

---

# *The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order*

Ole Spiermann\*

## Abstract

*The founding fathers of the European Community contributed one of the most exciting chapters to the book of international law in the twentieth century. The 1950s saw three Communities emerge, with a remarkably wide range of activities, procedures and powers, as constituent parts of an international organization. It was the first treaty-based order to be rooted in the rule of law. The European Court of Justice was established in order to provide a forum for adjudication on future disputes in relation to the Community and it rapidly generated the largest bulk of case-law ever seen in international law. However, almost the first word in this developing case-law was a claim that it differed from international law. The making of the 'new legal order' is the subject of a two-sided story. In addition to the popular side of the story, there is the other side – a story which is too important for international lawyers to miss.*

## 1 Introduction

The story of how the European Court of Justice developed, indeed innovated, the Community legal order through its interpretation of the Treaty establishing the European Economic Community is, of course, well known. It is the story of 'une

\* This article is based on a dissertation submitted to the University of Copenhagen in 1997, 'An Unpopular Essay on the European Community Legal Order – A Chronological Analysis of the Case-law of the European Court of Justice, 1954–1979'. The main ideas were delivered as a paper to a conference under the Swedish Network for European Legal Studies, which was convened at the University of Uppsala on 16 January 1998. I am pleased to acknowledge my debt to Professor James Crawford and Professor and sometime President and Judge of the European Court of Justice Ole Due. I am also grateful to Professor Trevor Hartley for having encouraged me to produce a final draft of ideas which are somewhat different from his own. Professor Joseph H. H. Weiler made some highly appreciated suggestions on how to improve the article. Many other people have commented on drafts. Thanks to Karina Bahrenscheer, Kurt Haegeman, Pär Hallström, Joanna Harrington, Thomas Holst Lauren, Göran Lysén and Jaan Paju.

*certaine idée de l'Europe*<sup>1</sup> and of the emancipation of the Community legal order from international law; it is a story that circulates among Community lawyers outside as well as inside the Court in Luxembourg.

'In contrast', the Court recalled in 1991, 'the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law'; moreover, 'the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals'.<sup>2</sup> These statements go back to two of the most celebrated moments in the Court's making of the Community legal order. In 1963–1964 the latter statement accompanied the adoption of a doctrine of treaty provisions having direct effect on individuals, while the former statement, dating back to 1986, was a most explicit corroboration on the Court's part of the rule of law.<sup>3</sup>

In telling the story of emancipation from international law, Joseph Weiler has been second to none. His balanced account of the Court's making of the Community legal order has been the most influential by far. And according to Weiler, 'there can be no argument that the Community legal order as it emerged from the Foundational Period appeared in its operation much closer to a working constitutional order'.<sup>4</sup>

I do not intend to challenge the popular story of the making of the Community legal order. Given its popularity, it would require some temerity to suggest that it does not contribute an enlightening account of certain aspects of the Community legal order. However, I do insist that the popular story is not the full story. There is another side of the story, which I propose to examine in this essay.

The view according to which the Community legal order is based on treaties and must therefore belong to international law has attracted adherents right up until the present day.<sup>5</sup> However, since the Court began to speak of '*un nouvel ordre juridique*' or, in English 'a new legal order', a great majority of Community lawyers have preferred to talk of constitutionalism rather than internationalism, clearly assuming that there is a gap between 'constitutional' and 'international' principles of interpretation. The Court's characterization of the EEC Treaty in 1986 as 'the constitutional charter' had been long anticipated, leaving internationalism as a concern for dissenting theorists. The present essay does not regret the neglect of internationalism in the mainstream

<sup>1</sup> Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law', 8 *European Law Review* (1983) 155, at 157.

<sup>2</sup> See Opinion 1/91, *Draft Agreement Relating to the Creation of the European Economic Area*, [1991] ECR I-6079, at para. 21.

<sup>3</sup> See, respectively, Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1, at 12 [hereinafter *Van Gend en Loos*] together with Joined Cases 90 & 91/63, *Commission v. Luxembourg and Belgium*, [1964] ECR 625, at 631, and Case 294/83, *Parti ecologiste 'Les Verts' v. Parliament*, [1986] ECR 1339, at para. 23.

<sup>4</sup> Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1991) 2403, at 2422.

<sup>5</sup> E.g., Wyatt, 'New Legal Order, or Old?', 7 *European Law Review* (1982) 147; De Witte, 'Rules of Change in International Law: How Special is the European Community?', 25 *Netherlands Yearbook of International Law* (1994) 299, and Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations', 37 *Harvard International Law Journal* (1996) 389.

analysis of the Court's case-law. The other side of the story does not argue for an international law, or an old legal order conception of the Community legal order. It is rather more complicated.

The other side of the story opens with the same event as opens the pages of the popular side of the story, namely the two landmark judgments of *Van Gend en Loos* and *Costa v. ENEL*. They figure prominently in what Weiler has called 'the Foundational Period'. These two judgments are analysed in Sections 2 and 3 of this article. Part of the analysis involves a comparison with international law. It is argued that the Court's approach to questions of direct effect of treaty law and the relationship between treaty law and national law is indeed unlike that of modern international law. Instead, in Section 4, the basic structure of the Court's judgments is related not to '*une certaine idée de l'Europe*' but to the views and values of national law, including an overwhelming focus on state sovereignty. In the twentieth century no international court has paid as great a regard to state sovereignty as the European Court. Section 5 offers some practical illustrations of how the focus on state sovereignty has affected the Court's understanding of the EEC Treaty and the common market.

The nub of the argument is that the popular side of the story of the Court's making of the Community legal order, whatever its incidental merits, encapsulates just how mighty this edifice appears beside the jealous state and its national law, which it was indeed intended to partially substitute. In contrast, the other side of the story compares the Court's conception of the Community legal order to the promises contained in the founding treaties, notably the EEC Treaty. When it is argued that the Court has occasionally interpreted the EEC Treaty restrictively, this does not mean that the Community treaties in themselves are not far-reaching achievements. Indeed, it will be taken for granted that the treaties form the most impressive treaty-based order of the twentieth century. It is precisely when taking into account the far-reaching nature of the treaties that the Court's making of the Community legal order appears less impressive and has, dare I say, various shortcomings.

## 2 *Van Gend en Loos*

Community lawyers remember the Court's judgment in *Van Gend en Loos* for two reasons. Here the Court ruled that provisions of the EEC Treaty have direct effect on individuals, and stated that the legal order established by the EEC Treaty is 'a new legal order'.<sup>6</sup> These statements were interrelated: because the treaty had direct effect, it constituted 'a new legal order'.

The EEC Treaty, the Court noted, was 'more than an agreement which merely creates mutual obligations between the contracting states'.<sup>7</sup> In a famous statement, the Court declared that 'the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also

<sup>6</sup> *Van Gend en Loos*, at 12.

<sup>7</sup> *Ibid.*

their nationals'. The EEC Treaty was seen as having the same direct effect as legislation, and in the very next sentence the Court stressed that the Treaty applies '[i]ndependently of the legislation of Member States'.

In *Van Gend en Loos* the Court concluded that Article 12 of the EEC Treaty (Article 25 EC Treaty) 'must be interpreted as producing direct effects and creating individual rights which national courts must protect'.<sup>8</sup> Direct effect meant that individuals 'on the basis of this Article [may] lay claim to rights which the national court must protect'.<sup>9</sup> Under Article 12 the individual was a holder of rights and national courts were obliged to hear the individual's claims when putting the rights into action (*ubi jus, ibi remedium*). For this reason, the EEC Treaty constituted, the Court said, 'a new legal order of international law'.

However, *Van Gend en Loos* was not merely about the Court's idea of the Community legal order. It was also about the Court's idea of international law. Direct effect made the Community legal order 'new' because, in the Court's view, international law did not have direct effect. This idea of international law echoed a classical article of faith, according to which international law governs the relations between sovereign states and knows no subjects but states. Because the EEC Treaty, in addition to the Member States, counted individuals as its subjects, the legal order set up by the Treaty was 'a new legal order of international law'.

Community lawyers have always been overwhelmed by the Court's reasoning. Thirty years after the decision in *Van Gend en Loos*, Judge G. Federico Mancini wrote: 'But if the European Community still exists 50 or 100 years from now, historians will look back on *Van Gend en Loos* as the unique judicial contribution to the making of Europe.'<sup>10</sup> There is no doubt that the expression 'a new legal order' is a key feature of Community phraseology. It is probably true that the Court developed the Community legal order without giving a great deal of thought to modern international law. And it certainly is true that this phraseology of the 'new legal order' endowed the study of Community law with a sense of self-confidence. Compared to international law the 'new legal order' was seen as being more of a legal order, transgressing what the Court had previously called 'the inertia and resistance of Member States'.<sup>11</sup>

But whatever the reaction of Community lawyers, one must also ask: Was direct effect alien to international lawyers? Was the 'new legal order' terminology justified? Or was the Court's idea of international law crude and inadequate? These questions have been confronted before,<sup>12</sup> yet it is necessary to do so again. It is not that a simple answer in the affirmative, or in the negative, is of much interest. Whatever its name a rose smells the same. Without scrutinizing these questions it will hardly be possible to

<sup>8</sup> *Ibid.*, at 13 and 16.

<sup>9</sup> *Ibid.*, at 11.

<sup>10</sup> Mancini and Keeling, 'Democracy and the European Court of Justice', 57 *Modern Law Review* (1994) 175, at 183.

<sup>11</sup> See Case 20/59, *Italy v. High Authority*, [1960] ECR 325, at 339 and Case 25/59, *Netherlands v. High Authority*, [1960] ECR 355, at 374.

<sup>12</sup> E.g., Wyatt, *supra* note 5, at 150–152.

appreciate the other side of the story of the Court's making of the Community legal order.

It is worth noting that a year before *Van Gend en Loos*, in 1962, an Italian court had ruled that the EEC Treaty had direct effect.<sup>13</sup> And in 1960 the European Court had emphasized that the Treaty establishing the European Coal and Steel Community, the first of the Community treaties, 'contains rules capable, like rules laid down by the national legislature, of being directly implemented in the Member States, such implementation taking place *ipso iure* as a result of their acceptance into the law of the Member States by the ratification of the Treaty'.<sup>14</sup>

So perhaps 'the unique judicial contribution', which Mancini and his co-author referred to, was not made in 1963 but in 1960 – and not in the interpretation of the EEC Treaty but in the application of the ECSC Treaty. Nevertheless, the genuine challenge is to compare *Van Gend en Loos* with the jurisprudence of (other) international courts. In this context it is of some interest that the Court's idea of international law is essentially ahistorical. Thus, in 1991 the Court referred to *Van Gend en Loos* to support its argument that the Community legal order is still 'new', as though international law had been at a virtual standstill in the interval of almost 30 years.<sup>15</sup> This decision, which concerned the European Economic Area Agreement, is particularly interesting because the Court's narrow conception of direct effect, at least in respect of treaties that fall outside the Community legal order, subsequently suffered the indignity of being brushed aside by a much more open-minded EFTA Court.<sup>16</sup> For the present purposes, however, one may neglect the developments in international law since 1963.

In the late 1940s military tribunals set up by the United States made a series of remarkable statements: 'International law, as such, binds every citizen just as does ordinary municipal law'; 'The laws and customs of war are binding no less upon private individuals than upon government officials and military personnel'; 'It is a fallacy of no small proportion that international obligations can apply only to the abstract legal entities called States'.<sup>17</sup> These statements echoed the judgment of the International Military Tribunal in Nuremberg. In 1946 the Tribunal held that '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.<sup>18</sup> One might argue that this was a special case. Yet, the year before, in 1945, a British military court had remarked: 'For many years past, however, military tribunals have tried and punished individuals guilty of violating the

<sup>13</sup> See *Societa Biscotti Panettoni Colussi di Milano v. Ministero del Commercio con l'Estero*, CMLR [1963] 133, at 139.

<sup>14</sup> *Italy v. High Authority*, *supra* note 11, at 335 and *Netherlands v. High Authority*, *supra* note 11, at 371.

<sup>15</sup> Opinion 1/91, *supra* note 2, at para. 21.

<sup>16</sup> Cf. *ibid.*, at paras 20 and 27 with Case E-1/94, *Restamark*, [1994-95] EFTA Court Report 15, at para. 77; and see Case T-115/94, *Opel Austria v. Council*, [1997] ECR II-39, at paras 108 *et seq.*

<sup>17</sup> See, respectively, *U.S. v. Flick and Others*, 9 War Crimes Reports 1, at 18, *U.S. v. Krupp and Others*, 10 War Crimes Reports 69, at 150 and *U.S. v. Ohlendorf and Others*, 15 ILR 656, at 659.

<sup>18</sup> *U.S., France, U.K. and U.S.S.R. v. Göring and Others*, 1 Trial of the Major War Criminals 171, at 223.

rules of land warfare laid down by this Convention.’<sup>19</sup> For this reason the military court recognized that the regulations appended to the Hague Convention IV Respecting the Laws and Customs of War on Land had direct effect, though such effect was not expressly granted in any provision of the regulations. Thus, the jurisprudence developed in the aftermath of the Second World War did not support the claim that direct effect was alien to international law.

One might go further back. In 1928 the Permanent Court of International Justice delivered the *Jurisdiction of the Courts of Danzig* opinion. Here the Court dealt with an agreement, the so-called ‘*Beamtenabkommen*’, between two states or state-like entities, Poland and the Free City of Danzig. This treaty regulated conditions of work for officials employed by the Polish Railways Administration. Before the Danzig courts, officials submitted that they were entitled, on the basis of the *Beamtenabkommen*, to bring actions against the Polish administration. Having been requested to advise on the direct effect of the *Beamtenabkommen* on individuals, the Court faced the contention of the Polish Government that the treaty did not ‘create direct rights or obligations for the individuals concerned’.<sup>20</sup> In 1963 three governments pleading before the European Court adopted the same position. However, three and a half decades earlier the Permanent Court had rejected the contention that the question of direct effect of treaty provisions could be answered by reference to state sovereignty: ‘[t]he answer’, the Court had then said, ‘depends upon the intention of the contracting Parties’. In an intriguing passage the Court added:

It may be readily admitted that, according to a well established principle of international law, the *Beamtenabkommen*, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts.<sup>21</sup>

According to Dionisio Anzilotti, who had played an important role in the drafting of the *motifs*, the decision

ne dit pas qu’un traité, comme tel, peut créer des droits et des obligations pour des individus, sans besoin que les règles y afférentes soient incorporées dans le droit interne: il dit seulement que l’intention des Parties contractantes peut être celle d’adopter des règles déterminées créant des droits et des obligations pour des individus et susceptibles d’être appliquées par les tribunaux nationaux.<sup>22</sup>

That being said, Anzilotti pointed to another passage in the *motifs*, which will sound familiar to Community lawyers, namely that if

Poland would contend that the Danzig Courts could not apply the provisions of the *Beamtenabkommen* because they were not duly inserted in the Polish national law, the Court

<sup>19</sup> *U.K. v. Kramer and Others*, 2 War Crimes Reports 1, at 149 *et seq.*

<sup>20</sup> See *Jurisdiction of the Courts of Danzig*, 1928 PCIJ Series B, No. 15, at 17. See also *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, 1932 PCIJ Series A/B, No. 44, at 20.

<sup>21</sup> *Ibid.*, at 17 *et seq.*

<sup>22</sup> D. Anzilotti, *Cours de droit international* (1929), at 407 *et seq.*

would have to observe that, at any rate, Poland could not avail herself of an objection which, according to the construction placed upon the *Beamtenabkommen* by the Court, would amount to relying upon the non-fulfilment of an obligation imposed upon her by an international engagement.<sup>23</sup>

In this way, the Permanent Court overcame the argument based on Polish national law by conceiving of the state as a subject under international law.

In the actual case, the Court concluded that the 'wording and general tenor of the *Beamtenabkommen* show that its provisions are directly applicable as between the officials and the Administration'.<sup>24</sup> The Court was not even close to presuming that a treaty in international law does not have direct effect, though the Court had the opportunity to reject the direct effect of the *Beamtenabkommen* altogether. The argument could have been based on Article 9 stipulating that under the *Beamtenabkommen* all matters 'shall be dealt with by the Polish State Railways Administration'. It could have been argued that the Polish administration would only apply Polish law so that the *Beamtenabkommen* foresaw implementation through Polish law. Yet the Court held that Article 9 'should not be construed in a manner which would make the applicability of the provisions of the *Beamtenabkommen* depend on their incorporation into a Polish Regulation'.<sup>25</sup>

The same year, in 1928, a Polish national brought an action against Poland before the Arbitral Tribunal of Upper Silesia, which had been established in 1922 under the German–Polish Convention concerning Upper Silesia. The Convention provided that the Tribunal was competent to adjudicate on questions of indemnity in respect of a '*plainte de l'ayant droit*' (a justified claim). The Polish Government took objection to the Tribunal having jurisdiction. It relied on what was dubbed 'a general principle of international law', viz. 'that an individual could not invoke an international authority against his own State'.<sup>26</sup> The Tribunal rejected this contention. 'The Convention', it held, 'conferred in unequivocal terms jurisdiction upon the Tribunal irrespective of the nationality of the claimants, and, the terms of the Convention being clear, it was unnecessary to add to it a limitation which did not appear from its wording'.<sup>27</sup>

Accordingly, the Polish national had a right of action before the Tribunal and the Upper Silesia Convention had direct effect.<sup>28</sup> Yet it is possible in this judgment to sense

<sup>23</sup> *Jurisdiction of the Courts of Danzig*, *supra* note 20, at 26 *et seq.* A similar argument has been employed by the European Court in decisions on the direct effect of directives, see Case 148/78, *Pubblico Ministero v. Ratti*, [1979] ECR 1629, at para. 22 and Case 8/81, *Becker v. Finanzamt Münster-Innenstadt*, [1982] ECR 53, at para. 24. A high price is paid if this argument is taken at its face value, see *infra* note 63.

<sup>24</sup> *Ibid.*, at 18.

<sup>25</sup> *Ibid.*, at 19.

<sup>26</sup> *Steiner and Gross v. Poland*, 4 Annual Digest of Public International Law Cases 291, at 291. Gross was the Polish national, while Steiner was of Czechoslovak nationality.

<sup>27</sup> *Ibid.*, at 292. See also G. Kaeckenbeeck, *The International Experiment of Upper Silesia* (1942), at 49–54.

<sup>28</sup> It was actually in the context of Polish Upper Silesia that the Permanent Court of International Justice had first dealt with the direct effect of treaties: see in respect of the Polish Minorities Treaty from 1919 *Questions Relating to Settlers of German Origin in Poland*, 1923 PCIJ Series B, No. 6, at 25 and *Questions Concerning the Acquisition of Polish Nationality*, 1923 PCIJ Series B, No. 7, at 16; see also *Rights of Minorities in Upper Silesia (Minorities Schools)*, 1928 PCIJ Series A, No. 15, at 32.

some reluctance towards direct effect. For what would have happened if the terms of the Convention had not been ‘clear’?

If one goes further back, to 1909, clear evidence of reluctance to accept a doctrine of direct effect can actually be found in the judgment of the Central American Court of Justice in *Diaz v. Guatemala*. The Court had jurisdiction to hear cases submitted to it by individuals, yet in 1909 it stated that

inasmuch as the said rule of the convention affects the sovereignty of the judicial branch of governments, because it confers on said court the power to judge matters under the jurisdiction of the territorial authorities, its bearings should be thoroughly scrutinized in applying it, for, as Fiore says, every limitation of autonomy must be regarded ‘as an exceptional right and be construed in its narrowest sense, in the manner most suitable to the nation on which it has been imposed and causing the least detriment to its natural liberty.’ *Codified International Law*. No. 150.<sup>29</sup>

So if the European Court had decided *Van Gend en Loos* in 1909, the Court would perhaps have been justified in declaring that, because of its direct effect, the EEC Treaty constituted ‘a new legal order of international law’. Indeed, the year before *Van Gend en Loos*, in 1962, it was the European Court – not the Central American Court – which had made reference to Community law imposing a ‘limitation of the powers of the national court’.<sup>30</sup>

To sum up, direct effect made the Community legal order ‘new’ because, according to the Court’s idea of international law, such effect was not known under international law. However, in 1963 this idea of international law was unsatisfactory. As a matter of principle, most international jurisprudence of the twentieth century has been less cautious about direct effect than the European Court of Justice. It would seem as though international law does not pay such regard to state sovereignty, so that the very idea of direct effect is next to utopian.

Admittedly, many of the above-mentioned cases may be seen as exotica, as is the case for so many of the disputes referred to international courts and tribunals for settlement in the first part of the twentieth century. There is, however, no doubt that under international law a national court, being an organ of the state, is obliged to reach decisions that are in accordance with the international obligations of the state.<sup>31</sup> This is so even when the holder of the corresponding right does not take part in the proceeding before the national court, though this will often be the case since in modern international law interests in the subject-matter governed by a rule normally breed rights (to lay claims and to bring actions) on the basis of the rule, also for individuals.

The impact of *Van Gend en Loos* and the Court’s inadequate idea of international law is not, however, necessarily far-reaching. Many will say that it is one thing to argue that the idea of international law was inadequate and quite another thing to conclude

<sup>29</sup> *Diaz v. Guatemala*, 3 AJIL (1909) 737, at 742.

<sup>30</sup> Joined Cases 31 & 33/62, *Wöhrmann v. Commission*, [1962] ECR 501, at 506 *et seq.*

<sup>31</sup> See in general *Yearbook of the International Law Commission* II (1973), at 193–196 and *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, ICJ Reports (1999), at para. 62 (29 April).



that it influenced the Court's approach to the Community legal order. After all, in *Van Gend en Loos* the Court ruled that the EEC Treaty has direct effect. Yet, it is still the main argument of this essay that the Court's interpretation of Community law has not been clinically isolated from the Court's classical, and somewhat inadequate, conception of international law. A dramatic manifestation of this impact occurred the following year, in 1964, with the Court's second judgment on direct effect, *Costa v. ENEL*.<sup>32</sup>

### 3 *Costa v. ENEL*

Community lawyers know *Costa v. ENEL* as the *locus classicus* of the principle of 'precedence of Community law'.<sup>33</sup> According to this principle, the EEC Treaty – and Community law in general – enjoys precedence over national law.

In 1963 the Court's 'new legal order' phraseology convinced Community lawyers that international law had been left behind.<sup>34</sup> The principle of precedence equipped them with a new understanding of the Community legal order. Community lawyers began to talk about constitutionalism, with the EEC Treaty being a constitution; talk which has not yet faded from the language of Community law.<sup>35</sup> Certain statements are instructive. According to Judge David Edward,

so far from not having a 'real constitution', the Community already has a rigid constitution in the sense that its legal order recognises a hierarchy of norms in which the law of the treaties takes precedence over national law and subordinate Community legislation.<sup>36</sup>

Commenting on this, Professor Bruno de Witte adds

The decisive element in this definition, which differentiates the Community legal order from the 'constitutions' of other international organizations, is the 'precedence over national law'. The supremacy of EC law over national legislation ... gives to EC law a quasi-constitutional status within the domestic legal orders.<sup>37</sup>

It is worth dwelling on this argument for a moment. The principle of precedence, or supremacy, is a commonplace in constitutions of federal states. From a legal point of

<sup>32</sup> It is true that already in 1963 the Court had delivered another judgment on direct effect, but that was simply a restatement of *Van Gend en Loos*: see Joined Cases 28–30/62, *Da Costa v. Nederlandse Belastingadministratie*, [1963] ECR 31, at 38 *et seq.*

<sup>33</sup> Case 6/64, *Costa v. ENEL*, [1964] ECR 585, at 594 [hereinafter *Costa v. ENEL*].

<sup>34</sup> Yet in *Van Gend en Loos* the Court did not adhere to a principle of precedence of Community law: see *Van Gend en Loos*, at 11.

<sup>35</sup> Most Community lawyers hold the view that the Community legal order is somewhere between internationalism and constitutionalism (or federalism): e.g., Hartley, 'Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community', 34 *American Journal of Comparative Law* (1986) 229, and Lenaerts, 'Constitutionalism and the Many Faces of Federalism', 38 *American Journal of Comparative Law* (1990) 205.

<sup>36</sup> Edward, 'The Community's Constitution – Rigid or Flexible? The Contemporary Relevance of the Constitutional Thinking of James Bryce', in H. G. Schermers, D. Curtin and T. Heukels (eds), *Institutional Dynamics of European Integration* (1994) 57, at 75.

<sup>37</sup> De Witte, 'Agreement or Constitution?', in J. A. Winter *et al.* (eds), *Reforming the Treaty on European Union* (1996) 3, at 12 *et seq.*

view, a particularly interesting aspect of federal states is that both the federal state and the component states of the federation legislate with direct effect on individuals. The powers are divided between the federal state and its member states, but most federal systems regard it as unavoidable that there will be overlapping powers between the federal state and its member states in certain fields. It is in order to resolve such conflicts of powers that a principle of precedence emerges. It will suffice here to quote Chief Justice Marshall who, in 1824, delivered the opinion of the United States Supreme Court in *Gibbons v. Ogden*:

The nullity of any act, inconsistent with the constitution, is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States.<sup>38</sup>

From a legal point of view, a prerequisite for the European Court's adoption of a principle of precedence was that it saw a conflict between a valid rule of Community law and a valid rule of national law. If one of the rules had not been valid, for instance because a law-making authority had acted *ultra vires*, there would have been no conflict between rules and no room for a principle of precedence. In *Costa v. ENEL* the Court recognized that Member States had retained the power to enact valid rules within fields covered by Community law. State sovereignty had remained such that the state could enact rules that were in conflict with Community law.

This is not simply a formal point. What actually happened in *Costa v. ENEL* was that the Italian Government contended before the Court that the EEC Treaty had no impact on Italian national law. The Italian act of ratification, it was argued, had been overturned by a new Italian act and therefore *lex posterior derogat priori*.<sup>39</sup>

A possible response to the argument of the Italian Government was found in the case-law of the Permanent Court of International Justice, according to which it is 'a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty'.<sup>40</sup> The argument of the Italian Government was not simply an international legal argument. Article 27 of the later Vienna Convention on the Law of

<sup>38</sup> 6 U.S. (9 Whea.) 23, at 73 *et seq.*

<sup>39</sup> *Costa v. ENEL*, at 593. This argument had been fuelled by the judgment of the Italian Constitutional Court in its *Costa v. ENEL* case: see *Costa v. Ente Nazionale per l'Energia Elettrica*, [1964] CMLR 425, at 436.

<sup>40</sup> *The Convention Respecting Reciprocal Emigration*, 1930 PCIJ Series B, No. 17, at 32 and likewise *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, 1932 PCIJ Series A/B, No. 44, at 24. These statements were repeated by the International Court of Justice in *Applicability of the Obligation to Arbitrate under the United Nations Headquarters Agreement*, ICJ Reports (1988) 12, at para. 57 and *Elettronica Sicula*, ICJ Reports (1989) 15, at para. 73. The EFTA Court, too, has touched upon this line of reasoning, see Case E-2/95, *Eidesund v. Stavanger Catering*, [1995–1996] EFTA Court Report 1, at para. 14 and Case E-3/95, *Langeland v. Norske Fabricom*, [1995–1996] EFTA Court Report 36, at para. 20. See also the judgment of the International Military Tribunal in Nuremberg: *U.S., France, U.K. and U.S.S.R. v. Göring and Others*, 1 Trial of the Major War Criminals 171, at 223.

Treaties is clear on this point: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.' From the point of view of international law, there can be no conflict between a treaty rule and a national law rule, for the rules do not belong to the same legal system. Yet in *Costa v. ENEL* the European Court gave credit to the argument of the Italian Government. Compared to modern international law this gesture was no less exceptional than the presumption against direct effect that underlay *Van Gend en Loos*.<sup>41</sup>

It is true, of course, that the Court, facing the conflict between a rule of Community law and a rule of national law, gave priority to Community law; this was the significance of precedence. But if the Court had done otherwise, it would have denied the binding force of international law, including the treaties that had established the Court. To contradict the principle *pacta sunt servanda* – and the conception of the state as an international law subject – would seem to be unacceptable to a lawyer. Indeed, in *Costa v. ENEL* the Court held that:

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity.<sup>42</sup>

In brief, *pacta sunt servanda*. States were not allowed to take 'unilateral and subsequent' action in contravention of 'a legal system accepted by them on a basis of reciprocity'.

What is important about *Costa v. ENEL* is not that the Court in the end relied on the conception of the state as an international law subject and opted for international law as opposed to state sovereignty. It is that the Court acknowledged the power of the Member States to create law that could conflict with Community law. It was because the Court acknowledged that the Member States had retained their sovereignty that the principle of precedence came to the Court's mind. In other words, there was more to the Court's reasoning than the state being a subject under international law.

In explaining the exceptional gesture towards the state and its national law, which indeed departs from modern international law,<sup>43</sup> a case can be made for the view that the Court's tribute to state sovereignty was merely a piece of rhetoric reflecting the special framework within which the Court delivered such judgments as *Van Gend en Loos* and *Costa v. ENEL*; namely, the preliminary rulings procedure set up in Article

<sup>41</sup> There certainly are examples in international law of a principle of precedence of international law being advanced as a rhetorical point, accompanying the principle *pacta sunt servanda*. An example is the judgment of the United States Military Tribunal in *U.S. v. Von Leeb and Others*, 12 War Crimes Reports 1, at 68, which should be compared to the judgment in *U.S. v. Altstötter and Others*, 6 War Crimes Reports 1, at 49. See also the European Court, interpreting the ECSC Treaty: Case 6/60, *Humblet*, [1960] ECR 559, at 569.

<sup>42</sup> *Costa v. ENEL*, at 593 *et seq.*

<sup>43</sup> On this point, which is absolutely crucial, the adherents of the old legal order view tend to be too unambitious on behalf of international law, cf. Wyatt, *supra* note 5, at 150 and 152, and, e.g., De Witte, 'Retour à "Costa": La primauté du droit communautaire à la lumière du droit international', 20 *Revue trimestrielle de droit européen* (1984) 425.

177 of the EEC Treaty (Article 234 EC Treaty).<sup>44</sup> Under this procedure national courts are allowed to request the Court to rule on questions relating to, *inter alia*, the interpretation of the Treaty and secondary legislation. The immediate recipients of the Court's judgments are national courts, and hence the fact that the Court writes its judgments in a language familiar to national lawyers might add to the trenchancy of Community law. National lawyers can hardly be expected to follow suit with Article 27 of the Vienna Convention and neglect national law. Whilst an international lawyer, who sees only the treaty, is pleased with the principle *pacta sunt servanda* and Articles 26–27 of the Vienna Convention, a national lawyer rather prefers a principle of treaty precedence, for the national lawyer envisages not only the treaty but also national law and thus potential conflicts between treaty rules and national law rules. It could be argued that the preliminary rulings procedure invited the Court to adopt the national, or constitutional, language of precedence as opposed to the international language of bindingness.

However that may be, *Van Gend en Loos* and *Costa v. ENEL* were not only about rephrasing ordinary principles of international law. Community lawyers clearly regard the 'new legal order' phraseology as more than a piece of rhetoric. According to the popular side of the story, *Van Gend en Loos* and *Costa v. ENEL* formed the basis of the Court's innovative approach to the Community legal order. The Court went beyond international law. In this author's view, the claim that the Community legal order as developed by the Court is unlike modern international law cannot be easily discarded. If *Van Gend en Loos* and *Costa v. ENEL* are compared to the jurisprudence of other international courts there are unmistakable differences, which are not just about form and phrasing; there are substantive differences as well. The Court stuck very much to the idea of state sovereignty after having recognized the direct effect of certain provisions of the EEC Treaty. In *Van Gend en Loos*, concerning Article 12 of the EEC Treaty (Article 25 EC Treaty), the Court concluded that this provision was 'ideally adapted to produce direct effects in the legal relationship between Member States and their subjects'.<sup>45</sup>

The European Court paid regard to state sovereignty precisely because of the involvement of the individual in the Community legal order.<sup>46</sup> According to *Costa v. ENEL*, the Community had 'real powers stemming from a limitation of sovereignty or a transfer of powers from the States' because the Community legal order was 'a body of law which binds both their nationals and themselves'.<sup>47</sup> For this reason, the Court juxtaposed the EEC Treaty with international law:

<sup>44</sup> Cf. Weiler, *supra* note 4, at 2421 *et seq.* and Lecourt, 'Quel eut été le droit des Communautés sans les arrêts de 1963 et 1964?', in *L'Europe et le droit: Mélanges en hommage à Jean Boulois* (1991) 349.

<sup>45</sup> *Van Gend en Loos*, at 13.

<sup>46</sup> In a series of judgments in the early 1970s the Court made explicit that direct effect produced precedence: see Case 43/71, *Politi v. Italy*, [1971] ECR 1039, at para. 9, Case 84/71, *Marimex v. Italian Ministry for Finance*, [1972] ECR 89, at para. 5, Case 120/73, *Lorenz v. Germany*, [1973] ECR 1471, at para. 9 and Case 121/73, *Markmann v. Germany*, [1973] ECR 1495, at para. 9. Many years later the opposite argument was forwarded in Joined Cases C-46 & 48/93, *Brasserie du Pêcheur and Factortame*, [1996] ECR I-1029, at para. 20.

<sup>47</sup> *Costa v. ENEL*, at 593.

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.<sup>48</sup>

The Community legal order was no longer, as in *Van Gend en Loos*, 'a new legal order of international law'. It was now 'an integral part of the legal systems of the Member States', a new legal order of national law, as it were. The Court was back to the classical separation of international law from national law. Because of its direct effect, Community law was not merely applicable to relations between states ('inter' nations), and consequently the Community legal order was not seen as belonging to international law. Instead, Community law was, the Court stated, 'an integral part of the legal systems of the Member States' ('intra' nations). That being the case, it was only logical that the Court should take seriously the Italian Government's national law argument that the Italian act of ratification had been overturned by a new Italian act. For the Court saw the Community legal order as belonging to the very system that bred that argument, *viz.* Italian national law.

#### 4 The Double Structure of International Legal Argument

In order to explain the logic of the European Court one must step back for a moment and briefly consider the question: What is a state?

One conception of the state has already been mentioned, namely the state as an international law subject. The primary function of the principle *pacta sunt servanda* is to underline that conception. But then this principle is only necessary in the first place because lawyers sometimes feel uneasy about the conception of the state as an international law subject. This uneasiness arises because of the presence of other, competing conceptions of the state. Although these other conceptions relate to the making of law, they may nevertheless also influence the application of it.

As regards the other conceptions of the state, it is not adequate to answer the question 'What is a state?' simply by saying that a state is sovereign, nor that it is a legislator. These answers are correct, but it is crucial to consider within which context the state is a sovereign legislator. There are essentially two different answers: the state can be seen as a national legislator, independently generating national law applicable to individuals; or the state can be seen as an international legislator, or co-legislator, which participates in the making of treaty law together with other states on a basis of mutual independence. Thus, in each specific case there will be a choice between an internal and an external context in which to place the sovereign legislator. Sovereignty carries two quite different meanings within the two contexts. In the internal context, the national sovereign is sovereign in the sense, used by Jean Bodin, of being the supreme, legislative authority over individuals.<sup>49</sup> In the external context,

<sup>48</sup> *Ibid.*

<sup>49</sup> See J. Bodin, *On Sovereignty* (Cambridge edition by Julian H. Franklin, 1992), at 56: 'When I say that the first prerogative of sovereignty is to give law to all in general and to each in particular, the latter part refers to privileges, which are in the jurisdiction of sovereign princes to the exclusion of all others.'

the international co-sovereign's sovereignty signifies 'the right of entering into international agreements' (or not to do so).<sup>50</sup>

The *Jurisdiction of the Courts of Danzig* opinion was characterized by a certain amount of doubt as to whether the state should be seen as a national sovereign or as an international co-sovereign. That individual officials were involved in the dispute made the Permanent Court think of the state as a national sovereign. Thus, 'an international agreement' concluded between two international co-sovereigns 'cannot, as such, create direct rights and obligations for private individuals'. According to this classical view, the direct effect of the *Beamtenabkommen* was conditional upon incorporation into Polish national law and thus upon the state acting as a national sovereign.

However, the Permanent Court did not abide by the classical view. As pointed out by Dionisio Anzilotti, the Court was aware that the classical view, if taken to extremes, contradicted the binding force of international law and thus the conception of the state as an international law subject. Actually, the classical view would not seem to have influenced in any way the Court's interpretation of the particular *Beamtenabkommen*. In particular, it was not given a restrictive interpretation as might well have been the case had the Court presumed that treaties do not grant rights to individuals.

In contrast, the Court's main line of reasoning was based on the state being an international co-sovereign that made international law together with other states. The *Jurisdiction of the Courts of Danzig* opinion reflected the conception of the state as an international co-sovereign, as distinct from that of the state as a national sovereign. Being seen as international co-sovereigns, states can co-legislate, or cooperate, to any effect they like. Statesmen can put any rule in a treaty, including rules that are directly applicable to individuals, thereby actually creating rights and obligations for them. As to the content and scope of the international law of cooperation so created, there are no prejudices and no presumptions: 'The answer depends upon the intention of the contracting Parties.'<sup>51</sup> In respect of the international law of cooperation, it would be a fallacy to make general statements as to the nature of international law for the purpose of comparing a specific treaty and to decide whether that treaty falls within international law. For the international law of cooperation is but the cumulative content of all treaties; by definition, each and every treaty belongs to international law.<sup>52</sup>

The European Court has held quite a different idea of international law. When thinking of the state, the Court has not seen an international co-sovereign. According to the Court, 'the states have limited their sovereign rights' as a result of the EEC

<sup>50</sup> *The Case of the S. S. Wimbledon*, 1923 PCIJ Series A, No. 1, at 25.

<sup>51</sup> *Jurisdiction of the Courts of Danzig*, *supra* note 20, at 17; see also *The Case of the S. S. Lotus*, 1927 PCIJ Series A, No. 10, at 18.

<sup>52</sup> There are a few border issues, notably treaties, which lay down the constitution of a unitary state or a federal state. That such texts, if successful, are dealt with as constitutions within national legal systems as opposed to treaties within international law does not necessarily exclude their concurrent status as treaties.

Treaty, whereas the Community institutions are 'endowed with sovereign rights'.<sup>53</sup> The Court has proceeded from a conception of the state as a national sovereign and it has focused on 'the legal relationship between Member States and their subjects'.<sup>54</sup> As conceived by the Court, direct effect has not merely been about the individual. In contrast to the *Jurisdiction of the Courts of Danzig* opinion, or at least to the main line of reasoning of that decision, direct effect has also very much been about the individual's master, the national sovereign. The ultimate question approached by the European Court has been whether the Community has substituted for the national sovereign in exercising sovereign rights, notably in legislating with direct effect on individuals.

Before going further into the Court's conception of direct effect and the involvement of the individual in the Community legal order, it is necessary to consider the relationship between the Court's conception of the state as a national sovereign and its idea of international law. Conceiving the state as a national sovereign is a key element of national legal reasoning. It falls naturally to national lawyers. The conception was adopted by the Court not only because the immediate recipients of its judgments under Article 177 of the EEC Treaty (Article 234 EC Treaty) were national lawyers, but because the judges themselves approached the Community legal order as national lawyers.

In *Bosch*, the rationale behind the preliminary rulings procedure was said to be 'a harmonizing of interpretation'.<sup>55</sup> The Court assisted national judges from the several Member States in harmonizing their interpretation of the EEC Treaty. One may wonder why the Court saw its task as one of harmonization as opposed to one of articulating the proper interpretation of Community law irrespective of national judges. That was arguably not just a sweetening gesture towards the national judges involved. Already in 1961, referring to the ECSC Treaty, Advocate General Lagrange stated that 'the Court interprets a rigid and careful text *on the basis of general principles of municipal law of the Member States*'.<sup>56</sup> In 1963, the same year as the Court rendered its judgment in *Van Gend en Loos*, the then President of the Court, Judge Donner, noted: 'In fact it is clear that the real sources of law are mainly the national laws of the states.'<sup>57</sup>

More recently, a former member of the Court commented upon the criticism as to the concise reasoning of certain judgments:

A further basic problem that must be emphasised and which is necessarily connected with the structure of the Court of Justice is the origin of the judges from the various legal systems. They have been influenced by their own traditions, values and principles and they rely upon

<sup>53</sup> *Van Gend en Loos*, at 12.

<sup>54</sup> *Ibid*, at 13.

<sup>55</sup> Case 13/61, *Bosch v. Van Rijn*, [1962] ECR 45, at 51; as for the term 'uniform interpretation', see *Van Gend en Loos*, at 12 and Joined Cases 28–30/62, *Da Costa v. Nederlandse Delastingadministratie*, [1963] ECR 31, at 38.

<sup>56</sup> Lagrange, 'The Role of the Court of Justice of the European Communities as Seen through Its Case Law', 26 *Law and Contemporary Problems* (1961) 400, at 408 (emphasis in original).

<sup>57</sup> Donner, 'National Law and the Case Law of the Court of Justice of the European Communities', 1 *CMLR* (1963–64) 8, at 9. Judge Donner defined the Court 'not as an international court, but as the administrative and sometimes constitutional court of the Communities', *ibid*, at 11.

experiences that they have had with the proceedings in their homes courts. . . . They are not national judges in a traditional sense, and thus do not represent national interests. . . . They are influenced by differing histories, education, and values, and bring this with their personal experiences into the decision-making body. They influence the formation of the judgments of the Court on the basis of the value, principles and ideas of justice that they have formed in their home legal systems. . . . The discussion . . . does not take place, as in national courts, in the context of a traditional, mature and largely developed legal system, but rather in the context of the rudimentary Community legal system.<sup>58</sup>

The writings of many other former and present members of the bench could be added, making the point that judges have reasoned as national lawyers thinking about international relations.<sup>59</sup>

It is a truism that lawyers who work and think on the basis of one or more national legal systems, that is 'national' lawyers, rarely pay regard to international law. The conception of the state as a national sovereign persists at the forefront of their minds, so that the normal way of things is for national lawyers to regard the national legal system as being self-contained or, in other words, capable of solving issues on its own as they present themselves. When dealing with an issue belonging to the vast fields within which a national lawyer regards national law as being self-contained, he or she will at least be sceptical, if not dismissive, of an argument about the relevance of international law. This starting-point, which relates to the conception of the state as a national sovereign, as opposed to the conception of the state as an international co-sovereign, may be termed 'the international principle of self-containedness'. However, in a few instances the national lawyer foresees a clash between the interests of several states such that no national sovereign can solve the issue on its own. In respect of certain categories of conflicts, national lawyers tend to recognize the existence of other national sovereigns and, as a consequence, feel a need for a residual, supplementary system of (international) law to deal with the conflicts so defined as being between states. In this way, national lawyers have promoted a project of international law which has been aimed at coexistence, adopting various principles necessary to smooth out potential conflicts between the several national sovereigns and their national legal systems.

The main fields of the international law of coexistence have a long history and they continue to form the backbone of textbooks on international law. It is within such fields as intervention and warfare, the treatment of state representatives and state nationals, the overlap between public law of different states (jurisdiction), the status of areas which are not state territory, particularly the high seas, the creation and

<sup>58</sup> Everling, 'Reflections on the Reasoning in the Judgments of the Court of Justice of the European Communities', in *Festschrift til Ole Due* (1994) 55, at 67 *et seq.*

<sup>59</sup> E.g., Hammes, 'Gedanken zu Funktion und Verfahren des Gerichtshofs der Europäischen Gemeinschaften', 3 *Europarecht* (1968) 1, at 9, Strauß, 'Abschied vom Gerichtshof der Europäischen Gemeinschaften', 5 *Europarecht* (1970) 303, at 306, Slynn, 'The Court of Justice', in D. Vaughan (ed.), *Law of the European Communities* vol.1 (1986) 173, at 173, Iglesias, 'Der Gerichtshof der Europäischen Gemeinschaften als Verfassungsgericht', 27 *Europarecht* (1992) 225, at 225 and Koopmans, 'Judicial Decision-making', in A. I. L. Campbell and M. Voyatzis (eds), *Legal Reasoning and Judicial Interpretation of European Law* (1996) 93, at 97 and 99 *et seq.*



succession of states, to name a few, that national lawyers have identified the need for international law to provide solutions. The legal framework for treaties, the law of treaties, is yet another topic which belongs to the international law of coexistence. It has hardly been suggested that contracts between states come under national law as opposed to international law. In the absence of an explicit provision to this effect, national lawyers would be surprised to hear that a contract between two or more sovereigns were made subject to the national law of one.

To sum up, there have been two different projects of international law, which may both give rise to rules under which the state can be conceived as an international law subject. On the one hand, statesmen have had a project of international law in the sense that they have concluded treaties, thereby giving rise to the international law of cooperation. This project has reflected the conception of the state as an international co-sovereign. On the other hand, national lawyers have seen the need for a supplementary legal system, thus pursuing another project of international law, which has founded the international law of coexistence on the conception of the state as a national sovereign. The two projects of international law coincide, yet there is no basis for assuming that the international law of cooperation has been harmonized with the international law of coexistence in any respect. This means that international law has two independent bases, namely the statesmen's and the national lawyers' projects of international law.

The ahistorical idea of international law embraced by the European Court of Justice in *Van Gend en Loos* and *Costa v. ENEL* was the international law of coexistence. By neglecting the international law of cooperation, the Court ended up with a narrow idea of international law, which explains how the Court could assume that international law is unfamiliar with the idea of direct effect and the involvement of the individual. Although the international law of cooperation offers a significant number of examples of the individual being subject to treaty rules, only a fraction of which fall within the jurisdiction of international courts, national lawyers as opposed to statesmen have normally seen no need for the involvement of the individual in international law. In this respect, it is undoubtedly the judgment of the Central American Court of 1909 which comes closest to the general feeling among national lawyers. Questions involving individuals *prima facie* come under the international principle of self-containedness for, so the argument runs, the national sovereign is fully equipped to deal with such matters on its own. The international law of coexistence is law only between states, or at least it is presumed to be so.

In the view of the European Court, the Community legal order was really the exception that proved the rule. This was why this treaty-based order could constitute 'a new legal order of international law' just because of its direct effects on individuals. The Court really had no choice but to acknowledge this 'exceptional' feature of the Community legal order. Direct effect had nothing to do with the Court's conception of the state as a national sovereign. It came from one of the only bits of the international law of cooperation which the Court could not possibly neglect without contradicting the conception of the state as an international law subject, namely the EEC Treaty.

Because of direct effect, the Court stated, 'Community law . . . not only imposes

obligations on individuals but is also intended to confer upon them rights.’<sup>60</sup> So it was beyond doubt that ‘obligations’ were imposed directly on individuals. Advocate General Roemer, who in *Van Gend en Loos* gave an opinion against the direct effect of rights under the EEC Treaty, had mentioned as sources of directly effective obligations, among others, the rules on competition law contained in Articles 85 (Article 81 EC Treaty) and 86 (Article 82 EC Treaty).<sup>61</sup> The Court only had to decide whether, in addition to such obligations, the individual also enjoyed rights under the EEC Treaty. It could not be denied that the individual was involved in the Community legal order.

What is more, the EEC Treaty had set up what the Court called ‘institutions endowed with sovereign rights’.<sup>62</sup> According to Article 189 (Article 249 EC Treaty), they can issue regulations that are ‘directly applicable’. That convinced Mr Roemer’s colleague, Advocate General Lagrange, that provisions under the EEC Treaty had direct effect. In the next case concerning direct effect he argued:

How can it be conceived that a provision of the Treaty, in pursuance of which a regulation has been issued, does not enter into force in domestic law at the same time as the regulation which is made under it? And how could it be imagined that another provision, which requires no regulation or domestic measure to carry it out, *for the very reason that it is sufficient in itself*, should not have the same effect?<sup>63</sup>

Under these circumstances it took no creative effort to subscribe to a doctrine of direct effect. It was a consequence of the EEC Treaty being binding upon the Member State that the national court, acting as an organ of the state, was required to decide a case in accordance with the EEC Treaty. To this obligation of result, the doctrine of direct effect added an obligation of conduct: in deciding the case in accordance with the EEC Treaty, the national court was obliged to hear the submission of a party regarding provisions of the Treaty, thus ‘Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect’.<sup>64</sup> In the context of the EEC Treaty, a denial of direct effect would have been a denial of the

<sup>60</sup> See *Van Gend en Loos*, at 12.

<sup>61</sup> *Ibid.*, at 20.

<sup>62</sup> *Ibid.*, at 12.

<sup>63</sup> *Costa v. ENEL*, at 603. It may be noted that a regulation is only ‘sufficient in itself’ because each Member State, as Article 189 (Article 249 EC Treaty) indeed presupposes and thus requires, has enacted a general act of incorporation which gives all future regulations the force of national law; cf. Weiler, *supra* note 4, at 2415. Ideally ‘direct applicability’ means that there is no need for a separate act of incorporation regarding each and every piece of secondary legislation for they already acquire the force of national law due to the general act of incorporation, while ‘direct effect’ means that under international law individuals are subject to rights and obligations as defined in the secondary legislation. While ‘direct applicability’ implies ‘direct effect’, ‘direct effect’ does not require ‘direct applicability’; indeed, ‘direct effect’ has nothing to do with Article 189. Community lawyers have, however, completely confused these concepts over the years; see, e.g., Case 9/70, *Grad v. Finanzamt Traunstein*, [1970] ECR 825, at para. 5 and Case 41/74, *Van Duyn v. Home Office*, [1974] ECR 1337, at para. 12, the consequence being felt in Case 152/84, *Marshall v. Southampton and South-West Hampshire Area Health Authority*, [1986] ECR 723, at para. 48 and Case C-91/92, *Faccini Dori v. Recreb*, [1994] ECR I-3325, at paras 22–24.

<sup>64</sup> *Van Gend en Loos*, at 13. Indeed, international lawyers may regard this result as simply a reflection of the rule of local redress. Contrast, however, Weiler, *supra* note 4, at 2413 *et seq.*

principle *pacta sunt servanda*, the very principle which was indeed fundamental to the subsequent *Costa v. ENEL*.<sup>65</sup>

To sum up, the Court developed its conception of the Community legal order against a background coloured by national law and the conception of the state as a national sovereign. In particular, the principle of precedence added nothing more to the *pacta sunt servanda* principle than a tribute to state sovereignty. Doctrines of direct effect and precedence impressed Community lawyers because they conceived the Community legal order in the light of the conception of the state as a national sovereign. For obvious reasons, the Community treaties diminished the international principle of self-containedness. And so without much explanation many lawyers took what the Court did to be innovative and radical, even activist. Yet when compared to the international law of cooperation, as opposed to the international law of coexistence, there was nothing impressive about the general approach adopted by the European Court. In fact, quite the opposite.

The Court's exceptional focus on state sovereignty provided the framework within which the EEC Treaty was interpreted. State sovereignty came to be continually available as a starting-point for the Court's legal reasoning. If an interpreter was in doubt, state sovereignty could always justify a restrictive interpretation of the Treaty so that the national sovereign carried the least burden on its shoulders. Here the international principle of self-containedness could substitute for the Treaty, something which actually happened on quite a few occasions. This will be illustrated in the following section by some of the Court's early landmark judgments on common market law. This section is also about how the Court came back to the principle of precedence, a principle which after *Costa v. ENEL* was not referred to for five years.

## 5 Substantive Impacts

In order to gain an idea of the impact on common market law of the Court's focus on state sovereignty, one does not have to read beyond *Costa v. ENEL*. Here the Court touched upon both the right of establishment and the free movement of goods.

With regard to the right of establishment, Article 52(2) (Article 43(2) EC Treaty) provides:

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings . . . under the conditions laid down for its own nationals by the law of the country where such establishment is effected.

Accordingly, the so-called 'freedom of establishment' obviously comprised a ban on discrimination due to nationality. But Article 52(2) merely stipulated that this principle was 'included'. The open question was whether the 'freedom' of establishment was more than a principle of non-discrimination. This depended on the interpretation given to Article 52.

The content of a ban on nationality discrimination is purely negative, saying that the state is not allowed to treat aliens in any way worse than its own nationals. The

<sup>65</sup> *Costa v. ENEL*, at 593 *et seq.*

EEC Treaty thereby opened a door. But in order to generate a real opportunity for aliens to go through that door, it was arguably necessary, or at least conducive to the objective of making a common market, to supplement the negative ban on discrimination with various positive principles; or to put it more crudely, to offer the aliens a pat on the back when they appeared on the doorstep. It would perhaps not be contrary to the ban on discrimination to require, for example, a special licence as a condition for establishment if that condition applied to nationals too. Likewise, the state may make the conduct of commercial activity subject to various conditions. Although such conditions can easily put off aliens, the discrimination ban only applies to these conditions if given a somewhat liberal interpretation. Yet it could still have been argued that, in addition to the indisputable, negative ban on discrimination, Article 52(2) ‘included’ some additional, positive principles. Although this interpretation would obviously restrict state sovereignty and the international principle of self-containedness, it could well be a decisive factor in realizing the freedom of establishment. However, in *Costa v. ENEL* the European Court refrained from relating anything but the negative ban on discrimination to the freedom of establishment.<sup>66</sup>

In *Costa v. ENEL*, the Court also dealt with Article 37 of the EEC Treaty (Article 31 EC Treaty), which applies the principle of the free movement of goods to state monopolies. Paragraph 1 prohibits a state monopoly from discriminating ‘between nationals of Member States’. That clearly is a ban on discrimination due to nationality. But paragraph 2, which the Court was requested to interpret, reads as follows:

Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the Articles dealing with the abolition of customs duties and quantitative restrictions between Member States.

The Court construed this provision so that

any new monopolies or bodies specified in Article 37(1) are prohibited in so far as they tend to introduce new cases of discrimination regarding the conditions under which goods are procured and marketed. It is therefore a matter for the court dealing with the main action first to examine whether this objective is being hampered, that is whether any new discrimination between nationals of Member States regarding the conditions under which goods are procured and marketed results from the disputed measure itself or will be the consequence thereof.<sup>67</sup>

This was the threshold for applying Article 37(2). Once again the Treaty, on the Court’s reading, merely imposed a discrimination ban on the sovereign Member States. Since Article 37(2) referred to the entire chapter on the free movement of goods, the suggestion seemed to be that, for instance, the prohibitions of quantitative restrictions and ‘all measures having equivalent effect’ on exports (Article 34 (Article 29 EC Treaty)) as well as imports (Article 30 (Article 28 EC Treaty)) were but bans on nationality discrimination.

As a result, the free movement of goods, persons, etc. provided in the EEC Treaty constituted free movement without movement. A Member State had to grant to the

<sup>66</sup> *Ibid.*, at 597.

<sup>67</sup> *Ibid.*, at 598.

nationals of other Member States the same movement that it granted to its own nationals. But the state could grant no movement to anybody and still observe the provisions on free movement. Free movement was merely an accessory to national law as generated by the national sovereign. The overarching theme was a somewhat restrictive interpretation of common market law, which approximated the principles of free movement to the general ban on discrimination due to nationality already contained in Article 7 of the EEC Treaty (Article 12 EC Treaty).

In the following years this interpretation of free movement was not modified in respect of persons and services.<sup>68</sup> It was, however, different with the free movement of goods. In the EEC Treaty, trade was regulated not only by the principle of the free movement of goods but also in provisions dealing with competition law. For example, Article 85 (Article 81 EC Treaty) prohibits

all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

This provision arguably assumes that there is some movement because otherwise there is nothing for the individual undertakings to prevent, restrict or distort.

In 1966, Article 85 was the subject-matter of the Court's landmark judgments in *Société Technique Minière* and *Consten and Grundig*. In these judgments some movement facilities were added to the common market as set up under the EEC Treaty and subsequently, in *Dassonville*, these facilities were read into the principle of the free movement of goods. In this way, the principle of the free movement of goods, at least when it came to imports, escaped the restrictive interpretation articulated in *Costa v. ENEL*.<sup>69</sup> But *Société Technique Minière* and *Consten and Grundig* became the model for another version of judicial self-restraint.

Article 85 is drawn in such wide terms that most trade within the common market could be covered by them. The crucial phrase is 'trade between Member States'. In what way does this phrase limit the scope of Article 85? It could have been decided that it only did so in an organizational sense. If competition were prevented, restricted or distorted, although 'trade between Member States' was not affected, it could have been argued that the Member State was obliged to intervene to stop acts mentioned in Article 85. Such an interpretation, based on an economic conception of a market,

<sup>68</sup> See, e.g., Case 2/74, *Reyners v. Belgium*, [1974] ECR 631, at para. 16, Case 33/74, *Van Binsbergen v. Bedrijfsvereniging Metaalnijverheid*, [1974] ECR 1299, at para. 10 and Case 36/74, *Walrave v. Union Cycliste Internationale*, [1974] ECR 1405, at paras 5–6. In Case 48/75, *Royer*, [1976] ECR 497, at para. 12, the Court explicitly put together the free movement of persons and services and the right of establishment under the discrimination umbrella.

<sup>69</sup> For the interpretation of Article 34, applying the principle of the free movement of goods to exports, see Case 53/76, *Procureur de la République v. Bouhelier*, [1977] ECR 197, at para. 16 and Case 15/79, *Groenveld*, [1979] ECR 3409, at para. 7, which has been upheld in, e.g., Case 237/82, *Jongeneel Kaas v. Netherlands*, [1984] ECR 483, at para. 22 and Case C-339/89, *Alsthom Atlantique*, [1991] ECR I-107, at para. 14. Another example of a narrow interpretation of the free movement of goods was Case 24/68, *Commission v. Italy*, [1969] ECR 193: see in this respect the analysis carried out in Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods', in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (1999) 349, at 354–359.

would essentially blur the distinction between international and national trade. The phrase ‘may affect trade between Member States’ would be nothing but an organizational mark of distinction. If international trade were affected, Community institutions would deal with the case; if only national trade were affected, national authorities would deal with it. In both cases the matter would be dealt with in accordance with the substantive principles laid down in the EEC Treaty.

The Commission had submitted that the phrase ‘may affect trade between Member States’ should be defined by reference to the ‘normal and natural routes’ of trade.<sup>70</sup> This was a step down the road. In 1966, however, the Court decided to see the phrase as a substantive mark of distinction. ‘[T]rade between member states’ delimited not only the organizational powers of the Community, but also substantively the scope of the common market. Thus, in *Consten and Grundig*, the Court ruled: ‘The concept of an agreement “which may affect trade between Member States” is intended to define, in the law governing cartels, the boundary between the areas respectively covered by Community law and national law.’<sup>71</sup> The Court held that the phrase ‘may affect trade between Member States’ served as the substantive hallmark of the common market, while any effect on national trade was a matter solely for national law. Competition law was linked to ‘abolishing the barriers between States’, which the Court indeed called ‘the most fundamental objective of the Community’.<sup>72</sup>

In this light, the Court elaborated on the meaning of the phrase ‘may affect trade between Member States’. It was, according to the Court,

particularly important . . . whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States.<sup>73</sup>

This was the definition that subsequently was recalled in *Dassonville*, interpreting Article 30 (Article 28 EC Treaty), which applies the principle of the free movement of goods to imports. The Court defined ‘measures having equivalent effect’ (as quantitative restrictions on imports) in the following way:

All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.<sup>74</sup>

<sup>70</sup> The suggestion was that the threshold of ‘may affect trade between Member States’ should be a restriction on competition that leads to ‘the diversion of trade from its normal and natural routes’: see Case 56/65, *Société Technique Minière v. Maschinenbau Ulm*, [1966] ECR 235, at 240 and Joined Cases 56 & 58/64, *Consten and Grundig v. Commission*, [1966] ECR 299, at 341. The Commission relied upon Advocate General Lagrange in Case 13/61, *Bosch v. Van Rijn*, [1962] ECR 45, at 70, who himself had quoted an argument advanced in the written observations submitted by the German Government.

<sup>71</sup> Joined Cases 56 & 58/64, *Consten and Grundig v. Commission*, *supra* note 70, at 341 and also Case 56/65, *Société Technique Minière v. Maschinenbau Ulm*, *supra* note 70, at 249. Likewise as regards the differently worded Article 86 (Article 82 EC Treaty): see Joined Cases 6 & 7/73, *Commercial Solvents v. Commission*, [1974] ECR 252, at para. 31.

<sup>72</sup> Joined Cases 56 & 58/64, *Consten and Grundig v. Commission*, *supra* note 70, at 340.

<sup>73</sup> *Ibid.*, at 341.

<sup>74</sup> Case 8/74, *Procureur du Roi v. Dassonville*, [1974] ECR 837, at para. 5. This definition should be compared to Commission Directive 70/50, OJ 1970 L 13/29.

This formula took the principle of the free movement of goods beyond the strictly negative principle of non-discrimination. Though the principle was still couched as a negative obligation – the Member State shall not enact such and such rules – it was not a negative obligation of non-discrimination. It was a negative obligation not to hinder trade across borders and thus, in a sense, a positive obligation to generate a reality where domestic and imported goods were treated more equally. Admittedly, the formula did not take the European Court much further, yet the principle of the free movement of goods was no longer completely without movement facilities.

However, the formula that had been coined in *Consten and Grundig* did more than widen the principle of the free movement of goods. It made Article 30 and the free movement of goods the centre of the common market. And that was yet another expression of the focus on state sovereignty. Despite the addition of some movement facilities to a principle of free movement, the common market still lacked in movement, for, as the principles of free movement, it was now restricted to movement between states. The further potential of competition law, or at least Article 85 (Article 81 EC Treaty), was neglected. Indeed, the movement facilities now added to the principle of free movement of goods did not in a sense originate in the Treaty: they were conditional upon divergence between the different national legal systems as created single-handedly by the national sovereigns.

What happened within the state was *prima facie* a domestic matter reserved for the national sovereign. That made clashes between Community law and national law more likely, because as an economic reality it is not possible to separate international trade from national trade. It was in 1969 when the Court, in *Wilhelm*, for the first time faced the question of such clashes that finally the principle of precedence was restated.<sup>75</sup> In the interval between *Costa v. ENEL* and *Wilhelm* the Court had relied on bindingness proper.<sup>76</sup> However, as in *Costa v. ENEL*, in *Wilhelm* state sovereignty was treated as a key ingredient of treaty interpretation, essentially because the Court by then had recognized such a strong position of national law in regulating market structures that the Treaty was binding only within the context of national law, thus making precedence an appropriate synonym of *pacta sunt servanda*. In *Wilhelm*, having first referred to the ‘binding force of the Treaty’, the Court inferred: ‘Consequently, conflicts between the rules of the Community and national rules in the matter of law on cartels must be resolved by applying the principle that Community law takes precedence.’

In the long run sovereignty-based arguments gained the upper hand. As for Article 30 (Article 28 EC Treaty) and the free movement of goods, the *dispositifs* of *Cassis de*

<sup>75</sup> See Case 14/68, *Wilhelm v. Bundeskartellamt*, [1969] ECR 1, at para. 6.

<sup>76</sup> See Case 9/65, *San Michele v. High Authority*, [1967] ECR 27, at 29 and Case 17/67, *Neumann v. Hauptzollamt Hof*, [1967] ECR 441, at 453.

*Dijon*, *Cinéthèque*, the *Sunday Trading* cases and *Keck* all convey the idea that room for the national sovereign acting as sole judge had steadily expanded.<sup>77</sup>

In summary, therefore, the principles of free movement were originally seen as nothing but a series of discrimination bans. According to *Costa v. ENEL*, the principles did not warrant any movement, or movement facilities themselves. They had a parasitic function so that if the national law of the Member State provided some movement, the principle of free movement added freedom, that is non-discrimination due to nationality. However, as the EEC Treaty had been drafted, it was impossible to uphold this interpretation, at least in respect of one of the principles. The formulas adopted by the Court in its interpretation of competition law were subsequently read into the principle of the free movement of goods. As a consequence, this principle came to be seen as providing some movement facilities, but then again the common market did not reach very far since movement was restricted to international trade across borders. It still had a parasitic function on national law in the sense that it only applied in case of conflict between national legal systems. The EEC Treaty continued to be interpreted cautiously so that national trade within the state was passed over when conceiving the common market. In respect of goods, as opposed to persons, services and capital, the common market broke down borders between national territories, but in no case did the common market break down borders between national sovereigns, as it were.<sup>78</sup>

## 6 Conclusions

From the point of view of an international lawyer, international law cannot be identified with the international law of coexistence. For in addition, an international lawyer knows another, independent international law of cooperation. The international law of coexistence and the international law of cooperation make up the world of international law, in an international lawyer's eyes; international legal argument has a double structure. It makes more sense to identify international law with the international law of coexistence if one is a national lawyer, since the international law of coexistence provides precisely that kind of international support that a national legal system would seem to need from a national, or internal, point of view.

It is the main conclusion of this essay that the judges of the European Court have

<sup>77</sup> See Case 120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649, at para. 8 (giving four examples of 'mandatory requirements' which summarized the restrictions accepted in previous decisions between 1974 and 1979), Joined Cases 60 & 61/84, *Cinéthèque v. Fédération Nationale des Cinémas Français*, [1985] ECR 2618, at para. 23, Case C-145/88, *Torfaen Borough Council v. B & Q*, [1989] ECR 3851, at paras 12–13, Case C-169/91, *City Council of the City of Stoke-on-Trent and Another v. B & Q*, [1992] ECR I-6635, at paras 11–17 and Joined Cases C-267 & 268/91, *Keck and Mithouard*, [1993] ECR I-6097, at para. 16.

<sup>78</sup> In later case-law it has not only been the principle of the free movement of goods that has broken down borders between national territories: see, e.g., Case C-76/90, *Säger v. Dennemeyer*, [1991] ECR I-4221, at para. 12, Case C-384/93, *Alpine Investments*, [1995] ECR I-1141, at paras 37–39 and Case C-415/93, *Bosman*, [1995] ECR I-4921, at para. 79.



acted as national lawyers when making the Community legal order. Thus, they have had a simplistic idea of international law, identifying it with the international law of coexistence. This easily made the only bits of the international law of cooperation which the judges could not neglect, namely the Community treaties, look fundamentally new. Yet, as an international lawyer will know, when compared to other parts of the international law of cooperation, there is nothing new about direct effect and nothing innovative about precedence.

In addition, the Court, being composed of national lawyers, has paid much regard to state sovereignty. The members have been aware that the Community legal order went far beyond the international law of coexistence, thereby diminishing the international principle of self-containedness. When the Court had a choice between the international principle of self-containedness and a less restrictive interpretation of a treaty provision or a provision contained in secondary legislation, it often opted for the former. This does not mean that state sovereignty has been left unaffected. Obviously, the international principle of self-containedness has suffered. When the provision is clear, it is followed by the Court, and the Court has normally refrained from embracing a restrictive interpretation if in practice that would hamper the application of a treaty or secondary legislation. But when provisions are unclear and a variety of more or less practicable solutions are on offer, the treaty has often yielded to state sovereignty; the same goes for secondary legislation. On these occasions the international law of cooperation is made subject to the international principle of self-containedness.

This other side of the story has been overlooked by Community lawyers because they have seen the Community legal order and the Court's contribution to it in the light of a structure of international legal argument that starts with the international principle of self-containedness and knows only the international law of coexistence, as opposed to the international law of cooperation. In other words, the readers of the Court's decisions have also acted as national lawyers. When seen against a background coloured by state sovereignty, the Court's making of the Community legal order has appeared innovative, radical, etc., even though it did not quite come up to the promises contained in the Community treaties.

These are the conclusions that have been reached in the present article. Now it might be asked whether the Court has betrayed the treaties or simply done what it was expected to do. Technically, that is a question as to whether the members of the Court should have been international lawyers as opposed to national lawyers. And whether Community lawyers in general should show more regard for the other side of the story of the Court and its making of the Community legal order than for the popular side of it. While I will leave this question for my readers, it is a matter of fact that the position reserved for the Court at the top of the first treaty-based order rooted in the rule of law was extremely vulnerable. Perhaps the Court's adoption of a national lawyer's approach to 'international law', including the strong focus on state sovereignty, was the wise response of judicial self-restraint to this unprecedented situation.

Outside that context, when considering what lesson the Court's making of the Community legal order teaches international lawyers, it must be reiterated that the

parts of the popular side of the story which compare the Community legal order to international law are clearly defective. The idea of international law ingrained in the popular side of the story, i.e. the international law of coexistence, when seen in isolation, is a travesty of international law, thus making it nonsensical to discuss on that basis whether the Community legal order is ‘old’ or ‘new’. It is instructive that Community lawyers tend to assume that international law contains a general, sovereignty-based principle of restrictive treaty interpretation.<sup>79</sup> International lawyers in general do not share this rather astonishing assumption, which finds no support in the case-law of the International Court of Justice.<sup>80</sup> On the other hand, when Community lawyers express doubt as to the Court’s style of interpretation, that is when the Court is criticized for going too far, one sees prominent scholars advocate an alternative style of interpretation that is confined to the text, or to the original intention of the contracting states.<sup>81</sup> But, of course, the principles of international law regarding treaty interpretation suggest a much more dynamic approach. It is a truism that founding treaties of international organizations, and also self-contained regimes laid down in multilateral treaties, are given an effective, teleological interpretation.<sup>82</sup>

At the same time, the entire discussion of constitutionalism versus internationalism is highly artificial. After all what does it mean that the EEC Treaty is ‘the basic constitutional charter’? ‘Constitution’ is an open-ended term, and it is not always justified to associate the term with its meaning in national law of the superior, legal

<sup>79</sup> E.g., Riese, ‘Über den Rechtsschutz innerhalb der Europäischen Gemeinschaften’, 1 *Europarecht* (1966) 24, at 27, Donner, ‘The Constitutional Powers of the Court of Justice of the European Communities’, 11 *CMLR* (1974) 127, at 135, Kutscher, ‘Methods of Interpretation as Seen by a Judge at the Court of Justice’, in *Judicial and Academic Conference 27–28 September 1976* vol. 1 (1976) 1, at 31, Mancini, ‘The Making of a Constitution for Europe’, 26 *CMLR* (1989) 595, at 596 and Weiler, *supra* note 4, at 2416. See also Advocate General Lagrange: Case 8/55, *Fédération Charbonnière Belgique v. High Authority*, [1954–56] ECR 245, at 277.

<sup>80</sup> In 1998 the Appellate Body of the World Trade Organization made a similar claim, holding that a principle of restrictive interpretation is ‘widely recognized in international law as a “supplementary means of interpretation”’, see *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R, at para. 165. However, from the case-law of the International Court the Appellate Body was only able to point to the *Nuclear Tests* cases, which concerned the interpretation of unilateral declarations as opposed to treaties, see *Nuclear Tests*, ICJ Reports (1974) 253, at para. 44 and 457, at para. 47; see also *Frontier Dispute*, ICJ Reports (1986) 554, at para. 40.

<sup>81</sup> E.g., H. Rasmussen, *On Law and Policy in the European Court of Justice* (1986), at 25–33, De Witte, *supra* note 5, at 323 and T. C. Hartley, *Constitutional Problems of the European Union* (1999), at 22–42. See also the various hints contained in Craig, ‘Once Upon a Time in the West: Direct Effect and the Federalization of EEC Law’, 12 *Oxford Journal of Legal Studies* (1992) 453.

<sup>82</sup> See Articles 31 and 33 of the Vienna Convention on the Law of Treaties, *Competence of the International Labour Organization*, 1926 PCIJ Series B, No. 13, at 18, *Reparations for Injuries*, ICJ Reports (1949) 174, at 182 and Max Huber’s letter reproduced in 44-I *Annuaire de l’Institut de Droit International* (1952) 198, at 201.

source of a sovereign entity.<sup>83</sup> Indeed, the European Court has always linked the expression ‘the constitutional charter’ to ‘the rule of law’, suggesting that the meaning of the former is restricted to the application of the latter.<sup>84</sup> This is a decent analogy taken from national public law, though not quite a revolution.<sup>85</sup>

A proper comparison of the Community legal order with international law presupposes that one takes into account the international law of cooperation as well as the international law of coexistence. On this basis it could be said that the Community treaties as such are ‘new’ and that the interpretation given to them by the European Court is also ‘new’. But there ‘new’ carries two different connotations. In the former, it refers to the unprecedented and progressive scope and features of the treaties, while in the latter it points to the occasionally unprecedented and reactionary, sometimes arguably primitive, interpretations of the Court in relation to the same treaties. It is only when it comes to these interpretations that modern international law cannot contain what is ‘new’. On a more general level, if the internationalist’s evergreen phrases such as ‘globalization’, ‘integration’ and ‘interdependence’, not to mention ‘the international community’, are or become a reality, whatever that means, the major challenge facing international lawyers will not be how to rethink international law and the structures of international legal argument but how not to lose the curb on the would-be national lawyer lurking within most of us.

<sup>83</sup> Cf. Kakouris, ‘La relation de l’ordre juridique communautaire avec les ordres juridiques des Etats membres’, in F. Capotorti *et al.* (eds), *Liber Amicorum Pierre Pescatore* (1987) 319, at 331, Boulouis, ‘Le droit des Communautés européennes dans ses rapports avec le droit international général’, 235 *RdC* (1992) 9, at 29, Herdegen, ‘Vertragliche Eingriffe in das “Verfassungssystem” der Europäischen Union’, in O. Due *et al.* (eds), *Festschrift für Ulrich Everling* (1995) 447, at 448, and Weiler and Haltern, ‘The Autonomy of the Community Legal Order – Through the Looking Glass’, 37 *Harvard International Law Journal* (1996) 411, at 421. See also D. R. Phelan, *Revolt or Revolution* (1997) 21 and 144 *et seq.* and J. H. H. Weiler, *The Constitution of Europe* (1999), at viii.

<sup>84</sup> Cf. Case 294/83, *Parti ecologiste ‘Les Verts’ v. Parliament*, [1986] ECR 1339, at para. 23, Case C–2/88, *Zwartveld and others*, [1990] ECR I–3365, at para. 16, Opinion 1/91, *Draft Agreement Relating to the Creation of the European Economic Area*, [1991] ECR I–6079, at para. 21 and Case C–314/91, *Weber v. Parliament*, [1993] ECR I–1093, at para. 8. See also previously Case 8/55, *Fédération Charbonnière Belgique v. High Authority*, [1954–56] ECR 245, at 258 and Opinion 1/76, *The Laying-up Fund for Inland Waterway Vessels*, [1977] ECR 741, at para. 12.

<sup>85</sup> Cf. Weiler, *supra* note 4, at 2421 *et seq.*