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Contents

Focus Section:

Recent Developments in the Application of International Law in Domestic and European Community Law

<i>Anne Peters: The Position of International Law Within the European Community Legal Order</i>	9
<i>Jordan J. Paust: Customary International Law in the United States: Clean and Dirty Laundry</i>	78
<i>Beth Stephens: Expanding Remedies for Human Rights Abuses: Civil Litigation in Domestic Courts</i>	117
<i>Igor I. Lukashuk: Treaties in the Legal System of Russia</i>	141
<i>Theodor Schweisfurth/Ralf Alleweldt: The Position of International Law in the Domestic Legal Orders of Central and Eastern European Countries</i>	164
<i>Jacob W. F. Sundberg: The European Convention on Human Rights and the Nordic Countries</i>	181
<i>Ineta Ziemele: The Application of International Law in the Baltic States</i>	243
<i>Brigitte Stern: La compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et au Rwanda</i>	280

Articles

<i>David P. Fidler: Trade and Health: The Global Spread of Diseases and International Trade</i>	300
<i>Rainer Hofmann: Minority Rights: Individual or Group Rights? A Comparative View on European Legal Systems</i>	356
<i>Eric Johnson: Hong Kong after 1997: A Free City?</i>	383

<i>Gregor Noll</i> : Prisoners' Dilemma in Fortress Europe: On the Prospects for Equitable Burden-Sharing in the European Union	405
<i>Roland Schärer</i> : The European Convention on Nationality	438

Reports

<i>Ursula E. Heinz</i> : Die Rechtsprechung des Internationalen Gerichtshofes in den Jahren 1995 und 1996	460
<i>Marian Niestedt/Dominik Ziegenhahn</i> : Die Rechtsprechung des Europäischen Gerichtshofes für Menschenrechte im Jahre 1996	514
<i>Martin Mennecke/Christian Tams</i> : Die Tätigkeit des Ministerkomitees und der Parlamentarischen Versammlung des Europarates in den Jahren 1995 und 1996	569
<i>Jörg Föh/Ina Wiesner</i> : Die Tätigkeit der International Law Commission in den Jahren 1995 und 1996	598

Book Reviews

<i>Chayes/Chayes</i> : The New Sovereignty. Compliance with International Regulatory Agreements (<i>Delbrück</i>)	623
<i>Giesen</i> : Die Vorbereitung der Grundgesetzänderungen nach der deutschen Wiedervereinigung. Zur Rechtmäßigkeit von Organisation und Verfahren der Gemeinsamen Verfassungskommission (<i>Wolter</i>)	626
<i>Herdegen</i> : Europarecht (<i>Hobe</i>)	630
<i>Kilian</i> : Europäisches Wirtschaftsrecht (<i>Hobe</i>)	631
<i>Kopke</i> : Rechtsbeachtung und -durchsetzung in GATT und WTO (<i>Tietje</i>)	633
<i>Lowe/Fitzmaurice</i> (eds.): Fifty Years of the International Court of Justice — Essays in honour of <i>Sir Robert Jennings</i> (<i>Delbrück</i>)	636
<i>Makarczyk</i> (ed.): Theory of International Law at the Threshold of the 21st Century. Essays in honour of <i>Krzysztof Skubiszewski</i> (<i>Hofmann</i>)	640
<i>Petersmann</i> (ed.): International Trade Law and the GATT/WTO Dispute Settlement System (<i>Tietje</i>)	642
<i>Ragazzi</i> : The Concept of International Obligations <i>erga omnes</i> (<i>Delbrück</i>)	645

<i>Schrijver: Sovereignty over Natural Resources, Balancing Rights and Duties (Riedinger)</i>	646
<i>Société française pour le droit international: Colloque de Caen: Droit d'asile et des réfugiés (Wolter)</i>	648
<i>Stokke/Vidas (eds.): Governing the Antarctic: The Effectiveness and Legitimacy of the Antarctic Treaty System (Riedinger)</i>	651
<i>World Intellectual Property Organization (WIPO): Introduction to Intellectual Property. Theory and Practice (Peifer)</i>	654
<i>van Wyk/Dugard/de Villers/Davis: Rights and Constitutionalism — The New South-African Legal Order (Hobe)</i>	656

Books Received

658

List of Contributors

661

FOCUS SECTION:
RECENT DEVELOPMENTS IN THE APPLICATION
OF INTERNATIONAL LAW IN DOMESTIC
AND EUROPEAN COMMUNITY LAW

**The Position of International Law
Within the European Community Legal Order**

By Anne Peters

Introduction

This article examines the status and effects of international law binding the Community itself¹ in the internal Community order. It does not deal with the distinct question to what extent international rules governing the relations between independent States apply to the relations between the Member States.

The most important sub-questions of this issue are: Does the Community system prohibit once and for all resort to traditional institutions, such as self-help or retaliation? Can the EC Treaty be interpreted according to the rules of interpretation of international treaties, or does it require a specific reading? Can the EC Treaty be amended or terminated pursuant to the Vienna Convention on the Law of Treaties, or does its system preclude any reference to these residual rules?²

¹ Treaties concluded by the Community, or general rules applicable to the Community in its quality as an international organization.

² *Jürgen Schwarze*, *Das allgemeine Völkerrecht in den innergemeinschaftlichen Rechtsbeziehungen*, *Europarecht*, Bd. 18, 1983, 1.

The starting point of my analysis is the proposition that Community law³ is a "new legal order"⁴ that is distinct from international law.⁵ This characterization of Community Law was championed by the European Court of Justice (ECJ)⁶, and has been accepted by the courts of the Member States⁷ and most students of Community law.⁸ The qualification of Community law as independent of international law⁹ de-

³ When speaking of Community law, I focus on the most important of the three Community treaties, *i.e.*, the EC Treaty, and leave aside the Treaty Establishing the European Atomic Energy Community and the Treaty Establishing the European Coal and Steel Community. I do not treat the overarching European Union, which is — in contrast to the three Communities it comprises — not a subject of international law. See in scholarship, *e.g.*, Rudolf Streinz, *Europarecht*, 3rd ed., 1996, Rdn. 121b; *see also* the *Bundesverfassungsgericht* (German Constitutional Court) decision on the Treaty on European Union, BVerfGE 89, 155, 195 (1993).

⁴ Opinion 1/91, *Draft Treaty on the establishment of a European Economic Area (re EEA)*, 1991 ECR I-6079, para. 21.

⁵ The *sui generis* quality of Community law is unaffected by the international law origin of the Community-founding treaties and the fact that international law (most importantly GATT rules and the European Convention's human rights) has played a constitutive role for the European integration of market and politics and does not preclude the possibility of a so-called monist relation between international law and Community law. See in detail *infra* II.1.

⁶ In Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen*, the Court held that "the Community constitutes a new legal order of international law, . . . the subjects of which comprise not only the Member States but also their nationals," 1963 ECR 1, 25. In case 6/64, *Costa v. ENEL*, 1964 ECR 1251, 1269, the Court dropped any reference to international law and said "the EEC Treaty has created its own legal system." In the quoted opinion 1/91, *re EEA* (note 4), para. 21, the Court referred to *Van Gend & Loos*, but spoke only of a "new legal order," but not of 'international law'. Opinion 2/94, *Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*, 1996 ECR 1763, para. 34 opined that the accession of the Community to the Convention would tie the Community into a distinct, international institutional system.

⁷ *See, e.g.*, *Bundesverfassungsgericht* (German Constitutional Court), BVerfGE 22, 293, 296 (1967); BVerfGE 37, 271, 277 - 278 (1974); *Corte Costituzionale* (Italian Constitutional Court), judgment No. 185 of 18 December 1973, German translation in *Europarecht*, 9 July, 1974, 255, 259.

⁸ Notwithstanding the fact that the school considering Community law as merely regional international law recently appears to have gained some strength. *See* Albert Bleckmann, *Die Rechtsnatur des Europäischen Gemeinschaftsrechts. Zur Anwendbarkeit des Völkerrechts im Europäischen Rechtsraum, Die öffentliche Verwaltung*, 31. Jhrg., 1978, 391, 391 - 98; Streinz (note 3), Rdn. 113; *Theodor Schilling*, *The Autonomy of the Community Legal Order: An Analysis of Possible Legal Foundations*, *Harvard International Law Journal*, vol. 37, 1996, 389, 403 - 404; *Axel Marschik*, *Subsysteme im Völkerrecht: Ist die Europäische Union ein "Self-Contained Regime"?*, 1997, 194 - 221.

⁹ The European founding treaties have installed independent organs, whose legislation constitutes a formal source of law within the legal order of the Member States without transformation, binds even non-consenting Member States, preempts municipal law of the Member States,

termines my approach. If Community law were merely regional international law, the question of status and effects of international law within the Community legal order would have to be answered by international rules on the conflict of treaties and by principles governing the internal law of international organizations. In contrast, the conception of Community law as a distinct body of law compels an altogether different approach.

On the premise that the Community is not only — similar to States — a subject of international law, but has, like States, its own internal legal order, an analogy to the relationship between international law and domestic law of States imposes itself.¹⁰ Analogy and deduction, however, bear the risk of losing sight of the specificity of the constellation we are dealing with. A more promising approach is the inductive one: I shall first examine how the Community institutions, above all the Court, handle the relation between international law and Community law (Part I), and then analyze this practice in doctrinal terms. The doctrinal analysis is divided into three questions:

- How are international rules inserted, adopted, or incorporated into the Community's legal order so as to produce legal effects within that order? (Part II)
- What is the hierarchical status of international law vis-à-vis Community law? In other words, which norms prevail in the event of a conflict? (Part III)
- When do international rules have a so-called 'direct effect' within the Community? (Part IV)

I. International Law under the Jurisdiction of the European Court of Justice

The mere fact that the ECJ has — without explicit authorization in the EC Treaty — assumed jurisdiction on international law in almost all types of proceedings implic-

and is safeguarded by the compulsory jurisdiction of the ECJ. Each of these elements of supranationality, taken by itself, is not unknown in traditional international organizations, but their accumulation is unique and makes the EC system special.

¹⁰ See, e.g., *Thomas Oppermann*, *Europarecht*, 1991, Rdn. 522; *Jean Boulois*, *Le droit des Communautés Européennes dans ses rapports avec le droit international général*, *Recueil des Cours*, vol. 235, 1992-IV, 9, 65; *Rudolf Geiger*, *EG-Vertrag*, 2nd ed., 1995, art. 228, para. 16; Resolution of the European Parliament on the relation between international law, Community law and constitutional law of the Member States of 10 October 1997, *Official Journal Eur. Comm. No. C 325*, 1997, para. 14. *But see Robert Kovar*, *Les Accords liant les Communautés Européennes et l'ordre juridique communautaire: à propos d'une jurisprudence récente de la Cour de Justice*, *Revue du Marché Commun*, tome 15, 1974, 345, 346; *Ulrich Everling*, *Sind die Mitgliedstaaten der Europäischen Gemeinschaft noch Herren der Verträge? Zum Verhältnis von Europäischem Gemeinschaftsrecht und Völkerrecht*, in: *Rudolf Bernhardt/Wilhelm Karl Geck/Günther Jaenicke/Helmut Steinberger* (eds.), *Völkerrecht als Rechtsordnung. Internationale Gerichtsbarkeit. Menschenrechte. Festschrift für Hermann Mosler*, 1983, 173, 175.