

5. Conclusion

The argument has been a lengthy excursus through jurisprudence, but the destination is simple: the state persists because capital persists.

The state is not necessary; it is a historical development. The total conception of the state treats the conditions it constantly reproduces as necessary realities. The territorial container, that is, the sum of land occupied by the subjects of civil authority, is given ontological priority over the association of citizens into authority. Yet one need only place civil authority first to resolve this dilemma and ground statehood in omnilateral authorisation rather than land. Doing so, one arrives at the Kantian conception of land and law in which civil authority only provisionally suspends the common possession of the finite Earth by all human beings. Yet this would also lead one to see states as fundamentally provisional and unstable, their borders never too safe from unauthorised land transfers. Thus, the state is threatened by the Kantian conception and the latter is discarded.

This is not an abstract turn but a historical one; it is well explained by the transformation of the economic structure of European society. Contractarianism is the theory of the revolutionary bourgeoisie, the Third Estate. It posits, against the contradictions of feudal relations,²¹⁰ a theory of the state as the product of the exercise of individual agency. The territory of the state is viewed as constituted through civil association. This is supported by State of Nature mythologies rather

210 See Munro (n 7) 70.

than official history because it is still a subaltern account. The transformation of the bourgeoisie from an estate into a dominant class is tracked by the switch from an emancipatory theory of the state to a speculative-ideological theory which reproduces the state eternally. The state, now charged not with the safeguarding of civil rights but with the representation of collective ownership interests, must emancipate land from its owners. But this emancipation does not take the form of a legal act but of an ideological turn. Territory is expropriated through a conceit: it is said to always have been expropriated. Expropriation through a rightful act would permit only the production of the state, expropriation through ideology permits its infinite reproduction. The ideological state form is a stabilising inversion of the whole economy in the same way as the legal form is the inversion of particular economic relations.

The intractable persistence of the state form is the intractable persistence of the capitalist economy as an ontologically closed system. To represent the interests of capital, the state must emancipate it. That is, it must constitute itself as the entire economy against other economies. It is insufficient to settle for concluding either that the state is a product of economics or a mere “expression of capitalist hegemony in the field”.²¹¹ Such superficial engagement leads critics to extend Pashukanis by saying that the decentralisation of the international legal form makes it even more *like* the commodity since the private ownership of a commodity and consequent exclusion of others from said ownership also implies a decentralised violence.²¹² But such analysis imagines that the truth of the commodity form is better revealed in some sort of primordial pre-state market situation as opposed to the complex state form that is inseparable from capitalist commodity production. It reduces the international sphere to a market situation. While there may be market forces at play, the social and economic relations between states are clearly not the same as those between private legal persons.

211 Ntina Tzouvala, ‘International Law and (the Critique of) Political Economy’ (2022) 121(2) *South Atlantic Quarterly* 297, 312.

212 Tzouvala (n 211) 311.

This is the insight I dare offer as a new one. That the state is not merely the international analogy of the municipal legal subject. Rather, the state form is the inversion of the entire economy. Perhaps there is an analogy to be found in the private legal person representing ultimately not a human being but an entire household (*οἶκος*). One could support such an argument by the Common Law doctrine of coverture, i.e. that the legal personality of a wife merges with that of her husband,²¹³ and draw a parallel between the private/public distinction and the internal/external distinction. But the starting point is that the state as this kind of legal person is an ideological inversion of contractarian civil authority.

Here are two reasons to engage with Kant. First, to recognise that the state form is not a monolithic fixture of Modernity. Kant's account is not ideologically distorted and is grounded in citizenship. The separation of the state from civil society and its assertion of ontological priority appears to happen after Kant or rather to him. Second, because grounding state power in civil authority rather than in property overcomes the state form we are today presented with. The humanist position that citizens make governments and governments make states is, in international law, a radical proposition.

The present dilemma for international law is that, as a result of climate change, some states will sink into the ocean and might therefore stop being states.²¹⁴ That these states cannot secure their existence simply by acquiring other forms of “trans-national” capital suggests that land is not simply one of the forms of property emancipated into the state but an essential one. Historically the status of land as “real” property may also follow from its stability. But that stability is now challenged by rising sea levels and a reconceptualisation may be in order and, in fact, may already be underway.²¹⁵

213 1 BI Comm 15, 8–14.

214 Andrea Caligiuri, ‘Sinking States: The statehood dilemma in the face of sea-level rise’ (2022) 91 *Questions of International Law: Zoom-Out* 23, 23–24.

215 *Obligations of States in Respect to Climate Change (Advisory Opinion)* (n 10) para 363.

The beginnings of reconceptualisation may rest in a civil-authority-first conception that demotes territory to a contingency. That statehood is (and ought to be) grounded in civil authority not territory is not only a metaphysical position but potentially a legal argument, one Hans Kelsen almost reaches.²¹⁶ Yet it is a legal argument that transcends the argumentative paradigm in which it is situated by opening up a radical political question about the organising premises of social life.²¹⁷ That question is not merely whether the political community must manifest as a territorial community. Rather, it is why political and social life should be trapped in and consumed by the real frame of the economy.

It is not emancipatory in this context to say that politics is, in any case, just economics. That depoliticises government when what is clearly necessary to escape the presently narrow imaginary is re-politicisation. If the former proceeds by collapsing the political question into morality and economics,²¹⁸ then the latter must ontologically distinguish government from morality and economics; not because they are not connected but because they are not the same.

216 Kelsen (n 195) 608.

217 See Robert Knox, 'Strategy and Tactics' (2011) 21 *Finnish Yearbook of International Law* 193, 221–222 and 228–229.

218 See Chantal Mouffe, *The Democratic Paradox* (Verso 2000) 99.