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Federated entities in international law: disaggregating the federal State?

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The dominant role of the sovereign State in international relations, it hardly needs recalling, remains the basis for our conception of international law; it is generally accepted that this has been so since the Peace of Westphalia imposed a horizontal inter-State model of international relations.[1] However, such a paradigm does not easily reconcile itself to the long-standing practices of certain subnational components of a federation to assert themselves and act on the international plane, forging links with each other or with foreign States. This is a practice which has amplified in recent years due to the growing interdependence between States and economies. The interface between international and domestic legal orders is reciprocal: the expansion of international law to touch upon issues heretofore considered as within the reserved domain of domestic constitutional law, and even to the activities of the federated entities of States, has led to a search for alternative paradigms through which better to understand how international law accommodates such entities.

In this respect, the orthodoxy that a central executive acts exclusively on behalf of a State in matters of foreign policy[2] has come to be challenged, and in many respects has a marked impact on the internal legal order of a federal State.[3] Yet, international legal scholarship has yet

[1] R. Falk, 'The Interplay of Westphalia and Charter Conceptions of International Legal Order', in R. Falk and C. Black (eds.), *The Future of the International Legal Order* (Princeton University Press, 1969), vol. I, pp. 32, 43.

[2] The classic expression of this rule may be found in Article II of the Montevideo Convention on the Rights and Duties of States, Montevideo, 26 December 1933, in force 26 December 1934, 165 LNTS 19.

[3] See, e.g., B. Hocking (ed.), *Foreign Relations and Federal States* (Leicester University Press, 1993), p. 6, suggesting that it would be misleading to dismiss non-central governments as second-order players: '[t]he global web of world politics ensures that non-central governments have interests and responsibilities which can often, quite unexpectedly and sometimes against their wishes, project them into the international limelight'.

to erect a conceptual framework suitable for incorporating the practice of federated, sub-State entities into international law in a manner which would allow for their practice to be extricated from the State level and accommodated on the international plane.

This chapter will review the constitutional structures of a few federal States[4] and the manner in which these allocate the competence to enter into treaties, and will present some thoughts as to how these might be reconciled with contemporary international law. Although a thorough exploration of how international law accommodates these constitutional arrangements is beyond the scope of this chapter, the research presented here aims to be a springboard for analysing how international law accommodates these constitutional realities.

I. The orthodox position

Defined pragmatically for the purposes of this chapter, a 'federal State'[5] is a State that, according to its constitutional arrangements, distributes the competences which normally fall to a State between two or more orders of government.[6] Usually, one of these orders will have jurisdiction over the whole of the State's territory, and the other will have territorially

[4] A notable exclusion from this chapter is Spain, one of the most decentralised States in the world, but one which formally remains a unitary State (Art. 2 of the Spanish Constitution). It is true that under Art. 149 of the constitution, the autonomous communities may conclude agreements with the constituent units of other federations, or even with foreign States; however, these have no formal treaty-making power, and ultimately the central State has a preponderant role in foreign policy and the conclusion of binding international legal agreements. Consequently, they cannot be qualified as treaties in the sense of public international law. For further discussion, see, generally, S. Beltrán Garcia, *Los acuerdos exteriores de las comunidades autónomas españolas: marco juridico actual y perspectivas de futuro* (Barcelona: Institut d'Estudis Autonòmics Generalitat de Catalunya, 2001).

[5] A colourful definition of a federal State is that it is a 'pluralistic democracy in which two sets of governments, neither being fully at the mercy of the other, legislate and administer within their separate and yet interlocked jurisdictions': I. Duchacek, 'Perforated Sovereignties: Towards a Typology of New Actors in International Relations', in H. J. Michelmann and P. Soldatos (eds.), *Federalism and International Relations: The Role of Subnational Units* (Oxford: Clarendon Press, 1990), pp. 1, 3.

[6] According to W. Rudolf, 'Federal States', in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law* (Oxford: Oxford University Press, 2012), vol. II, p. 1136, para. 4, only 18 States are properly constituted as federal States: Argentina, Australia, Austria, Bosnia-Herzegovina, Brazil, Canada, Germany, India, Malaysia, Mexico, Micronesia, Nigeria, Russia, South Africa, Switzerland, Tanzania, the United Arab Emirates, the United States and Venezuela. Serbia and Montenegro has since formally dissolved. To this one can add Belgium, a federal State in all but name.

limited jurisdiction over a portion of the whole. A federation is often likened to a 'composite "nation", . . . able to assert its sovereign unity *vis-à-vis* other nation-states while cultivating jurisdictional diversity inside'.[7] Normally, such a constitutional arrangement can only be amended through a new agreement which requires the consent of the different levels of government which comprise a State.[8]

The traditional position in international legal discourse on federal States regards them as opaque, monolithic international legal subjects, as neatly encapsulated by Malanczuk and Akehurst:

> [i]nternational law is concerned only with states capable of carrying on international relations; consequently the federal state is regarded as a state for the purposes of international law, but the member states of the federation are not. If a member state of the federation acts in a manner which is incompatible with the international obligations of the federal state, it is the federal state which is regarded as responsible in international law.[9]

This classic approach suggests that, in so far as federated entities are empowered or authorised under the constitution of a federal State to negotiate or enter into treaties with foreign States, even if it is in their own name, they do so as agents for the federal State which, 'as alone possessing international personality, is necessarily the entity that becomes bound by the treaty and responsible for carrying it out'.[10]

[7] Duchacek, 'Perforated Sovereignties', p. 4. Duchacek characterises as 'dialectic' the encounter between unifying and fragmenting tendencies that is embodied by the federal structure.

[8] The consent of the various levels of government conventionally distinguishes a federal State from a 'decentralised State' such as the United Kingdom, where the power granted to the lower levels emanates from a unilateral decision of the central government, and where it can unilaterally decide to reclaim powers so devolved.

[9] P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th edn (New York: Routledge, 1997), p. 81, citing J. B. Moore, *A Digest of International Law* (Washington DC: Government Printing Office, 1906), vol. 6, pp. 837–41, who cites a quintessential early example. A mob lynched some Italian nationals in New Orleans in 1891, and the United States admitted liability and paid compensation to Italy, even though the prevention and punishment of the crime fell exclusively within the powers of the State of Louisiana, and not within the powers of the federal authorities.

[10] G. G. Fitzmaurice, 'Third Report on the Law of Treaties', *Yearbook of the International Law Commission*, 1958, vol. II, UN Doc. A/CN.4/54, p. 24; see also his proposal, *ibid.*, 32, Art. 8(3). Another classic restatement of the principle can be found in H. Waldock, 'First Report on the Law of Treaties', *Yearbook of the International Law Commission*, 1962, vol. II, UN Doc. A/CN.4/144Add.1, pp. 36–37, Art. 2.

Under this view, such entities are merely agents or designees of the State.[11]

It is certainly true that 'the federal system of government is particularly ill-adapted to international cooperation',[12] and the orthodox position has an attractive simplicity in an international system that is complex enough. However, does it correspond to contemporary social reality? Does ignoring the letter and spirit of domestic constitutions that painstakingly establish federal structures further remove international legal practice from domestic developments of international significance?[13] It is with these questions in mind that the next sections will delve into the constitutional arrangements of a few federal States whose component entities have engaged in affairs of relevance for international law.

II. Federal States with no express conferral of treaty-making power on its constituent entities

1. United States

Perhaps the archetypal federal State projecting itself as a unitary actor in foreign policy is the United States, whose constitution provides at Article I(1) that 'no state shall, without the consent of Congress . . . enter into any agreement or compact with . . . a foreign power'.[14] Article II(2) allows the president to make treaties 'with advice and consent of the

[11] See H. Kelsen, *General Principles of International Law*, 2nd edn (New York: Holt Reinhart & Winston, 1966), pp. 260–1: 'since the component states have their competence in accordance with the federal constitution, the organs of the component states, in concluding treaties with the competence conferred upon them by the federal constitution, may also be considered as indirect organs of the federal state; hence the international person concluding the treaty may be considered to be the federal state acting, in certain regards, through a component state'. His reasoning was recalled in R. Ago, 'Third Report on State Responsibility', *Yearbook of the International Law Commission*, 1971, vol. II, UN Doc. A/CN.4/217, p. 272, to suggest that the acts and omissions of the officials of the component units could be imputable to the federal government, as if they had acted as its organs. Ago had included a draft article 6 to this effect, *ibid.*, p. 262.

[12] M. Sørensen, 'Federal States and the International Protection of Human Rights' (1952) 46 *American Journal of International Law* 195, 218.

[13] As L. Van den Brande, 'The International Legal Position of Flanders: Some Considerations' in K. Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy* (The Hague: Kluwer Law International, 1998), pp. 145, 150 suggests, the attribution of international competences by domestic constitutions was far more than merely technical, entailing an important political and psychological added value of autonomy and institutional independence.

[14] Constitution of the United States of America, Art. 1, s. 10, cl. 3.

Senate' and Article VI(2), the so-called 'supremacy clause', states that treaties '. . . shall be the supreme law of the land'. The exceptions allowed by Congress are relatively few, and emphatically exclude the exchange of ambassadors or generally to engage in relations with a foreign government.[15] A series of early judgments by the United States Supreme Court confirmed that the federal government alone has the capacity to conclude treaties.[16] Thus, at least since the *Missouri* v. *Holland* judgment of 1920, the distribution of powers in the constitution has not restricted entry into treaties by the federal government.[17] However, in practice, US states have occasionally concluded unauthorised agreements with foreign powers,[18] a recent example being Missouri in 2000.[19]

[15] *Restatement (Third) of the Foreign Relations Law of the United States* (Washington DC: American Law Institute, 1987), vol. 1, para. 201, Reporters' Notes, p. 76. See generally, E.H. Fry, 'The United States of America', in Michelmann and Soldatos (eds.), *Federalism and International Relations* at pp. 279–81. For a review of recent American jurisprudence on the federal issue and the treaty-making power, see C. A. Bradley, 'Treaty Power and American Federalism Part II' (2000–01) 99 *Michigan Law Review* 98, 111–18.

[16] See, e.g., *United States* v. *Arjona* (1887) 120 US 479 (United States); *Chae Chan Ping* v. *United States* (1889) 130 US 581 (United States) ('*Chinese Exclusion* case'), p. 606; *Holmes* v. *Jennison* (1940) 39 US 540 (United States), p. 573.

[17] *Missouri* v. *Holland*, 252 US 416 (1920) (United States): this judgment by the US Supreme Court upheld federal legislation implementing a treaty obligation dealing with the protection of migratory birds, a subject over which the federal government possessed no explicit legislative power. After an unsuccessful attempt in the 1950s to overrule *Missouri* v. *Holland* with a constitutional amendment (the 'Bricker Amendment', Senate Judiciary Resolution 1, 83rd Cong., 1st Sess. (1953)) failed in the Senate, the question of States' rights with respect to the treaty-implementation power has not resurfaced. For further discussion on the impact of that judgment, see J. L. Friesen, 'The Distribution of Treaty-Implementing Powers in Constitutional Federations: Thoughts on the American and Canadian Models' (1994) 94 *Columbia Law Review* 1415, 1423–8; L. Henkin, *Foreign Affairs and the Constitution*, 2nd edn (Oxford University Press, 1996), p. 190; H.C. Dillard, 'Should the Constitution be Amended to Limit the Treaty-Making Power?' (1953) 26 *Southern California Law Review* 373; and Q. Wright, 'Should the Constitution be Amended to Limit the Treaty-Making Power?' (1953) 26 *Southern California Law Review* 385. *Cf.* L. Wildhaber, *Treaty-Making Power and Constitution* (Basel and Stuttgart: Helbing & Lichtenhan, 1971), p. 330, who argues that *Missouri* v. *Holland* 'is nothing but an eloquent assertion of the principle well established by earlier cases'; at *ibid.*, pp. 324–8, he recalls that early jurisprudence from 1797 onwards.

[18] The US Supreme Court stated in *Virginia* v. *Tennessee*, 148 US 503 (1893), p. 518, that the prohibition against the conclusion of 'treaties' found in Art. I, s. 10 of the US Constitution did not apply to agreements concerning such minor matters as the adjustment of boundaries, which have no 'tendency to increase and to build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States'.

[19] The earliest example being North Dakota's administrative interstate agreements with Canadian municipalities, upheld by the Supreme Court of North Dakota in *McHendry County et al.* v. *Brady*, 37 North Dakota 59, 163 N.W. 540 (1917) (United States). In

2. *Canada*

In Canada, the allocation of competences between the federated provinces and the federal government was settled under the British North America Act of 1867.[20] Thus, in the original settlement, under Section 91 the Federal Government represented Canada as an international personality, but the imperial Parliament in London retained the power to conclude treaties under Article 132 of the Act.[21] Pursuant to the Statute of Westminster of 1931, this prerogative of the British Crown was transferred to the Canadian Governor-General in Council – in other words, to the federal executive.[22] In theory, therefore, Canada's constitutional arrangements should have resembled those of the United States in matters of foreign affairs;[23] however, in the controversial *Labour Conventions* cases, the UK Privy Council – which granted leave to appeal from Canada's Supreme Court for cases begun before 1949 – decided that although the federal government may legally negotiate and conclude treaties on all subject matters, it could only pass implementing legislation on subjects covered by Section 91. See especially the Privy Council's oft-quoted interpretations of sections 91 and 92 of the Constitution Act 1867 in *Attorney General for Canada* v. *Attorney General for Ontario* ([1937] AC 326 ('*Labour Conventions*'), 354):

> . . . if . . . Canada incurs obligations they must, so far as legislation be concerned, when they deal with Provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between

2000, Missouri concluded a Memorandum of Agreement with Manitoba on water issues without Congressional authorisation: see the letter from William H. Taft IV, the Legal Adviser to the US Department of State, to Senator Byron Dorgan of North Dakota, 'Capacity to Make: Role of Individual States of the United States: Analysis of Memorandum of Understanding between Missouri and Manitoba', 2001 Digest A (United States), pp. 179–98. Duchacek, 'Perforated Sovereignties', p. 20, also mentions the jointly financed water development in the Souris River Basin, linking Saskatchewan, North Dakota and Manitoba.

[20] British North America Act 1867, 30 & 31 Vict., ch. 3 (also 'Constitution Act 1867', name changed by the Constitution Act 1982, itself Sch. B to the Canada Act 1982 (UK), ch. 11), s. 91 (enumerating federal powers) and s. 92 (enumerating provincial powers).

[21] S. 132 of the British North America Act 1867 assigns to the federal Parliament 'all powers necessary or proper for performing the obligations of Canada or of any Province thereof, *as part of the British Empire*, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries' (emphasis added).

[22] The Statute of Westminster 1931 (22 & 23 Geo. V), ch. 4, corroborated on this point by Letters Patent of 1947, *reprinted in* (1947–8) *University of Toronto Law Journal* 475.

[23] For a detailed comparison of the Canadian and American treaty-implementing powers, see generally, Friesen, 'The Distribution of Treaty-Implementing Powers in Constitutional Federations: Thoughts on the American and Canadian Models'.

> the Dominion and the Provinces. While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.[24]

Although harshly criticised,[25] *Labour Conventions* remains good law, and the effect of its holding has been to subordinate concerns over international obligations to the domestic separation of legislative competences.[26] Although the federal government has maintained that its consent remains an imperative condition for the validity of agreements concluded by the provinces,[27] a mechanism has been found whereby the

[24] See, generally, G. V. La Forest, 'The Labour Conventions Case Revisited' (1974) 12 *Canadian Year Book of International Law* 137, and Friesen, 'Treaty-Implementing Powers in Constitutional Federations', 1434–9, for Canadian judicial decisions after 1937 on the question. In particular, see the *Re: Offshore Mineral Rights of British Columbia* decision [1967] SCR 792 (Canada). In this reference, the Supreme Court of Canada was asked by the Federal Government whether the Province of British Columbia or Canada was sovereign over offshore resources in the territorial sea. Deciding that the rights in the territorial sea formerly asserted by the British Crown in respect of the Colony of British Columbia had passed to Canada in 1871, the Court expressly linked subjecthood to international responsibility, *ibid.*, 821:

> Canada is the sovereign State which will be recognized by international law as having the rights stated in the Convention of 1958 [on the Territorial Sea], and it is Canada, not the Province of British Columbia, that will have to answer the claims of other members of the international community for breach of the obligations and responsibilities imposed by the Convention.

The High Court of Australia referred expressly to this reasoning in *Bonsor* v. *La Macchia* [1970] 43 ALJR 275 (Australia), 294, where it held that legislative power over the territorial sea accrued to the Commonwealth, and not to New South Wales, by virtue of the international sovereignty of the former.

[25] See, e.g., B. Laskin, 'Some International Legal Aspects of Federalism: The Experience of Canada', in D. P. Currie (ed.), *Federalism and the New Nations of Africa* (University of Chicago Press, 1964), p. 389; G. J. Szablowski, 'Creation and Implementation of Treaties in Canada, (1956) 34 *Canadian Bar Review* 28, 30–2; G. L. Morris, 'The Treaty-Making Power: A Canadian Dilemma' (1967) 45 *Canadian Bar Review* 478, 482–92; Wildhaber, *Treaty-Making Power and Constitution*, pp. 293–5.

[26] Friesen, 'Treaty-Implementing Powers in Constitutional Federations', 1433. At 1436–40, he gives several examples of difficulties faced by Canada in acceding to and implementing its international obligations.

[27] See, e.g., the intervention by the Secretary of State for External Relations, Paul Martin, in the Canadian House of Commons, HC Deb. (1964–65), vol. XI, col. 11818:

> On the international plane, the federal government represents all of Canada and under international law only sovereign states are recognized as members of the international community . . . The procedure followed on the occasion of the agreements cited above between France and Quebec is a reflection of and accords with the Canadian government's status under international law and the constitutional position in Canada. Standing

federal authorities of Canada can 'delegate' their treaty-making powers to other entities if necessary.[28] A good example of this is the 1983 agreement between Quebec and the United States on social security.[29]

The province most often asserting its rights to engage on the international plane is Quebec: since its first 'entente' on cultural questions with France, it has signed some 230 agreements with foreign governments.[30] In fact, Quebec has long argued that since the provinces must implement certain treaties, it is only logical under Section 92 that they should have an international power to negotiate and conclude them in the first place.[31] It should also be noted that the Quebec government is not the only provincial government to have sought enhanced treaty-making powers: Alberta has notably suggested that 'a revised constitution should include provisions relating to international affairs and should recognize the need for provincial involvement in those areas of foreign affairs of concern to them'.[32] Other provinces, primarily British Columbia, but also Ontario, Nova Scotia and New Brunswick, have also engaged in

alone these agreements between France and Quebec could not have been regarded as agreements subject to international law.

[28] Quebec's first international agreement with France, on technical cooperation, was concluded in 1963 by an exchange of letters between two of their subordinate agencies. By an exchange of letters dated 23 and 27 December 1963 between the French Ambassador in Ottawa and the Department of External Affairs of Canada, the Canadian Government consented to the ententes. Similarly, in 1965, an entente on cultural and educational cooperation was signed by the ministers of education of Quebec and the ministers of foreign affairs and of national education of France, the first more formal arrangement of its kind; the Canadian Government again insisted on an exchange of letters with France, and even entered into a subsequent framework cultural agreement (*accord cadre*) with France allowing for any province, by referring to the *accord cadre*, to enter into such agreements with that State in matters of cultural affairs and scientific and technical exchanges: see Franco-Canadian Cultural Agreement (France-Canada), 17 November 1965, (1965) 17 *External Affairs* (Canada) 514.

[29] Understanding and Administrative Arrangement with the Government of Quebec (United States-Quebec), 30 March 1983, US-Quebec), *Treaties and Other International Agreements* (United States), No. 10,863. However, Quebec's agreement with the United States was a separate subsidiary agreement falling under a framework agreement which authorised Canadian provinces so to act: see Agreement with respect to Social Security (Canada-United States), 11 March 1981, 35 UST 3403, 3417, Art. XX.

[30] D. B. Hollis, 'Why State Consent Still Matters – Non-State Actors, Treaties, and the Changing Sources of International Law', (2005) 23 *Berkeley Journal of International Law* 137, 150. Nearly 60% of these agreements are with foreign States.

[31] See, e.g., the statement of Paul Gerain-Lajoie, Minister of Education of Quebec in 1965, reprinted in L. L. La Pierre, 'Quebec and Treaty-making', (1965) 20 *International Journal* 362, 364. See also, L. Sabourin, 'La participation des provinces canadiennes aux organisations internationales', (1965) 3 *Canadian Year Book of International Law* 73, 83.

[32] Government of Alberta, *Harmony in Diversity: A New Federalism for Canada* (Edmonton: Government of Alberta Publications, 1978), p. 8.

international affairs, primarily with states of the United States; but the agreements concluded by these provinces, sometimes known as 'international compacts' or 'understandings', fell short of treaty agreements, and have sometimes been regarded as purely political agreements,[33] based as they are on the goodwill of the parties and the reciprocal benefit derived therefrom. Again, Canadian practice has consistently asserted an involvement of the federal government to transform agreements between Canadian provinces and foreign States or federated entities into binding obligations.[34] Until this is done, agreements between Canadian provinces and foreign States are said to be governed by municipal, rather than international, law.[35]

The Canadian constitutional system, with its protection of the prerogatives of its federated entities,[36] shares some resemblance to the federal States which expressly confer treaty-making powers on federated entities, which will be discussed below (Section III, *infra.*). It has also come to have an influence on Australia, a fellow Commonwealth federation, to which we now turn.

3. *Australia*

The 'external affairs' power found in Section 51, paragraph xxix of the Australian Constitution of 1900, gives the Commonwealth Parliament

[33] The Canadian Government has consistently maintained that such agreements are extra-legal and do not properly belong to the sphere of international law: see, e.g., the position taken in the Comment of the Canadian Department of External Affairs Legal Bureau (25 January 1979), in (1980) 18 *Canadian Year Book of International Law* 316–17. For long-standing examples of the international engagement of these provinces, see M. C. Rand, 'International Agreements between Canadian Provinces and Foreign States' (1967) 25 *University of Toronto Faculty of Law Review* 75, 76 ss.

[34] See, *supra.*, n. 28, for a summary of Quebec's practice; see also how the United States and Canada stepped in to 'consent' to and indemnify an agreement between the city of Seattle and the province of British Columbia: Treaty between the United States of America and Canada relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend d'Oreille River (Canada-United States), 2 April 1984, *Treaties and Other International Agreements* (United States), No. 11,088.

[35] E. McWhinney, 'Canadian Federalism and the Foreign Affairs and Treaty Powers: the Impact of Quebec's "Quiet Revolution" (1969) 7 *Canadian Year Book of International Law* 3, 14, who argued that non-binding agreements concluded by sub-State entities 'afford none of the international law protections of a treaty apart perhaps from the limited *parens patriae* protection that any one nation-state might choose to invoke on behalf of its own citizens'.

[36] Friesen, 'Treaty-Implementing Powers in Constitutional Federations', 1440–1, has gone so far as to distinguish Canada from the United States by describing it as a 'compact of provinces' rather than a 'union'.

competence over external relations. Thus, as with Canada, treaty-making by virtue of the common law is a prerogative of the Crown, and hence exercisable by the Commonwealth Parliament.

In the leading case on treaty enforcement power, *The King* v. *Burgess*,[37] the High Court of Australia found that even when the federal Parliament had no competence over specified subject matters, the Commonwealth was nonetheless capable of undertaking an external commitment of an international character in those areas of reserved competence. They concluded that although legislation implementing those international commitments was a constitutionally valid exercise of the external affairs power under the constitution, the regulations made under the act would be invalid if they were not strictly necessary for ensuring the execution of a convention signed by the federal government.[38] In *Commonwealth* v. *Tasmania*, many decades later, it was held that the result of this was that no formal power sharing between levels of government would be required, even if the subject matter of a treaty falls within an area of concern for the component states.[39] Nevertheless, a certain restraint has permeated the federal government's exercise of its constitutional power to implement treaties, as, in some cases, it has relied on state legislation enacted for that purpose.[40] This restraint culminated in the policy of 'cooperative federalism' formally adopted by Australia in the late 1970s, which has resulted in a reluctance by it to ratify certain normative or standard-setting conventions.[41]

[37] *The King* v. *Burgess, ex parte Henry* [1936] 55 CLR 608 (Australia).

[38] *Ibid.*, p. 696. A concise description of the individual judgments in *The King* v. *Burgess* is given by Wildhaber, *Treaty-Making Power and Constitution*, pp. 298–300. The judgment in *The King* v. *Burgess* was confirmed as holding true after the *Labour Conventions* case in *Frost* v. *Stevenson* [1937] 59 CLR 528 (Australia), p. 599 (Evatt J).

[39] [1983] 158 CLR 1 (Australia). A. Byrnes and H. Charlesworth, 'Federalism and International Law in Australia' (1985) 79 *American Journal of International Law* 622, 635, suggest that the majority took 'an internationalist view of Australia's view in the world by rejecting a fragmented power to implement treaties. The demands of the international order are preferred to those of state autonomy: the only guarantees of federalism provided are the states' continued existence and capacity to function and freedom from discriminatory federal legislation.'

[40] See Wildhaber, *Treaty-Making Power and Constitution*, pp. 301–2, for a description of Australia's policies with regard to labour and human rights conventions between 1928 and 1947. In sum, the federal government had a policy of consultation and deferral to the policies of the State Parliaments when matters within their competence fell within the respective convention.

[41] B. R. Opeskin, 'Federal States in the International Legal Order' (1996) XLIII *Netherlands International Law Review* 353, 373. See, e.g., Australia's practice in implementing its obligations under the International Convention on the Elimination of All Forms of

III. Federations which grant an actual treaty-making power to sub-national entities

1. Germany

Article 32 of the Basic Law of the Federal Republic of Germany, whilst stipulating that the conduct of relations with other countries is the concern of the federation (the '*Bund*'),[42] grants the constituent entities (the '*Länder*') a right to be consulted 'in sufficient time' before a treaty which affects their specific circumstances is concluded.[43] Moreover, Article 32 provides that the *Länder*, in so far as it is within their competence, and after having secured permission from the federal government, may conclude treaties with foreign States.[44] Although the federal government can conclude treaties with respect to subjects falling within its field of exclusive legislative competence,[45] it may also enter into treaties concerning subjects over which it has concurrent legislative powers,[46] or where it possesses the right to enact general rules.[47] Provision is also made for the participation of the *Länder* in treaty negotiations conducted by the *Bund*.[48] In matters where concurrent powers are exercised, the *Länder* may conclude treaties in so far as the

Racial Discrimination, New York, signed 7 March 1966, in force 4 January 1969, 1037 UNTS 151. Australian state legislation was specifically preserved as a result of an amendment to the domestic Racial Discrimination Act 1975 (Cth. No. 52) (Australia), which prevented federal legislation in this field from overriding relevant state legislation. See also, B. R. Opeskin and D. R. Rothwell, 'The Impact of Treaties on Australian Federalism' (1995) 27 *Case Western Reserve Journal of International Law* 1, 17–19.

[42] Art. 32, para. 1 of the Basic Law. For more extensive discussion of the German system, see W. Rudolf, 'Bundesstaat und Völkerrecht' (1989) 27 *Archiv des Völkerrechts* 1. Wildhaber, *Treaty-Making Power and Constitution*, pp. 302–10, describes the various theoretical schools which seek to reconcile the different interpretations of the German constitutional system.

[43] Art. 32, para. 2 of the Basic Law.

[44] Art. 32, para. 3 of the Basic Law. Arts. 73 and 87, *inter alia*, of the Basic Law reserve certain issues (foreign affairs and defence, citizenship and freedom of movement, passport matters, immigration, emigration and extradition) to the Federation. Art. 87 stipulates that the foreign service is a matter for direct federal administration: see Wildhaber, *Treaty-Making Power and Constitution*.

[45] Art. 73 of the Basic Law.

[46] So-called '*konkurriende Gesetzgebungszuständigkeit*': Art. 74 of the Basic Law.

[47] So-called '*Rahmengesetzgebungszuständigkeit*': Art. 75 of the Basic Law.

[48] The 'Kramer-Heubl-Papier' of 5 July 1968: it is not published, but see *Richlinien fur die Behandlung völkerrechtlicher Verträge*, Anlage D, mentioned in H. Beemelmans and H. D. Treviranus, 'Germany', in D. B. Hollis, M. R. Blakeslee and L. B. Ederington (eds.), *National Treaty Law and Practice: Dedicated to the Memory of Monroe Leigh* (Leiden and Boston: Brill, 2005) pp. 317, 329.

Bund has not yet done so; however, they must yield where the federation has concluded or wishes to conclude agreements relating to subjects over which it has concurrent legislative powers or the right to enact 'general rules'.[49]

This complex constitutional arrangement could have led to much deadlock and confusion. In practice, however, much treaty practice in Germany is conducted in accordance with the *Lindauer Abkommen* (Lindau Agreement), a 'gentlemen's agreement' according to which the *Länder* agreed to delegate their agreement-making powers to allow the federal government to conclude treaties in its own name on subjects deemed to be of predominantly federal concern. The *Bund* government, for its part, committed itself, on treaties of predominantly *Länder* concern, to seek their approval before any federal agreement would become constitutionally binding.[50] The Lindau Agreement, the basis of modern German treaty-making, survived reunification and continues to the present day.

2. *Switzerland*

Thoroughly revised in 2000, Switzerland's Federal Constitution contains several far-reaching changes to Swiss foreign policy, enshrining one of the purposes of the Swiss Confederation 'to strive to secure the long-term preservation of natural resources, and to promote a just and peaceful international order'[51] as well as the obligation of all Swiss authorities to respect international law.[52]

What is relevant for our purposes is the partition of competencies between the Federal Council and the cantons, which continues to be shared in so far as the conduct of external affairs is concerned. Although

[49] Art. 72, para. 1 of the Basic Law. The *Länder* have been rather active, concluding at least 79 treaties, not including concordats, from 1949 to 1994: see ibid., p. 328.

[50] See *Lindauer Abkommen* (Lindau Agreement) of 14 November 1957 between the federal government and the *Länder* governments, reprinted in H. Dreier (ed.), *Grundgesetz Kommentar*, 2nd edn (Tübingen: Mohr, 2006), vol. II, pp. 794–5. The Lindau Agreement affirms the federal government's leading role in foreign policy, but requires it to seek the consent of the *Länder* if the treaty under negotiation touches upon their areas of competence, for instance in culture or education. A similar provision can be found in Art. 10, para. 3 of the Constitution of Austria.

[51] Art. 2, para. 4 of the Swiss Constitution of 1 January 2000. See also Art. 54, para. 2, mentioning as a goal of Swiss foreign policy, to 'contribute to alleviate need and poverty in the world, and to promote respect for human rights, democracy, the peaceful coexistence of nations, and the preservation of natural resources'.

[52] This obligation applies to the Federal Council and the cantons (Art. 5, para. 4 of the Swiss Constitution), and also binds the Federal Tribunal and all other authorities (Art. 191).

the Confederation has the power to conclude any treaty on any subject, even if it falls within the domain of cantonal legislative or administrative powers,[53] the cantons have the formal right to 'participate in the preparation of decisions of foreign policy which concern their powers or their essential interests',[54] which, broadly speaking, gives them rights of participation and of negotiation in foreign policy, and requires that a consensus between the different levels of government be sought.[55] In practice, this suggests extensive information exchange between the levels of government, and the direct participation of cantonal representatives in certain negotiations involving Switzerland and foreign States.[56]

For their part, the cantons may conclude agreements with foreign States 'within the scope of their powers', subject to the caveat that such agreements may not be contrary to the law, nor to the interest of the Confederation or the laws of other cantons.[57] Active agreement-makers

[53] Art. 54, para. 1. See also L. Wildhaber, A. Scheidegger and M.D. Schinzel, 'Switzerland', in Hollis, Blakeslee and Ederington (eds.), *National Treaty Law and Practice*, pp. 627, 635. The 2000 Constitution appears to codify previous practice as to the full federal treaty-making power, even in matters within cantonal competence: see Wildhaber, *Treaty-Making Power and Constitution*, pp. 310–15, who, prior to 2000, recalled a Swiss debate over 'federalist' and 'centralist' interpretations of what was then Art. 8. See also *X* v. *Eidgenössische Steuerverwaltung*, BGE 96 (1970), vol. I, 737 (Switzerland), 747; *In re: Leuthardt*, BGE 9 (1883) 175 (Switzerland), at 178; J.-F. Aubert, *Traité de droit constitutionnel suisse* (Neuchâtel: Ides et Calendes, 1967), pp. 256–9; and W. Burckhardt, *Kommentar der Schweizerischen Bundesverfassung* (3rd edn, Bern: Stampfli, 1931), pp. 81–9.

[54] Art. 55, para. 1 of the Swiss Constitution.

[55] Art. 55, paras. 2–3. Wildhaber, Scheidegger and Schinzel, 'Switzerland', p. 665, suggest that the term 'take into consideration' contained in para. 3 is not as strong as it could have been, but that it suggests that the limitations on the federal power to act unilaterally seem to counterbalance the expansion of the federal treaty-making power to encroach on cantonal competencies.

[56] To regulate cantonal participation, Switzerland has enacted a Federal Statute on the Participation of the Cantons in the Foreign Policy of the Confederation, SR 138.1 (22 December 1999), found in Wildhaber, Scheidegger and Schinzel, 'Switzerland', Annex E, pp. 680–1.

[57] Art. 56, paras. 1–2. Wildhaber, *Treaty-Making Power and Constitution*, p. 315; and VEB 24 (1954) No. 5 (Switzerland). In Switzerland, the cantons have a limited international legal personality (*petite personnalité*); the Swiss Constitution thus leaves some limited room for the cantons to appear as subjects of rights and duties under international law. Austrian *Länder* now also possess an international treaty-making power, although it is limited to matters falling within their exclusive competence and only with neighbouring States: see Article 16(1–2) of the Constitution of Austria; and M. Thaler, *Die Vertragabschlußkompetenz der österreichischen Bundesländer* (Vienna: Braumüller, 1990). The pre-1992 Constitution of the Socialist Federal Republic of Yugoslavia, at Art. 271(2), provided for a similar competence for the federal republics.

prior to World War I, the cantons have rarely exercised their powers subsequently,[58] and when reviewing the subject matter of earlier cantonal agreements, many of these would fall under federal competence today.[59]

Interestingly, official intercourse between cantons and governments of foreign States or their representatives only takes place through the intermediacy of the Federal Council, which acts as an agent of the cantons.[60] Agreements negotiated in this manner must be notified to the Confederation; although they do not require permission,[61] they may be reviewed for compliance with federal law and the interests of the Confederation and of other cantons.[62] This appears reasonable: even if the cantons enter into an agreement, the Federal Council has long considered itself responsible for any cantonal breach of a federal or cantonal treaty.[63]

Cantons may also engage directly with 'lower ranking foreign authorities',[64] although in practice, this is commonly interpreted as extending to administrative and judicial officials operating on a non-political

[58] Wildhaber, *Treaty-Making Power and Constitution*, p. 317, identified only seven cantonal agreements between 1932 and 1972. See also, L. Di Marzo, *Component Units of Federal States and International Agreements* (Alphen aan der Rijn: Sijthoff and Noordhoff, 1980), pp. 123–6, who summarises Swiss cantonal practice in this regard.

[59] Swiss cantons have concluded some 140 international agreements, although it is difficult to gather all valid cantonal agreements in force, as many of these are neither published in the cantonal series of statutes, nor submitted to the federal government; see Wildhaber, Scheidegger, and Schinzel, 'Switzerland', pp. 667–8.

[60] *Ibid.*, p. 669. This practice is in line with the pre-2000 constitution, where cantonal agreements with foreign States are negotiated, signed and ratified in the name of the cantons, or both the federation and the cantons, by the Federal Council: see L. Wildhaber, 'Switzerland', in Michelmann and Soldatos (eds.), *Federalism and International Relations*, pp. 250–3.

[61] Art. 56, para. 2 of the Swiss Constitution.

[62] See Art. 62 of the Swiss Federal Statute on the Organisation of the Government and the Administration, SR 172.010, in Wildhaber, Scheidegger and Schinzel, 'Switzerland', Annex C, p. 677. Occasionally, the cantons 'forget' the requirement for federal approval: see Wildhaber, 'Switzerland', p. 260. In the normal course of affairs, however, such cases do not lead to conflict, as most of the agreements in fact comply with the substantive requirements of Article 102. Moreover, the Federal Council is often reluctant to intervene and generally turns a blind eye to the cantons' failure to submit their treaties.

[63] E. His, 'De la compétence des cantons suisse de conclure des traités', (1929) 10 *Revue de droit international et de legislation comparée*, 466, argued that this was the case even during the League era, when Switzerland, represented by the Federal Council, declared that '*[l]a responsabilité de l'Etat fédéral est de même ordre et de même étendue que celle de l'Etat unitaire*': see LN Doc C.75.M.69.1929.V.3, 243.

[64] Art. 56, para. 3.

level;[65] but it does not embrace state secretaries or ministers, which means that the cantons cannot directly negotiate even on plainly local or administrative agreements.[66] Yet, cantonal – and even municipal – participation in various transfrontier organisations is substantial,[67] and should not be underestimated.[68]

3. *Belgium*

The case of Belgium is unique, as there is no hierarchical relationship between the linguistic communities, the geographic regions and the federal institutions with respect to their spheres of competence, in particular as regards *jus tractati* (the treaty-making power).[69] The Belgian model is based on the objective of having as many exclusive spheres of competence as possible, based on the principle *in foro interno, in foro externo*, according to which competences on the domestic level are also brought into the arena of international relations.[70] In practice, this presumes that internal legislation enacted by the federated entities is

[65] Burckhardt, *Kommentar der Schweizerischen Bundesverfassung*, pp. 93, 678.

[66] Wildhaber, *Treaty-Making Power and Constitution*, p. 317.

[67] See Report on the Transfrontier Cooperation and the Participation of the Cantons in Foreign Policy (7 March 1994) BBl 1994 II 641, pp. 644, 659.

[68] See, in particular, Swiss cantonal and municipal participation pursuant to the European Outline Convention on Transfrontier Cooperation between Territorial Communities and Authorities, signed on 21 May 1980, entered into force for Switzerland on 4 June 1982 (see SR 0.131.1), ETS 159, and Protocol No. 2 thereto, ETS 169; and the so-called 'Agreement of Karlsruhe' between several frontier cantons of Switzerland, Germany, France and Luxembourg (23 January 1996), recalled in Wildhaber, Scheidegger and Schinzel, 'Switzerland', p. 668.

[69] Art. 167, para. 1 of the Coordinated Constitution of Belgium, coordinated on 17 February 1994, assigns the king, as the head of the federal executive power, 'the leadership of foreign affairs', but immediately following is added that this is only the case 'notwithstanding the competence of the Communities and Regions to regulate international cooperation, including the treaty-making power for the matters for which they are competent according to the Constitution'. Arts. 127 and 128 of the constitution confer *jus tractati* on the Flemish and French-speaking communities, and Article 130 on the German-speaking community. So far as the regions are concerned, only Art. 167, para. 3 of the Coordinated Constitution makes reference to their *jus tractati*. See generally, P. Gautier, 'Le regime des traités dans l'Etat fédéral – la conclusion des traités' (1994) 27 *Revue belge de droit international* 31, and R. Senelle, 'Federalizing a Divided State' in J. J. Hesse and V. Wright (eds.), *Federalizing Europe* (Oxford University Press, 1996), pp. 267, 307–11.

[70] The division of foreign policy matters in Belgium since 1993 has been laid down in Arts. 167–9 of the Coordinated Constitution. In particular, Art. 167, para. 1 states that '[t]he King manages international relations *without prejudice to* the ability of the Communities and Regions to engage in international cooperation, including the

equal in power to that of the federal level, and the allocation of the exclusive powers *ratione materiae* between the different orders of government is thus transposed at the international level.[71] Thus, if a Belgian regional government is competent internally for a given domain, in relation to the said domain it is automatically competent externally.[72] Perhaps unparalleled in other States, the federal executive does not have an implied power of supervision over the communities or regions in the exercise of their powers for international cooperation; in fact, this was expressly excluded.[73]

The complete parallelism between Belgium's governmental orders in treaty-making entails that the component entities of its federal structure possess a substantial treaty-making power,[74] one which far exceeds that of the federated entities in the other States surveyed above. The combined effect of the principle of fundamental equality of the various Belgian governments coupled with the principle *in foro interno, in foro externo* is without precedent in the constitutional arrangements of States, and the Belgian federal model also contains further innovations. If multiple layers of government are competent, a consensus is required to be reached for so-called 'mixed treaties'.[75] Given the non-subordination of either the federal or federated entities, a special statute lays down the procedure for

signature of treaties, for those matters within their respective responsibilities as established by the Constitution and in virtue thereof' (emphasis added). In foreign policy matters, all Belgian governments are thus jointly responsible for determining the federation's foreign policy.

[71] A. Alen and P. Peeters, 'Federal Belgium within the International Legal Order' in Wellens (ed.), *International Law*, pp. 123, 124.

[72] See, e.g., the citation of the agreements of the three Belgian regional governments with France and the Netherlands for the protection of the Scheldt: Belgium (Brussels-Capital, Flanders, Wallonia Regional Governments)-France-Netherlands: Agreements on the Protection of the Rivers Meuse and Scheldt, Charleville Mezières (France), 26 April 1994, (1995) 34 ILM 854 (Scheldt); (1995) 34 ILM 859 (Meuse). Art. 9 of each of the agreements requires each of the regional governments separately to notify France upon the completion of their required domestic procedures for entry into force, *ibid.*, p. 858.

[73] See Belgian Council of State, Legislation Section, opinion L. 22.506/8 (9 June 1993), Parliamentary Documents, Senate, 1993-1994, no. 956/1, p. 6.

[74] Some have even suggested that the federated entities of Belgium possess international legal personality: see Alen and Peeters, 'Federal Belgium within the International Legal Order', p. 135; W. J. Ganshof van der Meersch and R. Ergec, 'Les relations extérieures des Etats à système constitutionnel regional ou fédéral' [1986] *Revue de droit international et de droit comparé* 303; J. Wouters, and L. de Smet, 'The Legal Position of Federal States and Their Federated Entities in International Relations – The Case of Belgium' (Catholic University of Leuven, Institute for International Law, Working Paper No. 7 (June 2001)).

[75] Alen and Peeters, 'Federal Belgium within the International Legal Order', pp. 125–6, give several examples where mixed treaties came to be ratified by all the levels of government competent *ratione materiae*.

concluding mixed treaties in a mandatory *cooperation agreement* between the federal authority and the federated governments.[76]

In some cases, the federal authorities can substitute for a community or a region in order to comply with a ruling against the Belgian State by an international or supranational court or tribunal.[77] Strict conditions attach to this *power of substitution*, which have been characterised as 'so extremely severe that they can be considered as being rather symbolic';[78] yet they remain operational as a last resort, to ensure that Belgium meets its international obligations. As the Belgian Council of State has opined, 'even if the attribution of (constitutional treaty-making power) is a necessary condition for the federated entities to dispose of the treaty-making power, foreign States and especially international organisations must prove that they are willing to negotiate with the political sub-entities of a federal State'.[79] The power of substitution thus provides a valuable safeguard to ensure the effectiveness of the Belgian constitutional framework in relation to third States.

4. *Other recent examples: Austria, Bosnia and Herzegovina, and the treaty-making power of Hong Kong and Macau*

A few other States have recently made constitutional arrangements worth mentioning. Since 1988, the Austrian Constitution allows the *Länder* to

[76] Art. 167, para. 4 of the Belgian Coordinated Constitution provided that a Special Majority Act would determine the rules for the conclusion of such 'mixed treaties'. Art. 92*bis*, para. 4*ter* of the Special Majority Act on Institutional Reform provided that the federal Government, the Communities and the Regions should determine these rules in a cooperation agreement, which was concluded on 8 March 1994: see Alen and Peeters, 'Federal Belgium within the International Legal Order', p. 26. See also 'Statement of the Kingdom of Belgium regarding the conclusion of international agreements alongside the other members of the European Community', OJ 1995 No. C157 (23 June 1995), p. 1, reprinted in Alen and Peeters, 'Federal Belgium within the International Legal Order', p. 127.

[77] Art. 169 of the Coordinated Constitution and Art. 16, para. 3 of the Special Majority Act on Institutional Reform.

[78] Alen and Peeters, 'Federal Belgium within the International Legal Order', p. 135.

[79] Belgian Council of State, Legislation Section, opinion of 16 September 1992, Parliamentary Documents, Senate, Extraordinary Session 1991–1992, no. 457/2, 15–17. Even those opposed to the constitutive theory of recognition in international law as a matter of principle, suggest that it applies with regard to sub-State entities: see I. Bernier, *International Legal Aspects of Federalism* (London: Longman & Sons, 1973), pp. 79–81. *Cf.* Van den Brande, 'The International Legal Position of Flanders', p. 152, who suggests instead that the role of international community should be seen in terms of *efficacy*; a refusal to enter into direct relationship with sub-State entities renders these entities' treaty-making power meaningless, but not non-existent.

conclude treaties, within their constitutional sphere of competence, with other States or their constituent entities, if these share borders with Austria. Unlike in Switzerland, federal approval *must* be obtained before their conclusion; and treaties concluded by a *Land* shall be revoked upon request by the federal government. Failure to respect these obligations means that competence in the matter passes to the federation.[80] In Bosnia and Herzegovina, the Muslim–Croat Federation of Bosnia and Herzegovina and the Republika Srpska may enter into agreements with States and international organisations with the consent of the federal parliamentary assembly.[81] Finally, although not a federal State, a special case is China, in relation to Hong Kong and Macau. Since 1997 and 1999, respectively, these two entities are Special Administrative Regions, and they not only possess a limited treaty-making power, but Hong Kong has joined international organisations, most prominently the World Trade Organization (WTO).[82]

IV. Some observations: future avenues of research

Whatever the diversity of constitutional arrangements found above, the basic feature of a federation remains that it seeks to provide a unity – a federal State – with some room for diversity, for example in the form of multi-ethnic pluralism. So to do could conceivably grant federated entities an opportunity to assert their distinctiveness internationally. In fact, as has been shown above, certain constitutional arrangements can confer upon federated entities a considerable degree of independence in conducting foreign relations in matters coming within the ambit of their competence.[83]

[80] Federal Constitutional Law of Austria, Art. 16(3). See F. Koja, 'Zur Auslegung des Art 16 Abs. 1 B-VG' (1990) 41 ÖzöR 1; Thaler, *Die Vertragsschlußkompetenz*; and F. Cede and G. Hafner, 'Austria', in Hollis, Blakeslee and Ederington (eds.), *National Treaty Law and Practice*, pp. 59, 70.

[81] Art. III(2)(d) of the Constitution of Bosnia and Herzegovina; and both entities are parties to a number of international agreements which form the annexes to the Dayton Agreement (General Framework Agreement for Peace in Bosnia and Herzegovina), signed and entered into force 14 December 1995, (1996) 35 ILM 89.

[82] Under Art. 151 of the Basic Law of Hong Kong, the region, using the name 'Hong Kong, China', may conclude international agreements in certain fields, including trade and air service agreements (Arts 116, 133–4, 152, and 155 of the Basic Law of the Hong Kong Special Administration Region of the People's Republic of China). Prior to being retroceded to China, Hong Kong concluded several international agreements as a separate international legal person, which have continued to this day.

[83] Di Marzo, *Component Units of Federal States*, pp. 172–3, advances a theory of cumulative or shared responsibility, according to which both the component unit and the

1. *Separate international legal personality?*

Whatever the heterogeneity of practice described above, the question remains whether federated entities with the power to contract internationally binding legal obligations in the form of treaty-making powers – perhaps the quintessential requirement for international legal personality, however limited – can qualify as legal persons under international law.[84]

Such an argument has met with some resistance, due partly to the fear that such status for federated entities could lead to the fragmentation of the legal personality of the federal State.[85] Yet, if one considers the argument carefully, it neither suggests that federated entities are different and new legal persons, to the exclusion of the federal State, nor that they are the same legal person. On the contrary, a federal State remains vested with plenary or universal legal personality, whereas the legal personality of a federated entity remains limited, confined under international law as a corollary to constitutionally defined prerogatives to enter into treaties. What this overlapping conception of international legal personality would suggest is that the personality of the federal State and that of the federated entity never exist concurrently, in the sense that, through the constitutional mode of allocating competences, each level of personality operates within a different network of legal relations.

2. *Reconciling the treaty-making power with the sovereignty of the State*

Whatever the practice of States might suggest, it behoves international lawyers to resist the temptation to declare that federated entities, whatever their treaty-making prerogatives, have become separate subjects of international law. A first concern is primarily evidentiary: many of these 'agreements' are rarely published or consolidated in a manner that would

federal government would be simultaneously responsible for the same breach of international law. His argument is expressly policy-based, and does not rely on actual practice.

[84] Ago defines international legal personality in a functional manner: it 'is merely a concise way of describing the situation of an entity to which the international legal order attributes subjective legal situations, that is, subjective rights, faculties, powers and legal obligations': see R. Ago, 'Second Report on State Responsibility', *Yearbook of the International Law Commission*, 1970, vol. II, UN Doc. A/CN.4/233, p. 19, fn. 106.

[85] This is most apparent in the case of Belgium, where the federated entities' international competences are particularly strong: see Alen and Peeters, 'Federal Belgium within the International Legal Order', pp. 135–6; and Van den Brande, 'The International Legal Position of Flanders', pp. 150–1.

allow for an evaluation of their legal character.[86] Furthermore, in practice the federal governments have invariably stepped in, either during the negotiating process or *post hoc*, to ratify the acts of their component entities, and to assume international responsibility for them.[87] This weakens the claim of such federated entities to act independently.

International law itself has developed techniques to ignore or interpret away alternatives to a State-centric approach. As regards sub-State actors, for example, their activities are simply projected back to the national level.[88] Currently, as a matter of international law, the federal State comes to be bound as a matter of international law when the acts by sub-State units or federated entities have international legal consequences.[89] This is so regardless of the allocation of competences on the constitutional level of a State and the degree of control by the federal State over a given act.[90] It seems generally accepted that holding the

[86] Hollis, 'Why State Consent Still Matters', p. 150. Di Marzo, *Component Units of Federal States*, Ch 2, attempts to systematise and catalogue the practice of some States, but readily concedes, *ibid.*, p. 59, that 'a correct estimate of the practice is exceptionally difficult to obtain'.

[87] See, e.g., Wildhaber, Scheidegger and Schinzel, 'Switzerland', p. 669, with respect to the Canton of Jura, where the Swiss Federal Council authorised the Swiss Ambassador to act for the canton of Jura in signing an agreement on cultural and technical cooperation with the Republic of the Seychelles. For the practice of Canada and the United States, see, *supra.*, n. 34.

[88] This is the general approach taken by the International Law Commission in Article 4 of the Articles on the Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-Third Session, UN Doc. A/56/10, chap. V (2001), GAOR 56th Sess. Supp. 10. See also, C. Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?' (1993) 4 *European Journal of International Law* 447, 455.

[89] This rule is confirmed in Article 7 of the Articles on State Responsibility, which states that 'the conduct of an organ of a territorial government within a State shall also be considered as an act of that State under international law, *provided that organ was acting in that capacity in the case in question*' (emphasis added). There is divergence as to the reasons for this attribution. On the one hand, the federated entity can simply be seen as an organ of the federal State. On the other hand, where an organ of a component state engages in conduct which amounts to a specific breach of an obligation incumbent upon the component state as a separate subject of international law, the international responsibility of the federal State could be invoked, but only for direct responsibility: see Report of the International Law Commission on the Work of its Twenty-Sixth Session, *Yearbook of the International Law Commission*, 1974, vol. II, pt. I, UN Doc. A/9610/Rev.1, 157, p. 280.

[90] But *cf. ibid.*, p. 281, where the International Law Commission foresaw the possibility of separate responsibility for sub-State entities in certain, extremely limited circumstances:

> [w]here an organ of a component State of a federal State acts in a sphere in which the component State has international obligations that are incumbent on it and not on the federal State, that component State clearly emerges at the

federation bound is consistent with the idea that the internationally acknowledged treaty-making power of federated entities does not come into being by the federal constitution's conferral thereof upon the constituent units, but only if it is accepted by the contracting partners.[91] This suggests that there must be international recognition of the domestic constitutional arrangements for them to have legal effect in international law. States contracting with a federated entity are thus reassured that the federation will be ultimately responsible should that entity fail to meet its international legal obligations.[92] It seems that the perspective of international law remains that parent States are the ultimate addressees of both the primary and the secondary obligations arising from a treaty concluded by a federated entity, even if the two levels of obligation need not necessarily have identical addressees.[93]

There is also a conceptual argument as regards the international legal subjecthood of sub-State entities, which goes beyond Kelsen's claim that

> international level as a subject of international law separate from the federal State, and not merely as a territorial government entity subordinate to the federal State. *It stands to reason that in this case the conduct of the organ in question is, in virtue of article 5 of the present draft, the act of the component state; the problem of attributing the conduct in question to the federal State does not even arise in this hypothetical case, which thus falls automatically outside the scope of those covered by this article* [emphasis added].

However, the Commission was careful to explain, *ibid.*, that it is 'another matter to determine in such a case, not to what subject of international law the act is to be attributed, but what subject is to be held internationally responsible for that act'.

[91] C. Tomuschat, 'Component Territorial Units of States under International Law' in L. Daniele (ed.), *Regioni ed autonomie territoriale nel diritto internazionale ed europeo* (Naples: Scientifica Napoli, 2006), pp. 31, 48, a federation 'makes an offer which can be accepted by other States, without any obligation for any of them to do so'.

[92] As is pointed out in A. Aust, *Modern Treaty Law and Practice*, 2nd edn (Cambridge University Press, 2007), pp. 63–71, sovereign States frequently assume international legal responsibility for the agreements of sub-State actors, referring to the practice of Germany, Switzerland, Belgium, the United Kingdom, Bosnia and Herzegovina and China (although strictly in relation to Hong Kong and Macau, so-called 'Special Administrative Regions'). *Cf.* the case of Mexico, which at Art. 117, para. 1 of its constitution expressly denies the binding nature of agreements concluded by its federated states: L. M. Díaz, 'Mexico', in Hollis, Blakeslee and Ederington (eds.), *National Treaty Law and Practice*, pp. 439, 450.

[93] See A. Peters, 'Treaty-Making Power', in Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law* Oxford: Oxford University Press, 2012), vol. X, p. 56, para. 32. This accords with the view expressed in O. J. Lissitzyn, 'Territorial Entities other than Independent States in the Law of Treaties' (1968-III) 125 *Recueil des Cours* 1, p. 84, that international law imposes only two prerequisites on sub-State entity treaty-making: (1) the consent of the federal State responsible for the sub-State actor; and (2) the willingness of the sub-State actor's treaty partners to regard it as capable of entering into treaties.

such entities are merely agents or designees of the State,[94] or that the federal State acts indirectly through its component units.[95] Independent treaty-making powers need not necessarily entail independent international personality, but in fact can be reconciled with the principle of State sovereignty, of which the power to enter into treaties is an essential attribute. Even if a State wishes, within its own constitutional arrangements, to allow its component units to exercise the sovereign prerogative of entering into treaties, the treaty-making power of such units derives from the basic competence of the sovereign State, as a whole, to conclude treaties. So goes this argument, the sovereignty of the State will stand behind any treaty concluded by a competent level of that State, be it the federal level or the federated level; any obligations thus contracted will bind the State as a whole, which will be responsible at international law for their breach. Accordingly, reference by international law to a State's domestic constitutional arrangements[96] would serve to reinforce its sovereignty in international law, rather than to disperse it.

In the final analysis, treaty-making by federated entities remains for now a consequence of the constitutional arrangements of a State; and the conclusion drawn here is that international law indeed takes its starting point in the domestic law of the State concerned. If so, future enquiry will be needed to understand whether such reference to domestic law incorporates the rules and norms of the latter into international law itself, and to gauge the effects at international law of such reference or incorporation.

[94] Lissitzyn, 'Territorial Entities in the Law of Treaties', p. 15, claims that while treaty conclusion by a dependent entity may lead to the determination that the sub-State entity is an international person possessing its own treaty-making capacity, whether or not it is a 'State, a second juridical explanation is also possible where the sub-State actor may be regarded as having no distinct international personality or capacity of its own, but merely the authority to act as an agent or organ of the dominant State which retains the requisite capacity. See also Hollis, 'Why State Consent Still Matters', 155; and with regard to Canada, see A. E. Gotlieb, *Canadian Treaty-Making* (Toronto: Butterworths, 1968), p. 31.

[95] Kelsen, *General Principles*, pp. 260–1.

[96] Van den Brande, 'The International Legal Position of Flanders', 151, fn. 31, suggests such reference to domestic law constitutes '*renvoi*', citing J. P. Rougeaux, 'Les renvois du droit international au droit interne' (1977) 81(1) *Revue générale de droit international public* 167, 362: 'un procédé technique par lequel un ordre juridique déclare applicable, pour régler une question dont la solution lui incombe, une norme d'un autre ordre juridique et non l'une de ces normes'.