

case. Yet, the operation of politics above the realm of law dictates that these claims will be determined not on the basis of their relative legal conviction, but based on interest politics, thus severely casting doubt on the existence and operation of effective laws of self-determination.

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Wolfram Wormuth. **Die Bedeutung des Europarechts für die Entwicklung des Völkerrechts**

(The Significance of European Law for the Development of Public International Law). Frankfurt am Main: Peter Lang, 2004. Pp. 408. €64 (paperback). ISBN 3-631-51943-5 (Published in German).

Originally written as a doctoral dissertation, supervised by Professor Michael Schweitzer at Passau University, the aim of this book is to evaluate the arguments put forward by Pierre Pescatore in his 1970 article, 'L'apport du droit communautaire au droit international public',<sup>16</sup> in the light of 30 dynamic years of European integration.

In Wormuth's view, the impact of European law on the development of public international law is threefold. Accordingly, the book deals with (i) European law as such, (ii) the interaction between the Union and its Communities on the one hand and with other subjects of public international law on the other, and (iii) the role of the EC/EU as a model or blueprint for regional economic integration.

The author's basic approach to European law is a straightforward, mainstream one (to which this reviewer fully subscribes). The Community legal order is perceived as an

exceptionally well-integrated subsystem of public international law, reflecting the initial approach of the European Court of Justice (ECJ) from *Van Gend en Loos* to *Costa/ENEL* ('a new legal order of international law'). This is an approach which one could describe, as the author does, as 'revolutionary within, but not incompatible with, international law'. However, I would argue that this approach is not even 'revolutionary' within the theory of international law. As early as 1920 the Austrian scholar Hans Kelsen argued the principle of strict monism, requiring both direct applicability and supremacy over national law, within the realm of classic international law.<sup>17</sup> The revolutionary element is that this position was a minority view until the Community legal order evolved.

The author dismisses the *sui generis* theory of European law on the ground that the ECJ never sought to establish Community law as independent from public international law. What was sought was to create a legal system that was independent from the *national* legal systems of the Member States.<sup>18</sup> Unsurprisingly and *a fortiori*, the author perceives the EU legal order as part of the system of public international law. Pointing to the standard criteria of organ and treaty-making powers under classic public international law, he attributes legal personality to the EU, the criteria for which have so neatly been summed up by Rosalyn Higgins.<sup>19</sup>

Wormuth summarizes the first part of his study by referring back to Pescatore's term 'international law of integration' (*Internationales Integrationsrecht*) for the subsystem described so far. He points to the inherent flexibility of public international law in being able to both accommodate the protection of

<sup>16</sup> Pescatore, 'L'apport du droit communautaire au droit international public', 5 *Cahiers de droit européen* (1970) 501.

<sup>17</sup> H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre* (The Sovereignty Problem and the Theory of Public International Law. A Contribution to a Pure Theory of Law) (1920), at 145.

<sup>18</sup> See this writer in 9 *LIEI* (1995).

<sup>19</sup> 'If the attributes are there, personality exists. It is not a matter of recognition. It is a matter of objective reality.' R. Higgins, *Problems and Process. International Law and How We Use It* (1994) 48.

national sovereignty from external interference and to create a structure for such interferences in favour of a centralized law-making mechanism. It is submitted, however, that although the formula is an eye-catching one, the dichotomy is artificial, since a voluntary interference is no longer an interference properly so-called, and sovereignty is no defence against the operation of a system of law-making instituted by sovereign states among themselves; the capacity to relinquish sovereignty for the benefit of some higher-order mechanism is part of (rather than a negation of) states' sovereignty, as the author himself points out.

The second part of the book deals with the impact of European law on public international law through the interaction between the EU/EC and third states and international organizations. First, the author notes a general 'reflexive effect' of Community law insofar as rules of general international law are to be taken into account in the course of applying Community law. This is followed by a detailed discussion of Article 300 paragraph 7 EC which explicitly provides for a binding effect on Member States of treaties concluded by the EC. The ambiguous wording of the *Kupferberg* decision of the ECJ ('first and foremost') has given rise to a controversy as to whether Article 300 paragraph 7 only affects the relationship between the Community and its Member States or whether even third parties (i.e. third states parties to the treaties to which Article 300 refers) can claim rights from this provision. The author argues that the basic and well-known rule *pacta tertiis nec nocent nec prosunt* provides an overly simplistic answer to the problem – but only because at about the time when *Kupferberg* was decided by the ECJ there were ongoing discussions in the International Law Commission (ILC) about a more general rule to be included in the Draft Vienna Convention on the Law of Treaties II (VCT II). This rule would have resulted in obligations on the part of the Member States to an international organization *vis-à-vis* third states parties to treaties concluded with that organization. This draft provision (Article 36bis), however, was repeatedly cut back in the many sessions of the ILC, and what was left of it was ultimately

dismissed in 1986 when the text of the VCT II was finalized. At the end of the day, therefore, we are back to the *pacta tertiis* rule, which seems to render the *Kupferberg* episode a significant example of a *failure* to influence the development of general international law.

Rather than follow on from this chapter on Article 300 paragraph 7 with a discussion of particular treaties to which the Community is either a party (WTO agreement and annexes) or may at some stage seek to become a party (ECHR), as one may have expected, the author chose to focus on the preceding nature of some of these treaties (i.e. preceding the EC Treaty in time, such as GATT 1947); the current and future treaty arrangements are dealt with at a later stage. Before that, he discusses potential 'spillover' effects in the Member States' approach to treaties under public international law in general. If the latter are needed as an intellectual prerequisite for the treaty debate, they should have preceded the chapter on Article 300 EC; if not, the flow of arguments suggested above should perhaps not have been interrupted by this somewhat erratic (though interesting) chapter. It would seem difficult anyway to come to any conclusions on such spillover effects: a comparison of selected Member States shows that the treaty interfaces of at least three national constitutions have clearly been influenced by Community law in this respect, whereas a number of others have developed similar models without being significantly influenced by Community law. Although this chapter is thoroughly documented and includes plenty of references, it nevertheless suffers from occasional inaccuracies (e.g. the author misunderstands the Austrian system, construing it as entirely dualistic, which it is not<sup>20</sup>). Finally, the

<sup>20</sup> In particular, the author has misunderstood (and misquoted) the provision of Art. 50 of the Austrian Federal Constitutional Law, which provides *inter alia* that 'the National Council may decide on the implementation of treaties by adopting national legislation' (emphasis added); however, it *need not* do so. Indeed, a number of significant treaties (such as the ECHR) have been incorporated as such without implementing legislation to that end.

author notes that, despite the lack of an Article 300-type provision, other sources of public international law also benefit from the 'reflexive effect' mentioned above.

Turning now to the 'preceding treaties', the author begins by reminding us that there is no general rule, either in public international law or in Community law, which would create a binding effect on the Community of treaties previously concluded by the Member States. While providing an excellent overview and critical discussion of the rules concerning succession in treaty obligations, the author focuses almost entirely on the formal rules *in abstracto*. This becomes apparent in the author's summary of the case law of the ECJ with regard to GATT 1947 and its four-stage test as to whether the Community has succeeded the Member States with regard to their obligations under certain treaties. The four-stage test requires a) such treaties to be binding upon all Member States, b) a transfer of competences with regard to the subject-matter affected from the Member States to the Community, c) a clear and manifest intention of the Member States and the Community of such legal succession and d) a recognition by other states parties to the treaties concerned. While accurately reflecting the Court's case law, of course, the reader senses the lack of more critical comments on some elements of this test, which would seem inevitable when looking at the broader picture or at least at positions previously taken by the author. If one derives legal personality, as the author does, from objective criteria rather than recognition, and if one perceives treaty-making power, as he does, as a crucial element of such legal personality, it looks odd to require third-party recognition for succession into existing treaty obligations but not for amendment, revision or renewal by the successor! What sense does it make to require third-party recognition for the fact that competences concerning the customs union and the common commercial policy, which are the key competences with regard to the GATT subject matter, have been transferred from the Member States to the Community and are now exclusive competences of the latter, with regard to

both existing *and* new treaty obligations? Admittedly, one can distinguish between the Member States as the bearers of obligations under such treaties on the one hand, and the Community which, as a matter of fact, is the only body able to fulfil those after a subsequent transfer of competences on the other hand, but let us also remember that under international law *ultra posse nemo tenetur*. A model which does not link the transfer of obligations to the transfer of competences necessarily results in idle obligations under the treaties concerned; it is difficult to argue that this has been the intention of the parties and impossible to argue that this serves the objectives and purposes of the treaties concerned. It is submitted that more coherent conclusions could be reached by consistently applying the objective model: to the extent that competences have been vested exclusively in the Community, a transfer of obligations is mandatory from a teleological point of view. And if one looks at Articles 60, 297 and 301 EC together, which are the main instruments for implementing a trade embargo imposed by the Security Council under Article 41 of the UN Charter, it is difficult to contend that there is reason to assume legal succession for GATT (1947) obligations but not for UN Charter obligations.

Similarly, the author strongly focuses on a formal position with regard to state succession when he turns to the ECHR and submits that there is no formal obligation under international law of the EC to comply with the ECHR. First of all, with regard to exclusive Community competences, the arguments submitted above would apply *mutatis mutandis*. Second, this approach seems to be too narrow in its exclusive focus on formal treaty obligations. It is worth remembering that the author has ventured to study the impact of European law on the development of public international law as such, and not just of one source of it. Even before Article 6 found its way into the EU Treaty, the ECJ had regarded the ECHR as part of the constitutional legal heritage of the Member States, and therefore as common legal principles. Therefore, it is (also) a matter of law, and not

just a matter of fact, as the author has written in his somewhat misleading summary on this point, that the ECJ safeguards the coherent and uniform application of the ECHR's fundamental rights both by the Member States and by the institutions of the Community.

According to Wormuth, the 'mixed agreement' model (treaties concluded jointly by the Community and its Member States with third parties) has become so common and widely accepted that it can be regarded as customary law, which nicely solves the problem that VCT II does not expressly refer to treaties with a mix of parties (states *and* international organizations) on one side and one or more states on the other. One cannot but concur with the author in regarding the proper identification of 'who can do what' as the main problem for third parties, especially if one remembers that, even internally, some of these issues have been so ambiguous that advisory opinions of the ECJ were required to sort them out. This has particularly been the case with regard to the WTO system, in which the 'mixed' model is being taken one step further and extended from a mere treaty model to a model of membership in international organizations. The author is sceptical as to whether the EC/WTO solution lends itself to generalization, as not even the EC itself enjoys 'full autonomy' (as required by Article XII WTO) in the conduct of its external commercial relations in all subject-matters covered by the multilateral trade agreements annexed to the WTO agreement. While this is correct, the conclusion is not mandatory, as it implies that the deviation from Article XII was exceptional and will not occur again. Some support for the exceptional character could however be gained from the fact that, likewise, Eurocontrol membership for international organizations has so far been reserved for the EC.

Finally, as far as treaties are concerned, the author points to an interesting and most important contribution of European law to the development of public international law. By promoting the principle of 'good governance' in cooperation agreements with third

states, the EC has helped in the proliferation of democracy and respect for human rights and contributed to the gradual conversion of what was originally 'soft law' into hard law, producing (by virtue of appropriate treaty clauses) enforceable legal principles.

A last controversial point arises in the second part of Wormuth's book with regard to the policy of recognition of states. After reviewing the classic dispute as to the constitutive versus declaratory nature of recognition and the classic criteria for statehood, the author investigates the practice of the Community (and, from 1992 onwards, the Union), particularly with regard to the dissolution of the Soviet Union and the Federal Republic of Yugoslavia. The author considers the December 1991 guidelines for recognition requiring certain substantive standards beyond the established criteria of statehood as a legal (and not merely a political) doctrine. The ambiguity in its wording, referring to both internationally recognized principles and political realities, did allow both interpretations, and the author gives ample references to scholarly writing in both directions. While it can hardly be disputed that in cases such as Croatia and Bosnia-Herzegovina the classic criteria for statehood, especially the effective control over territory, were not fully present at the time of recognition by the EC, it remains doubtful whether the EC deliberately aimed at a fundamental change of international law or merely pursued its political aims without too much regard for the latter, 'political realities' simply taking precedence over principles of law (to use the wording of the 1991 guidelines). We must not forget that states have always been regarded as the prototype of original subjects of international law, whilst the recognition doctrine would put them in a merely derivative position, their personality under international law depending on the acts of other subjects of international law. It is precisely because of the ambiguous wording of the 1991 guidelines that they should not be read in that sense. Here again, the solution put forward by the author appears to be incoherent: Why should one assess the legal personality of

international organizations – which certainly are but derivative subjects! – according to objective criteria, but make the legal personality of states depend on constitutive acts performed by other subjects? Higgins, quoted by the author as regarding the recognition of Croatia as constitutive (not only) in a legal sense,<sup>21</sup> has limited her argument to the much narrower context of the right to self-determination, and this is about as far as this reviewer is willing to go, accepting premature recognition as an exceptional (!) instrument to achieve one of the principles of the United Nations.

The third part, which gives an overview of other organizations aiming at regional economic integration by presenting the whole bandwidth of supranational and purely inter-governmental approaches, from Comunidad Andina to MERCOSUR, is clearly more descriptive and encyclopaedic than the first and second parts. This is not the fault of the author, however, who implicitly recognizes that there is no genuine abstract model of regional economic integration tailored after the EU.

Summing up, Wormuth has presented an interesting study, not merely following the path sketched out by Pescatore more than three decades earlier but finding much new material along the way. It will certainly stimulate further discussion on the general points raised and serve as a good starting point for such discussions. For anyone working both in European and international law it is in any case mandatory reading.

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Jukka Viljanen, ***The European Court of Human Rights as a Developer of the General Doctrines of Human Rights Law. A Study of the Limitations Clauses of the European Convention on Human Rights.***

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Pat 342. Bibliography. €25. ISBN

951-44-5795-1.

The possibility of imposing limitations upon the enjoyment of human rights is arguably the hottest current issue in relation to the European Convention on Human Rights. In addition to an extensive literature over the past decade,<sup>1</sup> Dr. Jukka Viljanen has added this study of the limitation clauses of the Convention. His ambition is astonishing, given the breadth of the topic; he seeks to develop a general doctrine, an '*Allgemeine Lehre*' (at 30), of limitation clauses. He argues that in the European context there are 'no human rights free zones' (at 22); and that the European Convention is all-embracing. But he acknowledges the need for rules governing limitations (at 38) and suggests that a 'three-phase test' should be developed for the purpose of 'forming minimum criteria for all Contracting States at every level of government' (at 175). Based on a review of the Strasbourg case-law (at 33) he admits that no requirement for such a test emerges (at 177), since the 'interpretative links between different parts of the limitation clause testing has hardly ever been displayed openly in Strasbourg case-law' (at 336). One could argue that the onus is on

<sup>21</sup> Higgins, *supra* note 4.

<sup>22</sup> E.g. H. C. Yourow, *The Margin of Appreciation Doctrine* (1996), E. Kastanas, *Unité et Diversité* (1996), J. Schokkenbroek, *Toetsing aan de vrijheidsrechten van het europes verdrag tot bescherming van de rechten van de mens* (1996), A. Rupp-Sweenty, *Die Doctrine von der Margin of Appreciation in der Rechtssprechung des Europäischen Gerichtshofs für Menschenrechte* (1999) and Y. Arai-Takahashi, *The Margin of Appreciation and the Principle of Proportionality* (2002).