

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

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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.

basically of the extension of European political structures to these 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

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 L.J.* (1991) 397, 406.

⁵ Koskenniemi, *ibid.*, at 397-400.

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 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

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.

expression of an inability to come to terms with this phenomenon than an adequate description of reality.

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.

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).

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 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

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

command over a common military and strategic space.²³

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

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.

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 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

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).

practice is no longer entirely accurate.

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

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.