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7. Segmentation and Integration. Proposals for a Federalisation of Foreign Policy in Georgia

A conceptual framework for exploring the foreign policy of sub-State entities has to be extricated from a jigsaw of federal structures which are themselves embedded in extremely diversified forms of international relations. The increasing involvement of federated entities[2] on the international scene is a consequence of the growing interdependence between States and economies which, in federal States, leads to the formation of closer international links at all levels of the federal structure. 'The localisation of global economic, political and social forces and the internationalisation of domestic issues'[3] constitute a management challenge for federal States. With the dual process of globalisation and localisation, federations acquire more avenues for projecting their activities into the international domain. This process challenges the traditional view of foreign policy as emanating solely from the exclusive competence of the central government,[4] and this in turn has a marked impact on the legal order of federations.[5]

A federal state implies a division of labour between at least two levels of government. The distribution of competences is based on a constitutional agreement between both levels, which is only to be amended through a new agreement. In decentralised states the power granted to lower levels is a unilateral decision of the central government. It can recentralise the power in the same unilateral way. There is, however, a striking symmetry in the way political discourse, on the one hand, and international legal discourse, on the other, deal with foreign policy phenomena at the national and sub-national levels in federations and decentralised States. International law refers to one or more *subjects of international law* constructs, whereas political discourse refers to *one or more players in international relations*.[6] The legal and political underpinnings of federal models, examined from the perspectives of both international law/constitutional law and international relations/political science, could provide food for thought on a multi-layered foreign policy for a federated Georgian-Abkhaz State. The main aim of this paper is to offer an analysis from the point of view of international

and constitutional law, although this analysis will also be susceptible to input from political science.

Diversity within unity is one of the basic features of federations. In multi-ethnic societies, the international legal personality and international treaty-making powers of federated States may be accepted. This provides an opportunity for the federated entity to assert its distinctiveness and to enjoy a considerable degree of independence in conducting foreign relations in matters that come within the ambit of its competence. Although federated entities with treaty-making powers lack some faculties as holders of rights and obligations in the international legal order, they may qualify as legal persons under international law. This is not to say that a federated State is the same legal person as the federal State itself. The former is endowed with a *limited* and the latter with *universal* legal personality. Federated States may, however, assume sole responsibility under international law as a corollary to their treaty-making powers, so that they are endowed with legal personality before international law.[7] The fear that such status for federated entities would lead to the fragmentation of the legal personality of the federal State[8] is ill-founded. The personality of a federal State and that of a federated entity never exist at the same time, in the sense that they operate within a different web of legal relations where the constitutional mode of allocating competences is concerned.

Within the current international order, acts by sub-State units are attributable to the State, regardless of the distribution of powers and, correspondingly, the degree of State control over the particular act. This rule has been confirmed in Article 7 of the ILC Draft on State responsibility. Nevertheless, as stated by Luc Van den Brande, in its 1994 report to the UN General Assembly the ILC did recognise the possibility of separate responsibility for sub-State entities: "Where an organ of a component State of a federal State acts in a sphere in which the component State has international obligations that are incumbent on it and not on the federal State, that component State clearly emerges at the international level as a subject of international law separate from the federal State, and not merely as a territorial government entity subordinate to the federal State." [9]

A sub-State unit derives international legal personality from the constitution of a federal State. In the past, 'it had always been recognised that international law determined who were its subjects. It was now being suggested that a federal State, merely by adopting some constitutional provision, was free to impose on the international community an unlimited number of subjects."[10] The constitution of the State from the standpoint of international law could be seen as a *unilateral declaration* that entails recognition by the international community. Federated entities are then recognised as subjects of international law insofar as the federal State is accorded recognition as such.[11] Luc Van den Brande develops such a line of reasoning by posing the question: 'Would it be possible at all for a

third State to recognise a federal State, including its Constitution, and at the same time not to recognise one of its component units, which derives its competences from the same Constitution?'[12]

The second aim of this paper is to analyse the possible *fragmentation of player and policy* from the point of view of the discipline of international relations. As pointed out by Ivo Duchacek, 'in one way or another, the problem of segmented foreign policy in federal or decentralised States and the possibility of and need for new forms of co-ordination have been placed on the agenda of democracies and decentralised systems. The very concept of federal segmentation in the field of foreign policy is based on the assumption that international activities undertaken by democratic non-central governments have already become facts of international life, however much their effects may be minimised as marginal and purely technical by some, or described as portents of diplomatic chaos by others'.[13] The foreign policies of federated States can be seen as a form of segmentation of foreign policy players, indicating a rationalisation process in foreign policy making. The precondition for a real rationalisation process to take place is that the federal government and the federated States must harmonise their external policies.[14] Harmonisation should be understood as creating an institutional mechanism and a political environment conducive to settling, rather than suppressing and eliminating, differences between the federation and its federated entities. Just as conflict and competition are intrinsic elements of domestic politics in federal democracies, conflict and competition also have to be accepted as productive principles in the realm of foreign policy.[15]

At this point, it would seem expedient to move on and look at different models of federalism from the perspectives of both international/constitutional law and international relations/political science.

Competence for Foreign Policy Making

The competences of federated entities for external relations and, more specifically, their treaty-making powers, derive from their internal competences, and the scope of the competence of federal governments and federated States in conducting external relations differs from one federation to another.

Article 32 of the Basic Law of the Federal Republic of Germany prescribes the following: 1) Relations with other countries shall be conducted by the Federation; 2) Before a treaty which affects the specific circumstances of a *Land* is concluded, that *Land* shall be consulted in good time; 3) insofar as the *Länder* have power to legislate they may, with the consent of the Federal Government, conclude treaties with other countries. Article 73 lists the following exclusive federal powers pertaining to particular foreign relations: foreign affairs and defence, cit-

izenship and freedom of movement, passport matters, immigration, emigration and extradition. Article 87 further strengthens the position of the federal government by stipulating that the foreign service is a matter for direct federal administration.[16]

Article 8 of the Swiss Constitution says that the Confederation has the sole right to declare war and peace and to conclude alliances and treaties, particularly concerning customs and commerce.[17] Article 9 provides that, as an exception, the cantons retain the right to conclude agreements with foreign States on matters of public economy, neighbourly and police relations, provided such agreements contain nothing that is contrary to the Confederation or that infringes the rights of other cantons. According to Article 10, official intercourse between cantons and governments of foreign States or their representatives takes place through the agency of the Federal Council, with respect to the matters enumerated in Article 9 — however, the cantons may correspond directly with subordinate authorities and officials of foreign States. Cantonal agreements are negotiated, signed and ratified in the name of the cantons, or both the federation and the cantons, by the Federal Council.[18]

Treaty-making powers offer an avenue for altering the internal allocation of powers to the centre and the federated States fixed by the constitution. In Germany, Switzerland, Australia, Austria and Spain, the Federal Government can interfere with competences assigned to the federated units through its own international competences.[19] Belgium is a notable exception to this general rule. In the Belgian federation, there is no hierarchical relationship between the Communities and Regions and the federal institutions with respect to their spheres of competence. The community and regional governments have exclusive authority to sign treaties that relate exclusively to the subject matters within the jurisdiction of the Community or the Region. The powers of the Communities extend to cultural issues, education, languages and other so-called 'personalisable' issues. The powers of the Regions include non-personalisable issues, such as town and country planning, environmental and water-management policy, rural development and nature conservation, housing, agricultural policy, the economy, energy policy, employment policy, public works and transport.[20] The federal level has competence to decide matters of defence, justice, social security, monetary policy and finance, amongst others.

Contrary to the practice in other federal countries, the Communities and Regions in Belgium do not need to seek prior approval from the federal government in order to sign treaties that come within their exclusive powers. They must, however, inform the federal government of their intention to negotiate the treaty. Their negotiations may be suspended if i) the other party to the treaty is a State that has not been recognised by Belgium; ii) Belgium has no diplomatic relations with the other party to the treaty; iii) a decision or act by the State

shows that relations between Belgium and the other party to the treaty are broken off, suspended or seriously jeopardised; iv) the intended treaty is contrary to the international or supranational obligations that are binding on Belgium. In the case of grounds iii) and iv), the federal government is empowered to suspend the execution of treaties concluded by the community or regional Government within their exclusive jurisdiction.[21]

Federal governments conduct their foreign policies through foreign ministries, embassies and representations abroad. Only foreign policy officials in those institutions and bodies are accorded diplomatic status. In all federal States, the federal government maintains the right to recognise States and to establish diplomatic and consular relations with them.[22] The foreign relations of federated entities may be conducted through their own representations or through representatives within the embassies and representations of the federal State. This is the case with some representatives ('community attachés' or 'economic and commercial attachés') of Flanders and Wallonia, who are accredited as members of Belgian embassies in different countries and granted diplomatic status accordingly. They are subject to the rules governing foreign ministry officials, although they take orders solely from the governments of their respective regions and communities. The Belgian Ambassador is not in a position to give them any instructions. In other instances, the Communities and Regions open their own representations and appoint their own representatives in foreign countries.

Co-operation, Conflict of Competences and Interests - Legal and Non-Legal Mechanisms for Ensuring Coherent Foreign Policy

The Swiss model for ensuring a coherent foreign policy is based on a wide network of consultation and co-operation, in which all cantons must be consulted about federal legislation and federal treaties if they affect any canton's rights or if they are of major political, economic or financial significance to a canton. In this case, cantonal representatives may be included in Swiss negotiating teams. Pursuant to Article 102 of the Swiss Constitution, cantons must seek approval for cantonal agreements from the Federal Council, on the ground of their 'admissibility'. In fact, the Federal Council has discretionary power to control the compatibility of the proposed agreement with the constitutional distribution of powers, federal law and national interests. As noted by some analysts, the cantons sometimes 'forget' the requirement for federal approval.[23] Normally, however, such cases do not lead to conflicts between the Confederation and cantons, as most of the agreements that the latter fail to submit for federal approval actually do comply with the requirements of Article 102. The Confederation, for its part,

is reluctant to intervene and generally turns a blind eye to the cantons' failure to submit their treaties. This testifies to the fact that not only general rules and procedures, but also the allegiance of the cantons to the Confederation, are part of a well-established federal political culture.

The principle of *participation* is more sharply accentuated in the Federal Republic of Germany, where the *Länder* help to shape federal foreign policy through the German Federal Council (*Bundesrat*). They can make use of the *Bundesrat's* role in treaty-making to prevent the ratification of treaties that might encroach on their rights and interests. Where international treaty-making is concerned, the fact that the Basic Law requires the federal government's assent to a treaty negotiated between a *Land* and a foreign State illustrates the importance of the constitutional principle of *Bundestreue* (loyalty to the federation). This principle serves as a common denominator for both levels of government in conducting foreign relations. Unlike in the Swiss model, judicial review plays an important role in dealing with matters relating to the competence of the federal government and the *Länder*.[24] Here, an important instrument is the Lindau Convention (*Lindauer Abkommen*), which affirms the federal government's leading role in foreign policy but requires it to seek the consent of the *Länder* if the treaty under negotiation touches upon their areas of competence, for instance in culture or education.

In the Belgian case, the 'mixed treaties' are those that affect the federal and also the Community and/or Regional areas of jurisdiction. If they are to take effect, all the legislative assemblies concerned must agree to them. The Belgian system of foreign policy making is based on the objective of having as many exclusive spheres of competence as possible, on the principle that competences on the domestic level are also brought into the arena of international relations (the principle *in foro interno, in foro externo*, which is seldom found to the same extent in federations) and on a system of a non-hierarchical juxtaposition of the competences of the federal authorities and federated States. The Belgian system of foreign policy making is also based on the principle hat a consensus should be reached concerning all decisions in fields where both levels of government are competent or in cases where both levels of government are defending opposing interests. Given the non-subordination of the federal and federated entities in legislation, a special statute lays down the procedure for concluding mixed treaties in a mandatory *co-operation agreement* between the federal authority and the federated governments. As explained by André Alen and Rusen Ergec, "where the federal Government plans to negotiate what may be a mixed treaty, it must first notify the Inter-Ministerial Conference on Foreign Policy (ICFP) of its intentions. Likewise, where a Region or Community considers that negotiations should be engaged with a view to concluding a mixed treaty, it can refer the matter to the Inter-Ministerial Conference on Foreign Policy with a request that the

Federal Government take steps to that end. Within sixty days of being informed of or receiving the request, the ICFP must decide whether it is a mixed treaty, and determine the composition of the Belgian delegation and the joint position to be argued. The representatives of the authorities concerned negotiate on an equal footing, with the federal Ministry of Foreign Affairs acting as co-ordinator. A Community or Region is always free to inform the ICFP that it will not be taking part in the negotiations, which will not prevent others from going forward."[25]

In some cases, the federal authorities can substitute for a Community or a Region in order to comply with a ruling against the Belgian State by an international or supra-national court or tribunal. Strict conditions attach to this *power of substitution*, but it remains highly operational to ensure that Belgium meets its international obligations.

Some Thoughts on a Foreign Policy for a Federal Georgian-Abkhaz State

In the diverse and multifaceted foreign-policy mechanisms used by various federations, it is possible to discern some rules and principles that could be could be appropriate in organising the foreign policy of a federal Georgian-Abkhaz State:

1) The Constitution of the federal State should grant international treaty-making powers to all its subjects as an extension of their internal competences. Thus, all federated entities must be recognised as having a specific legal personality.
2) The Belgian system of foreign policy making shows that exclusive competences are easy to handle for the different governments and foreign policy administrations. They help to prevent conflicts of competences, which would be desirable in a federal Georgian-Abkhaz State. This is a possible system of co-ordination and harmonisation of the foreign policies of the various entities within the federation, whose exclusive competences need not necessarily be the same, but may be defined according to an asymmetrical federal pattern.
3) The fact that the competences of the different authorities are juxtaposed, without any form of subordination or centralisation, may satisfy the aspirations of both the Georgian and Abkhaz sides to secure their respective territorial integrity with a considerable degree of independence. Moreover, this kind of arrangement could help to overcome the mistrust on both sides. Relations between the federal authorities and the remaining subjects of the federation could be more similar to those in the German model, whose type of federal hierarchy has been described above.

4) The participation of the federated entities in shaping an overall federal foreign policy must be ensured at the highest possible level. As in the German case, the creation of a *Bundesrat* (a Second Chamber composed of representatives from the federated entities) could give the federated States and regions a strong voice in international treaty-making at the federal level, and act as a safeguard to prevent any ratification of treaties that would go against the interests of the federated States or regions.
5) On the one hand, the international treaty-making power of federated States must not infringe upon the international obligations of the federal State. On the other, the constitution must formulate clear principles so as to prevent the constitutional distribution of powers from changing through an abuse of its international treaty-making power by the federal authority.
6) In order to ensure compliance with the international obligations of the federal State, a substitution mechanism will have to be developed in relation to the federated State of Abkhazia. This mechanism should be invoked only by a special court – whose composition should guarantee its neutrality. The fact that a subject of the federation has overstepped the requirements of the constitution as regards international treaty-making, and has failed to remedy the violation after the specified period of time, could be established by this court. Similar judicial guarantees could be introduced to protect Abkhazia's rights from encroachment by the federal authorities, in particular in the field of international treaty-making.
7) All federated entities should be informed and consulted if a treaty initiated by the federal authorities affects their competences. In such cases, their representatives should be either consulted via special institutional channels (like that of the German Permanent Treaty Commission of the *Länder*) or included in the negotiating teams.
8) The right to exchange diplomatic representatives (international relations in the sense of international diplomatic relations, '*ius legandi* ') would remain the exclusive right of the federal authorities. Co-operation agreements between the federated states and the federal government may grant the federated states the possibility of sending representatives with diplomatic status to international organisations or to other countries. All federated entities would be allowed to open representations abroad as private legal establishments, and they would then be entitled to assign representatives to them — at their own expense – for all foreign policy matters coming within their own spheres of competence.
9) A special Commission on Foreign Policy, composed of the federal foreign minister and representatives of the federated entities, should help to consolidate the position of the federated entities.

This list of principles that would seem relevant for a blueprint on the conduct of foreign policy in a federal Georgian-Abkhaz State could easily be expanded. Most important of all is the fact that any federal arrangement can be effective if we are prepared to pay a high enough price for peace and a common democratic future.

Notes

1 The present article and proposals reflect the personal views of the author and cannot be attributed to the Georgian Government.

2 For the purposes of this report, federalism means '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' as offered by Ivo Duchacek in Hans J. Michelman and Panayotis Soldatos (eds), *Federalism and International Relations, The Role of Subnational Units*, (Oxford, Clarendon Press, 1990), p. 3.

3 Brian Hocking (ed.), *Foreign Relations and Federal States,* Leicester, Leicester University Press, 1993, p. 6.

4 As Brian Hocking has rightly pointed out, it would be misleading to dismiss non-central governments as second-order players: "The global web of world politics ensures that non-central governments have interests and responsibilities which can often, quite unexpectedly and sometimes against their wishes, project them into the international limelight" Hocking (ed.), *op. cit.*, p. 6.

5 Michelman and Soldatos (eds), *op. cit.*, p. 13. Flanders, being a federated State within Belgium, has concluded bilateral treaties with Chile, Estonia, Hungary, Israel, Latvia, Lithuania, the Netherlands, Poland, Romania, Slovenia and South Africa. See Government of Flanders, *Flanders Facts and Figures*, Brussels, 1998, p. 57.

6 See Michelman and Soldatos (eds), *op. cit.* and Hocking (ed.), *op. cit.*; Luc Van den Brande, 'The International Legal Position of Flanders: Some Considerations', in: K.Wellens (ed.), *International Law: Theory and Practice* (The Hague, Kluwer Law International, 1998), pp. 145-158.

7 See Luc Van den Brande, *op. cit.*; André Alen and Patrick Peeters, 'Federal Belgium within the International Legal Order', in: K.Wellens (ed.), *op. cit.*

8 *Ibid.*, *p.* 135;

9 Luc Van den Brande, *op. cit.*, p. 154.

10 International Law Conference Yearbook, 1965, vol. I, 811 meeting, p. 251.

11 See also the opinion of the Belgian Council of State: "The question whether a component unit possesses international legal personality in order to perform a particular act, such as in this case to conclude a treaty, has first to be answered on the basis of domestic law; component units of a federation can indeed possess treaty-making power if and when this power has been attributed to them by the federal Constitution. But even if attribution of that competence constitutes a necessary condition for those units to enjoy treaty-making power, it is still up to foreign States, and more particularly international organisations, to consent to negotiate with the political component units of a federated State". Council of State, quoted by Van den Brande, op. cit., p. 152. It is actually very debatable whether the consent of third States is a formative element of the international legal personality of federated entities. It is rather an expression of the will of that State to develop relations with other States, either at the federal level alone, or at

both federal and sub-federal levels. Any subject which comes within the scope of international law has an international legal personality regardless of the frequency with which its rights and obligations are exercised in an international legal order.

12 Luc Van den Brande, *op. cit.*, p. 152.

13 I. Duchacek, 'Perforated Sovereignties: Towards a Typology of New Actors in International Relations', in: Michelman and Soldatos (eds), p. 29.

14 Soldatos, 'An Explanatory Framework for the Study of Federated States as Foreign-policy Actors', in: Michelman and Soldatos (eds), p. 41.

15 See John Kincaid, 'Constituent Diplomacy in Federal Polities and the Nation-State: Conflict and Co-operation', in: Michelman and Soldatos (eds), *op. cit.*, p. 55.

16 See Bertus de Villiers, *Foreign Relations and the Provinces*, HSRC Publishers, Pretoria, 1995, pp. 25-27; Hans J. Michelman, 'The Federal Republic of Germany', in: Michelman and Soldatos (eds), *op. cit.*, pp. 214-215.

17 For example, German Länder, Swiss Cantons and Québec possess international treaty-making power. In Switzerland, it is generally accepted that the cantons have a limited international legal personality (*petite personnalité*).

18 See Lucius Wildhaber, 'Switzerland', in: Michelman and Soldatos (eds), *op. cit.*, pp. 250-253.

19 For Germany, however, the Lindau Agreement imposes some obligations on the federal government, as will be explained below.

20 Alen and Peeters, *op. cit.*, pp. 124-125; 135-137; André Alen and Rusen Ergec, *Federal Belgium after the Fourth State Reform of 1993,* Ministry of Foreign Affairs of Belgium, 1998; Robert Senelle, 'Belgium: Federalizing a Divided State', in: Joachim Jens Hesse and Vincent Wright (eds), *Federalizing Europe?* Oxford, Oxford University Press, 1996.

21 Alen and Peeters, *op. cit.*, p. 129.

22 Thomas Fleiner, *Comparative Analysis of different Autonomy Status within Federal and Unitary States*, Institute of Federalism, University of Fribourg, Switzerland, 1999.

23 Wildhaber, *op. cit.*, p. 260.

24 This was the case when the Federal Constitutional Court confirmed the right of the Länder to communicate directly with foreign regions, provinces and autonomous communities. See Uwe Leonardy, 'Federation and *Länder* in German Foreign Relations: Power-Sharing in Treaty-Making and European Affairs', in: Hocking, *op. cit.*, p. 239.

25 See Alen and Ergec, *op. cit.*, p. 23.