



ARTICLES

ARE THE EU MEMBER STATES STILL SOVEREIGN STATES UNDER INTERNATIONAL LAW?

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ARE THE EU MEMBER STATES STILL SOVEREIGN STATES? THE PERSPECTIVE OF INTERNATIONAL LAW

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TABLE OF CONTENTS: I. The present meaning of State sovereignty. – II. The sovereignty of EU Member States. – III. Concluding remarks.

ABSTRACT: The present *Article* addresses the issue of the sovereignty of EU Member States from the perspective of general international law. In a first part, it tries to define the present meaning of sovereignty in international law. As a guide, three main approaches to sovereignty are used, *i.e.* an understanding of sovereignty as independence, as *Völkerrechtsunmittelbarkeit* (direct legal relationship between a State and international law), and as an autonomy of States under the constitution of the international community. In a second part, the *Article* applies the criteria of these three approaches to the Member States of the EU. It also addresses the question of whether the EU itself can be qualified as sovereign, and the issue of a “shared” or “divided” sovereignty in Europe. By way of conclusion, the third part makes a plea for defending the concept of supranationalism, as established in Europe after World War II, against the idea of State sovereignty.

KEYWORDS: sovereignty – independence – autonomy – United Nations Charter – European sovereignty – new legal order.

I. THE PRESENT MEANING OF STATE SOVEREIGNTY

“Sovereignty of States” is a notion used in different branches of legal science, for instance in legal history, legal theory, legal philosophy, or the general theory of law and State (*Allgemeine Staatslehre*). In this *Article* (which presents thoughts and questions rather than definite answers), the notion is studied as a term of public international law, as defined by the United Nations Charter, international treaty and customary law.

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The notion of sovereignty has been criticised by international lawyers for a long time. In 1925, no less a figure than Hans Kelsen remarked that “it would be high time that this term, after having played a more than questionable role in the history of legal science for centuries, finally disappeared from the dictionary of international law”.¹ Kelsen criticised in particular a misuse of the term in a political sense, in that the inadmissibility of international organisation and specifically of the submission of a State to the jurisdiction of an international court was inferred from the concept of sovereignty.² After the Second World War, efforts to eliminate or replace the notion have become even stronger. Some readers will remember Professor Louis Henkin’s attack on “that S-word”, as he called it. In an address of 1999, he said: “I don’t like the ‘S word’. Its birth is illegitimate, and it has not aged well. The meaning of ‘sovereignty’ is confused and its uses are various, some of them unworthy, some even destructive of human values”.³ Professor Henkin blamed “the delusions and mythology of sovereignty for the failure of States to collaborate more extensively”, and criticised that “[t]he banner of sovereignty still waves ominously over all human rights issues”.⁴ Another prominent critic is Professor Martti Koskenniemi who in 2011 observed that

“at least since the time of the League of Nations, we international lawyers have been critical of sovereignty. We have thought it a narrow, ethnocentric way to think about the relations of human beings. We have rehearsed a *moral* case against it. Sovereignty, we say, upholds egoistic interests of limited communities against the world at large, providing unlimited opportunities for oppression at home. [...] From a *sociological* perspective, we have attacked it because it fails to articulate the economic, environmental, technological, and ideological interdependencies that link humans all across the globe, giving a mistaken description of the reality of human relationships across the world. And from a *functional* perspective, we have observed its failure to deal with global threats such as climate change, criminality, or terrorism, while obstructing such beneficial projects as furthering free trade and protecting human rights”.⁵

More recently, Professor Don Herzog opened his book “Sovereignty, RIP” with the words: “I come not to praise the concept of sovereignty, but to bury it [...]. I do want to denounce the concept’s role in our politics and law as obsolete, confused, and pernicious”.⁶ With the phrase “*our* politics and law” he particularly referred to the United States.

¹ H Kelsen, ‘Souveränität, völkerrechtliche’ in K Strupp (ed.), *Wörterbuch des Völkerrechts und der Diplomatie*, vol. II (Walter de Gruyter & Co 1925) 554, 559 (my translation, B.F.).

² *Ibid.*

³ L Henkin, ‘That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera’ (1999) FordhamLR 1.

⁴ *Ibid.* 3, 5.

⁵ M Koskenniemi, ‘What Use for Sovereignty Today?’ (2011) *Asian Journal of International Law* 61.

⁶ D Herzog, *Sovereignty, RIP* (Yale University Press 2020) ix.

While all that critique was and still is plausible, the notion of sovereignty has survived in international law (and in the vocabulary of governments), and will likely also live on in the future as long as States as we know them remain the central building-blocks of the international legal order. What the poet and writer Hermann Hesse once remarked applies to the term: “that the older a word is, the more vitality and evocative power it contains”.⁷

It is that old (but not necessarily venerable) age of the notion which complicates the endeavour to define State sovereignty today.⁸ Since the French jurist and philosopher Jean Bodin introduced it into the theory of State in the sixteenth century,⁹ it has been used in many different historical contexts and with different intentions. Often, it was resorted to as an argument in a concrete political conflict – as a description of what was desired or aspired to rather than of what really already existed. At the beginning of the modern European system of States, the notion was used to establish and defend the independence of the French King from the Pope and the Emperor of the Holy Roman Empire, and the supremacy of the King’s orders over those of particularistic powers in what gradually became France. In the second half of the twentieth century, the decolonized States of Africa and Asia relied on the notion of sovereignty to stabilise and strengthen their newly won independence.¹⁰

And today, sovereignty is used as an argument both in favour and against a more intense political and economic integration of States on a regional as well as a universal level. In an aspirational way, President Emmanuel Macron speaks of a “sovereign Europe” to promote a more unified Europe that can guarantee security in all its dimensions, can respond to the challenge of migration, be a model of sustainable development, etc.: “La seule voie qui assure notre avenir, [...] c’est à nous, à vous de la tracer. C’est la refondation d’une Europe souveraine, unie et démocratique. [...] L’Europe seule peut, en un mot, assurer une souveraineté réelle, c’est-à-dire notre capacité à exister dans le monde actuel pour y défendre nos valeurs et nos intérêts. Il y a une souveraineté européenne à construire, et il y a

⁷ H Hesse, ‘Über das Wort “Brot”’ in H Hesse, *Gesammelte Werke in zwölf Bänden* vol. 11 (Suhrkamp 1970) 283, 284.

⁸ For an overview of the history of sovereignty (with bibliographic references), see B Fassbender, ‘Sovereignty’ in H Volger (ed.), *A Concise Encyclopedia of the United Nations* (Martinus Nijhoff Publishers, 2nd edn 2010) 663, and B Fassbender, ‘Commentary on Art. 2(1) of the UN Charter’ in B Simma and others (eds), *The Charter of the United Nations* (Oxford University Press, 3rd edn 2012) vol I, 133, 136 ff.

⁹ J Bodin, *Les six Livres de la République* (Jacques du Puys 1576). A facsimile of the book is available in the “Gallica” collection of the Bibliothèque nationale de France gallica.bnf.fr.

¹⁰ See, as one of numerous examples, the ‘Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty’ adopted by the UN General Assembly on 21 December 1965, UN Doc A/RES/2131(XX).

la nécessité de la construire".¹¹ By contrast, President Donald Trump referred to sovereignty to promote his "America First" policy.¹²

The Charter of the United Nations of 1945 avoided the term "sovereignty".¹³ The drafters of the Charter associated it with the often violent competition and rivalry of nation States in the nineteenth and twentieth century, their fight over political, economic and military power, which eventually had led to the two World Wars of 1914 and 1939. They also considered traditional sovereignty incompatible with the new general prohibition of the use of force in international relations and the respective far-reaching powers given to the Security Council. Instead of "sovereignty", the Charter proclaimed the "sovereign equality" of States (art. 2(1) UN Charter), a notion emphasizing not the self-reliant, or self-absorbed, autonomy of a State but its co-existence with other States and a shared membership in the international community. The idea of equality of States in law was given precedence over that of sovereignty by relegating the latter to the position of an attributive adjective merely modifying the noun "equality". In this combination, sovereign equality meant to exclude a legal superiority of any one State over another, but not to exclude a greater role of the (organized) international community played *vis-à-vis* all its members. As the Friendly Relations Declaration of the UN General Assembly of 1970, interpreting the Charter rule, put it, "[a]ll States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature".¹⁴ Wolfgang Friedmann aptly described that shift as the advent of a new international "law of cooperation", replacing or at least complementing the traditional "law of coexistence", as "a move of international society from an essentially negative code of rules of abstention to positive rules of cooperation".¹⁵

Similar to the founders of the United Nations, the six European States which in 1951 established the European Coal and Steel Community did not use the word "sovereignty"

¹¹ President E Macron, 'Speech at the Sorbonne' (26 September 2017) www.elysee.fr. See also 'Déclaration de M. Emmanuel Macron, président de la République, sur les principaux facteurs de la souveraineté européenne, à La Haye le 11 avril 2023' www.vie-publique.fr. For a discussion from a legal point of view, see S Barbou des Places, 'Taking the Language of "European Sovereignty" Seriously' (2020) European Papers www.europeanpapers.eu 287, and T Verellen, 'European Sovereignty Now? A Reflection on What It Means to Speak of "European Sovereignty"' (2020) European Papers www.europeanpapers.eu 307.

¹² See, e.g., US President Donald J Trump in his third annual speech to the UN General Assembly, 24 September 2019: "If you want freedom, take pride in your country. If you want democracy, hold onto your sovereignty. And if you want peace, then love your nation". Wise leaders always place the good of their people and country first, he said, emphasizing that the future belongs not to globalists but to patriots, to sovereign independent nations that protect their citizens, respect their neighbours and honour the differences that make each nation special and unique. UN Meetings Coverage GA/12183 of 24 September 2019 press.un.org.

¹³ See B Fassbender, 'Commentary on Art. 2(1) of the UN Charter' cit. 153 f.

¹⁴ General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, UN Doc A/RES/2625(XXV).

¹⁵ W Friedmann, *The Changing Structure of International Law* (Stevens & Sons 1964) 60 ff., 365 ff.

in the Treaty of Paris but instead declared, in the treaty's preamble, their determination "to replace the centuries-old rivalries by uniting their essential interests".¹⁶ Sovereignty was opposed with the new guiding idea of supranationalism, which was meant to reconcile a certain autonomy of States with their intensified cooperation – a cooperation deemed necessary to stabilise the autonomy of the participating States. The difficult and divisive question of sovereignty was deliberately left aside, in an effort to create something new, to make a fresh start in the relations between States "divided for a long time by bloody conflicts".¹⁷ Supranational integration was "a new form of international connection between its members, which, in a peculiar state of uncertainty, neither necessarily aims at a European federal State as its ultimate goal nor wants to be satisfied with the limited binding force of international law".¹⁸

In the early period of European integration some observers saw the creation of the Communities both as a model for other regions of the world and as a possible forerunner of new legal and political arrangements on a global level. In 1964, Wolfgang Friedmann in a hopeful way wrote:

"While national sovereignty continues, in the world at large, to be the dominant legal and political fact of international law and society, there have been certain regional developments towards a supranational order and authority. Far and away the most important laboratories of such an evolution are the European Communities which are to a certain extent developing a new 'common' order, with a legal and constitutional momentum of its own".¹⁹

Professor Friedmann regarded the Communities as "pioneers in the transition from international to community law"²⁰ and in the "gradual transition from multinational arrangements to a common constitutional order"²¹ – expectations which until now have been unfulfilled, with the European Union worldwide remaining to be an exceptional and unique case, "an international legal experiment"²² mirroring the political and economic one.

There is no definition of the term "sovereignty" in a written rule of positive international law.²³ However, as an expression of customary international law a majority of international lawyers will probably still approve of Max Huber's famous dictum in the *Island of Palmas* arbitral award of 1928: "Sovereignty in the relations between States signifies

¹⁶ Treaty establishing the European Coal and Steel Community (1951), preamble.

¹⁷ *Ibid.*

¹⁸ T Oppermann, 'Der Europäische Traum zur Jahrhundertwende' (1999) *Juristenzeitung* 317, 320.

¹⁹ W Friedmann, *The Changing Structure of International Law* cit. 370.

²⁰ *Ibid.* 367.

²¹ *Ibid.* 114.

²² B de Witte, 'The European Union as an International Legal Experiment' in G De Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2011) 19.

²³ However, the term "sovereign equality" was defined in the Friendly Relations Declaration which here largely followed an interpretative statement adopted by the San Francisco Conference in June 1945; see B Fassbender, 'Commentary on Art. 2(1) of the UN Charter' cit. 145 ff., 148 ff.

independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State".²⁴ What, at the time, was generally meant by those State "functions" becomes clear from the definition of independence by the Permanent Court of International Justice in its 1931 advisory opinion on the *Customs Régime between Germany and Austria*:

"[T]he independence of Austria, according to Article 88 of the Treaty of Saint-Germain^[25], must be understood to mean the continued existence of Austria within her present frontiers as a separate State with sole right of decision in all matters economic, political, financial or other with the result that that independence is violated, as soon as there is any violation thereof, either in the economic, political, or any other field, these different aspects of independence being in practice one and indivisible".²⁶

Most international lawyers will also still agree with Alfred Verdross when he equated sovereignty with *Völkerrechtsunmittelbarkeit*, or a direct legal relationship between a State and the international legal order: "A State is sovereign if it is subject only to international law, *i.e.* if it is a direct and immediate subject of international law without any intervening authority".²⁷ Very similarly, Dionisio Anzilotti defined sovereignty in his individual opinion in the case of the *Customs Régime between Germany and Austria* when he wrote:

²⁴ The full quotation reads as follows: "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations". *Island of Palmas* case (Netherlands v United States of America), Award of 4 April 1928, Reports of International Arbitral Awards vol II, 829. For an analysis of the case, see DE Khan, 'Max Huber as Arbitrator: The *Palmas (Miangas)* Case and Other Arbitrations' (2007) EJIL 145, 158 ff.

²⁵ That article reads as follows: "The independence of Austria is inalienable otherwise than with the consent of the Council of the League of Nations. Consequently, Austria undertakes in the absence of the consent of the said Council to abstain from any act which might directly or indirectly or by any means whatever compromise her independence, particularly, and until her admission to membership of the League of Nations, by participation in the affairs of another Power". PCIJ *Customs Régime between Germany and Austria* (Advisory Opinion) [5 September 1931] PCIJ Series A/B No 41, 37, 42; Treaty of Peace with Austria (St. Germain-en-Laye, 10 September 1919), Australian Treaty Series 1920 No 3, www.austlii.edu.au.

²⁶ PCIJ *Customs Régime between Germany and Austria* (Advisory Opinion) [5 September 1931] PCIJ Series A/B No 41, 37, 45. For an analysis of the historical context, see A Orde, 'The Origins of the German-Austrian Customs Union Affair of 1931' (1980) Central European History 34.

²⁷ A Verdross and B Simma, *Universelles Völkerrecht* (Duncker & Humblot, 3rd edn 1984) 28 f., 226 (my translation, B.F.). See also H Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization' (1944) Yale Law Journal 207, 208: "[T]he State is then sovereign when it is subjected only to international law, not to the national law of any other State. Consequently, the State's sovereignty under international law is its legal independence from other States".

“[T]he independence of Austria within the meaning of Article 88 is nothing else but the existence of Austria, within the frontiers laid down by the Treaty of Saint-Germain, as a separate State and not subject to the authority of any other State or group of States. Independence as thus understood is really no more than the normal condition of States according to international law ; it may also be described as *sovereignty (suprema potestas)*, or *external sovereignty*, by which is meant that the State has over it no other authority than that of international law”.²⁸

Accordingly, Anzilotti’s line of thought can be described as follows: if a State is subject only to international law, it possesses (external) sovereignty, and if it does so, it is legally independent.

Both Huber’s and Verdross/Anzilotti’s approaches to sovereignty predate the UN Charter of 1945 which according to a generally held view designated the beginning of a new era in international law. In an effort to appreciate and to recognise that watershed in the development of modern international law, the author of the present *Article* has defined the sovereign equality of States as their “constitutional autonomy” in the international legal order, guaranteeing each State an equal status under the constitution of the international community, with rights protecting that autonomy, and rights of participation in the international community.²⁹

Although they include some substantial elements (like a “sole right of decision in all matters economic, political, financial”),³⁰ the three definitions of sovereignty (as independence, as *Völkerrechtsunmittelbarkeit*, and as an autonomy under the constitution of the international community) are largely formal. Thus the question arises as to what actually is the substance of State sovereignty today. Already Jean Bodin made an effort to define what he called the “marks” of sovereignty (*marques de la souveraineté*):³¹ “This then is the first and chiefest mark of Sovereignty, to be of power to give laws and command to all in general, and to every one in particular”, “to have power to give laws unto all and every one of the subjects, & to receive none from them”.³² For the present, Professor

²⁸ PCIJ *Customs Régime between Germany and Austria* (Advisory Opinion) [5 September 1931], individual opinion of Judge Anzilotti, PCIJ Series A/B No 41, 55, 57. See JM Ruda, ‘The Opinions of Judge Dionisio Anzilotti at the Permanent Court of International Justice’ (1992) EJIL 100, 110 f.

²⁹ See B Fassbender, ‘Commentary on Art. 2(1) of the UN Charter’ cit. 154 ff. See also B Fassbender, ‘Sovereignty and Constitutionalism in International Law’ in N Walker (ed.), *Sovereignty in Transition* (Hart 2003) 115. My understanding of sovereign equality is based on a constitutional reading of the UN Charter, as elaborated in B Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff Publishers 2009).

³⁰ PCIJ *Customs Régime between Germany and Austria* (Advisory Opinion) cit. 45.

³¹ J Bodin, *Le six Livres de la République* cit. 221.

³² J Bodin, *The Six Bookes of a Commonweale: A Facsimile Reprint of the English Translation of 1606 Corrected and Supplemented* (KD McRae ed., Harvard University Press 1962) 162 f., quoted from D Herzog, *Sovereignty, RIP* cit. 277 f.

Herzog proposed (recognisably from an American perspective) the following “list of incidents of sovereignty”, namely “the powers to:

- Control the country’s territory, with a monopoly on legitimate coercion;
- Control the country’s borders;
- Raise and command armed forces;
- Control the money supply;
- Promulgate laws of property and other matters;
- Declare war;
- Negotiate treaties and other international agreements;
- Send representatives to international organizations;
- Punish criminals, including with the ‘power of life and death’; and
- Impose taxes”.³³

That list is not exhaustive (one could add, for instance, the power to confer citizenship in accordance with a State’s own nationality law, or the right to provide diplomatic and consular protection, or the rights summarised as the sovereign immunity of a State) but enlightening on what today most governments have in mind when they claim sovereignty for their respective State. The list also illustrates that despite the generally assumed process of an ongoing relativisation and limitation of State sovereignty since the first half of the twentieth century, important “sovereign rights” remain identifiable.

II. THE SOVEREIGNTY OF EU MEMBER STATES

If we let ourselves be guided by the above definitions, can the EU Member States still be characterised as sovereign States under international law? One is tempted to take a shortcut to an answer by noting that most certainly the European Union in its present legal condition is *not* enjoying sovereignty under international law.³⁴ The reason for that is simple: In international law, sovereignty has remained a status reserved for States,³⁵ and the EU has not claimed statehood, and even excluded the possibility of being regarded as a State³⁶ – notwithstanding the fact that its general aims are the same as those of the classical modern (Western) State, namely “to promote peace [...] and the well-being of its peoples” (art. 3(1) TEU), that it has its own citizenship (art. 20 TFEU) and a defined

³³ D Herzog, *Sovereignty*, *RIP* cit. 279.

³⁴ The same view is held by C Eckes, ‘EU Autonomy: Jurisdictional Sovereignty by a Different Name?’ (2020) *European Papers* www.europeanpapers.eu 319, 320.

³⁵ By contrast, constitutional law and legal theory know the notion of *popular sovereignty*, or *sovereignty of the people* (of which not the State but an organised community of humans is the owner), or the notion of *Parliamentary Sovereignty* as a principle of the constitution of the United Kingdom and other States.

³⁶ See Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 156: “Those amendments [of the ECHR, as provided for in the draft revised agreement on the accession of the EU to the ECHR] are warranted precisely because, unlike any other Contracting Party, the EU is, under international law, precluded by its very nature from being considered a State”.

territory, and legislative powers (with a primacy of its law) similar to those of a (federal) State.³⁷ Art. 1(1) TEU describes the EU as an entity “on which the Member States confer competences to attain objectives they have in common”. Those competences can also be characterised as sovereign rights transferred by Member States to the EU.³⁸ That is, for instance, the concept and language of the German Constitution (art. 23(1)) or the Italian Constitution (art. 11). Accordingly, the EU is in possession of certain sovereign rights given to it by its Member States, but it is not sovereign under international law because it is not a State, as the so far only legal entity to which international law attributes sovereignty.

Furthermore, the EU lacks sovereignty because it does not possess a *Kompetenz-Kompetenz*, that is the right to decide itself and autonomously about the scope of its competences, and its possible expansion.³⁹ To the contrary, the competences of the EU are “limited”, and “[c]ompetences not conferred upon the Union in the Treaties remain with the Member States” (art. 5(2) TEU). New EU competences require the consent of Member States given by way of amendment of the Treaties in accordance with an ordinary or a simplified revision procedure (see art. 48 TEU), and measures of the EU adopted according to the so-called “enabling clause” (art. 352(1) TFEU) need a unanimous decision by the Council. Consequently, the *Kompetenz-Kompetenz* (a notion devised in the later nineteenth century to clarify the legal nature of the new German federal State, and to distinguish between a “federation” and a “confederation” of States⁴⁰), still rests with the Member States (who must, however, comply with the obligations assumed in the EU Treaties).

So if the EU is not sovereign, does this automatically mean that the individual Member States are? Not necessarily, I think. The Member States could have lost their sovereignty without the EU having gained it. There could have emerged a kind of “sovereignty

³⁷ For an analysis of “State-like” actions of the EU in international relations and their implications for the issue of sovereignty, see C Eckes and R Wessel, ‘The European Union: An International Perspective’ in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law, vol. 1: The European Union Legal Order* (Oxford University Press 2018) 74.

³⁸ See Opinion 2/13 cit. para. 157: “As the Court of Justice has repeatedly held, the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields [...] (see, in particular, judgments in *van Gend & Loos*, 26/62, p. 12, and *Costa*, 6/64, p. 593, and Opinion 1/09, para. 65)”.

³⁹ In a judgment of 5 May 2020 regarding the Public Sector Purchase Programme of the European Central Bank, the German Federal Constitutional Court reiterated that “[t]he Basic Law does not authorise German State organs to transfer sovereign powers to the European Union in such a way that the European Union were authorised, in the independent exercise of its powers, to create new competences for itself. It [the Basic Law] prohibits conferring upon the European Union the competence to decide on its own competences (*Kompetenz-Kompetenz*)”. German Federal Constitutional Court of 5 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, www.bverfg.de, marginal no. 102.

⁴⁰ See M Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. II: 1800-1914 (C.H. Beck 1992) 358, 367.

vacuum” in which neither the EU nor its Member States are sovereign entities under international law.

Within the EU, that is in the relations between Member States and the Union as determined by the Treaties, the concept of sovereignty as such is of no importance.⁴¹ In that relationship, the ownership of sovereignty (under international law) cannot change the allocation of competences as defined by the Treaties. That vertical distribution of rights and duties does not leave room for a “super-competence” of Member States existing somewhere in the background. The horizontal relations between Member States are also not controlled by each State’s sovereignty under international law but by a mutual respect for their relative and equal autonomy in the legal order of the EU which they owe each other as parties to the Treaties.⁴² To that extent, the special regime established by EU law supersedes the rules of general international law.

But does not the right of a Member State unilaterally to withdraw from the Union, as enshrined in art. 50 TEU, prove the persistent sovereignty of Member States *vis-à-vis* the EU? This was the view of the German Federal Constitutional Court in its *Maastricht* decision of 1993,⁴³ and similarly the CJEU in its 2018 *Wightman* judgment stated that art. 50 TEU “enshrin[ed] the sovereign right of a Member State to withdraw from the European Union”.⁴⁴ Indeed, the right of a State to terminate an international treaty can be seen as

⁴¹ But see the *Maastricht* decision of the German Federal Constitutional Court of 12 October 1993: “The Federal Republic of Germany remains to be, even after the entry-into-force of the TEU, a member of a group of States [*Staatenverbund*] the public authority of which is derived from the Member States, and which in the German sovereign sphere [*Hoheitsbereich*] only can become effective because of the German parliamentary act of approval to the TEU. [...] Therefore, Germany preserves the quality of a sovereign State in its own right, and the status of sovereign equality in its relations with other States in the sense of Art. 2 para. 1 of the UN Charter”. German Federal Constitutional Court of 12 October 1993 2 BvR 2134, 2159/92, BVerfGE vol. 89, 155, 190 (my translation, B.F.).

⁴² It is a different question whether there still exists a legal relationship between Member States which is not controlled by their EU membership, for instance with regard to their bilateral diplomatic relations under the regime of the 1961 Vienna Convention on Diplomatic Relations, or with regard to international treaties concluded among them which are outside the scope of EU law. For the latter issue, see, e.g., B Fassbender, ‘Der deutsch-französische Elysée-Vertrag von 1963: Idee und Zukunft eines bilateralen Freundschaftsvertrags im Rahmen der Europäischen Union’ (2013) *Die Öffentliche Verwaltung* 125.

⁴³ See the *Maastricht* decision of the German Federal Constitutional Court, cit. 190: “Germany is one of the ‘masters of the Treaties’ which have bound themselves to the TEU, ‘concluded for an unlimited period’ (Art. Q TEU), with intent to maintain a long-term membership, but which could ultimately also revoke that membership by an *actus contrarius*” (my translation, B.F.).

⁴⁴ Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:999 para. 56. See also *ibid.* para. 50: “The decision to withdraw is for that Member State alone to take, in accordance with its constitutional requirements, and therefore depends solely on its sovereign choice”, and para. 57: “the sovereign nature of the right of withdrawal enshrined in Article 50(1) TEU”. See further case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:978, opinion of AG Campos Sánchez-Bordona, para. 92: “The withdrawal decision, unilaterally adopted in the exercise of the departing Member State’s sovereignty, [...]”.

an emanation of its sovereignty. But in the case of the EU, a Member State's right of withdrawal can just as well be explained by the character of the Union as a voluntary association of States and their peoples which has never been called into question since the ECSC was founded. In other words, it was never assumed that a State could be compelled to remain a member of the Communities, or the Union, against its will.

The system of competences established by the Treaties has sometimes been said to result in a sovereignty "shared" by, or "divided" between, the Union on the one hand, and the Member States together, or each Member State individually, on the other hand.⁴⁵ In Europe, the concept originates from the German discussion about the "nature of the federal State" in the middle of the nineteenth century, in the context of the Frankfurt Constitution (or Constitution of St. Paul's Church, *Paulskirchenverfassung*) of 1849 which attempted to create a unified German federal State.⁴⁶ However, the concept of a divided sovereignty could not well explain the structure of the German *Reich* actually constituted in 1871, and it ran counter to the long-established belief in the absolute and exclusive character of sovereignty which had been its hallmark since Bodin. Understood as *suprema potestas*, sovereignty defies a partition or divide, and this seems still to be the view of the majority of writers addressing the *locus* of sovereignty in the European Union. If a "shared" sovereignty is assumed, it is the sovereignty of Member States exercised through the organs of the EU. In that sense the German Federal Constitutional Court explained in its *Maastricht* decision that the "Member States have founded the European Union in order to carry out together a part of their tasks, and in so far jointly to exercise their sovereignty".⁴⁷

If, for those reasons, the concept of sovereignty is not of a legal significance *within* the Union, what about the legal status of EU Member States in their relationship with third States (non-Member States), and as members of the international legal community? In that respect, the sovereignty of Member States is still generally recognized, as is apparent, in particular, from their continuing full membership in universal international organizations, above all the United Nations. Art. 4 of the UN Charter restricts membership

⁴⁵ See, e.g., SD Krasner, 'The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law' (2004) *MichJIntL* 1075, 1085 f. See also J Habermas, *Zur Verfassung Europas: Ein Essay* (Suhrkamp 2011) 48 ff., in relevant parts reprinted as 'Die Krise der Europäischen Union im Lichte einer Konstitutionalisierung des Völkerrechts' (2012) *ZaöRV* 1, 18 ff. (proposing to establish a sovereignty divided between the citizens of the EU and the European nations).

⁴⁶ The authorship of the concept is attributed to the legal historian Georg Waitz (1813-1886) who was a prominent member of the Frankfurt National Assembly. See G Waitz, 'Das Wesen des Bundesstaates' (1853) *Allgemeine (Kieler) Monatsschrift für Wissenschaft und Literatur* 494, reprinted in G Waitz, *Grundzüge der Politik* (Homann 1862) 153. For context, see M Stolleis, *Geschichte des öffentlichen Rechts* cit. 271 ff., 365 f., and D Grimm, *Souveränität* (Berlin University Press 2009) 61 ff. (with a sketch of the US-American discussion of a sovereignty divided between the federal government and the individual States).

⁴⁷ *Maastricht* decision of the German Federal Constitutional Court cit. 189 (my translation, B.F.).

in the United Nations to “States” – “a term that, from the very beginning, has been unanimously interpreted to refer to entities that meet the requirements of statehood under international law: *i.e.* a defined territory and a permanent population effectively controlled by an independent government”.⁴⁸ To that extent, international law is turning a blind eye to the incorporation of Member States into the EU. At the United Nations, the EU is an “observer” of the work of the General Assembly only; in UN terminology it belongs to the presently twenty-five “Intergovernmental Organizations having received a standing invitation to participate as Observers in the sessions and the work of the General Assembly and maintaining Permanent Offices at Headquarters”.⁴⁹ So far, international law and UN law have not found in their system of international legal persons a proper place for a “supranational organization” such as the EU. In its resolution entitled “Participation of the European Union in the work of the United Nations” of May 2011, the UN General Assembly expressly reaffirmed “that the General Assembly is an intergovernmental body whose membership is limited to States that are Members of the United Nations”, that the representatives of the EU shall be seated among the observers (*i.e.* not among the delegations of Member States), and that they shall not have the right to vote, to co-sponsor draft resolutions or decisions, or to put forward candidates in the General Assembly or its subsidiary organs.⁵⁰

Let us here return to the three approaches to sovereignty in international law discussed above (Huber’s definition of sovereignty as independence, Verdross’ definition of sovereignty as *Völkerrechtsunmittelbarkeit*, and my own understanding of sovereignty as an autonomy of States under the constitution of the international community), and apply them to the Member States of the EU.

If, according to Max Huber, sovereignty is the right of a State to exercise, on a specific territory, the (typical) functions of a State *to the exclusion of any other State*, each EU Member State must be regarded as sovereign because (with the EU not being a State) each Member State is the only *State* exercising State functions on its respective territory.

As regards Verdross’ criterion of *Völkerrechtsunmittelbarkeit*, a membership of a State in the EU has not (or not yet) abolished or overridden its direct (immediate) relationship with international law because there is not, between the domestic law of that State and international law, a layer of another *State* law (like the federal law of a federal State). International law is content with the fact that the EU remains an organisation the existence of which depends on international treaties, and that there is, on the part of a Member State, the legal possibility of leaving the Union.

⁴⁸ U Fastenrath, ‘Commentary on Art. 4 of the UN Charter’ in B Simma and others (eds), *The Charter of the United Nations* (Oxford University Press, 3rd edn 2012) vol I, 341, 346.

⁴⁹ See United Nations, *Intergovernmental Organizations having Received a Standing Invitation to Participate as Observers in the Sessions and the Work of the General Assembly and Maintaining Permanent Offices at Headquarters* www.un.org.

⁵⁰ General Assembly, Resolution 65/276 of 3 May 2011, UN Doc A/RES/65/276, para. 1 and Annex, paras 2 and 3.

Lastly, an understanding of sovereignty as an autonomy of States under the constitution of the international community (made up of the rights which, at a given time, international law accords an independent State, and of the duties which the same law imposes on a State) also supports a continuing sovereignty of EU Member States.

Accordingly, the hypothesis of a "sovereignty vacuum" in which neither the EU nor its Member States are sovereign entities under international law has to be rejected: In their relationship with non-Member States and as members of the international legal community at large, EU Member States still must be regarded as sovereign while the EU still lacks a sovereign status under international law.

III. CONCLUDING REMARKS

By way of conclusion of these provisional thoughts, I want to refer once more to Wolfgang Friedmann as a scholar who studied very closely the strained relationship between the concepts of State sovereignty and international cooperation. In 1964, Professor Friedmann wrote: "In terms of objectives, powers, legal structure and scope, the present state of international organisation presents an extremely complex picture. It reflects the state of a society that is both desperately clinging to the legal and political symbols of national sovereignty and being pushed towards the pursuit of common needs and goals that can be achieved only by a steadily intensifying degree of international organisation".⁵¹ As we saw earlier, Friedmann set his hope on the process of European integration as the main example of "regional developments towards a supranational order and authority".⁵² He saw the Communities as a possible "prototype of developments that may occur elsewhere in the world, or eventually extend to the international community as a whole".⁵³

Oddly enough, some sixty years later the situation described by Professor Friedmann has not significantly changed on a global level. European supranational integration, much intensified since, has remained an exception in a world of nation States and national State sovereignty. Very much contrary to Kelsen's desire of 1925, sovereignty continues to be a prominent keyword in the dictionary of international law and relations. It is curious that Europe, as the political space that gave rise to the concept of sovereignty in early modern times and eventually imposed it throughout the world, has today relativised it the most and replaced it with new and more expedient supranational forms of exercising public authority. Paradoxically, however, a further intensification of European integration would likely lead to some form of federal statehood, which in turn would re-establish a global uniformity of public government in the form of the State.

But even the Member States of the EU have not been ready completely to relinquish the concept of (their individual) sovereignty. In their relations with third countries, they

⁵¹ W Friedmann, *The Changing Structure of International Law* cit. 293-294.

⁵² *Ibid.* 370.

⁵³ *Ibid.* 113.

attach importance to acting as independent States on an equal footing, to concluding treaties under international law, to maintaining diplomatic and consular relations, and to exerting influence on the development of international law.⁵⁴ Professor Colin Warbrick once remarked that “[t]here are powerful legal advantages to being a [sovereign] State, which in practically every case, cause a qualified entity to want to claim its prerogatives”.⁵⁵ It seems that the same advantages cause EU Member States to hold on to their independent statehood. Within the EU, the notion of sovereignty today stands for a final reservation of Member States in favour of their autonomous statehood which allows them to keep performing, in the words of art. 4(2) TEU, “their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security”.⁵⁶ Sovereignty so understood serves as a kind of insurance policy covering a real or imagined ultimate freedom of the individual European nations.

Sovereignty, as we have seen, is an ancient and powerful concept that has survived in international law for centuries under very different conditions of international relations. But that does not mean that we are prisoners of this terminology. This is impressively demonstrated by the founding of the European Communities, a truly “creative effort”, as the preamble to the Treaty establishing the European Coal and Steel Community puts it, which replaced the long-standing and often violent rivalries between European States with a union of their essential interests. We should therefore use the notion of

⁵⁴ One may add that a renunciation of independent statehood in this sense would make central institutions (such as the head of state, the foreign minister or the diplomatic service) with their entire civil service to a large extent superfluous. Bureaucracies, however, do not tend to abolish themselves.

⁵⁵ C Warbrick, ‘States and Recognition in International Law’ in MD Evans (ed.), *International Law* (Oxford University Press, 2nd edn 2006) 217, 218.

⁵⁶ In its *Lissabon* judgment of 30 June 2009, the German Federal Constitutional Court expressed that reservation in a rather far-reaching way as follows: “However, European unification on the basis of a treaty union of sovereign States must not be realised in such a way that there is no longer sufficient room in the Member States for the political shaping of economic, cultural and social living conditions. This applies in particular to areas which shape the living conditions of citizens, above all their private sphere of personal responsibility and personal and social security protected by fundamental rights, as well as to those political decisions which are particularly dependent on prior cultural, historical and linguistic understandings and which unfold discursively in the party-politically and parliamentarily organised space of a political public sphere. Essential areas of democratic organisation (*demokratische Gestaltung*) include citizenship, the civil and military monopoly on the use of force, income and expenditure, including borrowing, as well as the decisive elements of an interference with fundamental rights, especially in the case of intensive infringements such as the deprivation of liberty in the administration of criminal justice or measures of involuntary commitment. These important areas of democratic organisation also include cultural issues such as the control of the use of language, the organisation of family and educational affairs, the regulation of freedom of expression, of the press and of assembly, or the treatment of religious or ideological confession”. See German Constitutional Court of 30 June 2009 BVerfGE vol. 123, 267, 357 ff. (my translation B.F). For an analysis of the case law of the CJEU regarding art. 4(2) TEU, see T Boková, ‘Exploring the Concept of Essential State Functions on the Basis of the CJEU’s Decision on the Temporary Relocation Mechanism’ (2022) *European Papers* www.europeanpapers.eu 773.

sovereignty as little as possible so that peoples outside Europe, too, see that “the State” today does not represent an absolute and supreme power, but is a part of a *Stufenordnung* of universal law, an “intermediate structure in a continuous sequence” of legal communities that leads from the “international legal community through the various associations of States, member States of federations, autonomous provinces, and municipalities to the smallest treaty community” (Kelsen).⁵⁷ Europeans should be proud of having created legal relations between their countries which largely can do without the notion of sovereignty.

⁵⁷ H Kelsen, ‘Souveränität, völkerrechtliche’ cit. 554 (my translation, B.F.).

