

The Waning of the Sovereign State: Towards a New Paradigm for International Law? *

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I. Introduction: The Dominant Role of the Sovereign State

The concept of an international community made up of sovereign States is the basis of our intellectual framework for international law. A look at history, however, tells us that conceptions of world order have by no means always been shaped by the model of sovereign co-equal actors with a territorial basis. Although there are old historical precedents for relations between territorial communities on an equal footing, the imperial conceptions of Roman times and of the Middle Ages were based on entirely different ideas. They were strongly hierarchical and paralleled religious or secular concepts of subordination and dependence. Sixteen forty-eight, the year of the Peace of Westphalia, is usually given as the decisive date for the transition from the vertical imperial to the horizontal inter-State model.¹ Needless to say, in historical terms this is an oversimplification. The Empire existed until 1806 and the process towards sovereign equality was gradual. It culminated with the collapse in the early twentieth century of the Austro-Hungarian and Ottoman Empires, and the displacement of the Concert of Europe as the most important international arena by an open global community of States.

Colonialism was not really a deviation from this movement. The existence of different forms of social organization in other parts of the world was a welcome excuse for European powers with colonial ambitions to deny statehood to these communities and to annex the territory inhabited by them.² Decolonization consisted basically of the extension of European political structures to these

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1 See Falk, 'The Interplay of Westphalia and Charter Conceptions of International Legal Order', in R. Falk & C. Black (eds), *The Future of the International Legal Order*, Vol. 1 (1969) 32, 43.

2 Cf. Ginther, 'Systemwandel und Theoriendynamik im Völkerrecht', in P. Feuerstein, C. Parry, *Multum non Multa, Festschrift Lipstein* (1980) 31, 36.

communities.³ The sovereign State as the prototype of international actor has become the universal standard.

Contemporary international law presupposes this structure of co-equal sovereign States. The international community's constitutive set-up is dominated by it. The classical sources of international law depend on the interaction of States in the form of treaties and customary law. Diplomatic relations are conducted between States. Official arenas, like international organizations and international courts, are largely reserved to States. The protection of individual rights still depends mostly on diplomatic protection through State representatives. Central concepts of international law, like sovereignty, territorial integrity, non-intervention, self-defence or permanent sovereignty over natural resources all rely on the exclusive or dominant role of the State.⁴

Interestingly enough, the advent of participants with new ideological orientations, like the socialist States or the developing countries, has not detracted from this State-centred perspective. Despite their claims for a more progressive world order, statehood and the exclusive prerogatives attached to it have been very prominent in their programmes.

This classical model of international law as the law to be applied among sovereign States has undoubtedly served useful purposes, but it also has serious shortcomings. The concentration of authority at the level of national governments has facilitated the abuse of power. The internal exercise of power has largely been insulated from the scrutiny of the larger community by such concepts as sovereign prerogative and internal affairs. The need to protect the national community from external danger frequently serves as a justification for internal repression.⁵

The convergence of formal authority in the hands of a small central ruling elite, the government, has also contributed to an inherent instability in the international system. This concentration of official transnational contacts has created dangerous breaking points in international relations. The highly personalized nature of inter-State relations conducted by a small number of individuals creates situations where disagreements on specific issues can lead to disproportionate consequences for the respective national communities, or the international community at large.

International law has responded to these and many other problems with a rapidly growing body of substantive rules ranging from human rights issues to control over the use of military force. These prescriptions have limited the freedom of lawful action by States in detail but have left the basic structure of international law unchanged. The States have retained control over their obligations. International law has increased in volume, but has mostly remained a law that is applicable among States. Sovereignty is no longer absolute. It has been harnessed to some extent, but its core has remained

3 A good example for the clash between the classical concept of statehood and other cultural concepts of control of a society over territory is provided by the International Court of Justice's analysis in the *Western Sahara case*, ICJ Reports (1975) 10.

4 See Koskenniemi, 'The Future of Statehood', 32 *Harv. Int'l LJ.* (1991) 397, 406.

5 Koskenniemi, *ibid.*, at 397-400.

intact. The volume of international regulation has not changed the basic power structures.

The obvious weakness of the traditional system has prompted a search for alternatives. A recurrent theme in this search is the projection of the State's internal organization onto the international level. However, the structures of the modern State and its legal system are not necessarily a useful model for international organization.⁶ World State or super State institutions are not the answer.⁷ They are unrealistic because they do not reflect the decentralized nature of the international community, a feature which is likely to persist in the foreseeable future. They are inadequate because centralism is not a promising recipe for social stability or a better world order. A civil war is no improvement over an international conflict. These models are also undesirable because they tend to stifle pluralism and cultural diversity. This applies not only to global systems but to regional ones as well. For instance, it is unhelpful and misleading to judge progress in the European Community by its approximation to a United States of Europe, which is usually modelled after the United States of America.

The traditional image of the international community composed of sovereign and equal States has not only displayed practical shortcomings, but has also shown weaknesses as a theoretical model. In particular, the concept of equality among States is to a large extent based on fiction. The enormous differences between participants in terms of power and wealth have created a constant tension between basic conceptions of international law and reality.

In addition, the monolithic picture of an international legal community consisting of States was never entirely accurate. International law has always accepted certain actors in addition to States, at least for certain purposes. They include the Holy See, international organizations, the International Committee of the Red Cross, Amnesty International, corporations and individuals. However, the dominant role of States has never really been questioned by these additional actors. They were either established and controlled or at least tolerated by the States.

II. Towards a Greater Diversity of Participants

More important than a description of present realities are certain trends perceptible in the role of actors in the international system and in authoritative power structures. States are delegating or relinquishing some of their functions to other actors on the sub-State level as well as on the inter-State level.

6 Falk, *supra* note 1, at 42.

7 See also Bleckmann, 'Zur Strukturanalyse im Völkerrecht', 9 *Rechtstheorie* (1978) 143, 155.

A. Sub-State Entities

In federal States official functions are divided between the federal government and the component units (states, regions, cantons, provinces). International law has a tendency to turn a blind eye to federal structures and regards their distribution of functions as an internal matter. This attitude has reinforced a unitary conception of the sovereign State and of international law as a horizontal system of co-equal participants.

A number of national constitutions concede limited authority to sub-State entities to regulate certain matters across national boundaries with other States or sub-State entities.⁸ Countries with provisions or practice to this effect include Germany,⁹ Switzerland,¹⁰ Canada,¹¹ the United States,¹² most recently Austria,¹³ and the now defunct constitutions of Yugoslavia¹⁴ and the USSR.¹⁵ The practical importance of these competences varies considerably. In the United States it is very limited and of little or no political relevance.¹⁶ In all these constitutions, the foreign relations power of sub-State entities is limited to matters assigned to them for internal regulation and is subject to strict federal control.

Not infrequently, sub-State entities enter into local transboundary arrangements to regulate matters such as environmental protection, utilization of lakes and rivers and regional planning.¹⁷ The classification of these arrangements as extra-legal and not properly belonging to the sphere of international law¹⁸ is probably more the expression of an inability to come to terms with this phenomenon than an adequate description of reality.

- 8 Generally see L. Wildhaber, *Treaty-Making Power and Constitution* (1971) 254-343; L. di Marzo, *Component Units of Federal States and International Agreements* (1980); H.J. Michelmann, P. Soldatos (eds), *Federalism and International Relations, the Role of Subnational Units* (1990).
- 9 Article 32 para. 3 of the German Basic Law (Constitution); W. Rudolf, 'Bundesstaat und Völkerrecht', 27 *Archiv des Völkerrechts* (1989) 1.
- 10 Article 9 of the Swiss Constitution; Wildhaber, 'External Relations of the Swiss Cantons', 12 *Can. Y.B. Int'l L.* (1974) 211.
- 11 L. di Marzo, *supra* note 8 at 42-48, 60-61, 70-74, 84, 91-94, 135-144; McWhinney, 'Canadian Federalism, and the Foreign Affairs and Treaty Making Power. The Impact of Quebec's "Quiet Revolution"', 7 *Can. Y.B. Int'l L.* (1969) 3.
- 12 Article I, Section 10, clause 3 of the US Constitution. See *Restatement (third) of the Foreign Relations Law of the United States* (1987) para. 302, comment f.; Rodgers, 'The Capacity of States of the Union to Conclude International Agreements: The Background and Some Recent Developments', 61 *AJIL* (1967) 1021.
- 13 Article 16 paras. 1-2 of the Constitution; M. Thaler, *Die Vertragsabschlußkompetenz der österreichischen Bundesländer* (1990).
- 14 Article 271 para. 2 of the pre-1992 Constitution.
- 15 Article 80. See Uibopuu, 'International Legal Personality of Union Republics of USSR', 24 *ICLQ* (1975) 811.
- 16 Cf. L. Henkin, *Foreign Affairs and the Constitution* (1972) 227-248; Bilder, 'The Role of States and Cities in Foreign Relations', 83 *AJIL* (1989) 821.
- 17 See, e.g., Agreement on Acid Precipitation between Québec and the State of New York, 26 July 1982, 21 *ILM* (1982) 721.
- 18 See, e.g., Comment of the Canadian Department of External Affairs Legal Bureau of 25 January 1979, 18 *Can. Y.B. Int'l L.* (1980) 316-317.

B. International Institutions

The picture is considerably more dynamic when it comes to international organizations. Over the last decades, States have created numerous regional and global organizations. The mere existence of a large number of these organizations does not necessarily signal a change in the structure of the international system. International organizations which are no more than an arena for the interaction of their Members merely underline the inter-State nature of the traditional system. However, States have also transferred a considerable number of functions and powers to them. To the extent that these institutions become actors in their own right and exercise some measure of authority and control they must be seen as a new dimension in the international community.

This process is more advanced in the European Community than in any other organization. The Community has assumed functions in a wide array of areas hitherto considered typical State prerogatives. These include regulation of external trade, economic policy, anti-trust regulation, social policy, regional policy and environmental protection to name just a few. These functions are exercised by way of Community legislation, administration and adjudication. The Community's power to enter into external commitments is parallel to these internal competences¹⁹ and has found expression in numerous treaties. On the other hand, the Community is far from being a super-State. Despite progress towards the internal market, improved political cooperation in external matters and projects for economic, monetary and political union,²⁰ the statehood of its members is not going to vanish in the foreseeable future.²¹ The most important place of European decision-making is still the Council of Ministers, which is composed of the representatives of individual governments, even though the directly elected European Parliament has made advances in some areas of legislation. The Community's budget, huge as it may seem for an international organization, is still less than two per cent of the aggregate of its Members' budgets.

On the global level, this process has been much less spectacular. Much of the activity there is simply communication and cooperation among States. The United Nations Charter provides for far-reaching functions of the Security Council in the area of peace and security, but until recently these have only been utilized to a minimal extent. Significantly, the procedures leading to such decisions deviate from the traditional concept of sovereign equality through permanent seats and the power of veto.

The General Assembly of the United Nations has become the world's clearing house for ideas and sentiments with an agenda covering practically all matters of

19 See the decision of the European Court in *Case 22/70, AETR* [1971] ECR 274.

20 See especially the Treaty on European Union, signed in Maastricht on 7 February 1992, OJ 1992 C 191/1, 31 ILM (1992) 247, in force 1 November 1993.

21 Cf. generally W. Meng, *Das Recht der Internationalen Organisationen – eine Entwicklungsstufe des Völkerrechts* (1979).

international legal concern. Although the legal authority of its resolutions is disputed, its influence on the flow of legal developments is undeniable. It may well be argued that the General Assembly is a classic example of interaction among States; that it is an arena rather than an actor. The equal voting rights of all members would tend to underline this. The behaviour of members, however, is strongly influenced by a group system which runs counter to the individualistic assumptions about an international community composed of sovereign States. The process of decision-making is not characterized by sovereign equality and consent but by a system of collective bargaining in which most States individually play a relatively subordinate role. This group dynamic has endowed the General Assembly with a role which is clearly distinguishable from the sum total of the States represented in it.

Most technical organizations would barely qualify as independent international actors at first sight. However, in some areas of their activity and in certain geographic regions, their functions go beyond mere coordination of State activity. Especially in developing countries, organizations and programmes such as the World Health Organization, the United Nations Development Programme and the United Nations Relief and Works Agency have created structures which are more reminiscent of public administration normally associated with States than of inter-governmental institutions.²²

C. Confederate Structures

Supra-national cooperation, other than through organizations established by treaties among sovereign States, has become relatively rare. Personal unions of States under the same monarch are primarily of historical interest. The spread of republicanism and of democracy has diminished their importance. The Commonwealth (formerly the British Commonwealth), once a powerful structure, has slowly developed into a loose grouping of States with historical ties rather than any remaining authoritative structures. The Benelux Union has to a large extent been overtaken by integration in the European Community. Scandinavian States in the Nordic Council have achieved a high degree of integration, but this is more akin to cooperation among State authorities.

It remains to be seen whether, after the disintegration of the USSR, there will be substantial residual powers with a confederate body distinct from normal cooperation under international law. The Agreement Establishing the Commonwealth of Independent States, the successor to the Soviet Union, foresees not only close economic cooperation but also joint control over nuclear weapons and a joint command over a common military and strategic space.²³

22 Cf. Buehring, 'Patterns of Authority in International Law', 27 *GYIL* (1984) 11, 17, 21.

23 Agreement of Minsk, 8 December 1991, Article 6, para. 3, 31 *ILM* (1992) 144.

III. A Multi-Layered Picture of International Law

The gradual diffusion of powers among different types of participants casts doubts on our traditional conception of international law. The main attraction of State-centricity is its simplicity. International law has developed techniques to ignore or interpret away alternative structures. Sub-State entities are simply projected back to the national level. Their activities, rights and obligations are attributed to the central government. International organizations are seen to derive their authority from the participating States and hence to lack status as independent actors. A differentiated picture is thereby reduced to the level of the most conspicuous and powerful participant.²⁴

It is likely that the archetype of the State, as we know it, will continue to exist for some time and that it will even persist in its role as the most powerful actor. However, there is mounting evidence that the process of redistributing authoritative functions will continue and that the vertical element in a preponderantly horizontal order will continue to grow. The sovereign State is still the chief pillar of our international system, and there is no evidence that it is crumbling or is in danger of collapse. Rather, the static weight it has carried is gradually being shifted to other, for the time being, still lesser pillars. This process is gradual and irregular. It will proceed more rapidly in some regions than in others and it is likely to assume a variety of forms. The picture emerging from all this is still somewhat diffuse, but it is distinct enough to warrant a re-examination of a number of assumptions about international law to which we have become accustomed.

Rather than grope for the seat of sovereignty, we should adjust our intellectual framework to a multi-layered reality consisting of a variety of authoritative structures.²⁵ Under this functionalist approach what matters is not the formal status of a participant (province, state, international organization) but its actual or preferable exercise of functions.²⁶ For instance, it is not meaningful to attempt to isolate the point at which the European Community will be transformed from an international organization into a European State.²⁷ Rather, we will have to examine in detail exactly what functions and powers it has assumed from its Member States. We should get used to the idea that despite an ongoing shift of authority to the Community it will continue to exist as an international institution side by side with its Member States for a long time to come.

24 The assumptions of international lawyers about the near-exclusive role of States seem to be largely shared by international relations theory. See Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers', 14 *Yale J. Int'l L.* (1989) 335.

25 Janis, 'International Law?', 32 *Harv. Int'l L.J.* (1991) 353, 367-370.

26 Cf. Johnston, 'Functionalism in the Theory of International Law', 26 *Can. Y.B. Int'l L.* (1988) 3.

27 For a jurisprudential analysis see MacCormick, 'Beyond the Sovereign States', 56 *Modern L. Rev.* (1993) 1.

IV. The Need for Adjustment

A. The Making of International Law

1. Treaties

Classical treaty law is typical of the horizontal structure of international law and its focus on the interaction of sovereign and equal participants. It is therefore not surprising that international law has viewed the capacity of non-State actors to enter into international agreements with some reserve. Their treaty-making power is typically left to the respective sub-system, that is the national constitution in the case of sub-State entities, or the 'rules of the organization' in the case of international organizations.²⁸ A draft provision in the Vienna Convention on the Law of Treaties concerning the right of component States to enter into treaties if permitted by the federal constitution was deleted upon the insistence of federal States, wary of giving clues to centrifugal sentiments.²⁹

Treaty-making by international organizations had become so widespread that by 1986 it was considered necessary to draft a second Vienna Convention on the Law of Treaties.³⁰ The outcome was a document which largely duplicates the Treaty Convention of 1969 with a few adjustments, mostly of a procedural character. The half-hearted attitude towards the admission of international organizations into the community of official treaty-makers is perhaps best illustrated by the final clauses of the 1986 Convention; the Convention is open to States and to international organizations, but only the ratifications of States count towards the number necessary for its entry into force.³¹

While the capacity of the State to enter into treaty commitments is unlimited, in principle, sub-State entities and international organizations are typically confined to the powers assigned to them either explicitly or by implication. International organizations have shown a remarkable ability to expand their treaty competences through doctrines such as implied powers.³² Sub-State entities, on the other hand, usually remain under strict federal supervision.

The increasing scope of regulation through treaties has sometimes led to a conflict between the constitutional powers of the sub-State entities and the treaty-making

28 Cf. Article 6 in conjunction with Article 2(j) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, 25 ILM (1986) 543.

29 Draft Article 5(b) was deleted mainly upon the insistence of Canada. For detailed references see L. Wildhaber, *supra* note 8, at 265-66.

30 See *supra* note 28.

31 Articles 82(c), 84 para. 1, 85 para. 1; Cf. also Article 8 of Annex IX to the United Nations Convention on the Law of the Sea, *infra* note 38.

32 This is reflected in the 11th preambular paragraph to the 1986 Vienna Convention, *supra* note 28, which notes 'that international organizations possess the capacity to conclude treaties which is necessary for the exercise of their functions and the fulfilment of their purposes.'

monopoly of the central government.³³ Where treaty commitments undertaken by the federal government encroach upon decentralized competences, there is sometimes provision for participation by the sub-State entities in the internal decision-making process leading to the conclusion of the treaty.³⁴ In some instances treaties contain federal clauses making allowance for internal difficulties which may arise from the implementation of treaty provisions which fall under the jurisdiction of constituent States.³⁵

The European Community has developed a different technique to deal with treaties straddling State and Community competences. These treaties are concluded in the form of 'mixed agreements' to which the Members as well as the Community are formal parties.³⁶ This 'double decker' method may be an interesting model for future solutions. It is quite conceivable to have different levels of authority represent the same communities in the treaty process simultaneously.³⁷ An increasing number of the more recent multilateral treaties are open not only to States but also to international organizations where the organizations have assumed functions in the respective areas.³⁸ The European Community participates in a number of general multilateral treaties which are also open to its Members. The EC signature to the Law of the Sea Convention³⁹ is particularly striking in view of the refusal of the United Kingdom and Germany to sign it. It is conceivable, though not likely, that this highly important treaty may one day become part of Community law while some Members persist in their refusal to ratify it.⁴⁰

The logical outcome of these developments would be a general opening up of the treaty process for non-State actors to the extent that they have assumed the functions

- 33 See, e.g., the debate surrounding *Missouri v. Holland*, 252 US 416 in the United States; see also Byrnes & Charlesworth, 'Federalism and the International Legal Order: Recent Developments in Australia', 79 *AJIL* (1985) 622; Morviducci, 'The International Activities of the Italian Regions', 2 *IYIL* 1976) 201.
- 34 See, e.g., Article 32 para. 2 of the German Basic Law and the Lindau Agreement of 14 November 1957 between the Federal Government and the *Länder* governments; Article 10 para. 3 of the Austrian Constitution.
- 35 See, e.g., Article 28 of the American Convention on Human Rights, 22 November 1969, 9 *ILM* (1970) 673, 683.
- 36 See Schermers, 'International Organizations as Members of Other International Organizations', in R. Bernhardt, K. Doehring & J.A. Frowein (eds), *Festschrift für Hermann Mosler* (1983) 823, 826-831; D. O'Keefe & H.G. Schermers (eds), *Mixed Agreements* (1983).
- 37 The ratifications of multilateral treaties by Byelorussia (now Belarus) and the Ukraine while they were still Soviet Republics, in addition to the Soviet Union, are only of historical significance today.
- 38 See, e.g., Article 305 para. 1(f) of the United Nations Convention on the Law of the Sea in conjunction with its Annex IX, 21 *ILM* (1982) 1261, 1326, 1353; Article 14 of the Convention on Long-Range Transboundary Air Pollution, 13 November 1979, 18 *ILM* (1979) 1442, 1448; Articles 4(b) and 54 of the Agreement Establishing the Common Fund for Commodities, 27 June 1980, 19 *ILM* (1980) 896, 900, 928; Article 15 of the Treaty on Intellectual Property in Respect of Integrated Circuits, 26 May 1989, 28 *ILM* (1989) 1484, 1490.
- 39 Made on 7 December 1984; see Koers, 'Participation of the European Economic Community in a New Law of the Sea Convention', 79 *AJIL* (1979) 426.
- 40 The phenomenon of 'incomplete mixed agreements' is not new. For instance, by 1 January 1991 nine out of twelve EC Members, in addition to the EC itself, were parties to the Convention for the Prevention of Marine Pollution from Land-Based Sources, 4 June 1974, 13 *ILM* (1974) 352.

covered by the respective treaties.⁴¹ The resulting network of treaty relations will be considerably more complicated than before. The typical horizontal treaty relationship between States is then supplemented by vertical agreements between international organizations and States⁴² or even their sub-entities. An example of an existing type of vertical agreement would be a loan agreement between the World Bank and one of its Members. Diagonal relationships result where States enter into agreements with foreign sub-State entities⁴³ or international organizations with non-Member States.⁴⁴ The need for adjustment in our way of thinking about treaty law will be considerable.⁴⁵

2. Custom

Customary law is typically associated with State practice.⁴⁶ Practice of sub-State entities is normally ascribed to the respective State if it is considered relevant at all. Whether that is a realistic assumption in areas where they act independently is another matter. Practice within international organizations may or may not be realistically characterized as State practice. Individual statements by State representatives or voting behaviour is clearly State practice. Collective practice of organs composed of State representatives is more difficult to categorize in view of the group dynamics prevailing there. Description of the practice of independent organs such as the UN Secretariat or the EC Commission as State practice is clearly a fiction.

This leads to the obvious conclusion that the international community is no longer exclusively composed of sovereign States and that hence customary international law cannot be based on State practice alone. Once it is recognized that behaviour patterns accompanied by legitimate expectations of compliance are relevant at all levels of the authoritative process of decision-making, the classification of this process as State practice is no longer entirely accurate.

41 This functional approach is reflected in Annex IX to the United Nations Convention on the Law of the Sea, *supra* note 38. Its Article 1 provides: *Use of Terms*. For the purposes of article 305 and of this Annex, 'international organization' means an intergovernmental organization constituted by States to which its member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters.

42 The Trusteeship Agreements were not formally concluded with the United Nations as a party but were subject to the approval of the competent UN Organ. See, e.g., Article 16 of the Trusteeship Agreement for the Pacific Islands, 2 April 1947, 8 UNTS 189, 199.

43 See, e.g., the Agreement on the Protection of Lake Constance against Pollution, 27 October 1960, between Switzerland, Austria, Bavaria and Baden-Württemberg, Austrian Federal Gazette (BGBl.) 1961/289.

44 See, e.g., Headquarters Agreement between the United Nations and Switzerland, 11 June 1946 and 1 July 1946, 1 UNTS 153.

45 Cf. also section IV. B. of this article, *infra*.

46 This is well illustrated by the definition of *jus cogens* in both Vienna Conventions on the Law of Treaties. The respective Articles 53 define a peremptory norm of general international law as a norm accepted as non-derogable by the international Community of States (emphasis added).

3. General Principles

General principles of law qualify as a source of international law if they are recognized by civilized nations. While the adjective 'civilized' has been disregarded as discriminatory and irrelevant, the requirement of origin in national law apparently remains. It should be obvious, however, that in federal States with distinct legal systems this cannot refer only to law at the national level. For instance, when making an assessment of the situation in the United States with respect to a purported general principle of law, it would be quite absurd to look at federal law only and to stop short of examining state law.

It is also clear that the legal principles developed by international organizations on the regional and global levels are part of this body of law. Thus, the law governing employment by the United Nations or EC competition law will yield important clues concerning general principles in these fields.

4. Decisions of International Institutions

Decisions of international institutions should be the most obvious indicator of an independent law-creating role on the international level. Attempts to press these into the Procrustean bed of the more traditional types of sources, by describing them as secondary treaty law or as highly organized State practice,⁴⁷ merely reflect the inability of the authors of these descriptions to come to terms with new decision-making processes carried out by new actors.

B. The Relationship of Different Legal Orders

1. Competing Prescriptions

The traditional question of the relationship of domestic or State law to international law becomes considerably more complex when we start to examine interrelationships in a stratified system of international legal order. Here too, we find the familiar technique of international law to relegate issues involving sub-State legal systems to constitutional law. Implementation of international law by decentralized legislative action is left to the respective constitutions.⁴⁸ In case of a conflict with international law, the law of the sub-State entity is simply regarded as part of the national law of the sovereign State to which questions of responsibility are addressed.

47 Cf. Schreuer, 'Recommendations and the Traditional Sources of International Law', 20 *GYIL* (1977) 103.

48 Article 27 of the Vienna Convention on the Law of Treaties would preclude the invocation of internal law reserving certain matters to sub-State entities as a justification for a failure to perform a treaty. Article 46 could possibly be used to claim the invalidity of a treaty which was concluded in manifest violation of a constitutional provision of fundamental importance protecting the prerogatives of sub-State entities.

The question becomes more problematic when it comes to conflicts between prescriptions of international origin. In the context of European Community law, the European Court has repeatedly affirmed the superiority of Community law over national law, but the relationship between EC law and general international law is less clear. In a 1991 decision, the European Court held that national French law prohibiting the employment of women at night was contrary to EC laws guaranteeing equal access of men and women to employment.⁴⁹ The Court did not mention the fact that France, like several other EC Members, is bound by an ILO Convention prohibiting the employment of women in night work.⁵⁰ Although the Court did not address the problem of a conflict between EC law and treaty law which bound some of the Member States,⁵¹ the case serves as an example for the sort of competition that might arise between different international sub-systems. A reference to Article 30 of the Vienna Convention on the Law of Treaties, dealing with successive treaties relating to the same subject-matter, is no answer. Apart from the unsatisfactory nature of the solution offered there, it merely deals with overlapping rules between States. It is unable to cope with competing decision-making processes involving different law makers.

2. Succession

The traditional concept of State succession deals with a typically horizontal process by which States assume certain rights and duties from other States. On the other hand, when it comes to transfers of powers from one level to another, the succeeding actor may find itself confronted with legal prescriptions originally directed at a different type of actor which was its predecessor in the respective functions. Where sub-State entities are endowed with the power to enter into agreements with foreign States or their respective sub-units, they are confronted with the law of treaties as well as with existing substantive provisions of international law. When States transfer competences to international institutions,⁵² these institutions are sometimes faced with parts of international law originally designed to regulate the respective functions between States.

For example, in the area of customs duties and foreign trade, the EC has taken over most of the powers previously exercised by its Members. This has raised the question of the applicability of GATT rules to the EC. The Community is not a party to the

49 Case C-345/89, *Criminal Proceedings Against Stoeckel*, [1991] ECR I-4047; see, however, Advocate General Tesauro at 4056.

50 ILO Convention (No. 89) *Concerning Night Work of Women Employed in Industry*, 9 July 1948, 81 UNTS 147.

51 Article 234 of the EEC Treaty preserves the rights and obligations arising from treaties concluded by Community Members before the entry into force of the EEC Treaty. See also Case 812/79, *Attorney General v. Burgoa*, [1980] ECR 2787.

52 Article 9 para. 2 of the Austrian Constitution restricts the right of Parliament to transfer powers to intergovernmental institutions to federal competences except through constitutional amendment.

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Agreement. Nevertheless, the European Court has answered the question in the affirmative, holding that by stepping into the Member States' functions the Community had automatically succeeded to the rights and obligations arising from GATT.⁵³ Similar considerations have shaped the European Community's attitude towards obligations arising from the UN Charter. Security Council decisions imposing economic sanctions are seen to bind not only Member States, but also the Community itself.⁵⁴

Similarly, if the Commonwealth of Independent States were to assume control over nuclear weapons, as provided by the Minsk Agreement,⁵⁵ the question would arise regarding the application to the Commonwealth of relevant rules of international law. These would include pertinent treaties in the areas of arms control and non-proliferation, and humanitarian law.

There are other situations where the adoption of functions formerly exercised by States is less obvious. The European Community has increasingly assumed powers affecting individual rights. Since Community law was initially short on express provisions concerning the protection of human rights, the European Court had to look for a legal framework outside its own black letter law. This it found not only in the civil rights provisions common to the constitutions of its Members, but also in the European Convention on Human Rights, a regional treaty concluded within the wider framework of the Council of Europe but including all Member States of the European Community. Under the European Court of Justice case-law, the substantive provisions of this treaty also bind the Community.⁵⁶

Obvious difficulties arise when some of the States which have transferred functions to an international institution are not parties to a treaty applicable to that institution. For instance, the European Court of Justice did not rely on the European Convention on Human Rights as part of the general principles constituting part of Community law until the last EC Member State had become party to the Convention.⁵⁷ One obvious solution to partial participation is a formal accession to the treaty by the international institution itself as described above. However, this may run into technical difficulties since most multilateral treaties are only open to accession by States.⁵⁸ In addition, a treaty may contain obligations, especially of a procedural kind, which are difficult or impossible for international institutions to comply with. Thus, the strongest argument against a formal accession of the European Community to the European Convention on Human Rights is its elaborate supervision mechanism, which involves

53 Case 21-24/72, *International Fruit Company*, [1972] ECR 1219, 1227.

54 See, e.g., Council Regulation 2340/90 of 8 August 1990 concerning the prevention of Community trade with Iraq and Kuwait, OJ 1990 L 213/1.

55 *Supra* note 23.

56 Case 4/73, *Nold v. Commission*, [1974] ECR 491, 507; Case 36/75, *Rutili v. Minister of the Interior*, [1975] ECR 1219, 1232; Case 44/79, *Hauer v. Rheinland-Pfalz*, [1979] ECR 3727, 3745.

57 France, 3 May 1974.

58 See, however, *supra* note 38.

the Commission, the Committee of Ministers and the European Court of Human Rights. Formal participation by the Community would create a complicated structure involving all these bodies plus the European Court of Justice and domestic courts.⁵⁹

A different technique to make general international law applicable in situations where international organizations have assumed powers hitherto reserved to States is the incorporation of the relevant provisions into the organization's internal law or into agreements concluded by it for specific purposes. The 'principles and spirit' of the Geneva Conventions for the Protection of War Victims of 1949 and of related treaties have been made applicable to UN peace-keeping forces by regulations issued by the Secretary General,⁶⁰ and by their incorporation into bilateral agreements with States providing armed forces.⁶¹ A formal accession of the United Nations to the relevant treaties is regarded as problematic *inter alia* in view of the obligation of its parties to enforce their provisions through criminal jurisdiction – a power the United Nations cannot exercise at present.⁶²

C. Participation

1. Admission

The traditional method of admission into the club of official international participants is recognition between States. The process is essentially bilateral and horizontal. More recently, admission of new States to international institutions has supplemented the traditional method. Both in the context of decolonization and in the recent fragmentation of Eastern European multi-ethnic States, the newly emerging States were eager to join the United Nations and regional institutions which had generous admission policies, such as the CSCE. Admittance to these multilateral arenas is seen as an official certificate of statehood. The new multilateral admission process has not replaced the traditional bilateral one, but has taken over some of its functions.⁶³

Other actors have not had the benefit of institutionalized procedures for their admission to the international arena. Sub-State entities participate to the extent that other actors enter into relations with them through agreements or by other methods.

When international institutions are created, the conditions for their participation in international legal relations, as, for example, legal personality or privileges and immunities, are specifically regulated *vis-à-vis* Member States. Their status in relation to non-Members is less obvious. The ICJ has attested objective legal personality to the

59 Schermers, *supra* note 36 at 834.

60 See, e.g., para. 40 of the Regulations for the United Nations Force in Cyprus of 25 April 1964, ST/SGB/UNFICYP/1; cf. also R. Higgins, *United Nations Peace-Keeping* (1970-II) 191, 303.

61 See, e.g., Exchange of Notes between the Austrian Government and the United Nations on the Service of Austrian Contingents in the Framework of a United Nations Peace-Keeping Force in Cyprus, 21 February 1966, Austrian Federal Gazette (BGBl.) 1966/60, para. 10.

62 Memorandum of the United Nations Office of Legal Affairs, 15 June 1972, *U.N.Jur.Y.B.* (1972) 153.

63 J. Dugard, *Recognition and the United Nations* (1987).

United Nations for the purpose of pursuing claims on the international level.⁶⁴ The EC has entered into numerous treaty relations with non-Members. International organizations of lesser importance may find it more difficult to assert their official status *vis-à-vis* non-Members.⁶⁵ Ultimately, the acceptance of an international institution as an official actor also by non-Members and by other institutions will depend on its significance for the larger community and on the willingness of other accepted actors to enter into relations with it.

2. *Bilateral Relations*

Diplomatic relations among sovereign States are another typical example of the horizontal structures in the traditional system of international law. Sub-State entities have not gained admittance to this exclusive arena. Some provinces or component states have established semi-official representations abroad, often under the name of trade offices. Of course, there is agreement that these offices are not diplomatic missions. It is arguable, however, that they perform some of the functions normally connected with diplomatic relations although on a much more limited scale.

States frequently entertain permanent official representations with international organizations in which they are Members. A distinctive feature of these permanent missions is their non-reciprocal character. In some cases, we also find formal relations between organizations, and non-Member States. Among international organizations the European Community has been most conspicuous in establishing formal diplomatic ties with non-Members. There are over 130 missions accredited with the Community. The Community itself has established over 50 missions with non-Members.⁶⁶

3. *Multilateral Cooperation*

Official international arenas like political conferences or international organizations have traditionally been closed to sub-State entities, but there are exceptions. The Ukraine and Byelorussia were original Members of the United Nations. The World

64 *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949) 174.

65 Section 1 of the US International Organizations Immunities Act, 59 Stat. 669 (1945), 22 USCA para. 288 et seq. (1976), restricts its application to public international organizations in which the US participates. By contrast, the respective Austrian Act (BGBl. 1977/677) provides for the granting of privileges and immunities to international organizations in which Austria participates or the activities of which in Austria have been designated by the government. Both are designated as being in Austria's foreign policy interest. Cf. the Headquarters Agreement Austria-OPEC (BGBl. 1974/382).

66 An interesting new idea has been put forward in connection with the establishment of diplomatic relations between the successor States of the Soviet Union and the Member States of the European Community. Under a French proposal, joint embassies of the 12 Community Members were to be set up in the respective capitals of the new States. Under this intermediate solution, there would be individual diplomatic relations, but integrated organizational structures for their exercise. Although the idea was supported by Germany and Belgium, it seems to have been abandoned at least in relation to the larger successor States such as Russia and the Ukraine. *International Herald Tribune*, 6 February 1992, at 1.

Meteorological Organization provides for membership to territories maintaining their own meteorological service under certain circumstances with reduced membership rights.⁶⁷ However, these examples are the result of very special historical circumstances or of a specific technical orientation by the organization, and are not necessarily indicative of a general trend.

The Treaties establishing the European Community do not provide for a role of component units of Members in the decision-making process even though they have taken over some of their competences. German law provides for the inclusion of representatives of the *Länder* in national delegations to Community bodies. The German *Länder*, have also set up the office of a joint observer in Brussels which has full access to EC institutions. In addition, the German *Länder*, as well as Spanish autonomous regions, have set up individual information offices with the European Community.⁶⁸

A different type of multilateral activity among sub-State entities involves local transfrontier cooperation. Examples are the Saar-Lorraine-Luxembourg Commission, cooperation between the regions in the European Alps or the International Commission for the Environmental Protection of Lake Constance. There is a Convention on Transfrontier Co-Operation in the framework of the Council of Europe to facilitate this process.⁶⁹

Institutionalized cooperation among international organizations has also progressed considerably. The relationship agreements between the United Nations and the Specialized Agencies are well known. Regional organizations including the EC have been accorded observer status in the UN General Assembly.⁷⁰ At the same time, the 12 Members have sought to coordinate their positions in UN bodies, to speak with one voice and to vote jointly. Not infrequently, the Member State currently holding the Presidency in the EC Council will speak for all Twelve. At times, the representative of the Commission will also speak on the same issues on behalf of the Community.⁷¹ As for the Security Council, there are suggestions that the United Kingdom and France as Permanent Members which are also Members of the EC should represent Community positions rather than national interests.⁷² Even more radical proposals envisage a transfer of the two permanent Security Council seats to the Community. Not surprisingly, the two countries concerned have been less than enthusiastic about these ideas.

In the Specialized Agencies and in GATT, the European Community has also increasingly emerged as an independent actor. In November 1991 this process

67 Article 11 of the Constitution of WMO.

68 W. Burtscher, *EG-Beitritt und Föderalismus* (1990) 95-112; H.-J. Blanke, *Föderalismus und Integrationsgewalt* (1991); Rudolf, *supra* note 9, at 23 et seq.

69 European Outline Convention on Transfrontier Co-Operation between Territorial Communities or Authorities, 21 May 1980, *European Treaty Series* No. 106.

70 UN GA Res. 3208 (XXIX) (11 October 1974).

71 Brückner, 'The European Community and the United Nations', 1 *EJIL* (1990) 144.

72 *Ibid.*, at 179.

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culminated in the admission of the European Community to full membership of the Food and Agriculture Organization (FAO).⁷³ The Community had until then enjoyed observer status. However, the far-reaching competences of the Community in the areas of food and agriculture made its full participation seem appropriate. The admission of a regional economic organization to the FAO necessitated an amendment to its Constitution which had hitherto only provided for State members. The EC members continue to be members of the FAO.⁷⁴ However, membership rights will be split. The twelve votes will be cast either by the Community or by its Member States depending on the distribution of competences between the Community and its members. There are plans for an early accession of the European Community to the International Energy Agency and to the Brussels Customs Cooperation Council.

The admission of a regional international organization as a full member to a global organization is an important departure from the purely inter-governmental structure of international institutions. It could mark the starting point for a more open and flexible process of organized decision-making in the international arena in which different types of participants interact. Under this model, participation would no longer depend on the requirement of statehood but on the specific functions which have been assigned to a particular actor.

4. Adjudication

Access to international courts is also normally limited to States. The Statute of the ICJ is typical of this limitation; it grants access in contentious proceedings only to States. Participation of sub-State entities in the Court is excluded.⁷⁵ As far as international organizations are concerned, the Court's jurisdiction to give advisory opinions is sometimes used to overcome the exclusion of non-State parties. This is best illustrated by a comparison of the respective Articles 66 of the two Vienna Conventions on the Law of Treaties. The original Convention of 1969 provides for adjudication by the ICJ of disputes between States concerning peremptory rules of international law (*jus cogens*). Since this procedure is not available where an international organization is a party to the dispute, the 1986 Convention envisages advisory opinions in this situation which 'shall be accepted as decisive by all the parties'.⁷⁶ Ultimately, there is no

73 OJ 1991 C 292/8 and 10.

74 Cf. Schermers, *supra* note 36, who is against 'mixed membership'.

75 The Ukraine and Byelorussia (now Belarus) could have become parties to proceedings while they were still parts of the Soviet Union.

76 Cf. also Section 30 of the Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 43 *AJIL Supp.* (1949) 1, 7; Section 2(b) of the Headquarters Agreement between the United States and the United Nations, 26 June 1947, 43 *AJIL Supp.* (1949) 8, 15. Generally, see Ago, "Binding" Advisory Opinions of the International Court of Justice, 85 *AJIL* (1991) 439. See also Article 287 of the United Nations Convention on the Law of the Sea in conjunction with Article 7 of its Annex IX, *supra* note 38, substituting arbitration for litigation before the ICJ in disputes involving international organizations.

convincing reason why international organizations should be debarred, in principle, from contentious proceedings before the International Court.

The European Court of Justice is open to Member States and to the organs of the Community.⁷⁷ Under certain circumstances, natural or legal persons also have access to the Court.⁷⁸ This access is of vital importance for the vindication of individual rights against Community institutions. The European Court has extended the right of action by legal persons to territorial units of Member States.⁷⁹ It is therefore entirely feasible that a sub-State entity, like a German *Land*, may use this right of action to contest the legality of Community directives it has to implement under German constitutional law.

Proceedings before the European Court of Human Rights can be initiated only by States or by the Human Rights Commission.⁸⁰ Additional Protocol IX to the Convention⁸¹ will extend this right to natural and legal persons who have brought an individual petition to the Commission. However, this new right will not be open to provinces or regions of States parties to the Convention: Article 25 explicitly limits the right of individual petition to persons, non-governmental organizations and groups of individuals.

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States⁸² contains a provision explicitly opening an international procedure for adjudication to sub-State entities. Article 25 of the Convention extends the jurisdiction of the International Centre for Settlement of Investment Disputes not only to contracting States, but also to any constituent subdivision or agency of a contracting State designated to the Centre by that State.

The above examples indicate that access to international judicial arenas should not be determined by the formal status of the prospective litigants, but by the purpose of the judicial mechanism in settling disputes and in affording judicial protection. To the extent that new participants are taking over functions from States which may involve them in disputes, or which raise issues of judicial protection, it is important to open judicial procedures to these new actors, both as plaintiffs and defendants.

77 See esp. Articles 169, 170, 173, 175 and 180 of the EEC Treaty.

78 See esp. Articles 173, 175 and 179 of the EEC Treaty. In pursuance of Article 168a, added by the Single European Act, *infra* note 106 the Court of First Instance has assumed some of these powers.

79 Case 62 & 72/68, 8 March 1988, *Exécutif régional wallon and Glaverbel v. Commission*, [1988] ECR 1573.

80 Article 48 of the European Convention on Human Rights.

81 6 November 1990, *European Treaty Series* No. 140. Not yet in force.

82 18 March 1965, 575 UNTS 159.

D. Individual Rights

The protection of the rights of the individual used to follow the classical pattern of State orientation. Under traditional international law, the treatment of citizens was seen as an internal matter. Violations of rights of foreigners were regulated on the inter-State level through diplomatic protection. This situation has been transformed dramatically, not only through the development of an international law of human rights, but also through the arrival of new actors, both in their capacity as potential protectors and as potential violators of human rights.

The creation of international machineries for the supervision of human rights on the regional level, such as the European or Inter-American Conventions and on the global level in the framework of the United Nations, has given the protection of the individual a new dimension. It transcends the classical attribution of individual rights and interests to the State of nationality. However, the traditional process of diplomatic protection has also been adapted and expanded. International organizations have successfully protected their agents and employees,⁸³ even against the State of their nationality.⁸⁴ European Community law has given the citizens of Member States a host of substantive rights (e.g. the right of establishment) and procedures for their enforcement. A European Community citizenship has thereby been effectively created.⁸⁵ It seems only a matter of time until the Community will commence protecting its citizens *vis-à-vis* third States.

The expansion by international institutions of their range of activities has also increased the danger of a violation of individual rights by them. There have been cases of transgressions by UN Forces, in which the home countries of the victims have sought and received compensation from the United Nations.⁸⁶ In the EC, means for the protection of human rights against Community action have been developed first by the European Court of Justice⁸⁷ and later by the other Community organs.⁸⁸ At first, courts of Member States were reluctant to yield judicial protection of these rights⁸⁹ but eventually accepted that the European Court could enforce basic rights against the

83 *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949) 174.

84 See especially the facts surrounding the *Mazilu case*, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, ICJ Reports (1989) 177.

85 Cf. also Arts. 8-8e of the EEC Treaty as amended by the Maastricht Treaty *supra* note 20. The new Art. 8c provides that citizens of the European Union shall be entitled to diplomatic protection against a third country by any Member State on the same conditions as the nationals of that State if their own State is not represented in the third country.

86 Exchange of Letters Constituting an Agreement between the United Nations and Belgium relating to the Settlement of Claims filed against the United Nations in the Congo by Belgian Nationals, 20 February 1965, *U.N. Jur. Y.B.* (1965) 39.

87 In addition to the cases *supra* note 56 see Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, 1135.

88 See especially the Joint Declaration on Fundamental Rights of 5 April 1977 by the Assembly, the Council and the Commission, OJ 1977 C 103/1; Declaration of Fundamental Rights and Freedoms by the European Parliament, 12 April 1989, OJ 1989 C 120/51.

89 See especially the *Solange I* decision of the German Constitutional Court, 29 May 1974, BVerfGE 37, 271.

Community institutions.⁹⁰ A future role of the European Commission of Human Rights and of the European Court of Human Rights against the European Community is feasible if the idea of accession of the Community to the European Convention on Human Rights should materialize.

E. Use of Force

International law has traditionally focused its concern with the use of armed force on inter-State relations. Efforts to contain military force by legal means through the League of Nations, the Pact of Paris or the United Nations have all concentrated on the State as the prime actor. Violence on the sub-State level is regarded with some diffidence by international law. Civil wars do not attract much interest from international lawyers until there is a foreign military intervention, or where major human rights abuses come to light. This is well illustrated by the differences in reaction by the World community to the Iraqi attack on Kuwait in 1990 and to the Serbian attacks on Croatia in 1991 and on Bosnia-Herzegovina since 1992. In the former case, there was an attack by one State on another. Therefore, the legal question seemed clear, outrage was almost unanimous and the reaction was drastic. In the latter cases, many of the factual elements were quite similar, but the description of the actors under international law was different. What we saw initially was an attack by one element of a disintegrating State on another. Even more importantly, the attacker was able to use the vestiges of the former central government, thereby gaining a semblance of legitimacy. After the recognition of the two new States and their admission to the United Nations and other international organizations, Serbia declared the withdrawal of the Federal Army and attempted to portray the ongoing hostilities as internal wars in the two countries. Despite the lack of credibility of these claims, this strategy succeeded in creating a different perspective under international law, contributing to the mix of disinterest, indecision and half-hearted action displayed by the World community.

The humanitarian law of warfare also distinguishes between inter-State hostilities and armed conflicts involving actors other than States. The four 1949 Geneva Conventions for the Protection of War Victims contained identical Articles extending some minimum protection to the victims of non-international armed conflicts.⁹¹ By 1977, the time was ripe for a separate multilateral treaty specifically regulating the humanitarian law of hostilities below the level of sovereign States.⁹²

Not surprisingly, States are reluctant to share their prerogative to use military force with other types of participants. Regional military alliances like NATO are not an

90 See especially the *Solange II* decision of the German Constitutional Court, 22 October 1986, BVerfGE 73, 339.

91 Article 3 of the four Conventions for the Protection of War Victims, 12 August 1949, 75 UNTS 31, 85, 135, 287.

92 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 16 ILM (1977) 1442.

exception to this phenomenon. They are organizations for the coordination of State activity in this field, rather than independent actors.

Chapter VII of the UN Charter, dealing with enforcement action by the Security Council, was an ambitious project to break the monopoly of States in the use of military force. Articles 42 to 49 provide for an elaborate balance between central action and a decentralized support system carried out by Member States. The weakness of the system lies in the dependence of the global actor (i.e. the United Nations) on the cooperation of individual States at all stages. The voting procedure in the Security Council, which is often perceived as the main obstacle to effective action, is only one aspect of this weakness. The inability to reach decisions on effective global military enforcement action masks the more fundamental problem of the Organization's lack of independent military resources. For the time being, control over military action remains on the State level. This observation is underlined by the instances in which military action was taken under the authority of the United Nations in Korea and against Iraq. In the first case, the Security Council 'recommended' that the Member States furnish assistance to repel the armed attack.⁹³ In the second, it 'authorized' Member States to use all necessary means to implement its resolution calling for withdrawal.⁹⁴ All this is, at best, a preliminary step towards an independent role for an international institution in the military arena.

Peace-keeping operations by international organizations such as the United Nations have been considerably more effective. Their low level of military power and their purely preventive role do not make them serious competitors to States. Their strength lies not in any ability to play an independent military role, but in their usefulness to both sides of a conflict and their legal and moral authority, making attacks on them disproportionately costly in political terms.

F. Control Over Territory and Over People

Control over territory and over people is the classic and primary task of the State. In federal States, some of the functions arising therefrom are delegated or reserved to the component units. The internal allocation of these powers is left to the individual constitutional set-up and is largely ignored by international law. Some constitutions require consent by sub-State entities to a transfer of portions of their territory to other States.⁹⁵ Some provide for separate citizenship.⁹⁶ However, international law continues to look at the national government which is seen as the focal point of authority.

93 SC Res. 83 (27 June 1950).

94 SC Res. 678 (29 November 1990).

95 See, e.g., Article 3 para. 2 of the Austrian Constitution.

96 See, e.g., Article 43 of the Swiss Constitution.

In times of national crisis, identification may shift from the centre to the periphery and internal boundaries may become fracture points in disintegrating States. The demise of the Soviet Union, the collapse of Yugoslavia and the break-up of Czechoslovakia are cases in point.⁹⁷ A complete transfer of statehood to previously subordinate administrative units is no departure from the established structures, but merely an exchange of actors in the traditional roles.

The administration of territory and its inhabitants by international institutions has remained an exceptional phenomenon.⁹⁸ The mandate and trusteeship systems delegated the actual administration to States under more or less strict supervision. The outcome was a form of controlled colonialism which resulted in the declared goal of the system: self-administration in the form of independent States. A direct administration by the United Nations was established in West New Guinea for a short transitional period only.⁹⁹ In other cases, such as Jerusalem¹⁰⁰ and Trieste,¹⁰¹ international administration was planned, but never implemented. In Namibia it was instituted but never became effective.¹⁰² After the entry into force of the 1982 Convention on the Law of the Sea, the administration of the resources of the 'Area' by the International Sea-Bed Authority under Part XI of the Convention will be the first instance of an international institution exercising a significant measure of territorial control.

Territoriality and political identification are still very much tied up with the notion of the sovereign State. They are linked to such concepts as territorial sovereignty and nationality. Self-determination and decolonization have also largely focused on statehood as the ultimate accomplishment.¹⁰³ However, there are also pointers in the opposite direction. Decentralization and autonomy have shown their worth in diluting centralist authoritarianism and in defusing ethnic and sectional disaffection. The break-up of federal States, such as the USSR, Yugoslavia and Czechoslovakia, does not signal a failure of federalism but of communism which superimposed totalitarian structures over an ostensibly decentralized political system. Regional integration, especially in Europe, has been successful in creating wider identifications and in checking abuses of national power. To the extent that the sovereign State loses its exclusive or dominant control and is replaced by a more multi-layered political set-up, the potential for conflict inherent in territorial disputes should also diminish. National

97 In the process of the disintegration of old Yugoslavia the Security Council explicitly rejected forcible changes of the old internal administrative borders. See esp. SC Res. 713(1991) and 757(1992).

98 Cf. Buehring, *supra* note 22 at 18-19.

99 GA Res. 1752(XVII) (21 September 1962). See also *Yearbook of the United Nations* (1962) 124-127.

100 GA Res. 181(II) (29 November 1947).

101 Treaty of Peace with Italy, 10 February 1947, 49 UNTS 126.

102 GA Res. 2248(S-V) (19 May 1967).

103 See, however, the *Western Sahara* case, ICJ Reports (1975) 10 at 32, where the Court, relying mainly on GA Res. 1514(XV) and 2625(XXV), points out that decolonization and self-determination may be attained not only through emergence as a sovereign independent State but also through free association with an independent State or integration with an independent State.

independence or boundary changes are not necessarily the only or even the best form of implementation for self-determination. A combination of local autonomy or federalism with a regional system of political and economic integration, coupled with an effective international supervision of individual and minority rights, can take much of the pressure out of territorial questions. A curtailment of the predominant role of the State will also make the question of which national government has control over a particular province or locality appear less important.

The creation of a 'citizenship of the Union' as provided in the Maastricht Treaty¹⁰⁴ gives legal expression to broader political identifications going beyond the State of the individual's nationality. European citizenship ensures freedom of movement and residence in the entire Community, allows participation in local elections and in elections for the European Parliament irrespective of the place of residence of a candidate within the Community, and confers the right to diplomatic protection by any Member State.¹⁰⁵

V. Conclusion

The examples presented here amount to no more than a loose mosaic, each element of which may be dismissed as unconvincing. However, in their entirety they do provide the contours of an emerging new picture, if only we are prepared to see it.

Many of the illustrations focus on Europe and may appear less convincing if viewed from other parts of the world. However, a theoretical framework based on uniformity must be able to accommodate all phenomena under consideration. Once a theory becomes punctuated with exceptions and inconsistencies the time has arrived to rethink it and build a new one. The fact that one important geographical area no longer fits smoothly into the traditional picture of inter-State relations should be reason enough to reconsider its theoretical assumptions. A framework based on diversity is closer to reality even if the majority of phenomena still fits into the old paradigm.

Such a framework would introduce considerable complexity. Classic international law is based on a high degree of uniformity of the participating States, although in many aspects this uniformity is a legal fiction. The new picture introduces diversity not only with regard to the different levels of organization (global, regional, national, sub-national), but also with regard to the degree to which different levels possess authority. Thus, a relatively centralist State may participate in a highly integrated regional community, whereas a State with a strongly developed federal system may be part of a regional system with only a limited degree of integration. There will be areas of the globe where State orientation persists longer than in others.

¹⁰⁴ *Supra* note 20.

¹⁰⁵ Articles 8-8c of the EEC Treaty as amended. See also *supra* note 85.

Yet another complicating factor is variation in the assignment of different functions to different levels of authority. International organizations will continue to specialize in economic integration, human rights or the preservation of peace and security, although there are indications that the connections between different aspects of international cooperation are close enough to make their separation impracticable. Technical cooperation, especially in Europe, has created considerable stability also in areas of high politics. The European Community has long gone beyond economic questions and has expanded into the fields of general political cooperation and even security.¹⁰⁶

In the social sciences, including law, theoretical models do not just explain reality. They also influence the facts under observation. Therefore, we must be aware of the potential policy implications for the future. If the international system continues to develop in the direction outlined here, there will be advantages and disadvantages. The loss of the simplicity inherent in the inter-State system will add considerable complexity and will require an adaptation of our intellectual framework. This is not just a problem for academics and theorists who may be reluctant to adjust to new patterns of thinking. A more heterogeneous international order will also create practical difficulties resulting from confusion about the appropriate role of different actors and duplication or even multiplication of work at different levels of authority.

As against these drawbacks, there are likely to be considerable benefits arising from a modified international legal order:

1. There is likely to be more inherent stability in the system. The potential breaking points between States will be reinforced by a supporting system of contacts and relations at different levels. A laminated structure of international legal order is likely to gain in horizontal as well as in vertical strength.
2. A diffusion of power will afford a better guarantee against its abuses both internally and externally. The danger of irresponsible tyrants oppressing their peoples or starting military adventures should be drastically reduced.
3. The fading of nationalism should add rationality to international relations. The distribution of identification over several levels of political organization rather than an exclusive commitment to a fatherland, *la patrie*, or the flag will curtail the potential for irrational and dangerous mass psychology.
4. Functional specialization and decentralization should lead to an optimum allocation of official activities at different levels of government.¹⁰⁷ The rational distribution of tasks to sub-State, State, regional and global institutions is an extension of the federal principle to international relations.¹⁰⁸

106 See esp. Article 30 of the Single European Act, 17, 28 February 1986, 25 ILM (1986) 506, 517; Title V of the Maastricht Treaty on European Union, *supra* note 20, establishing a Common Foreign and Security Policy.

107 Cf. also Kiss, Shelton, 'Systems Analysis of International Law: A Methodological Inquiry', 17 *NYIL* (1986) 45, 69; Trachtmann, 'L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity', 33 *Harv. Int'l L.J.* (1992) 459.

108 The idea is reflected in the (Maastricht) Treaty on European Union, *supra* note 20, through the principle

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There is no convincing reason why international relations must continue to be concentrated at the national level. Centralism is a pseudo-utilitarian concept which can be directed at all areas of public administration. Applied to external relations it is premised on a confrontational picture of international relations under which all forces need to be concentrated to counteract external threats. Such a concept of international relations is liable to be self-perpetuating. The concentration of power for the defence of national interests, widely perceived to be an appropriate reaction to international instability, is really one of the main causes for this instability.

In the process of the momentous changes in Europe in recent years, politicians have repeatedly invoked the image of the common European house. If we see our planet as the common house, we should realize that this house does not only consist of individual rooms. There are niches, apartments, floors, staircases and wings. It is the entire architecture and not the furnishing of individual rooms which provides the static stability and the overall quality of the building.

of subsidiarity as defined in the new Article 3b of the EEC Treaty and through the creation of a Committee of the Regions (new Articles 198a-198c EEC Treaty). Art. 3b defines subsidiarity as follows:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objects of this Treaty.

The Committee of the Regions as envisaged by Art. 198a will be 'consisting of representatives of regional and local bodies'.