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The Practice of Shared Responsibility in relation to Federal States

*Gleider I. Hernández**

1. Introduction

A curious, singular incident motivated the research behind this chapter. In the summer of 2008, a request for provisional measures was delivered by Mexico to the Registry of the International Court of Justice (ICJ or Court), seeking the interpretation of the 2004 *Avena* judgment.[1] In this most unusual request, Mexico also sought that provisional measures be indicated against the United States (US) in respect of the pending execution of Mr. Medellín and some 50 other Mexican nationals; this was after that country's Supreme Court had declared the right of Texas under the constitution to do so.[2] The United States submitted cleverly that the Court was without jurisdiction, as there was no dispute between it and Mexico. It took the position that the execution would be contrary to international law and that there would be no dispute as to the interpretation of the obligation on the United States pursuant to the 2004 *Avena* judgment. Yet the US federal government also took the position that under its internal law, it was powerless to compel the state of Texas to comply with that obligation; and it thus accepted responsibility under international law.

In a decision that would come to be overturned at the judgment phase, the Court indicated provisional measures in favour of Mexico. By a slim seven-five majority, the Court suggested that, on the basis of Texas' conduct, 'the Parties nonetheless apparently hold different views as to the meaning and scope of [the obligation in the 2004 Judgment], whether that understanding is shared by all United States federal and state authorities and whether that obligation falls upon those authorities'.[3] The Court tantalisingly held out the prospect that, at international law at least, the legal opinion of Texas, a federated entity, could give rise to an

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[1] *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, Judgment, ICJ Reports 2004, 12.

[2] *Medellín* v. *Texas*, [2008] 552 US 491 (Sup Ct).

[3] *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico* v. *United States of America) (Mexico* v. *United States of America)*, Provisional Measures, Order of 16 July 2008, ICJ Reports 2008, 311, at 326, para. 55.

international dispute. By assessing Texas' conduct separately, the possibility arose that the United States could *share* responsibility with Texas, for an act of that federated entity. By 'shared responsibility' in this context,[4] what is meant is that the Court could have held *either* the United States or Texas as concurrently and fully responsible for the acts of Texas, or the Court could have opened the idea that responsibility could be apportioned between the United States and Texas. But at the judgment phase, that possibility proved to be unfounded: the Court did not directly address the question as to whether Texas' interpretation was relevant for determining whether there was a dispute between the United States and Mexico. Instead, it did not accede to Mexico's request on the basis that the 2004 Judgment did not decide the means of implementation for the United States, and that as such, there could be no question of interpretation on this point as it was not in the judgment.[5]

As such, the questions at the heart of this present chapter arose: to what extent are the acts of a federated entity cognised at international law? Are federated entities nothing more than 'organs' of federal states, to the effect that if they breach international law, the federal state alone is responsible? Or is there a possibility that responsibility is shared between the two layers of government, due to a claimed *souveraineté interne* of the federated entity?[6] Can the federated entity be held internationally responsible for their own acts if such acts are internationally relevant, for example, if their acts are in breach of an internationally binding obligation that they may have undertaken? What are the consequences for the law of responsibility should these federated entities be recognised as international actors?

The traditional monism/dualism dichotomy, which either posits the supremacy of international law within domestic law or its subordination to domestic incorporation, does not clearly settle the international legal effects of domestic constitutional structures. Practice is similarly thin: despite the fact that a few federal states' constitutional arrangements allow for the autonomous international action of federated entities, as will be demonstrated, very few third states are willing to recognise and respond to such arrangements. What is more, in virtually all cases, the federal state is called upon to guarantee or otherwise to stand in for the federated entity. Although it is true that that provisions of municipal law are generally

[4] See chapter 1 in this volume, P.A. Nollkaemper and I. Plakokefalos, 'Introduction', p. __, at p. __.
[5] *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico* v. *United States of America) (Mexico* v. *United States of America*), Judgment, ICJ Reports 2009, 17, at para. 44.
[6] C.-E. Côté, 'Les difficultés d'application du principe d'unité de l'État fédéral dans le droit de la responsabilité de l'État: Retour sur le(s) livre(s) d'André Mommeja et Maurice Donot' (2013) 117 RGDIP 769, 779.

regarded as 'facts' on the international level,[7] in the light of the fact so few third states are prepared to engage with these states' respective federated entities, scholarly treatment of the question in the matter of international responsibility is limited to the doctrinal interest elicited by it.

This piece will address first the relevant domestic law structures of federal states and the extent to which these permit federated entities to engage on the international law plane. These provide valuable indicia as to how federated entities could engage international responsibility, notably, by concluding an international agreement with a third state in an area of their competence, and then breaching the said agreement. Secondly, it will address the scope of their self-standing responsibility under international law, and explain how, despite elaborate federal structures that empower certain federated entities to act under international law, the practice of third states has been largely to ignore their semi-independent nature and to rely on the federal state as a guarantor of the federated entity's obligations. Given how the vast majority of practice has rejected recognising the idea of federated entities acting independently on the international plane, this chapter will conclude with some brief thoughts as to how future practice might develop, advancing the concept of 'shared responsibility' as a possible way forward.

2. The significance of domestic constitutional structures on the international plane

Defined pragmatically for the purposes of this chapter, a 'federal state'[8] is a state that distributes, according to its constitutional arrangements, the competences which normally fall to a state between two or more orders of government.[9] The social justification of the federal state, the premise that people can choose to organise themselves into different normative

[7] *Payment of Various Serbian Loans Issued in France (France* v. *Yugoslavia)*, PCIJ, Ser. A., No. 20 (1929), paras. 42-44. See also *Payment in Gold of Brazilian Federal Loans Contracted in France (France* v. *Brazil)* PCIJ, Ser. A No. 21 (1929), paras. 75-80.

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

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

frameworks suited to their overlapping identities, could ostensibly entail a measure of overlapped sovereignty between the various sub-orders, at least within a domestic legal framework.

However, the traditional international position on such states regards them as opaque, monolithic international legal subjects, where the federal state alone is regarded as responsible for international relations.[10] Indeed, so goes the classical view, 'the essential factor that distinguishes International States … from entities that are neither States nor international persons … is not the mere fact that these latter entities are not independent, but the fact that they lack that capacity to enter into treaty or other international relationship which is possessed by all international persons, including international organizations'.[11] From the international law viewpoint, therefore, a federation is essentially 'closed': only the federation enjoys the power to act on the international scene.[12]

Certainly, as the oft-quoted passage from the Permanent Court's *Wimbledon* judgment suggests, the capacity 'of entering into international engagements is an attribute of sovereignty'.[13] However, it is relatively clear that sovereignty is not *required* in order to enter into international engagements, at least for international organisations, as the international legal personalities of the United Nations[14] and the European Union[15] demonstrate. What is more, the domestic constitutional arrangements of several federal states endow their respective federated entities with *jus tractatuum*; and in fact, several third states have willingly entered into treaty relations with such entities. A brief *tour d'horizon* of the practice

[10] P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th edn (New York: Routledge, 1997), p. 81.
[11] G.G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law' (1953) 30 BYIL 2, footnote 2. See also D. Anzilotti, 'La capacité de passer des traités se confond avec la personnalité internationale de sujets', *Cours de droit international*, vol. I (Paris: Gidel trans, 1929), p. 356.
[12] A term used by R. Schütze, 'Federalism and Foreign Affairs: Mixity as an (Inter)national Phenomenon', in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited* (Oxford: Hart, 2010), p. 57, at p. 59; and B. Fassbender, *Der offene Bundesstaat* (Tübingen: Mohr Siebeck, 2006).
[13] *Case of the S.S. Wimbledon (United Kingdom* v. *Japan)*, PCIJ, Ser. A., No. 1 (1923), 25.
[14] As the ICJ noted in *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, international personality is the 'capacity to be titular to international rights and obligations', concluding ultimately, p. 179, that the United Nations, as an international organisation with 'objective international personality', also was the bearer of rights and duties under international law. This rather expansive definition also admits that subjects of international law need not be identical in their nature; nor must their rights and obligations be of the same kind and extent.
[15] See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, in force 1 December 2009), OJEU C 83 (2010), at Article 47: 'The Union shall have legal personality.' For a comparative constitutional study of the European Union as a federal entity, see, generally, Schütze, 'Federalism and Foreign Affairs: Mixity as an (Inter)national Phenomenon', see n. 12.

of several federal states confirms that, even if relatively restricted, there is a certain degree of international engagement for federated entities that requires conceptual reconciliation.

2.1 Federal states where the treaty-making power is limited to the federal government

It is true that constitutional arrangements of some federal states suggest a restrictive or 'closed' view. The United States Constitution provides at Article I(1) that 'no state shall, without the consent of Congress … enter into any agreement or compact with … a foreign power'.[16] In Canada, the 1867 British North America Act,[17] when read together with the 1931 Statute of Westminster, transferred the treaty-making power from the Westminster Parliament exclusively to the federal executive.[18] Australia's constitutional settlement has followed a similar path to that of Canada.[19]

Yet, despite being formally 'closed' federations, in at least two of these states, examples abound of the federated entities concluding international agreements, sometimes under the aegis of the federal state, which 'adopts' their conduct, either with a similar federated entity or with a third state.[20] At times, despite being obliged first to seek federal consent through a framework treaty, US states have occasionally concluded unauthorised agreements with foreign federated entities,[21] usually Canadian provinces, an example being an agreement between Missouri and Manitoba in 2000.[22] The Canadian solution has been to devise a

[16] Constitution of the United States of America (ratified 21 June 1788; as amended), Article 1, section 10, cl. 3.
[17] British North America Act 1867, 30 & 31 Vict., Chapter 3, (also 'Constitution Act 1867', name changed by the Constitution Act 1982, itself Sch. B to the Canada Act 1982 (UK), ch. 11), s. 91 (enumerating federal powers) and s. 92 (enumerating provincial powers). S. 132 of the British North America Act 1867 assigns to the federal Parliament 'all powers necessary or proper for performing the obligations of Canada or of any Province thereof, *as part of the British Empire*, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries' (emphasis added).
[18] The Statute of Westminster 1931 (22 & 23 Geo. V), Chapter 4, corroborated on this point by the Letters Patent of 1947, reprinted in (1947-48) *University of Toronto Law Journal* 475.
[19] Section 51, paragraph xxix of the Australian Constitution of 1900.
[20] The review here is necessarily brief: but these federal states' practices are canvassed in more detail in G.I. Hernández, 'Federated Entities in International Law: Disaggregating the federal State?', in D. French (ed.), *Statehood and Self-Determination* (Cambridge University Press, 2013), p. 491, at pp. 494-500.
[21] The US Supreme Court stated in *Virginia* v. *Tennessee*, 148 US 503 (1893), 518, that the prohibition against the conclusion of 'treaties' found in Article I, section 10 of the United States Constitution, n. 16, did not apply to agreements concerning such minor matters as the adjustment of boundaries, which have no 'tendency to increase and to build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States'.
[22] The earliest example being North Dakota's administrative interstate agreements with Canadian municipalities, upheld by the Supreme Court of North Dakota in *McHendry County et al.* v. *Brady*, 37 North Dakota 59, 163 N.W. 540 (1917) (United States). In 2000, Missouri concluded a Memorandum of Agreement with Manitoba on water issues without Congressional authorisation: see the letter from William H. Taft IV, the Legal Adviser to

mechanism, the *accord cadre* ('enabling agreement'), through which the Canadian federal government and a third state together recognise that agreements between a Canadian province and that state will be binding under international law.[23] The province most often asserting its rights to engage on the international plane is Quebec, which in fact provoked the *accord cadre* practice in the 1960s. Quebec's first international agreement, with France, on technical co-operation, was concluded in 1963 by an exchange of letters between two of their subordinate agencies. This was followed by a 1965 entente on cultural and educational co-operation that was signed by the ministers of education of Quebec and the ministers of foreign affairs and of national education of France. In both these cases, the Canadian government insisted on a later exchange of letters with France,[24] and later entered in a subsequent framework cultural *accord cadre* with France allowing for any province, by referring to the *accord cadre*, to enter into such agreements with that state in matters of cultural affairs and scientific and technical exchanges.[25] Quebec, availing itself of its rights under this and other *accords cadre*, has since signed some 230 agreements with foreign governments.[26] A good example of this is the 1983 agreement between Quebec and the US on social security.[27] Although without the *accord cadre* guaranteeing the validity of the obligation,[28] the Canadian example is indicative that a constitutionally 'closed' federation can enjoy a surprising degree of openness.

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the US Department of State, to Senator Byron Dorgan of North Dakota, 'Capacity to Make: Role of Individual States of the United States: Analysis of Memorandum of Understanding between Missouri and Manitoba', 2001 Digest A (United States), 179-98. Duchacek, 'Perforated Sovereignties', 20, also mentions the jointly financed water development in the Souris River Basin, linking Saskatchewan, North Dakota and Manitoba.

[23] Canada insists on these *accords cadre*, hand refuses to recognise its provinces' international agreements as such unless it has consented to them: see M. Copithorne, 'Canada', in D.B. Hollis, M.R. Blakeslee and L.B. Ederington (eds.), *National Treaty Law and Practice: Dedicated to the Memory of Monroe Leigh* (Leiden & Boston: Brill, 2005), p. 91, at p. 103.

[24] See exchange of letters, dated 23 and 27 December 1963, between the French Ambassador in Ottawa and the Department of External Affairs of Canada (in respect of technical co-operation); and exchange of letters, dated 27 February 1965, between the Secretary of State of External Affairs of Canada and the French chargé d'affaires (in respect of cultural affairs). For further discussion, see M.C. Rand, 'International Agreements between Canadian Provinces and Foreign States' (1967) 25 *University of Toronto Faculty of Law Review* 75, at 81-2.

[25] Franco-Canadian Cultural Agreement (France-Canada), 17 November 1965, Can TS 1965/21, reprinted in (1965) 17 *External Affairs* (Canada) 514.

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

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

[28] Indeed, it is an open question as to whether provincial governments have the power to bind the provinces by treaty at international law: see G. van Ert, 'The Legal Character of Provincial Agreements with Foreign Governments' (2001) 42 *Les Cahiers de Droit* 1093, 1112.

2.2 Federal states where the component units enjoy constitutionally-defined treaty-making powers

In terms of external international personality, there is more practice with so-called 'open' federations, where the actual *jus tractatuum* is granted to sub-national entities within the Constitution. Operating on the basis of these internal constitutional arrangements, there is ample practice in relation to the treaty-making power exercised by federated entities.[29] A few examples are illustrative.

Article 32 of Germany's Basic Law[30] grants the *Länder* the right to conclude treaties with foreign states.[31] Although the federal government ('Bund') can conclude treaties with respect to subjects falling within its field of exclusive legislative competence,[32] it may also enter into treaties concerning subjects over whom it has concurrent legislative powers,[33] or where it possesses the right to enact general rules.[34] Provision is also made for the participation of the *Länder* in treaty negotiations conducted by the *Bund*.[35] This complex constitutional arrangement could have led to much deadlock and confusion. In practice, however, much treaty practice in Germany is conducted in accordance with the 1957 *Lindauer Abkommen* (Lindau Agreement) between the federal government and the *Länder* governments,[36] a 'gentlemen's agreement' according to which the *Länder* agreed to delegate their agreement-making powers so as to allow the federal government to conclude treaties in its own name on subjects deemed to be predominantly of federal concern. The *Bund* government, for its part, committed itself on treaties of predominantly *Länder* concern, to seek their approval before any federal agreement would become constitutionally binding. Through the Lindau Agreement, at least 80 agreements between German *Länder* and neighbouring European

[29] An important work in this respect was that of L. di Marzo, *Component Units of Federal States and International Agreements* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980).
[30] In German: *Grundgesetz für die Bundesrepublik Deutschland*, Bonn, 23 May 1949, in force 23 May 1949, BGBI S. 1.
[31] Schütze, 'Federalism and Foreign Affairs: Mixity as an (Inter)national Phenomenon', n. 12, 65-70, recalls the history of the German constitutional model, and differing internal views as to how German federalism has accommodated the autonomous *jus tractacti* of the *Länder*.
[32] Article 73 of the German Basic Law, n. 30.
[33] So-called 'konkurriende Gesetzgebungszuständigkeit', Article 74 of the Basic Law, ibid.
[34] So-called 'Rahmengesetzgebungszuständigkeit', Article 75 of the Basic Law, ibid.
[35] The 'Kramer-Heubl-Papier' of 5 July 1968: it is not published, but see *Richlinien fur die Behandlung völkerrechtlicher Verträge*, Anlage D, mentioned in H. Beemelmans and H.D. Treviranus, 'Germany', in D.B. Hollis, M.R. Blakeslee and L.B. Ederington (eds.), *National Treaty Law and Practice: Dedicated to the Memory of Monroe Leigh* (Leiden & Boston: Brill, 2005), p. 317, at p. 329.
[36] Lindauer Abkommen (Lindau Agreement) of 14 November 1957, reprinted in H. Dreier (ed.), *Grundgesetz Kommentar*, 2nd edn, vol. II (Tübingen: Mohr, 2006), pp. 794-95.

states have been concluded.[37] A similar arrangement may be found in Article 16, paragraphs 1 and 2 of the Constitution of Austria, which grants the *Länder* an international treaty-making power, although this power is limited to matters falling within their exclusive competence, treaties may only be concluded with neighbouring states, and the power is subject to certain residual rights of the federal state.[38]

Article 56(1) of the 1999 Federal Constitution of the Swiss Confederation[39] provides that the cantons may conclude agreements with foreign states 'within the scope of their powers', subject to the caveat that such agreements may not be contrary to the law, nor to the interest of the Confederation, nor to the laws of other cantons.[40] Moreover, Article 55 of the Constitution provides for cantonal participation in the negotiation of foreign policy by the Confederation. Cantons may also engage directly with 'lower ranking foreign authorities',[41] although in practice, this is commonly interpreted as extending to administrative and judicial officials operating on a non-political level.[42] The term does not embrace state secretaries or ministers, which means that the cantons cannot directly negotiate even on plainly local or administrative agreements.[43] Yet, cantonal – and even municipal – participation in various transfrontier organisations is substantial[44] and should not be underestimated.[45]

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[37] Beemelmans and Treviranus, 'Germany', n. 35, p. 328.

[38] Federal Constitutional Law of Austria; in German: *Österreichische Bundes-Verfassungsgesetz*, Vienna, 1 October 1920, as reinstated 1 May 1945. See F. Cede and G. Hafner, 'Republic of Austria', in D.B. Hollis, M.R. Blakeslee and L.B. Ederington (eds.), *National Treaty Law and Practice: Dedicated to the Memory of Monroe Leigh* (Leiden & Boston: Brill, 2005), p. 59, at p. 61. The pre-1992 Constitution of the Socialist Federal Republic of Yugoslavia, at Article 271(2), provided for a similar competence for the federal republics.

[39] Federal Constitution of the Swiss Confederation, Bern, 18 April 1999, in force 18 April 1999; in German: *Bundesverfassung der Schweizerischen Eidgenossenschaft*; French: *Constitution fédérale de la Confédération suisse*; Italian: *Costituzione federale della Confederazione Svizzera*; Romansh: *Constituziun federala da la Confederaziun svizra* (Swiss Constitution).

[40] Article 56, paras. 1-2. See also L. Wildhaber, *Treaty-Making Power and Constitution* (Basel: Helbing and Lichtenhahn, 1971), p. 315. In Switzerland, the cantons have a limited international legal personality (*petite personnalité*); the Swiss Constitution thus leaves some limited room for the cantons to appear as subjects of rights and duties under international law.

[41] Article 56(3) of the Swiss Constitution, n. 39.

[42] W. Burckhardt, *Kommentar der Schweizerischen Bundesverfassung vom 29 Mai 1974* (Bern: Stämpfli, 1931), pp. 93, 678.

[43] Wildhaber, *Treaty-Making Power and Constitution*, n. 40, p. 317.

[44] See Federal Government of Switzerland, *Report on the Transfrontier Cooperation and the Participation of the Cantons in Foreign Policy* (7 March 1994) *Bundesblatt* (Swiss Federal Gazette) 1994 II 641, pp. 644, 659.

[45] See, in particular, Swiss cantonal and municipal participation pursuant to the European Outline Convention on Transfrontier Cooperation between Territorial Communities and Authorities, 21 May 1980, in force for Switzerland on 4 June 1982 (see SR 0.131.1), ETS 159, and Protocol No. 2 thereto, ETS 169; and the so-called 'Agreement of Karlsruhe', between several frontier cantons of Switzerland, Germany, France and Luxembourg (23 January 1996), recalled in L. Wildhaber, A. Scheidegger, and M.D. Schinzel, 'Switzerland', in D.B. Hollis, M.R. Blakeslee and L.B. Ederington (eds.), *National Treaty Law and Practice: Dedicated to the Memory of Monroe Leigh* (Leiden & Boston: Brill, 2005), p. 668.

Finally, Belgium's 1993 Coordinated Constitution[46] enshrines the *in foro interno, in foro externo* principle through which domestic divisions of competence, between both different regions as well as between linguistic communities, are made operative in international relations.[47] Unlike with other federal states surveyed above, under this principle, the federal government of Belgium may not conclude treaties related to matters falling within the exclusive competences of the federated entities.[48] Accordingly, if the Flemish or Walloon regional government is competent internally for a given domain, in relation to the said domain it is automatically competent externally to enter into internationally binding agreements.[49] The same would apply to the Flemish- and French-language communities. The Belgian sub-orders have been particularly prolific: between 1993 and 2008, Flanders (the Flemish-language community and the Flemish region) concluded 33 exclusive treaties, the Walloon region 67 treaties, and the French-language community 51 treaties.[50] In addition, up to 2009, there were some 345 mixed treaties, signed by regional and federal governments

[46] Coordinated Constitution of Belgium, Brussels, adopted by the Chamber of Representatives on 20 January 1994, and by the Senate on 3 February 1994; published in the *Moniteur Belge/Belgische Staatsblad* on 17 February 1994, in force 17 February 1994; in French: *Constitution coordonnée de la Belgique du 7 février 1994*; in Dutch: *Belgische Grondwet van 7 februari 1994*; in German: *Verfassung des Königreichs Belgien vom 7. Februar 1994*.

[47] See Articles 167-9 of the 1993 Coordinated Constitution of Belgium, ibid.

[48] P Gautier, 'La conclusion des traités' (1994) 27 RBDI 31, 38. See the 'Code of Conduct for the Conclusion of Treaties concerning Matters for which the Flemish Council is Competent', approved by the Flemish government on 15 December 1993, Chapter 1; reproduced in Dutch in J. Wouters, *Bronnenboek Internationaal Recht* (Antwerp: Intersentia, 2000), p. 27; and in French, in L. Le Hardy De Beaulieu, 'Fédéralisme et relations internationales en Belgique' (1994) 46 *Revue internationale de droit comparé* 823, at 827.

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

[50] D. Criekemans, 'Foreign Policy and Diplomacy of the Belgian Regions: Flanders and Wallonia', Netherlands Institute of International Relations 'Clingendael', Discussion Papers in Diplomacy (March 2010), available at www.clingendael.nl (last accessed in December 2014), p. 20. Flanders has signed agreements, inter alia, with the Netherlands, see the Treaty between the Flemish Community of the Kingdom of Belgium and the Kingdom of the Netherlands on the cooperation on matters of culture, education, science and social welfare, 17 January 1995 (*Moniteur belge*, 23 May 1996), and South Africa, see the Treaty between the Flemish Government and the Government of the Republic of South Africa on cooperation on matters of education, art, culture, science, technology, and sports, 28 October 1996 (*Moniteur belge*, 17 March 1998). The Walloon Region and the French Community have signed treaties, inter alia, with the Democratic Republic of the Congo, see the Cooperation Agreement between the Government of the Democratic Republic of the Congo, the Government of the French Community in Belgium and the Government of the Walloon Region, 9 December 2002 (*Moniteur belge*, 4 December 2003), and with Bolivia, see Cooperation Agreement between the Government of the Republic of Bolivia, the Government of the French Community in Belgium and the Government of the Walloon Region, 18 May 1999 (*Moniteur belge*, 5 April 2000).

according to a Cooperation Agreement between the Belgian state, the communities and the regions.[51]

3. International responsibility and federated entities

3.1 The responsibility of the federal state

The orthodox view on the attribution of the conduct of federated entities to the state is codified in Article 4 of the International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA): 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and *whatever its character as an organ of the central Government or of a territorial unit of the State.*'[52] According to the ILC, the responsibility of the federal state is engaged by conduct incompatible with its international obligations, 'irrespective of the level of administration or government at which the conduct occurs'.[53] This rule harkens back to a long-standing international practice to hold the federal state internationally responsible for the acts of federated entities, even when such entities are not acting within the control of the federal state.[54] It is a rule that would apply irrespective of whether the

[51] See the Cooperation Agreement of 8 March 1994 between the Federal State, the Communities and the Regions on the Arrangements for the Conclusion of Mixed Agreements, 8 March 1994, *Moniteur belge* (17 December 1996). For the English version of this agreement, see A. Alen and R. Ergec, 'Federal Belgium after the Fourth State Reform of 1993' (Ministry of Foreign Affairs, External Trade and Development Cooperation, 1994), p. 57. When Belgium ratifies such 'mixed treaties', it does so making a declaration such as this declaration that accompanied the signature of the Treaty of Lisbon, n. 15: 'for his Majesty the King of the Belgians, ... This signature also engages the French Community, the Flemish Community, the German-speaking Community, the Flemish region, the Walloon Region and the Brussels-Capital Region'.

[52] Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA), Article 4 (emphasis added). This reprises the essence of Article 3 of the Harvard Draft Code on International Responsibility (1929) 23 AJIL 131, at 145: 'a state is not relieved of responsibility because an injury to an alien is attributable to one of its political subdivisions, regardless of the extent to which the national government, according to its constitution, has control of the subdivision'.

[53] Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary), Commentary to Chapter II (attribution of conduct to a state), p. 39, para. 5.

[54] The rule was formulated more than a hundred years ago in the *Montijo* Arbitration *(United States of America* v. *Colombia)*, 26 July 1875, as reported in A. de La Pradelle and N. Politis (eds.), (1954) III RIAA 650 (see n. 55 below). In that case, Colombia, a federal state, refused to take responsibility for the unauthorised seizure of an American commercial vessel by its constituent state of Panama. The arbiter concluded that constituent states were non-existent in matters relating to treaties, and that such claims had to be addressed from one international legal person to another. See also Annuaire de l'Institut de droit international (session de Neuchâtel, 1900) 255: 'Le gouvernement d'un Etat fédéral composé d'un certain nombre de petits Etats qu'il répresente au point de vue international, ne peut invoquer, pour se soustraire à la responsabilité qui lui incombe, le fait que la

international obligation, or primary rule, was brought about by the conclusion of a treaty by the federated state or the federated entity, or whether the primary rule exists by virtue of customary international law. In this respect, the nature of the obligation under international law is immaterial: the default rule is that the federal state is responsible for all breach of international law committed by a federated entity. This point will be addressed further below.

What is more, international law does not deem relevant, when attributing responsibility, whether the internal law of the state gives the federal government the power to compel a federated entity to comply with that state's international obligations.[55] That principle is codified in Article 32 of the ARSIWA, and was reaffirmed by the ICJ in *LaGrand*:

> Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States.[56]

Judicial practice has borne these claims out: the constant practice of the European Court of Justice[57] and the ICJ[58] has also been to hold the federal state responsible for the non-

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Constitution de l'Etat fédéral ne lui donne sur les États particuliers ni le droit de contrôle, ni le droit d'exiger d'eux qu'ils satisfassent à leurs obligations.'

[55] Ibid. The Commission invokes a long line of arbitral case law in support of this practice, beginning with the Arbitral Award of 26 July 1875 in respect of *Montijo*, ibid., 674; see J.B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. II (US Government Printing Offices: Washington, 1898), p. 1440. See also the French-Mexican Claims Commission's 1929 award in the *Hyacinth Pellat* claim, (1929) V UNRIAA 534, at 536, which reaffirmed 'the principle of the international responsibility ... of a federal State for all the acts of its separate States which give rise to claims by foreign States'. Interestingly, it has been claimed that the ILC omitted to refer to early international practice that would have contradicted the tribunals in *Montijo* and *Hyacinth Pellat* on this point, in relation to the United States' inability to regulate the conduct of its federated states in the 19th and 20th centuries: see Côté, 'Les difficultés d'application du principe d'unité de l'État fédéral, n. 6, 773-8.

[56] *LaGrand (Germany* v. *United States of America)*, Provisional Measures, ICJ Reports 1999, 9, at 16, para. 28. See also *LaGrand (Germany* v. *United States of America)*, Judgment, ICJ Reports 2001, 466, at 495, para. 81.

[57] Most recently *Konle* v. *Austria*, Case C-302/97, [1999] ECR I-3099, para. 62, but see also *Commission* v. *Belgium*, Case 69/81, [1982] ECR 153, para. 5; *Commission* v. *Belgium*, Case C-323/96, [1998] ECR I-5063, paras. 40-42; Case C-326/97 *Commission* v. *Belgium* [1998] ECR I-6107, paras. 6-7: 'a Member State may not plead provisions, practices or circumstances in its internal legal system to justify failure to comply with obligations under Community [law]'.

[58] *LaGrand*, n. 56. Again, it is justified under Article 27 VCLT (see n. 65), according to which a state cannot invoke arguments regarding its internal organisation to justify the non-implementation of its international obligations.

implementation of obligations by federated entities. As such, it is irrelevant whether the government is a component unit of a federal state or a specific autonomous area.

Of Chapter II of the ARSIWA, Article 4 contains the sole relevant secondary rule, as the conditions required for the application of Articles 4 to 11 are not otherwise applicable. Chapter IV of the ARSIWA (Articles 16-18) would be wholly inapplicable, save for the extremely unlikely circumstance where a treaty between a federated entity and a third state could be seen as 'aid or assistance', or 'direction and control', of the federated entity by the third state. The only occasion in which this unlikely scenario has unfolded was when the Federal Republic of Yugoslavia was accused of directing and controlling the VRS Army of the Republika Srpska, a constituent unit of Bosnia and Herzegovina.[59] Yet that scenario is complicated by the fact that the Republika Srpska attempted to declare independence from Bosnia and Herzegovina on 9 January 1992, less than three months after Bosnia and Herzegovina declared its independence from the Socialist Federal Republic of Yugoslavia.[60] The specific factual scenario here is *sui generis*; and the ICJ, applying Article 8 of the ARSIWA, found an insufficient degree of direction and control over the VRS Army of the Republika Srpska by the Federal Republic of Yugoslavia.[61] To the author's knowledge, such a curious scenario has otherwise never unfolded; in virtually every other situation, the federal state has been, without exception, eager to consider the conduct of their federated entities as their own.

3.2 Is the responsibility of the federated entity excluded?

The question of the federal state's responsibility being relatively settled as the general rule, the question remains only whether federated entities' limited international personality can or could, in certain exceptional circumstances, give rise to corresponding international responsibility, for example in attributing responsibility solely to them under certain circumstances, or perhaps through the mode of shared responsibility.[62]

[59] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Merits, ICJ Judgments 2007, 43, at 128, para. 202.
[60] Bosnia and Herzegovina declared its independence from the Socialist Federal Republic of Yugoslavia on 15 October 1991. Ibid., at 139, para. 235.
[61] Ibid., at 207-10, paras. 398-407.
[62] See e.g. G. Schwarzenberger, *Manual of International Law* (London: Stevens & Sons, 1967), p. 167: has argued that the federal government is responsible for the torts of a federated entity 'to the extent to which the

The general rule as to the irrelevance of domestic constitutional arrangements has often been interpreted restrictively, as attributing *sole* responsibility to the federal state. So goes this restrictive interpretation, to *exclude* the possibility of international legal treaty-making by federated entities would also exclude the possibility of finding these entities as internationally responsible; federated entities would merely be agents or designees of the federal state,[63] either without international legal personality of their own, or via a legal fiction in which the federal state is acting indirectly through its component units.[64] This view is arguably justified by the exclusion, in the final text of the Vienna Convention on the Law of Treaties (VCLT),[65] of Draft Article 5(2) of the 1966 Draft Articles on the Law of Treaties, which provided that 'states members of a federal union may possess a capacity to conclude treaties if such a capacity is admitted by the federal constitution and within the limits there laid down'.[66] Serious Canadian opposition to the proposal entailed its deletion at the time.[67]

The problem with this view, even if conceptually elegant, is that it is at odds with the state practice of several federal states discussed above. Such practice confirms that, where domestic constitutions essentially enable federated entities to engage on the international plane, and where foreign states have also recognised their ability so to do, federated entities can – and have – readily entered into treaty relations with such federated entities, and expressed a preparedness to assume responsibility for any breach of international law. For this reason, it is the view of the present author that the traditional international law position,

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latter's international personality has ceased to exist'; and D.P. O'Connell, *International Law*, vol. 1 (London: Stevens & Sons, 1965), p. 318, has suggested that 'the federal government may or may not be responsible for breaches of international law committed by the states, depending on whether or not the latter retain sufficient international competence'.

[63] O.J. Lissitzyn, 'Territorial Entities other than Independent States in the Law of Treaties' (1968-III) 125 RCADI 1, 15, claims that while treaty conclusion by a dependent entity may lead to the determination that the sub-state entity is an international person possessing its own treaty-making capacity, whether or not it is a 'State, a second juridical explanation is also possible where the sub-State actor may be regarded as having no distinct international personality or capacity of its own, but merely the authority to act as an agent or organ of the dominant State which retains the requisite capacity'. See also Hollis, 'Why State Consent Still Matters', n. 26, at 155; and with regard to Canada, see A.E. Gotlieb, *Canadian Treaty-Making* (Toronto: Butterworths, 1968), 31.

[64] H. Kelsen, *Principles of International Law* (revised and edited by R.W. Tucker) (New York: Holt, Rinehart and Winston, 1966), pp. 260-61. This approach would justify the fact that most federated entities only conclude treaties when expressly authorised by the federal government.

[65] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331 (VCLT).

[66] Draft Articles on the Law of Treaties, ILC *Yearbook* 1996/II, pp. 191-192. See also, generally, H. Steinberger, 'Constitutional Subdivisions of States or Unions and their Capacity to Conclude Treaties. Comments on Art. 5.2 Para. 2 of the ILC's 1966 Draft Articles on the Law of Treaties' (1967) ZaöRV 411.

[67] United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April - 22 May 1969, Official Records (United Nations, 1970), 6-7.

according to which domestic constitutional arrangements are irrelevant, ought better to be seen as neutral.[68]

Neutrality does not automatically exclude the ability of federated entities to conclude international agreements with outside governments that are willing to enter into treaty relations with them; it merely suggests that they are irrelevant by themselves, and responsibility depends fully on acceptance by the third state. There is no rule of international law which precludes a third state from accepting the separate international legal personality of a sub-state entity on a given subject-matter, entering into relations with that sub-state entity, and claiming against that sub-state entity in the event of a breach.[69] The question remains as to whether such a claim by a third state against a sub-state entity could be successful on the international plane; and it seems that it can only be successful if there is express recognition by the third state as to the internal apportionment of competences between a federal state and its federated entities.[70] Otherwise, the default international law rule, that the acts of the sub-state entity are viewed as acts of the organ of the federal state, would apply. As section 4 will demonstrate, in multilateral treaty-making, such recognition seems generally to have fallen into desuetude.

3.3 The 'federal state' clause?

To recognise the participation of federated entities in international treaty-making can complicate matters in several respects. First, the principle of certainty might be seen as compromised: third states might begin to view with suspicion the possibility that a federal

[68] See I. Bernier, 'Remarks: ASIL/CCIL Joint Panel on the Conduct of International Relations in Federal States' (1991) *Proceedings of the American Society of International Law* 132, at 135.

[69] L. Van den Brande, 'The International Legal Position of Flanders: Some Considerations', in K. Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy* (The Hague: Kluwer Law International, 1998), p. 145, at p. 154; see also E. David, 'La responsabilité des Etats fédéraux dans les relations internationales' (1983) 17 RBDI 483.

[70] Of course, with respect to *intra*-state relations, the matter is different: as explained earlier, a federal state may decide how to apportion responsibility as it wishes within its domestic constitution. However, an interesting *sui generis* aside was the unusual Human Rights Chamber of Bosnia and Herzegovina, which existed from 1995 to 2003, and which had competence over matters arising under conventions listed in the Appendix to Annex 6 of the Dayton Agreement, which included the ECHR. A hybrid body established under the Dayton Agreement and applying international law directly, the Chamber did not hesitate to conclude that federal and federated entities either to have joint responsibility, or shared responsibility, in the violation of certain ECHR rights: see e.g. *Boudellaa et al* v. *Bosnia and Herzegovina and The Federation of Bosnia and Herzegovina*, cases No. CH/02/8678, CH/02/8689, CH/02/8690, and CH/02/8691, Human Rights Chamber for Bosnia and Herzegovina, October 2002. However, the Bosnian example is too unusual an example to constitute ready evidence of practice on the international plane.

state can, according to its internal law, guarantee the fulfilment of treaty obligations falling outside their domestic competence, as is glaringly illustrated by the United States' conduct with respect to the abovementioned *Medellín* dispute. Article 46 of the VCLT, – according to which a state may only invoke the fact that the consent to be bound by a treaty was given in violation of a provision of its internal law regarding competence to conclude treaties, if that violation was manifest and concerned a rule of its internal law of fundamental importance – may not fully resolve concerns in this regard. Moreover, the division of competences within a state might require third states to negotiate with different authorities, thus reducing the predictability of international relations.

The 'federal clause' solution has been proposed, through which the federal state is relieved of the obligations of the treaty in matters which fall within the competence of the federated entities.[71] These unusual clauses aim to secure at least the partial participation of federal states. However, in imposing a differential set of obligations on contracting states, they undermine the principle of reciprocity of obligations,[72] and as such, they are rarely used.[73]

4. Beyond the 'black box': possible conceptualisations of shared responsibility between federal states and federated entities

In the light of the practice described above, we are perhaps at a threshold moment in international law where one could argue that an entity that represents a territory in international relations in relation to a specified subject-matter, or an entity that can subscribe to internationally binding commitments, can also be held responsible for breaches or non-compliance with such commitments, if a third state were to recognise the international apportionment of competences within a federal state. In particular, when the unauthorised act

[71] R.B. Looper, '"Federal State" Clauses in Multilateral Instruments' (1955-6) 32 BYIL 162, at 164.
[72] R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th edn, vol. I (Oxford University Press, 1992), p. 255.
[73] See e.g. Article 41(c) of the Convention relating to the Status of Refugees, Geneva, 28 July 1951, in force 22 April 1954, 189 UNTS 137; and Article 19(7) of the Constitution of the International Labour Organisation, Paris, 1 April 1919, in force 28 June 1919. But *cf.* Article 50 of the International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171; and Article 28 of the International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 993 UNTS 3, both of which declare that the covenants are applicable 'to all parts of federal States without any limitations or exceptions'. See M. Sørensen, 'Federal States and the International Protection of Human Rights' (1952) 46 AJIL 195, at 209-12, and Looper, '"Federal State" Clauses in Multilateral Instruments', n. 71, at 186 *et seq.*, who recall the debates relating to federal states in relation to what became the human rights covenants. All federal clauses were excluded, and proposed clauses allowing federal states to enter reservations in relation to their domestic constitutions were rejected.

consists of the non-execution of international obligations undertaken by the component unit itself in its own right, then in principle there is nothing to prevent that unit itself from being held responsible internationally.[74] First, this chapter will next consider whether the constitutional arrangements of a federal state are objectively relevant at the international level (4.1). Following this, the question to be considered is whether such constitutional arrangements can, in certain circumstances, give rise to situations where responsibility is shared (4.2).

4.1 Interpreting existing practice and the lack of recognition by third states

Currently, international law concedes that recognition by a third state of the international capacity of a federated entity can allow for bilateral relationships between the third state and a federated entity. In the absence of an *ex ante* agreement through which a foreign state recognises the constitutional structure, is there any scope for the argument that the constitutional structure of the federal state has international legal effect? One must of course be cautious because this argument has far-reaching implications, and could even translate into international rights of sub-state entities, for example to external self-determination. This is also the reason why the classical view requires dual authorisation before a federated entity can enter into a treaty relationship: first, consent from within the federal state, primarily through constitutional attribution of international competences to a federated entity (and thus, of internal law, its 'internal sovereignty'); and secondly, a willingness and recognition from prospective treaty partners to regard the federated entity as capable of entering into treaty relations (thus, a matter of international law).[75] Because it is indisputable that the constitutional provision by itself would not suffice to create international legal personality for a federated entity, it is only when these two basic conditions would be met that the federated entity could be regarded as having some form of international legal personality, one essentially relational in that it would only apply vis-à-vis foreign states that recognise that entity.

[74] Looper, ibid., at 155.
[75] See G.J. Perrin, *Droit international public. Sources, sujets, caractéristiques* (Zürich: Schulthess, 1999), p. 562; J. Salmon, 'Conclusions', in *Les Etats fédéraux dans les relations internationales* (Bruxelles: Bruylant, 1984), p. 505, at p. 507.

4.2 The possibilities for shared responsibility

It is interesting to reflect on the possibility of both the federated entity and the federal state being *simultaneously* responsible for the breach of an international obligation contracted by a federated entity, with the injured party or state being free to address a claim either to the federal government or to the government of the federated entity. Such responsibility would be seen to be *shared* between the two levels, in that both levels of government could be seen as to the breach of the international obligation. The discussion that follows will consider two possibilities as to how responsibility can be shared, whether as concurrent responsibility (4.2.1) or as apportioned responsibility (4.2.2).

4.2.1 Beyond the exclusive responsibility of the federated entity: concurrent responsibility

It has been argued forcefully that, when federated entities themselves may enter into obligations through agreements signed in their own name, only they should incur responsibility for any breach with respect to that obligation.[76] Given the long-standing principle of the responsibility of the federal state for the acts of a federated entity, on the basis that these are acts of the organs of the federal state, it would be unrealistic to argue that this position reflects the present state of international law. However, that long-standing principle does not exclude the possibility of *concurrent responsibility*, according to which *either* the federated entity or the federal state can be held *fully* responsible for any breach of an international obligation entered into by the federated entity, and the injured party could choose between them, depending on which forum or remedy it would seek to pursue. Though as a general rule federal state would, as a matter of international law, be held responsible, the scope of the federated entity's responsibility could be defined in an *ex ante* agreement or in a special agreement following the breach of the international obligation. The said agreement, in such circumstances, would constitute a valid international law agreement to share responsibility. Conceptualised as such, concurrent responsibility would be a specific type of shared responsibility.

It is possible to conclude that the formation of a federation results in an 'inherent risk', in that the federal constitution makes the federal state powerless to control the conduct of federated

[76] I. Bernier, *International Legal Aspects of Federalism* (London: Longman & Sons, 1973), p. 101.

entities on conduct that may entail the breach of an international obligation.[77] As such, the federal government must be bound by an obligation arising out of any negotiations undertaken by a federated entity.[78] This principle of inherent risk would justify that the injured party can direct claims to the federal government, which remains at all times responsible under international law.[79] To choose this outcome is to choose to continue along the lines of traditional international law.

More interesting is to conceive of situations where an injured party would choose to address its claim to a federated entity, pursuant to the sort of agreement it has concluded *ex ante*. Returning to risk for a moment, any 'inherent risk' relating to the formation of a federation would then be assumed by any foreign state or entity that enters into an agreement with a federated entity as to the recourses available to it in case of a breach.[80] This risk may be mitigated by consulting with the federal government, as do Israel and the United States.[81] A good example of this practice would be France, which has demonstrated a willingness to recognise all its agreements with Quebec as internationally binding on both of them, notwithstanding whether Canada has consented to them or not.[82]

In the case of a refusal by the federated entity to entertain the claim, the question would arise as to the procedure to be followed for the injured party to obtain redress. Although in the first instance the component units ought to be allowed to answer, which would guarantee the third state's interests whilst according due recognition to the federal state's division of competences,[83] would refusal by the federated entity be a precondition for the federal state's concurrent responsibility to be engaged?[84] An analogy to the principle of the exhaustion of

[77] Côté, 'Les difficultés d'application du principe d'unité de l'État fédéral, n. 6, 781.
[78] Di Marzo, *Component Units of Federal States and International Agreements*, n. 29, p. 175, quoting M.V. Polak, 'Die Haftung des Bundesstaates für sein Gliedstaaten' (1948) 1 *Österreichische Zeitschrift für öffentliches Recht* 382, at 386.
[79] *Cf.* Di Marzo, ibid., p. 172, who suggests that such a shared approach would still make it appear from the outside that the federal government has exclusive responsibility. It would only be *within* the federal state that the federal government could then ask for reparation from the federated entity.
[80] However, *cf.* A. Verdross, 'Theorie der mittelbaren Staatenhaftung' (1948) 1 *Österreichische Zeitschrift für öffentliches Recht* 388, who suggests that in dealing with the federated entity, the third state or entity will have *recognised* the risk; and that it ought to have dealt with the federal government directly in order to avoid these problems.
[81] Hollis, 'Why State Consent Still Matters', n. 26, at 152.
[82] See B. Nikravesh, 'Quebec and Tatarstan in International Law' (1999) 23 *Fletcher Forum of World Affairs* 227, at 242.
[83] Verdross, 'Theorie der mittelbaren Staatenhaftung', n. 80, at 416; H. Triepel, *Droit international et droit interne* (Paris: Pedone, 1920), p. 364.
[84] Di Marzo, *Component Units of Federal States and International Agreements*, n. 29, p. 173, notes that this choice of respondent has the 'rather disconcerting aspect' of allowing the injured party to maximise its advantage by playing off the different orders of government within a federal state against each other.

local remedies in the exercise of diplomatic protection might point the way to a solution, but this is not yet implemented in practice.

Even if a third state chose to claim, under the category of concurrent responsibility, exclusively against a federated entity for the breach of an international obligation, a number of practical issues would arise. This would be so even if the federated entity were prepared to accept its international responsibility. Foremost remains the challenge that federal constitutional arrangements do not themselves create international legal personality, and that recognition by the addressees of such an obligation is required before an obligation is contracted. Rare indeed are the treaties that allow for direct sub-state participation, although the Law of the Sea Convention[85] and WTO Agreement[86] represent movement in this direction. What is more, if the federal state is to accept in its entirety responsibility for the acts of its federated entity, we return once more to Article 4 of the ARSIWA: federated entities are no more than organs of the federal state. Above all, any notion of concurrent responsibility remains fully dependent on recognition of the federal state's internal law by third states. As such, even if third states would accept that a federated entity could enter into international obligations with it, concurrent responsibility may not be the most compelling paradigm on either a doctrinal or a practical level to resolve claims arising from a breach of international law by that entity.

4.2.2 Towards a notion of apportioned responsibility?

The key distinction between concurrent and apportioned responsibility is the *nature* of the responsibility assumed. Under concurrent responsibility, each level of government could be found to be fully responsible, whilst under the paradigm of apportioned responsibility, the nature of the responsibility assumed by the federal state would not be simply to substitute for

[85] Although they do exist, see Article 305 of the 1982 United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 3 (Law of the Sea Convention). Article 305 allows three categories of associated states and territories to sign and ratify the Convention, provided that such entities have competence to enter into treaties in respect of matters governed by the Convention.

[86] Marrakesh Agreement Establishing the World Trade Organization, Marrakesh, 15 April 1994, in force 1 January 1995, 1867 UNTS 3 (WTO Agreement), Article XII allows for any 'customs territory possessing full autonomy in the conduct of its external commercial relations' to join. Hong Kong and Macau, prior to their reversion to China in 1997, availed themselves of this right, and have continued their independent membership in the WTO despite China's accession in 2001, and their status as Special Administrative Regions of China since reversion.

that of the federated entity, but in fact to apportion responsibility between the layers of government under domestic law.

There is some practice on the possibility of apportioned responsibility between different levels of federal government, which sidesteps the issue of 'inherent risk' that looms large in discussions on concurrent responsibility. In federal states where an *accord cadre* practice predominates, it would be reasonable to view the federal government as holding primary responsibility.[87] In Canada, 'indemnity agreements' ensure that reparations paid by the federal government for breaches of international law by the provinces are indemnified.[88] The *accord cadre* thus represents a mechanism to allow for Canada's federated entities to project themselves on the international plane and for third states to engage with them at little risk.

In the absence of an *accord cadre*, but where a federal state's constitution permits it to enter into international legal agreements, the conclusion of an agreement between a federated entity of that state with another sovereign state could constitute recognition by the contracting state of the federal state's internal constitutional arrangements.[89] In such situations, the federated entity would have primary responsibility, but the federal state would remain concurrently responsible should the federated entity fail to meet its obligations. This has particular relevance when dealing with matters beyond compensation or satisfaction, but where restitution or the cessation of a breach are demanded.[90] One could then conceive of the federal state having *subsidiary* responsibility, shared with the federated entity, for the latter's acts.

The overlapping conception of sovereignty built into this paradigm of shared responsibility suggests that the federal state acts as a 'guarantor' of the federated entity's conduct, yet concedes that the federated entity's conduct can be relevant on the international plane, even when no express recognition exists on the part of a third state. This approach is used by Switzerland, where the Swiss Confederation, in negotiating on behalf of the cantons, accepts

[87] Di Marzo, *Component Units of Federal States and International Agreements*, n. 29, p. 170, suggested 'cumulative' responsibility, with primary responsibility resting either with the component unit or with the federal state.
[88] Copithorne, 'Canada', n. 23, pp. 103-4, who points to the arrangements with respect to the St. Lawrence Seaway (Canadian TS 1953/21, 1954/14) and the Columbia River Treaty and Protocol (Canadian TS 1964/2).
[89] J-Y Morin, 'La conclusion d'accords internationaux par les provinces canadiennes à la lumière du droit comparé' (1965) 3 CYIL 126, pp. 146-7.
[90] Côté, 'Les difficultés d'application du principe d'unité de l'État fédéral, n. 6, 782. Indeed, cessation and guarantees of non-repetition were in issue in *LaGrand*, n. 56; *Avena*, n. 1; and also *Vienna Convention on Consular Relations ('Breard') (Paraguay* v. *United States of America)*, Provisional Measures, Order of 9 April 1998, ICJ Reports 1998, 248, at 258, para. 41.

responsibility for reparation on the international plane, but may recover the financial cost of this federal responsibility from the canton in question.[91] Even in Belgium, there is the 'power of substitution', through which the federal authorities can substitute for a community or a region in order to comply with a ruling against the Belgian state by an international or supranational court or tribunal.[92] As such, although practice remains limited only to a few states, there are several mechanisms for possible shared responsibility *within* federal states.

Problems remain, however, as the method and procedure of apportioning responsibility between different levels of governments has enormous practical repercussions at the domestic law level, with the margin of manoeuvre of the federated entity likely to be greatly diminished if the federal state is to assume all responsibility on the international plane.[93] Practice remains thin; with the limited exceptions of Canada, Switzerland and Belgium, no federal states have erected models where the federal state and the federated entity have agreed in advance on how responsibility would be shared in the case of breaches of international obligations by federated entities. There are virtually no judicial decisions on the apportionment of such responsibilities, and what little informal practice exists leads only to the conclusion that third parties are reluctant to complicate matters with concurrent/shared responsibility, preferring to deal with the federal state directly, as both Canada's *accord cadre* practice and Switzerland's practice of having the federal state negotiate on behalf of the cantons demonstrate. Yet even this limited practice seems to suggest that a model of shared responsibility is not impossible, and it may continue to develop and expand in the future.

5. Conclusion

International law exhibits a certain ambivalence towards that which does not suit the opaque, monolithic view of the state that has generally prevailed. From non-state actors to sub-state actors to federal states themselves, there is a general insistence on the binary relationship

[91] See section 2.2, above.

[92] See Article 169 of the Coordinated Constitution of Belgium, n. 46, and Article 16(3) of the 1988 Special Majority Act on Institutional Reform. The latter also provides for simple financial recovery, through which the Belgian federal government can recover the cost of non-observance of an international obligation from the federated entities. These are most exceptional provisions and have, to date, never been invoked.

[93] The notable example being Canada, where the federal government steps in systematically to assume responsibility for the acts of the provinces, and expressly disclaims any international agreements concluded by the provinces in the absence of an *accord cadre* signed by it: see Copithorne, 'Canada', n. 23, p. 103.

between ‘state’ and ‘non-state’, with little room for a gradient. Thus, from above, supra-national entities such as the European Union, and from below, the sub-state entities which are the focus of this chapter, find themselves contorting their practices and distorting their interpretation of their own functions in order somehow to secure participation on the international plane.

The modest theories on concurrent or shared responsibility put forward here depend on a reconceptualisation of federated entities not purely as organs or agents of the federal state, but rather as possessing limited international personality by virtue of their sovereign competence over various attributes of states, perhaps viewed in an overlapping or interlocked relationship with the federal government. This would break free from the *in foro interno, in foro externo* analogy that has heretofore constituted the only alternative view as to the possible responsibility of federated entities.[94] It is true that federal governments readily accept responsibility for the breaches of international obligations caused by their component entities;[95] but this obscures the lack of control that most federal states have over federated entities, which are free to enact laws over whatever matters falling within their competence without the interference of the federal state. Many federal states thus *divide* sovereignty between different levels of government, and in no way are federated entities necessarily subordinated to the federal state within domestic constitutional structures.[96]

It is the division or apportioning of *sovereignty* that is of wider interest in matters of shared responsibility in federal states. The overriding imperative behind a federation has been to channel local, sub-national interests into the state system of governance, thus allowing these interests to be represented long before state policy is determined. The federal state is thus internally confined, in what Triepel called a ‘double limitation’ on its international margin of manoeuvre: ‘l’État central et l’État-membre sont, dans une mesure déterminée, constitutionnellement limité, et tous deux par la même constitution, la constitution fédérale: l’État fédéral en faveur de l’État particulier et l’inverse’.[97] From these limitations arise exciting potential possibilities with respect to the role the federal state can come to play in international relations. Although not formally part of the international scene, the consequences of the acts of subnational actors transcend the territorial confines of the state

[94] A point raised by Côté, ‘Les difficultés d’application du principe d’unité de l’État fédéral, n. 6, 789.
[95] See Di Marzo, *Component Units of Federal States and International Agreements*, n. 29, pp. 184-85.
[96] A point conceded by *Oppenheim’s International Law*, H. Lauterpacht (ed.), 9th edn (London: Longmans, 1955), p. 175.
[97] Triepel, *Droit international et droit interne* n. 83, pp. 240-1.

and reverberate on the international level.[98] Treaty-making and responsibility are but a small piece of the puzzle; whatever the language of any federal constitution, the governments of sub-state entities have begun to play active and direct roles in international relations, a dynamic role that can be accommodated within international law with some creativity.

[98] What Duchacek calls 'perforated sovereignties: see I. Duchacek, 'Perforated Sovereignties: Towards a Typology of New Actors in International Relations', in H.J. Michelmann and P. Soldatos (eds.), *Federalism and International Relations: The Role of Subnational Units* (Oxford: Clarendon Press, 1990), p. 1.