: the powers of the state
- C. Corollaries of state sovereignty

## A. GENERAL REMARKS

- The international status of the state is marked by the recognition of its **sovereignty**, which is a constitutional principle of the legal system.
- Definition: it is the characteristic and exclusive attribute of the state.
  - In the internal sphere: supreme (summa potestas) and complete (plenitudo potestatis) authority.
  - At the international level: absence of subjection to a power superior to that of the state itself and is equivalent to independence. It implies exclusive responsibility for the exercise of authority over a given territory to the exclusion of any other state.
- Content: entails a broad sphere of powers (state responsibilities) which it can exercise independently and autonomously, and duties:
  - Exclusive powers for the exercise of legislative, executive, and jurisdictional powers in the domestic sphere.
  - Permanent sovereignty over natural resources and wealth and over the economic activities carried out in its territory. GA Resolution 1803 (XVII) of 14 December 1962.
  - Sovereign powers to decide freely on its external action, with no limitations other than those established by international law.
  - Duty: the need to respect the sovereignty of the other states and the requirements introduced for this purpose by international law.

## **B. CONTENT OF SOVERIGNTY: POWERS OF THE STATE**

### ***B.1. NATURE AND SCOPE OF STATE POWERS***

- Powers of the state: domestically and internationally.
  - In its internal dimension: power to legislate for the whole of its territory, the exercise of jurisdiction by its courts of justice, and the monopoly of coercive power within its territory.
  - In its external dimension: freedom to conduct its international relations independently and without being subject to requirements other than those deriving from international law itself.
- State powers:
  - original or inherent character (sovereignty), which constitute an essential attribute recognized by international law.
  - Discretionary: they can be exercised freely without interference from the other subjects of international law. Effect:
    - Existence of powers that have not been regulated by international law and therefore belong to the internal jurisdiction: *domaine réservé* of the state and "exclusive powers" (an autonomous power of decision).
      - ❖ Art. 2.7 UN Charter
  - Initially full: general scope and not restricted by the principle of specialty.

## ***B.2. LIMITS TO THE EXERCISE OF STATE POWERS***

- The powers of the state are subject in their exercise to certain limits set by international law:
  - PCIJ Lotus case of 1927, the powers of the state cannot be exercised in the territory of another state: “In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention”.
  - Limited by obligations that have been freely assumed with respect to specific matters: PCIJ Wimbledon case of 1923 “The right to enter into international agreements is an attribute of state sovereignty.”
  - Limitation of the so-called “regulated powers” (powers which under international law are subject to a restrictive regulation to ensure their compatibility with the powers of other states or with the collective interests of the international community).
    - Process of progressive reduction of original powers.
    - International organizations / Human rights developments.

## **C. COROLLARIES OF STATE SOVERIGNTY**

### ***C.1. SOVEREIGN EQUALITY***

- Fundamental principle of IL
  - Article 2.1 of the Charter of the United Nations.
  - Developed in GA Resolution 2625 (XXV) of 24 October 1970: All states enjoy sovereign equality. They have equal rights and equal duties and are equal members of the international community, notwithstanding differences of an economic, social, political, or other nature.
- It comprises the following elements:
  - States are legally equal;
  - Each state enjoys the rights inherent to full sovereignty;
  - Each state has the duty to respect the personality of other states;
  - The territorial integrity and political independence of a state are inviolable;
  - Each state has the right to freely choose and carry out its political, social, economic and cultural system;
  - Each state has the duty to comply fully and in good faith with its international obligations and to live in peace.
- Compatible with certain treaty derogations that admit disparities of treatment in favor of certain states:

- Privileges accorded to some states by granting them a pre-eminent position in certain areas (the right of "veto" of the permanent members of the Security Council).
- Practices of positive discrimination in favor of certain states suffering from a structural situation of inequality or vulnerability.
  - Advantages of developing countries in the World Trade Organization system.
  - The special status of landlocked or geographically disadvantaged states.
  - Principle of "common but differentiated responsibilities" in international environmental law.

## **C.2. NON-INTERVENTION IN INTERNAL AFFAIRS**

- The principle of the sovereign equality of states implies the obligation not to intervene in matters within the domestic jurisdiction of other states.
  - ICJ Judgment of 9 April 1949 Case of the Straits of Corfu
  - Proclaimed by GA Resolution 2131 (XX) of 21 December 1965 "Declaration on the Inadmissibility of Intervention in the Internal Affairs of states and the Protection of their Independence and Sovereignty".
  - Content of this principle specified in Resolution 2625 (XXV) of 24 October 1970: No state or group of states has the right to intervene directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state: armed intervention, other form of interference or threat against the personality of the state or the political, economic and cultural elements that constitute it, are violations of international law.

- Analysis by ICJ Judgment of 27 June 1986 concerning the case of military and paramilitary activities in and against Nicaragua:
  - Principle of customary international law.
  - This principle prohibits any state or group of states from intervening directly or indirectly in the internal affairs of another state.
    - matters in respect of which the principle of sovereignty of states recognizes their right to decide freely.
- Recent times: trend towards the introduction of certain exceptions to the prohibition of intervention in the internal affairs of other states
  - assistance, interference, or "humanitarian intervention".
  - The "responsibility to protect" populations when the territorial state does not duly fulfill its duties in this respect: reaffirmation of the obligation of states to be responsible for the well-being of their populations and to assist the United Nations in protecting populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.

### **C.3. SOVEREIGN IMMUNITY OF THE STATE**

- A state may not be subjected against its will to the judicial (immunity from jurisdiction) or coercive (immunity from execution) powers of another state without its consent: *par inter pares no habet imperium*.

- Body of customary rules:
  - Absolute theory of immunity: the courts of a state cannot exercise jurisdiction against a foreign state without its consent or take enforcement measures against it.
  - Relative theory of immunity: distinguishes between acts of the state performed in the exercise of its sovereign powers (iure imperii acts - state immunity) and those performed in the context of civil and commercial activities (iure gestionis acts).
    - This relaxation also begins with respect to the immunity of execution of the foreign state.
- ICJ: in favor of maintaining the immunity of the foreign state from jurisdiction and enforcement of civil claims brought in national courts alleging a violation of peremptory norms (ius cogens).
  - Judgment of 3 February 2012 concerning state jurisdictional immunities: *"A state is not deprived of immunity merely because it is accused of serious violations of international human rights law or the international law of armed conflict that could constitute war crimes or crimes against humanity"*.
- ILC: United Nations Convention on Jurisdictional Immunities of States and their Property of 2 December 2004 (not in force, missing eight parties).

## DYNAMICS OF THE STATE

- A. Identity and continuity of the state
- B. Birth and recognition of new states
- C. Political transformation: recognition of governments
- D. Territorial transformations: the succession of states

## **A. IDENTITY AND CONTINUITY OF THE STATE**

- States are social bodies subjects to historical dynamics: changes and modifications ("transformations of the state") that may affect its various component elements (population, territory, and government) and are of interest to international law when they affect its relations with other states.
- General principle relating to the transformations of the state: principle of "identity and continuity" of the state: except in cases where the state is totally extinguished, the state entity remains identical for international law despite changes.
  - Application in cases of revolutions (changes in governing regimes).
- Rationale: do not alter the international status of the state or affect the persistence of the rights and obligations established under international law.

## **B. BIRTH AND RECOGNITION OF NEW STATES**

- Emergences of new states: colonial emancipation, dismemberment or splitting of another state, unification of states, etc.
- Other members of the international community reaction: recognition or non-recognition of the new state.

### ***B.1. CONCEPT AND MODALITIES OF RECOGNITION***

- Doctrinal (Institute of IL) definition: free act by which one or more states declare the existence on a given territory of a politically organized human society, independent of any other existing state, capable of observing the prescriptions of international law, and by which they consequently express their willingness to consider it as a member of the international community.
- Modalities:
  - Expressly, by means of a specific and formal declaration of recognition.
  - Tacitly or implicitly, by means of other acts implying recognition of the state (complex question).
  - Cases of (mis)so-called "collective" or concerted recognition: a group of states have agreed on the conduct to be followed with respect to the recognition of new states in each case (a concerted act adopting criteria for the recognition, which will then materialize through individual recognition by each of the states).

## **B.2. DISCRETIONARY NATURE OF RECOGNITION**

- It is a free act because it is within the discretionary power of the state with total independence and based on criteria of opportunity.
  - Political nature.
  - Evolution of IL: limit discretion in matters of recognition.
- Implications of principle prohibiting recourse to the threat or use of force against the territorial integrity or political independence of any state, or in any manner incompatible with the purposes of the United Nations.

*Ex: Declaration on 15 November 1983, by the Turkish community in the northern part of Cyprus as an independent state under the name "Turkish Republic of Northern Cyprus".*

## **B.3. DECLARATORY NATURE OF RECOGNITION**

- The recognition does not have a constitutive value (it does not create the state being recognized) but is merely declaratory, since it merely states that the state exists.
  - Existence of the state is governed by the principle of effectiveness, precedes recognition and does not depend on it.
  - The state exists when a government exercises its authority over a given territory and population, regardless of its recognition or non-recognition by other states.

- Recognition does not create the recognized state, but simply expresses the acceptance of its existence by the recognizing state.
- However, the effects of recognition are not inconsequential.

## C. POLITICAL TRANSFORMATIONS: RECOGNITION OF GOVERNMENTS

- General rule: changes in the regime of government do not affect the international status of the state.
- However, in cases where a revolutionary change in the power structure occurs within a state, the question of "recognition of governments" often arises in practice.
  - Third states are free to decide whether to recognize the de facto government.
  - Attempts have been made in international practice to subject this process to predetermined criteria or guidelines:
    - "legitimacy" criteria.
    - theory of "effectiveness".
    - "Estrada doctrine": the maintenance or withdrawal, as it seems convenient, of diplomatic agents.

## D. TERRITORIAL TRANSFORMATIONS: SUCCESSION OF STATES

- Changes in the territory: specific problems of "state succession". Complexity of situations caused by diversity of cases (the emergence of new states because of the emancipation of colonial countries, the merger of two pre-existing states, the division of a state into two states, the dismemberment of a state, and the segregation of a part of the territory of a state).
- Definition: replacement of one state (predecessor state) by another (successor state) in the responsibility for the international relations of a territory. Questions regarding:
  - treaties concluded by the predecessor state with respect to the territory being succeeded.
  - property, archives, and debts of the predecessor state.
  - membership of the predecessor state in international organizations.
  - nationality of the population of the predecessor state.
  - private property affected by the succession, etc.
- Some of the matters: international codification.
  - succession of states with respect to treaties of 1978: principles of tabula rasa (new states) and continuity of treaties (other cases).
  - succession of states with respect of property, archives, and debts of 1983 (casuistic).
  - ILC Draft Articles on the nationality of individuals in relation to the succession of states.

- Generally: problems solved by special agreements between the predecessor state and the successor state.

STATE BODIES IN CHARGE OF  
INTERNATIONAL RELATIONS:  
HEADS OF STATE, HEADS OF  
GOVERNMENT AND  
MINISTERS OF FOREIGN  
AFFAIRS

- A. General aspects
- B. Birth and recognition of new states
- C. Political transformation: recognition of governments
- D. Territorial transformations: the succession of states

## A. GENERAL ASPECTS

- States do not live in isolation but related to other subjects of international law: international relations, responsibility of the organs to which national law confers such powers, assigning them the representation of the state at the international level and acting in its name and on its behalf (principle of self-organization of the state).
  - Status under international law and enjoy a regime of inviolability, privileges, and functional immunities recognized by this system.
  - These immunities and privileges are not personal but functional in nature, since they are granted not for the benefit of individuals, but to ensure the effective performance of their functions as representatives of states.
- Regime of diplomatic relations based on the idea of voluntary consent and mutual benefit, as well as on respect for the balance of positions between the state sending a diplomatic mission and the state receiving it:
  - ILC codification of customary international rules (detailed regulation):
    - Convention on Diplomatic Relations of 18 April 1961.
    - Convention on Consular Relations of 24 April 1963.
    - Convention on Special Missions of 16 December 1969.

- Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975 (not yet in force)
- Convention on the Prevention and Punishment of Crimes against Specially Protected Persons, including Diplomatic Agents of 14 December 1973, etc.

➤ The state organs of international relations are:

- the organs of the central power endowed with responsibility for international relations (i.e., head of state, head of government and minister of foreign affairs).
- the specialized organs of the state's foreign administration (i.e., diplomatic missions, special missions, representations to international organizations, and delegations to international conferences, as well as consular offices).

## B. THE HEAD OF STATE, THE HEAD OF GOVERNMENT, AND THE MINISTER OF FOREIGN AFFAIRS

- Head of state (HS), head of government (HG) and minister of foreign affairs (MFA) are vested with the highest authority for the conduct of the state's international action.
  - Comparative constitutional practice.
  - No definition under IL. Status in accordance with national law.
  - International case law/conventions:
    - PCIJ Judgment of 5 April 1933, concerning the case of the legal status of East Greenland: MFA.
    - Article 7 of the Convention on the Law of Treaties of 23 May 1969: no necessary full powers.
    - ICJ Judgment of 20 December 1974, concerning the nuclear tests case: HS.
    - ICJ Judgment of 3 February 2006, in the case of armed activities in the Territory of the Congo (New Application: 2002): *“in accordance with its uniform case law, it is a well-established rule of international law that the HS, the president of the government, and the MFA are deemed to represent the state merely by virtue of the exercise of their functions, including the performance, on behalf of their state, of unilateral acts which have the force of international commitments”*.

- The HS, the HG, and the MFA, when in a foreign state, enjoy inviolability, immunities, and privileges recognized by international law.
  - Article 21 of the Convention on Special Missions of 8 December 1969: persons when they are on diplomatic mission in another state enjoy personal inviolability (they may not be subjected to any measure of arrest or coercion either in their person or in their residence, property, baggage or correspondence) + exempted from the criminal jurisdiction of the territorial state and enjoy immunity from civil jurisdiction.
- Likewise, the HS, HG, and MFA, when they are in a foreign state, are "internationally protected persons": the state in which they are located must assume special obligations of protection.
  - Convention on the Prevention and Punishment of Crimes against Specially Protected Persons, including Diplomatic Agents, of 14 December 1973.
- Neither absolute nor for life, but they cover the persons concerned only for the duration of their term of office and for acts performed in their official capacity.
  - The question of the limits for the commission of so-called "international crimes" has given rise to complex situations:
    - Pinochet case.
    - [The ICJ Judgment of 14 February 2002, in the case of the arrest warrant of 11 April 2000.](#)

- ❖ Absolute nature of the criminal immunity of a **serving** MFA.
  - ❖ Only may cease to apply in three specific cases: (i) when they are tried by the national courts of their own state under its national law; (ii) when their own state has decided to waive their immunity; and (iii) when they are charged before certain international criminal tribunals, when these have jurisdiction.
  - ❖ Upon the removal of the minister concerned from office, she or he ceases to enjoy immunity from jurisdiction in other states.
- These pronouncements, which are also applicable a fortiori to heads of state and heads of government, imply a considerable brake on the extensive tendencies to the exercise of universal criminal jurisdiction by national courts.

### ***B.1. IN SPANISH LAW***

- Capacity for external action of the King, the Prime Minister, and the Minister of Foreign Affairs are clearly defined in our constitutional and legislative system.
- Article 56.1 of the Constitution states that "the King is the Head of State" and as such, "assumes the highest representation of the Spanish state in international relations... and exercises the functions expressly attributed to him by the constitution and laws". But the powers of the King in the field of foreign relations are not substantive, but representative, being limited to solemnly formalizing the acts decided by the Government with the authorization of the Cortes Generales if necessary.

- Article 63 of the constitution.
- Article 22 of Act 25/2014, of 27 November.
- Article 98 of the Constitution: the head of the Government (Prime Minister) is the one who directs the action of the Government, which in turn is the body that directs the foreign policy of the state (Art. 97 of the constitution).
- Article 6.3 of Act 2/2014 on state action and foreign service.
- Article 6.5 of Act 2/2014 on state action and foreign service: MFA.