PART II

STATES AS SUBJECTS OF INTERNATIONAL LAW

I

ATTRIBUTES OF STATEHOOD IN INTERNATIONAL LAW

CHAPTER I

SOVEREIGNTY AND FEDERATION IN INTERNATIONAL LAW

Editor's note This chapter was found in a file marked by Lauterpacht 'Unpublished incomplete'. Unpublished it is; but incomplete it is not. Certainly it is unpolished; and the text as printed has not been the subject of more than a few minor grammatical and typewriting corrections. But the perennial value of the piece is immediately striking, especially by its relevance to the debate about sovereignty within the European Economic Community. So it seemed that it would be a waste to omit the item simply because Lauterpacht had not refined its style and content in his usual way.

As will be seen, the chapter was written as a lecture. It bears no date. At one point there is a reference to 1940. This is followed by an indication that it was written after 5 December (probably 1939). The general tone of optimism suggests that it could not have been conceived (at any rate in 1940) after the fall of France. Hence, one may conclude that it was prepared in the early spring of 1940. But of the identity of the prospective audience there is no indication.

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The purpose of this lecture is, in the first instance, to re-state the meaning and the place of sovereignty in international law by reference to the current discussion on the subject of a federation of democratic States. This will include an attempt to show in what way the controversies as to the nature of the federal system have influenced the fortunes of the conception of sovereignty.

My second object will be to review the principal features of the federal system as distinguished from that of a confederation of States. I shall have to draw your attention to the theoretical and practical consequences of the adoption of the federal system as commonly understood, and I shall have to do it for reasons other than mere pedantry. There has always been in the discussion of international affairs a tendency to employ speech which is unreal and wholly divorced from common usage. This is so not only in the matter of obvious abuse of language, as in cases in which a powerful nation invading a weaker neighbour invokes the sacred right of self-defence. That tendency to artificiality finds expression in the use of technical terms which have acquired a definite meaning. We recall how some international lawyers invoked 'prescription' as a reason for the immediate recognition of

Manchukuo and of the conquest of Abyssinia, as if prescription meant the instantaneous validation of every illegality. To give an example directly related to this lecture: when in 1930 the French Government, in a memorandum circulated to the European Members of the League of Nations, proposed the creation of a system of European federal union, they were emphatic that 'in no case and in no degree may the formation of the federal union desired by the European Governments affect in any way the sovereign rights of the States which are members of such an association'. The union, it was said, was to be realized 'on a basis of absolute sovereignty and entire independence'; the federation, it was stated with lucidity, was to be 'founded on the idea of union, not unity'. The last eight words were a literal reproduction, without due acknowledgment, of Dicey's description of the nature of a federal State, but Dicey used the phrase in a quite different connotation. There is reason to believe that in the near future plans for European federation will be put forward in which little will remain of the idea of federation save the name. Such a misuse of language must be opposed, not because we may be in favour of a true and unadulterated federal State – many of us are decidedly not – but because the use of terms stripped of their usual meaning is confusing and wasteful.

The third object of this lecture is to examine the practical possibilities of some of the main requirements of the federal system and to inquire to what extent they may be regarded as capable of realization within the existing confederation of States, namely, the League of Nations.

2. SOVEREIGNTY IN INTERNATIONAL LAW

What, in the first place, is the present position of sovereignty in relation to international law? It is a tempting, but an alarming and inaccurate, simplification of a difficult problem to maintain that international law and sovereignty are incompatible. For in many ways international law seems to give countenance to a conception of sovereignty analogous to that of legal sovereignty within the State – which is the highest power not derived from any superior authority and is absolutely binding upon the agencies administering the law. In fact, a State, in order to be entitled to recognition as a normal subject of international law, must be sovereign not only in the sense of being independent of any other State. It must also possess a sovereign Government exacting and enjoying habitual obedience on the part of the bulk of the population. It must possess legal sovereignty in the accepted meaning of constitutional law. Neither does international law, as at present constituted, claim any right to interfere substantially with sovereignty thus conceived. Within its

borders the State's freedom of action is complete save for restrictions to which it may have consented by treaty and subject to the duty to treat aliens in accordance with what has been termed the minimum standard of civilization. (It may be noted, incidentally, that according to the predominant theory that duty is owed not to aliens in their capacity as human beings whose fundamental rights as such are recognized by international law, but only to the States of which these individuals are subjects. The strange result is that the individual may, in his capacity as an alien and while in the territory of a third State, effectively enjoy rights which cease as soon as he enters the territory of the State of which he is a national.)

In the external sphere the position is essentially the same. Although the subjection of the State to international law is both the indispensable hypothesis and an acknowledged principle of the Law of Nations, that subordination is to a large extent purely formal. It has not prevented a far-reaching recognition of rules and principles, often described as the consequences of sovereignty and suggesting that sovereignty in international law is a legal right transcending that of independence in relation to other States. Present-day international law recognizes that each State is independent not only of other States but also of the totality of States acting as organs of what is termed the international community. By virtue of sovereignty thus understood States are under no duty to agree to anything in the nature of international legislation; in the absence of agreement to the contrary, the rule of unanimity is paramount. International society is thus deprived of the essential instrument of any system of law worthy of that name, namely, of the machinery for adapting the law and re-distributing, if necessary, existing rights in accordance with changed conditions. Moreover, to a considerable extent sovereignty claims – and validly claims – freedom of action in relation to existing law. In international law the rule obtains that States are under no duty to submit disputes with other States to obligatory judicial settlement. Every State is, by law, judge in its own cause; it is entitled, in relation to other States, to insist upon its own views of the law. Finally, apart from the ill-fated Kellogg–Briand Pact, every State has a right, seemingly conceded by international law, to seek the annihilation and to destroy the independence of any other State by declaring and waging a successful war. These aspects of sovereignty would seem to indicate that while, in principle, States are subject to international law and therefore are not sovereign, that subjection is accompanied by a practically unlimited recognition of the internal sovereignty of the State and by a measure of freedom of action outside its borders which tends to bring international law to the vanishing point of jurisprudence.

This, of course, is only one side of the picture. It is a clear legal rule recognized by States that in relation to international law they are not sovereign – if by sovereignty is meant the absolute legal supremacy of the will of the State. In so far as they admit the existence and binding force of international law, States acknowledge that they are not sovereign ; further, in so far as they can be imagined as rational beings capable of orderly thought, they cannot fail to realize that it is only because of their subjection to international law that their mutual independence and equality can be assured of existence either in juridical logic or, in the long run, in actual fact. Thus viewed, both the internal and external sovereignty of the State is a quality, a competence, conferred by international law.

This is not a theory sadly out of touch with realities, but a legal rule admitted by States through the fact of their recognition of international law and by their submission to its rules flowing from sources independent of their express will. Thus, from the point of view of international law, sovereignty is a delegated bundle of rights. It is a power which is derived from a higher source and therefore divisible, modifiable and elastic. This is so although international law has suffered for a long time from the theory of the indivisibility of sovereignty, with the result that writers were unable, without the assistance of artificial explanations, to comprehend the numerous phenomena in the practice of governments like State servitudes, *condominia*, mandates, and other instances of joint international administration of territory. (The Permanent Court of International Justice has laid down in clear terms that that formidable conception of 'matters of domestic jurisdiction', which some have identified with sovereignty, is a variable notion determined by the progress of international law.)

The conclusions of this cursory survey cannot be summarized in one terse sentence. They seem inconsistent with one another. In fact, they are more mutually exclusive than the perplexing features of the political reality of international relations. That reality shows a picture of the modern world as one of common solidarity and community of interests in the field of economic endeavour and of scientific pursuit of humanitarian assistance – a unity transcending the borders of the sovereign State in a manner which has led many to believe that the exclusive and self-sufficing sovereign State is a challenge to a higher and ever present reality, and that interdependence and not independence is the primary and fundamental fact with which we are inescapably confronted.

But who will deny that the sovereign State exists and that it asserts itself in a decisive manner in law and in fact over the transcending unity of the world and of mankind ? That contradiction explains what may

appear to be a dialectical and unhelpful summary of the position of sovereignty in relation to international law: firstly, that it is only by dint of a gross inaccuracy of language that we give the same designation of sovereignty to the supreme authority of the State as determined by its constitutional law and to its legal position in international law; secondly, that the rights of sovereignty which international law fully recognizes are nevertheless so extensive in both the internal and the external sphere as to reduce, to a large extent, the regulative and restraining power of international law to a mere formality and as to render its place in jurisprudence purely nominal; thirdly, that, this notwithstanding, the competence of the sovereign State is, by virtue of recognized legal principle, derived from and determined by international law; and that, fourthly, that competence must be thought of as subject to progressive limitation and curtailment.

3. THE THEORY OF FEDERATION AND THE NOTION OF SOVEREIGNTY

We may now, for a while, turn to the further question of the influence which the federal principle has had on the fortunes of the notion of sovereignty. The legal historian cannot fail to be impressed by the fact that one of the principal causes of the modern onslaught upon the notion of sovereignty has been its obstructive influence in the international field. Even when the attack was conducted with weapons taken exclusively from the armoury of national jurisprudence, the hidden springs of its energy were to be found in the resentment against the repercussions of sovereignty in the external relations of States. But it is of special interest for the purposes of this lecture to note that the phenomenon of federation has done almost as much to displace sovereignty from the high seat of exclusive and indivisible authority. It is not only that the federal State was called in to show that a single and undivided sovereign will of Austinian jurisprudence is not essential to the State – where, it was asked, is the sovereign according to the constitution of the United States? The way in which legal writers, largely moved by political motives, juggled with the conceptions of sovereignty in order to find a solution pleasing to themselves has done as much to pave the way for a critical approach to the problem of the sovereign State. The authors of the *Federalist*, anxious to smooth the path of the transition from a confederation to a federal State, developed the theory of the division of sovereignty between the union and the member States. De Tocqueville planted the doctrine in European soil and Waitz adapted it for German consumption with the added embellishment of the distinction between

the substance of sovereignty (which, he taught, was indivisible) and the scope of sovereignty (which could be portioned out). This was a moderate theory when contrasted with that of Calhoun (followed in Germany by Seydel), who insisted on the indivisibility of sovereignty, but asserted that the latter was fully retained by the member States and not at all impaired by the delegation of some of its functions to the federal State. The other extreme was represented by those believers in national unity who regarded sovereignty both as indivisible and as essential to the State, with the result that in their view the members of the union could not properly be regarded as States. The pill was in turn sweetened by writers like Laband and Carré de Malberg, who served the causes both of the unity of the exclusively sovereign federation and of the individuality of the members by showing that sovereignty is not at all essential to statehood. They were joined by the high authority of Jellinek, who, while buttressing national unity by insisting on the complete subordination of the member States to the federation and on the absence of any right of secession, flattered the vanity of the members of the federation by arguing that they took part in the life of the union in their capacity as States and that they were not without a status in international law. On the other hand, Duguit, while insisting that the members of the federation are States as distinguished from decentralized provinces, pointed out that that statehood cannot be comprehended with the help of the traditional notion of sovereignty – in which fact he found yet another argument in support of his criticism of the accepted meaning of the sovereign State. But we may be well advised to stop here – not, however, without noting the indirect results of these controversies on the authority of the conception of sovereignty and as an incidental reminder that, in the matter of unions of States, pure theory and rigid classification are not necessarily a reliable guide.

4. THE FEDERAL STATE AND THE CONFEDERATION OF STATES

This reminder is bound to prove useful in relation to the postulated differences between the federal State (the *Bundesstaat*) and the confederation of States (the *Staatenbund*). In the recent discussions concerning the federation of Europe much has been made of a fundamental distinction between a mere confederation of States (a mere 'League', as it is called, for instance, in Mr Streit's book) and a true federal State. That distinction seems to express itself mainly in two directions. In the first instance, it is maintained that in a federal State there is a direct link between the federation and the individual. The federal State

exercises in many, although certainly not in all, matters, direct legislative authority over the individual; it has direct powers of taxation; its own courts exercise direct jurisdiction over the citizen; and, last but not least, the individual has a direct share in the creation of the organs of the union. In contrast with the position in a confederation of States, within a federation it is not only the member State but also the individual human being who is a unit of federal law and government. The second difference between a federal State and a confederation of States is due to the fact that, in the first, the component States cease to exist internationally; there is only one international unit, namely, the federal State. In a confederation of States the member States preserve their full international personality, with the concomitant right of conducting a foreign policy of their own. Another distinction, which has established itself in the Continental legal literature, between the two forms of union is based on the view that a confederation rests on a treaty while a federal State owes its existence to a municipal constitutional law. The distinction has been adopted in order to save the federal State from the vicissitudes of international treaties and so to remove any possible legal basis for the right of secession.

It is now being urged that the advance in international organization must be on the lines of a federal State as distinguished from confederations – all of which, beginning with the American confederation and ending with the League of Nations – have, it is said, proved unworkable and have given way to the closer unity of the federal bond.

These two typical features of the two forms of association – the exclusive international personality of the federal State and its direct authority over the citizen – constitute a working test of the distinction between the federal State and a confederation. At the same time, however, closer study shows that the typical characteristics of a federal State may on occasions be found in a confederation; and the converse case is not exceptional. The American confederation did away with the international personality of the State as if it were a federal State; in some matters it exercised direct legislative authority over individuals. The States of the German confederation between 1815 and 1866 were full international persons, although at the same time the confederation was a full subject of international law. On the other hand, the German Federal State of 1871 admitted, and Switzerland, Argentina, Brazil, Venezuela and other federal States still admit, a measure of international status for the member States in the domain of the treaty-making power. And it is significant that the German *Staatsgerichtshof*, prior to the advent of the Third Reich, decided disputes between member States on the basis of international law. This is also a conspicuous feature of the

practice of the Supreme Court of the United States and of the Swiss Federal Court. Comparative study and legal analysis both lead to the conclusion that there is no difference in kind between these types of union, and that the only difference is that of the distribution of powers between the federation (or confederation) and the member States.

5. THE SUPPRESSION OF THE INTERNATIONAL PERSONALITY OF MEMBER STATES

This being so, it is advisable to approach the question of any future developments in international organization not in the dogmatic spirit of preconceived choice between two fundamentally opposed forms of organization, but as a matter of weighing the merits of each of them in relation to the fact that the sovereign State as a separate international entity embodies a historic and cultural reality as enduring as the human eye can foresee. It is an attractive but deceptive short-cut of reasoning to assume that the danger to which progress and the very continuance of civilization are exposed as the result of the existing legal position of the sovereign State in the international sphere can or might be removed by the extinction, as distinguished from the limitation, of the sovereign international personality of States. Our task must be – and here the comparative study of institutions will offer substantial assistance – to select from the various forms of State associations those elements of integration which are most suitable to that reality and to reject schemes which because of their crudeness may block the avenue of progress.

Let us consider, for instance, the first of the two principal features of a federal State, namely, the obliteration of the international personality of the member States. It is impracticable to urge a form of European association in which Great Britain, France and Germany, or, for that matter, Holland, Sweden and Switzerland, will disappear as international units; in which they will be deprived of the right to send and receive diplomatic and consular representatives; in which, as in the case of member States of federal States, they will lose the jurisdictional immunities enjoyed by States in foreign courts; in which they will not be permitted to conclude treaties either among themselves or with other States. It is impracticable to urge a form of association in which, internationally, the status of France or Great Britain will be lower than that of Liberia, Ecuador or Panama. In connection with the recent Pan-American Declaration claiming a 300-mile safety zone round the American coasts, the acting President of Panama addressed a telegram of protest to His Britannic Majesty. If a European union were to follow