

THE COMMON MARKET: BETWEEN INTERNATIONAL AND MUNICIPAL LAW

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I. INTRODUCTION

THE decision of the Court of Justice of the European Communities in *Costa v. E.N.E.L.*¹ is a major contribution to the jurisprudence of the Court. First, this decision reaffirms the self-executing² character of certain provisions of the EEC Treaty³ and introduces criteria by which additional provisions may be held to create rights and duties directly enforceable by citizens of Member States before their domestic courts. The initial step in this important body of case law was, of course, the decision in the first *Tariefcommissie* case.⁴ In this opinion, delivered on February 5, 1963, the Court first determined that in proceedings under Article 177⁵ of the Treaty of Rome it was competent to examine

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1. *Costa v. E.N.E.L.*, Court of Justice of the European Communities, July 15, 1964, 10 *Recueil de la Jurisprudence de la Cour* [French edition of the official Common Market reports, hereinafter cited as *Recueil*] 1141, 10 *Amtliche Sammlung* [German edition of the official Common Market reports, hereinafter cited as *Sammlung*] 1251, 3 *COMMON MKT. L. REV.* 425, 2 *CGH COMMON MKT. REP.* 7384 (1964).

2. On the ambiguity of this concept, see WAGNER, *GRUNDBEGRIFFE DES BESCHLUSSRECHTS DER EUROPÄISCHEN GEMEINSCHAFTEN* 334 (1965). In matters of European Community law the concept has come, however, to include those rules of the Treaty that not only constitute internal sources of law but are immediately applicable in the sense that they create rights enforceable by individual citizens.

3. This treaty, establishing the European Economic Community, was signed by the representatives of France, Germany, Italy, and the Benelux countries in Rome on March 25, 1957.

4. *N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Fiscal Adm.*, 9 *Recueil* 1, 9 *Sammlung* 1, 1 *COMMON MKT. L. REV.* 82, 2 *CGH COMMON MKT. REP.* 7206 (1963) [hereinafter cited as first *Tariefcommissie* case]. See also the comments on this judgment made by Samkalden in the *Common Market Law Review* article and by Amphoux in 68 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 1 (1964).

5. Article 177:

The Court of Justice shall be competent to make a preliminary decision concerning:
(a) the interpretation of this Treaty;

the question whether a provision of the Treaty is directly applicable to private parties. The Court then decided that Article 12—a standstill obligation⁶ binding on the Member States—was such a self-executing provision. Although the Court's power to determine this question was contested by the Netherlands Government, the contention was certainly wrong: even the International Court of Justice in *The Hague* has claimed similar powers since its Advisory Opinion on the *Danziger Beamtenabkommen*.⁷ On the merits, despite the disagreement of the German, Belgian and Netherlands Governments and the Advocate General, the decisive consideration for the European Court of Justice in this case was the purpose of the European Communities and their special institutional character.

The *E.N.E.L.* case further develops the doctrine announced in the first *Tariefcommissie* case. Here—again with respect to obligations to abstain—the direct applicability of Article 93(3),⁸ Article 53⁹ and Article 37(2)¹⁰ is recognized, but there is a further finding that the

(b) the validity and interpretation of acts of the institutions of the Community; and
(c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide.

Where any such question is raised before a court or tribunal of one of the Member States, such court or tribunal *may*, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a domestic court or tribunal from whose decisions no appeal lies under municipal law, such court or tribunal *shall* refer the matter to the Court of Justice.

6. Article 12:

Member States shall refrain from introducing, as between themselves, any new customs duties on importation or exportation or charges with equivalent effect and from increasing such duties or charges as they apply in their commercial relations with each other.

7. Advisory Opinion of March 3, 1928 (*Jurisdiction of the Courts of Danzig*), Permanent Court of International Justice [hereinafter cited as P.C.I.J.], Ser. B, No. 15, at 17-18 (1928).

8. Article 93(3):

The Member State concerned may not put its proposed measures into effect until such procedure shall have resulted in a final decision.

9. Article 53:

Member States shall not, subject to the provisions of this Treaty, introduce any new restrictions on the establishment in their territories of nationals of other Member States. . . .

10. Article 37(2):

Member States shall abstain from any new measure which is contrary to the principles laid down in paragraph 1 or which may limit the scope of the Articles relating to the abolition, as between Member States, of customs duties and quantitative restrictions.

provisions of Articles 102,¹¹ 93(1) and (2)¹² and 37(1)¹³ are not directly applicable because the obligations they create are addressed exclusively to the Member States. In this regard, the distinguishing mark for the Court of Justice seems to be that in the one case the obligation is "not subject to any condition" and that "neither its execution nor its effects require the enactment of any legislation either by the Member States or by the Commission," whereas in the other case effectuation of the duty imposed by the Treaty could require such action by the Member

11. Article 102:

1. Where there is reason to fear that the enactment or amendment of a legislative or administrative provision will cause a distortion within the meaning of the preceding Article, the Member State desiring to proceed therewith shall consult the Commission. After consulting the Member States, the Commission shall recommend to the States concerned such measures as may be appropriate to avoid the particular distortion.

2. If the State desiring to enact or amend its own provisions does not comply with the recommendation made to it by the Commission, other Member States may not be requested, in application of Article 101 to amend their own provisions in order to eliminate such distortion. If the Member State which has ignored the Commission's recommendation causes a distortion to its own detriment only, the provisions of Article 101 shall not apply.

12. Article 93:

1. The Commission shall, together with Member States, constantly examine all systems of aids existing in those States. It shall propose to the latter any appropriate measure required by the progressive development or by the functioning of the Common Market.

2. If, after having given notice to the parties concerned to submit their comments, the Commission finds that any aid granted by a State or by means of State resources is not compatible with the Common Market within the meaning of Article 92, or that such aid is applied in an improper manner, it shall decide that the State concerned shall abolish or modify such aid within the time-limit prescribed by the Commission.

If the State concerned does not comply with this decision within the prescribed time-limit, the Commission or any other interested State may, notwithstanding the provisions of Articles 169 and 170, refer the matter to the Court of Justice directly.

At the request of any Member State, the Council, acting by means of a unanimous vote, may, if such a decision is justified by exceptional circumstances, decide that any aid instituted or to be instituted by that State shall be deemed to be compatible with the Common Market, notwithstanding the provisions of Article 92 or the regulations provided for in Article 94. If the Commission has, in respect of the aid concerned, already initiated the procedure provided for in the first sub-paragraph of this paragraph, the request made to the Council by the State concerned shall cause such procedure to be suspended until the Council has made its attitude known.

If, however, the Council has not made its attitude known within a period of three months from such request, the Commission shall act.

13. Article 37:

1. Member States shall progressively adjust any State monopolies of a commercial character in such a manner as will ensure the exclusion, at the date of the expiry of the transitional period, of all discrimination between the nationals of Member States in regard to conditions of supply or marketing of goods.

State concerned. The most recent decision of the Court concerning the direct applicability of Treaty norms points in the same direction. In *Albatros v. Sopeco*,¹⁴ the Court of Justice recognizes at least implicitly the direct applicability of Articles 31, para. 1¹⁵ and 32, para. 1,¹⁶ but not of Articles 32, para. 2,¹⁷ 33¹⁸ and 37(3).¹⁹

14. 11 Recueil 1, 11 Sammlung 1, 2 COMMON MKT. L. REV. 441, 2 CCH COMMON MKT. REP. 7438 (1964). See the commentary by Amphoux in 1 CAHIERS DE DROIT EUROPÉEN 59 (1965).

15. Article 31, para. 1:

Member States shall refrain from introducing as between themselves any new quantitative restrictions or measures with equivalent effect.

16. Article 32, para. 1:

Member States shall, in their mutual trade, refrain from making more restrictive the quotas or measures with equivalent effect in existence at the date of the entry into force of this Treaty.

17. Article 32, para. 2:

Such quotas shall be abolished not later than at the date of the expiry of the transitional period. In the course of this period, they shall be progressively abolished under the conditions specified below.

18. Article 33:

1. Each of the Member States shall, at the end of one year after the entry into force of this Treaty, convert any bilateral quotas granted to other Member States into global quotas open, without discrimination, to all other Member States.

On the same date, Member States shall enlarge the whole of the global quotas so established in such a way as to attain an increase of not less than 20 per cent in their total value as compared with the preceding year. Each global quota for each product shall, however, be increased by not less than 10 per cent.

The quotas shall be increased annually in accordance with the same rules and in the same proportions in relation to the preceding year.

The fourth increase shall take place at the end of the fourth year after the date of the entry into force of this Treaty; the fifth increase shall take place at the end of a period of one year after the beginning of the second stage.

2. Where, in the case of a product which has not been liberalised, the global quota does not amount to 3 per cent of the national output of the State concerned, a quota equal to not less than 3 per cent of such output shall be established not later than one year after the date of the entry into force of this Treaty. At the end of the second year, this quota shall be raised to 4 per cent and at the end of the third year to 5 per cent. Thereafter, the Member State concerned shall increase the quota by not less than 15 per cent annually.

In the case where there is no such national output, the Commission shall fix an appropriate quota by means of a decision.

3. At the end of the tenth year, each quota shall be equal to not less than 20 per cent of the national output.

4. Where the Commission, acting by means of a decision, finds that in the course of two successive years the imports of any product have been below the level of the quota granted, this global quota may not be taken into consideration for the purpose of calculating the total value of the global quotas. In such case, the Member State shall abolish the quota for the product concerned.

5. In the case of quotas representing more than 20 per cent of the national output of the product concerned, the Council, acting by means of a qualified majority vote on a proposal of the Commission, may reduce the minimum percentage of 10 per cent

[The] chapter [concerning the abolition of quantitative restrictions] contains two types of provisions having a bearing on this case. Some of them, which appear not only in Article 31, paragraph 1, and Article 32, paragraph 1, of the Treaty, but also in Article 37, paragraph 2, and prohibit any tightening of the restrictions, discriminations, or measures having equivalent effect that were in existence on the date the Treaty entered into force, because of their very nature can be applied only to national measures adopted after that date. There are other provisions, in Article 32, paragraph 2, and in Article 33, which prescribes the gradual abolition, during the transitional period and according to a specified time-table, of the quantitative restrictions referred to in said articles, or in Article 37, paragraphs 1 and 3, which prescribes the gradual adjustment of national monopolies according to a pace adjusted to that provided for under Articles 30 and 34 for the same products. The idea of a gradual adjustment does not call for the immediate repeal, *ipso jure*, of the national laws referred to in said articles. Furthermore, the schedule contemplated for adjustment does not make it possible to foresee in the abstract at what times during the transitional period the obstacles in question in this case must have been abolished, but proves that the Member States at any rate were not under the obligation to have abolished them completely as early as in 1959.

The Treaty, therefore, does not call for the immediate repeal of all the measures controlling imports that were in existence when it came into force; it does, however, contain a prohibition against any new restrictions or discriminations, an obligation gradually to abolish existing restrictions and discriminations, and the requirement that they be completely abolished no later than at the end of the transitional period.²⁰

It is not yet clear whether the Court intended to limit the direct applicability of those Treaty norms which create obligations binding on Member States to standstill clauses, or whether some provisions laying down affirmative obligations to act may also, under certain conditions, be regarded as self-executing. The Court of Justice will shortly

laid down in paragraph 1. This modification shall not, however, affect the obligation annually to increase the total value of global quotas by 20 per cent.

19. Article 37(3):

The timing of the measures referred to in paragraph 1 shall be adapted to the abolition, as provided for in Articles 30 to 34 inclusive, of the quantitative restrictions on the same products.

In cases where a product is subject to a State monopoly of a commercial character in one Member State or certain Member States only, the Commission may authorize the other Member States to apply, for as long as the adjustment referred to in paragraph 1 has not been carried out, measures of safeguard of which it shall determine the conditions and particulars.

20. *Albatros v. Sopeco*, 2 CCH COMMON MKT. REP. at 7441-42.

be required to settle the question. By a decision of November 25, 1965, the Finance Court of Saarbrücken has requested the Court to rule on whether Article 95 of the Treaty of Rome creates rights directly enforceable by individuals in national courts. In particular, it is the final paragraph²¹ of this Article, directing Member States to conform their law to the Treaty, which is at issue and which could lead the Court to review and possibly broaden its case law on the question of direct applicability.

These questions illustrate an essential feature of European Community law. There is, however, a second, more important aspect of the *E.N.E.L.* case—the relationship between Community law and municipal law when they are in conflict. Although the views of the Court are expressed only in that part of the opinion concerning the Court's competence to make a preliminary decision interpreting the Treaty, and although the ruling on the question of interpretation points to the conclusion that this case was almost certainly not such a case of conflict,²² the *E.N.E.L.* case is, nevertheless, a final and authoritative judgment, handed down by the highest tribunal having jurisdiction over Community affairs, on the question of whether Community law or municipal law has precedence. Herein lies the essential interest of this judgment and its fundamental importance for an understanding of the European Communities.

II. BACKGROUND OF THE *E.N.E.L.* CASE

In order fully to understand the various issues involved it is necessary to glance briefly at the background of the Court's decision.

On December 6, 1962, pursuant to Law No. 1643, the Italian Republic nationalized the entire electricity industry, transferring control to the Ente Nazionale per l'Energia Elettrica (*E.N.E.L.*), a state monopoly. Article 1, para. 1 of this law reserves the production, importation, exportation, transportation, conversion, distribution and sale of electricity throughout Italy to *E.N.E.L.*—apart from a few insignificant exceptions that need not be discussed here.²³ Among the many production and distribution companies affected by nationalization was Edisonvolta, one of whose shareholders, a Milan lawyer named

21. Article 95:

Member States shall, not later than at the beginning of the second stage [*i.e.*, January 1, 1962] abolish or amend any provisions existing at the date of the entry into force of this Treaty which are contrary to the above rules.

22. The same view was previously expressed by De Caterini in *La Loi Italienne Portant Institution de l'E.N.E.L. et les Traités Européens*, 1963 *ATOMO-PETROLIO-ELECTRITÀ* 3.

23. Law No. 1643, Art. 4, paras. 5, 6, and 8.

Flaminio Costa, opposed nationalization for a number of reasons and refused to pay his electricity bills to E.N.E.L. In a suit brought before the local magistrate (*giudice conciliatore*) in Milan, Signor Costa alleged that Law No. 1643 and a series of implementing presidential decrees were incompatible with the Italian constitution and contrary to Articles 102, 93, 53 and 37 of the EEC Treaty. He petitioned the magistrate to seek a ruling from the Italian Constitutional Court on the constitutional issue and at the same time to request the Court of Justice of the European Communities under Article 177 of the EEC Treaty to determine how these articles were to be interpreted. The magistrate granted both petitions.

In a decision handed down on September 10, 1963,²⁴ the magistrate stated that five of the thirteen allegations of infringement of the Italian Constitution were *prima facie* not without foundation,²⁵ and requested the Constitutional Court to rule on these points. The last of the five allegations so treated by the magistrate was that Law No. 1643 infringed Article 11 of the Italian Constitution of December 27, 1947,²⁶ on the grounds that it conflicted with Articles 102, 93(3), 53 and 37(2) of the Treaty of Rome. The argument envisaged seems clearly to be that where treaty provisions meet the requirements of Article 11 of the Constitution—and thus limit national sovereignty—statute law alone cannot override them without at the same time violating Article 11.

In the ensuing proceedings, this argument was expanded by Signor Costa, the plaintiff in the original case, and Edisonvolta, which intervened. Costa also petitioned the Constitutional Court to request a preliminary ruling from the Court of Justice under Article 177 on the compatibility of Law No. 1643 with the EEC Treaty. E.N.E.L. and the Italian Premier, represented by the *Avvocatura dello Stato* (the Italian equivalent of the Solicitor General's Office), entered their opposition. The representative of E.N.E.L. maintained that Article 11 of the Constitution applies only to treaties assuring peace and justice and not to

24. 86 FORO ITALIANO I. 2368 (1963). Full text is in LE LEGGI 1899 (1963).

25. This is the condition for the admissibility of a submission to the Constitutional Court. See Telchini, *La Cour Constitutionnelle en Italie*, 15 REVUE INTERNATIONALE DE DROIT COMPARÉ 33, 45-46 (1963).

26. See CONST. OF ITALIAN REPUBLIC, art. 11:

Italy renounces war as an instrument of offense to the liberty of other peoples or as a means of settlement of international disputes and, on conditions of equality with the other States, agrees to the limitations of her sovereignty necessary to an organization which will assure peace and justice among nations, and promotes and encourages international organizations constituted for this purpose.

the EEC Treaty. The *Avvocatura dello Stato* insisted that the law at issue and the Italian law ratifying the EEC Treaty were of the same rank and that one of them could not, therefore, be used as a yardstick to measure the other. Furthermore, no state institution—much less an ordinary citizen—had any right to question on appeal the validity of the law on grounds of infringement of the Treaty of Rome, or to a finding that there was such an infringement. A violation of the Treaty, it was argued, could only be pleaded in accordance with the specific procedure laid down by the EEC Treaty itself.²⁷ Moreover, it was asserted that the Constitutional Court had no power under Article 177 to refer the case to the Court of Justice of the European Communities on a point of interpretation, because it (the Constitutional Court) was not an ordinary branch of the Italian judiciary.

In its Decision No. 14, of March 7, 1964,²⁸ the Italian Constitutional Court found no grounds for the doubts raised by the Milan magistrate concerning the constitutionality of Law No. 1643. With respect to the alleged infringement of Article 11 of the Constitution, the Court noted that although this Article makes it possible for a treaty to impose limitations on sovereignty and for such a treaty to be given the force

27. This procedure is laid down in Articles 169, 170, and 171:

Article 169:

If the Commission considers that a Member State has failed to fulfill any of its obligations under this Treaty, it shall give a reasoned opinion on the matter after requiring such State to submit its comments.

If such State does not comply with the terms of such opinion within the period laid down by the Commission, the latter may refer the matter to the Court of Justice.

Article 170:

Any Member State which considers that another Member State has failed to fulfill any of its obligations under this Treaty may refer the matter to the Court of Justice.

Before a Member State institutes, against another Member State, proceedings relating to an alleged infringement of the obligations under this Treaty, it shall refer the matter to the Commission.

The Commission shall give a reasoned opinion after the States concerned have been required to submit their comments in written and oral pleadings.

If the Commission, within a period of three months after the date of reference of the matter to it, has not given an opinion, reference to the Court of Justice shall not thereby be prevented.

Article 171:

If the Court of Justice finds that a Member State has failed to fulfill any of its obligations under this Treaty, such State shall take the measures required for the implementation of the judgment of the Court.

28. 87 FORO ITALIANO I. 465, 116 GIURISPRUDENZA ITALIANA I. 516, SENTENZE E ORDINANZE DELLA CORTE COSTITUZIONALE 82, LE DROIT ET LES AFFAIRES, No. 38 (1964). See also the note by Catalano rejecting this view in 87 FORO ITALIANO I. 465-75 and the criticism by Piola-Caselli in [1964] *Aussenwirtschaftsdienst des Betriebsberaters* [hereinafter cited as A.B.] 219.

of law within Italy simply by the enactment of a statute, it does not endow such a statute with any precedence over other statutes. The enactment of a statute in violation of the EEC Treaty, even if it created international liability, could not divest the law infringing the Treaty of its full internal applicability, because within Italy the Treaty had the same legal standing as the law which ratified it. Since *lex posterior derogat priori*, the assumption of a conflict between the Treaty and a later statute could never justify allegations of unconstitutionality. The Constitutional Court, therefore, saw no need to submit any request for interpretation to the European Court of Justice.

This ruling caused dismay in Community quarters. Its content, and the fact that at one point the EEC Commission was termed an "advisory commission"—which betrayed a profound lack of knowledge of the institutional system of the Treaty of Rome—threw into sudden relief the failure of Community law to penetrate the general legal consciousness and the precariousness of its standing in the Member States.

A Dutch member of the European Parliament, Mr. van der Goes van Naters, addressed a written question²⁹ to the EEC and Euratom Councils concerning this decision. He voiced his concern at the Constitutional Court's opinion that all Italian laws passed after Italy's ratification of the Treaty had precedence over the Treaty, and at the Court's failure to request a preliminary ruling under Article 177. He asked the Councils whether they shared the view that this interpretation was a threat to the attainment of the aims contained in the Treaty, that it would have unacceptable consequences for the direct enforceability of Community law in each Member State, and that Italy should therefore be asked to remedy the situation. He also asked what other measures the Councils considered practicable to secure the precedence of Community law over municipal law in all Member States. Since the Councils delayed answering these questions for a considerable period of time, we might first turn our attention to the later stages of the constitutional dispute.

Signor Costa returned to court in Milan after receiving another electricity bill from E.N.E.L. On this occasion he attacked the constitutionality of Law No. 1643 on the same and on a number of additional grounds. He repeated his contention that this law was incompatible with the Treaty of Rome.

On January 16 and January 21, 1964, before the Constitutional Court had handed down its decision in the first case, the Milan magis-

29. Written question no. 27, May 22, 1964, 1964 OFFICIAL GAZETTE OF THE EUROPEAN COMMUNITIES [hereinafter cited as OFFICIAL GAZETTE] 2161.

trate decided to refer the new objections raised by the plaintiff to the Constitutional Court and at the same time to call on the Court of Justice of the European Communities for a preliminary ruling on the interpretation of Articles 102, 93, 53 and 37 of the EEC Treaty.³⁰ In addition to the parties to the original suit, the EEC Commission and the Italian Government submitted written observations to the Court of Justice under Article 20, paragraph 2, of its Statute.³¹

The EEC Commission expressed its apprehension about the Constitutional Court's decision in the parallel case of *Costa v. E.N.E.L.*, pointing out that if this decision was meant to indicate that the Treaty of Rome had no more authority than any other statute and could therefore be invalidated by any subsequently enacted statute, the Commission could not refrain from manifesting its alarm. In the Commission's view, such an interpretation would have injurious consequences for the Common Market in all Member States and would have unavoidable repercussions on the whole system of Community law. The Commission also believed that a judgment of a national court of a Member State on a given question could not be considered definitive until the Court of Justice of the European Communities had ruled on the scope of the obligations undertaken by the Member States under the Treaty. The Commission therefore had no objections to the case being heard. The Italian Government, on the other hand, argued that the submission to the Court of Justice was inadmissible. The court seeking the ruling was, in its view, not required to implement the EEC Treaty but Italian Law No. 1643. Whether the latter was compatible with the Treaty could not be tested under the procedure for obtaining a preliminary ruling (Article 177) but only under the procedure expressly laid down in Articles 169 and 170 of the Treaty. On the merits of the case, therefore, the Italian Government agreed with the decision handed down by the Constitutional Court on March 7, 1964, to the effect that the Italian magistrate should concern himself only with the later Italian statute, even if it did conflict with the Rome Treaty.

30. 89 FORO ITALIANO I. 460 (1964).

31. Article 20, para. 1 of the Protocol on the Statute of the Court of Justice of the EEC reads:

In cases provided for under Article 177 of this Treaty, the decision of the domestic court or tribunal which suspends its proceedings and makes a reference to the Court shall be notified to the Court by the domestic court or tribunal concerned. Such decision shall then be notified by the registrar to the parties in the case, to the Member States and to the Commission, and also to the Council if the act whose validity or interpretation is in dispute originates from the Council.

III. THEORY AND PRACTICE IN THE MEMBER STATES AT THE TIME OF THE COURT'S DECISION

Before we examine in greater detail the grounds for the Court's decision in the *E.N.E.L.* case, it would seem advisable to clarify the legal position in the Community and in the individual Member States with regard to the relationship between Community law and national law. It is not an exaggeration to say that in view of the confusing multiplicity of opinions and of the provisions considered applicable, the situation was anything but clear. In all Member States there was a distinct tendency to regard Community law as a particular variety of international law. In order to decide how Community law affects the national legal order, people therefore turned to the established rules concerning the incorporation of norms stemming from international law. Such an attitude was natural. It corresponded to the still deeply rooted idea that all law must be either municipal or international. It was supported by the fact that the form used in drawing up the Treaties of the European Community was outwardly that normally used to frame international agreements. Lastly, it was supported by the assumed parallelism between Community law and the acts of certain associations in international law, for example the former European Danube Commission or the Central Commission for the Navigation of the Rhine, which had previously exercised powers to create binding obligations. International legal theory had long ago classified such phenomena as international law, under the heading of internal law created by an international organ.³² The fact that in the judgment on the first *Tariefcommissie* case the Court of Justice had described the Community as "a new legal order in international law" appeared to fit in with this conception of the law of the European Communities.

The most obvious, if not very profound, solution was thus to assimilate Community law to general international law. The results to which this solution leads can be illustrated by a glance at the relevant doctrine in the individual Member States.

Let us begin with the Netherlands which, of all the Community's members, is the model pupil as far as international law is concerned. By constitutional amendment of June 22, 1953, the relationship of the Dutch legal order to international law and to the modern forms of international co-operation was fundamentally reshaped.³³ A

32. This is referred to by Verdoss as "internes Staatengemeinschaftsrecht."

33. See ERADES & GOULD, *THE RELATION BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW IN THE NETHERLANDS AND IN THE UNITED STATES* (1961); van Panhuys, *The Netherlands Constitution and International Law*, 58 AM. J. INT'L L. 88 (1964); Zimmerman, *Die Neure-*

few additional improvements were made by the Constitutional amendment of September 10, 1956.³⁴ Of the new Articles 60 to 67, the following are of interest here:

Article 65:

Clauses of international agreements by whose content everyone is bound shall acquire binding force upon their publication.

The publication of international agreements shall be subject to statutory regulation.

Article 66:

Legislative provisions in force within the Kingdom shall not be applied in cases in which such an application would be incompatible with clauses by which everyone is bound contained in agreements which have been concluded either before or after the entry into force of such provisions.

Article 67:

Subject, where necessary, to the provisions of Article 63,³⁵ legislative, administrative and judicial powers may be delegated under an agreement, to organizations founded upon the law of nations.

Articles 65 and 66 shall apply by analogy to the acts of organizations founded upon the law of nations.

With exemplary clarity, the authors of the Netherlands Constitution ensured by these provisions that the self-executing rules originating in international law would be unconditionally applicable within the Kingdom. These rules cannot be superseded even by subsequent laws. Although the Dutch judge is not empowered to pronounce upon the constitutionality of laws (Article 131, para. 2), Article 66 requires him not to apply national legislative provisions when they conflict with directly applicable provisions of international law.

When the Constitution was amended, account was also taken of the decisions reached by international organizations, particularly those of the European Coal and Steel Community, in order to exclude any possibility of doubt. Under Article 67(2), the aforementioned rules also apply to decisions of organizations founded upon the law of nations and by whose content everyone is bound. This form of words

gelung der auswärtigen Gewalt in der Verfassung der Niederlande, 15 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [hereinafter cited as Z.R.V.] 164 (1953).

34. See Bauer, *Die Niederländische Verfassungsänderung von 1956 betreffend die auswärtige Gewalt*, 18 Z.R.V. 137 (1957).

35. Article 63 lays down the procedure by which provisions of the constitution can be set aside for the purpose of international treaties.

is, to be sure, not completely satisfactory because of the qualification "founded upon the law of nations," but it nevertheless makes the general decisions of the ECSC High Authority and the regulations of the EEC and Euratom Councils and Commissions unconditionally applicable within the Kingdom.

The Constitution of the Fifth French Republic of October 4, 1958, also contains provisions ensuring the precedence over internal legislation of provisions embodied in international treaties. Based on Article 26 of the Constitution of the Fourth Republic of October 27, 1946,³⁶ Article 55 of the present Constitution states that:

Treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party.

Although this clause appears to resolve potential conflicts in the same manner as the relevant Article in the Dutch Constitution just quoted, Article 55 of the French Constitution, in fact, gives rise to a number of serious problems of interpretation. In the first place, what is meant by "subject, for each agreement or treaty, to its application by the other party"? These words occur for the first time in the Constitution of 1958. Article 26 of the 1946 Constitution included no comparable qualification. Does this reservation apply only to bilateral agreements ("application by the other party")? Hardly, for the *traités-lois* that are ensured precedence over municipal laws by Article 55 are in most cases not reciprocal but multilateral treaties—"Vereinbarungen" in the sense in which that term is used by Triepel. But what is meant, then, by "application by the other party"? Does this phrase mean that in the case of multilateral agreements each partner must simply endeavor to ensure that the content of the agreement be respected within its own internal legal order, or does it mean, on the contrary, that the treaty is given precedence in the French legal order, under Article 55, only when the same precedence is ensured by the other parties to the agreement within their territories? This question is completely open, with the obvious result that a great deal of uncertainty attaches to the import of the provisions contained in Article 55.³⁷

36. Article 26:

Diplomatic treaties duly ratified and published shall have the force of law even when they are contrary to internal French legislation; they shall require for their application no legislative acts other than those necessary to ensure their ratification.

37. The same view is expressed in ROUSSEAU, *DRÖIT INTERNATIONAL PUBLIC* No. 61 and in Hayoit de Termicourt, *Le Conflit 'Traité-Loi Interne,'* 1963 *JOURNAL DES TRIBUNAUX* 482.

Unfortunately, this is not the only difficulty. It is also uncertain whether the concepts "traité" (treaty) and "accord" (agreement) are intended to include the decisions, regulations and other official acts of Community institutions, that is, derived law.³⁸ Interpretation of the Article in its context would seem to suggest that they do,³⁹ but one cannot be sure. Finally, there is another, very compelling reason for not placing too much confidence in the effectiveness of the principle proclaimed in Article 55: it is by no means certain that the French judge is empowered to use the rule of the "supremacy" of treaties in international law as a basis for his decisions, i.e., that, should there be conflict of laws, he is empowered not to apply French municipal law. Ever since the French Revolution, French legal practice, supported by the most widely accepted doctrine, has refused to examine the acts of the legislature to determine their compatibility with the Constitution. This tradition, which has its roots in the political concept of parliamentarianism, also plays a part here. For some French writers⁴⁰ it is therefore unthinkable that a judge should refuse to obey a law because in his opinion it is incompatible with an international agreement; that would, in the last resort, be nothing less than controlling the actions of the legislature on the basis of a principle enunciated in the Constitution. According to this view, the only guar-

38. "Primary" law of the Treaty is opposed to "derived" law.

39. See Batailler, *Le Juge Interne et le Droit Communautaire*, 1963 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 735, 765. The fact that acts of the Community institutions need only to be published in the official gazette of the European Communities in order to become applicable within the Member States does not definitely mean that they share the precedence accorded to the Treaties. Art. 3, para. 3 of the Decree of March 14, 1953, Journal Officiel, March 15, 1953, p. 2436, relates to the ratification and publication of the international commitments entered into by France. It states:

The provisions of the present Article [under which publication in the French Journal Officiel is as a rule required] do not apply to regulations emanating from an international organization, when those regulations are published in full in the official bulletin of that organization available to the public and when such publication is sufficient, by virtue of the express provisions of a convention by which France is bound, to make those regulations applicable to individuals.

This does not tell us anything about the internal effect of regulations which are meant to apply to private parties. The answer to this question should, rather, depend on the applicability conceded to these provisions in accordance with the content of the Treaty. It could thus be said that, with regard to derived law, Article 55 of the French Constitution refers to the content of the Treaty, i.e., admits the precedence of secondary rules over municipal laws, only when an obligation to do so arises from the Treaty on which these rules are based.

40. The best known exponent of this view is BATTIFOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT INTERNATIONAL PRIVÉ* 42 (1959). See also DUMON & RIGAUD, *LA COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES ET LES JURISDICTIONS DES ÉTATS MEMBRES* 4 (1959); Hayoit de Termicourt, *supra* note 37, at 482.

antee of compatibility between legislation and international treaty law lies in an appeal to the Constitutional Council. Under Article 61(2) of the Constitution, the President of the Republic, the Prime Minister and the Presidents of the Chamber and Senate are empowered to make such an appeal. Moreover, it is possible to invoke the Constitutional Council only prior to the promulgation of the challenged law. Obviously this procedure does little to guarantee respect for the principle of Article 55.

Other French writers⁴¹ take the view that the judge cannot be prevented from attempting to give due weight to Article 55, that is, from ignoring a national law where there is a conflict of laws. Two Courts of Appeal took this view while the 1946 Constitution was still in force.⁴² Thus far neither the Cour de Cassation nor the Conseil d'Etat has expressed a clear opinion on the question. On the basis of a few recent decisions, however, it would appear that both Courts consider themselves in principle bound to respect the rule contained in Article 55, although they have hitherto managed to evade threatened conflicts.⁴³ Whether the decline in the influence exerted by the French Parliament under the Constitution of the Fifth Republic will in the future encourage further progress of the judiciary in this direction cannot yet be foreseen.

The Constitution of the Grand Duchy of Luxembourg of October 17, 1868, contains no clause concerning the internal validity of agreements pursuant to international law. Article 49 bis, which was added to the Constitution by an amendment of July 27, 1956, merely pro-

41. See, e.g., Donnedieu de Vabres, 2 CHRONIQUE 5 (1948); ROUSSEAU, *op. cit. supra* note 37.

42. Lyon, February 16, 1952, [1952] Dalloz Jurisprudence 801; Paris, April 1, 1954, [1954] Dalloz Jurisprudence 280.

43. See Société des Pétroles Shell-Berre et autres, June 19, 1964, [1964] Recueil des Décisions du Conseil d'Etat 344: "In accordance with Article 55 of the Constitution, French courts are obliged to apply the Treaty establishing the EEC. . . ."; Riff et Société Grande Limonaderie Alsacienne, Cour de Cassation (Ch. crim.), February 19, 1964, 84 Gazette du Palais 42 (Nos. 193-96) (1964); 1965 JOURNAL DU DROIT INTERNATIONAL 85-86:

Although it is true that under Article 55 of the constitutional law of October 4, 1958, treaties and agreements duly ratified or approved have, upon their publication, an authority superior to that of laws, the judges of the appellate court were nonetheless right to reject the argument . . . that Article 80 of the Treaty of March 25, 1957, establishing the EEC is applicable in this particular case. . . .

See also Société Anonyme La Technique Minière v. Maschinenbau Ulm Gmb H, Cour d'Appel de Paris, July 7, 1965, 85 Gazette du Palais 4, 4-6 (Nos. 230-32) (1965) and LE DROIT ET LES AFFAIRES, No. 15, 1965:

The nature of the legal order established by the Treaty of Rome—in particular by Articles 5, 189(2), and 219—brings its provisions and the Community Regulations within French municipal law under Article 55 of the Constitution of October 4, 1958.

vides that the exercise of powers reserved by the Constitution to the legislature, the executive or the judiciary may be temporarily delegated by treaty to international institutions set up under international law.⁴⁴

Nevertheless, in this country, which because of its special geographical position has always favored international cooperation, the judiciary began relatively early to give precedence to international over national law in cases of conflict.⁴⁵ This development was continued in a judgment of the Supreme Court of the Grand Duchy (*cour supérieure de justice*) of July 14, 1954,⁴⁶ holding that a treaty which has been approved by statute ranks above national law.⁴⁷

The Belgian Constitution of February 7, 1831 also contains no rules governing the relationship of international law to the internal legal order. The traditional view in legal practice⁴⁸ and theory⁴⁹ is that a treaty in international law which has been approved by Parliament has the same force as a municipal law, and that in case of conflict the more recent act should therefore supplant the earlier one. This view is derived both from the influence of the dualist theory of international law and from the traditional fear that the Courts may exercise control over the legislature.⁵⁰

44. The exercise of powers reserved by the Constitution to the legislature, the executive or the judiciary may be temporarily delegated by treaty to international institutions set up under international law.

45. See Pescatore, *La Prééminence des Traités sur la Loi Interne selon la Jurisprudence Luxembourgeoise*, 1953 JOURNAL DES TRIBUNAUX 645.

46. 1955 REVUE CRITIQUE DU DROIT INTERNATIONAL PRIVÉ 283; Hayoit de Termicourt, *supra* note 37, at 483.

47. "A ratified treaty is superior to municipal law. . . . Consequently, international law must prevail over municipal law."

48. Cour de Cassation Belge, May 20, 1916, [1915-16] *Pasicrisie* [hereinafter cited as *Pas.*] I. 375, 417; Cour de Cassation Belge, January 8, 1925, [1925] *Pas. I.* 101, 102; Cour de Cassation Belge, November 26, 1925, [1925] *Pas. I.* 76, 77; Cour de Cassation Belge, December 4, 1947, [1947] *Pas. I.* 515; Conseil d'État Belge, May 9, 1958, 1959 JOURNAL DES TRIBUNAUX 511.

49. P. DE VISSCHER, *DE LA CONCLUSION DES TRAITÉS INTERNATIONAUX* (1943); Rollin, *La Force Obligatoire des Traités dans la Jurisprudence Belge*, 1953 JOURNAL DES TRIBUNAUX 561; F. Rigaux, *Rapport de l'Association Belge pour le Droit Européen sur le Problème des Dispositions Directement Applicables [self-executing] des Traités Internationaux et son Application aux Traités Instituant les Communautés*, 1963 DEUXIÈME COLLOQUE INTERNATIONAL DE DROIT EUROPÉEN 38; de Visscher, *Droit et Jurisprudence Belges en Matière d'Inexécution des Conventions Internationales*, 1965 REVUE BELGE DU DROIT INTERNATIONAL 125.

50. Characteristic in this respect is the reason that the Special Committee of the Chamber gave in 1955 for rejecting a proposed amendment to Article 107 of the Constitution which would have instructed the courts not to apply laws which conflict with international agreements. The Committee held that even if treaties are superior to municipal law, "the judiciary cannot refuse to apply a domestic statute *posterior* to a treaty without intruding upon the competence of the legislature and the executive." Documents Parlementaires, Chambre, No. 369, 1952-53 Session, p. 54.

Recently, however, there has been reason to think that the view just outlined will not remain unchallenged. In the first place, for many years there have been efforts to subject the constitutional provisions relating to treaty-making powers and their internal repercussions to a thorough revision and in so doing to establish the precedence of international agreements, even internally.⁵¹ For more than ten years now proposals to this effect have repeatedly been laid before the Constitutional Amendments Committee of the Belgian Chamber.⁵² Although the relative strength of the various political parties in the Chamber makes it difficult to pass such a bill today, it is nevertheless likely that in the long run the Constitution will be amended along the lines proposed.

Parallel to these efforts, prominent lawyers, without amending the text of the Constitution, have been tending towards a rule of interpretation that would give international agreements and rules based thereon precedence over domestic legislation.⁵³ This new orientation derives in part from the general intensification of international cooperation, but it is primarily⁵⁴ a reaction to the specific problems connected

51. The impetus would appear to have come from an essay by the well-known Belgian international lawyer, Ganshof van der Meersch, *La Constitution Belge et l'Évolution de l'Ordre Juridique International*, 1952 ANNALES DE DROIT ET DE SCIENCES POLITIQUES 350. See also Salmon & Suy, *La Primauté du Droit International sur le Droit Interne*, in L'ADOPTION DE LA CONSTITUTION BELGE AUX REALITÉS INTERNATIONALES CONTEMPORAINES (1965), a comprehensive report written for the symposium organized by the Universities of Brussels and Louvain on May 6 and 7, 1965. The authors of the report suggest that the following paragraph should be added to Article 107 of the Belgian Constitution: "They [*i.e.*, the courts] shall not apply laws unless they conform to the rules of general international law and to the provisions established by or by virtue of treaties that are in force and have been duly published."

52. The proposed additions to Article 107 of the Constitution are to be found in Documents Parlementaires, Chambre, No. 369, 1952-53 Session; Documents Parlementaires, Sénat, Sitting of May 7, 1953. In 1959 the question was considered again in the report presented by Mertens de Wilmars on behalf of the Constitutional Amendment Committee. Documents Parlementaires, Chambre, No. 374, 1959-60 Session. More recently, it has engaged the attention of the committees of the parties of the governing coalition. See Salmon & Suy, *supra* note 51, at 6 n.10.

53. Rolin, *supra* note 49; Hayoit de Termicourt, *supra* note 37; Dumon, 1965 REVUE INTERNATIONALE DE DROIT COMPARÉ 21. See also the resolution of the *Commission de Droit International de l'Union Internationale des Magistrats* of March 12-13, 1964, which reads, *inter alia*:

I. The Commission . . . unanimously . . . affirms the superiority of the sources of international law and Community law over the sources of municipal law. . . .

II. The Commission considers . . . that the progress of Community law and the attainment of the objectives envisaged by the Communities depend on the legal systems in the Member States recognizing that Community law has its own peculiar character . . . [and] that the sources of Community law . . . must be recognized as higher than the sources of municipal law and, in particular, as higher than any statute. . . .

54. See Hayoit de Termicourt, *supra* note 37, at 484.

with the existence of the European Communities. Although the new thinking has not yet affected any of the decisions actually reached by the courts, these views have gained an attentive hearing among leading representatives of the Belgian judiciary, and there is reason to believe that as a result of future decisions the opinion that has so far prevailed in the courts and in the legal theory will undergo a change.

In the Member States thus far considered, there is the certainty, or at least a significant chance, that in case of conflict the supremacy of international law over the internal legal order will be conceded; but in Germany and Italy the situation is fundamentally different. One characteristic of both these states is a dualistic tradition, closely associated with such illustrious scholars as Heinrich Triepel⁵⁵ and D. Anzilotti,⁵⁶ which exerts a powerful influence on both theory and practice. In neither state has the "monist" view of the primacy of international law, represented by Hans Kelsen⁵⁷ and the Viennese School which he founded, been able to prevail. The constitutions of both states, moreover, require at least indirectly that in general—in accordance with dualistic theory—the rules of international law be of the same rank as the domestic statutes by which they are accepted. Article 10 of the Italian Constitution of December 27, 1947, and Article 25 of the German Basic Law of May 23, 1949, hold in similar terms that the general rules of international law, and those alone, shall take precedence over domestic law.⁵⁸

Only a few outsiders maintain that under these provisions, the rules of international treaties would also enjoy precedence because the dictum *pacta sunt observanda* is also a general rule of international law.⁵⁹ There is general agreement that precisely the opposite conclusion must be drawn from these two constitutional clauses, namely, that the provisions of international treaties are equal in rank to the law which makes them part of the internal order.⁶⁰ This is also the opinion of the

55. *Völkerrecht und Landesrecht* (1899).

56. *IL DIRITTO INTERNAZIONALE NEI GIUDIZI INTERNI* (1905).

57. *DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS* 166 (1920).

58. *CONST. OF ITALIAN REPUBLIC*, art. 10, para. 1: "The Italian Juridical System conforms to the generally recognized principles of international law."

GRUNDGESETZ [Basic Law of the German Federal Republic], art. 25:

The general rules of international law shall form part of federal law. They shall take precedence over the laws and create rights and duties directly for the inhabitants of the federal territory.

59. *E.g.*, QUADRI, 2 *ACTES OFFICIELS DU CONGRÈS INTERNATIONAL D'ÉTUDES SUR LA CECA* 383 (1957); Biscottini, *L'Adequamento del Diritto Interno alle Nome Internazionale*, 1951 *JUS* 219.

60. See *CONST. OF ITALIAN REPUBLIC*, art. 80 and *GRUNDGESETZ* art. 59, para. 2.

judiciary in these countries, particularly of the two Constitutional Courts. In the case of Italy it is sufficient in this connection to refer to judgment No. 14 (*Costa v. E.N.E.L.*), handed down by the Constitutional Court on March 7, 1964, and referred to in Section II above. The opinion of the German Federal Constitutional Court is no less precise:

The Basic Law does not go so far in its acceptance of international law as to ensure the observance of treaties in international law by binding the legislature to the law contained in them. . . . The Basic Law leaves the implementation of obligations arising under treaties in international law to the responsibility of the competent legislative authority. . . . Special contractual agreements, even when they lay down directly applicable law, do not enjoy this position of precedence (i.e., of the general rules of international law by virtue of article 25). The legislature thus has power to decide what constitutes the law, even where a contractual obligation exists, provided this obligation does not concern general principles of international law.⁶¹

One conclusion emerges clearly from this outline: the legal orders of the six Member States of the European Community—because of their divergent legal and political traditions—bear a significantly different relationship to treaty law. If Community law is identified with international law—as it generally was when the Court of Justice announced the ruling with which we are here concerned, and as it is even today—the relationship of this law to domestic legislation inevitably differs from one Member State to another. Only in the Netherlands is the precedence of international law adequately assured by the constitution. How far it is assured in France is unclear; in Luxembourg the judiciary gives precedence to international law, while in Belgium certain theoretical indications of this ordering are only now becoming apparent. In the Federal Republic of Germany and in Italy, however, the Treaties and the directly applicable legal acts of the Communities enjoy no precedence over municipal law. The judges of those two states must, in case of conflict, apply the national law of later date, whereas judges in the Netherlands and Luxembourg would in the same situation be obliged not to apply that law.

How unsatisfactory this is has for some time now been evident to a number of writers. These include, in the first place, those who—like Hayoit de Termicourt, the Belgian “procureur général”—seek an interpretation of law that ensures the absolute applicability of Community

61. Judgment of May 26, 1957, Bundesverfassungsgericht, 6 Entscheidungen des Bundesverfassungsgerichts, [hereinafter cited as B. Ver. F.G.E.] 309, 362 (Ger. Fed. Rep.).

law even when domestic statutes collide with it. Obviously, a similar solution was also the aim of German and Italian lawyers who hoped in this way to bring the position of Community law in those two countries closer to what it is in the other Member States. The constitutions of both these countries do in fact give some support to the view that membership in the European Communities merits a legal treatment different from that accorded the usual participation in matters of international life. Thus, under Article 11 of the Italian Constitution—as mentioned above⁶²—Italy agrees, on certain conditions, to the limitations on her sovereignty needed to assure peace and justice among nations. It is possible that when this clause was written its authors were thinking primarily of membership in the United Nations and not of the movement towards European unity,⁶³ but unquestionably the establishment of the European Communities is also included in the letter and spirit of Article 11.

Given the present constitutional situation, there are naturally a number of writers⁶⁴ who regard Article 11 as a basis for the gradual adjustment of the Italian legal order to Community law. This clause thus assumes the significance of an automatic switching device which ensures that the domestic law of Italy shall always conform to Community law and thereby raises Community law to a position of absolute supremacy. It must, however, be added that the Italian theorists who hold this view are still a relatively small minority.

Very similar views, based on Article 24 of the Basic Law,⁶⁵ are put forward by some German writers.⁶⁶ Their aim is to prove that it would

62. See note 26 *supra*.

63. An argument which constantly recurs in the discussion, although it is obviously an inadequate one with which to limit the scope of Article 11 to accession to the United Nations. See, e.g., PALLIERI, *DIRITTO COSTITUZIONALE* 465 (8th ed. 1965); Trabucchi, *Un Nuovo Diritto*, 1963 *RIVISTA DI DIRITTO CIVILE* 259, 270.

64. The various authors do not all go equally far in this direction. See, e.g., LA PERGOLA, *COSTITUZIONE E ADATTAMENTO DEL ORDINAMENTO INTERNO AL DIRITTO INTERNAZIONALE* 164 (1961); MIGLIAZZA, *LE COMUNITÀ EUROPEE IN RAPPORTO AL DIRITTO INTERNAZIONALE E AL DIRITTO DEGLI STATI MEMBRI* 129 (1964); MORTATI, *INTITUZIONI DI DIRITTO PUBBLICO* 1056-58 (6th ed. 1962); Monaco, *Diritto Comunitario e Diritto Interno avanti la Corte Costituzionale*, 1964 *GIURISPRUDENZA ITALIANA* I. 1312; Perassi, *La Costituzione Italiana e l'Ordinamento Internazionale*, 1 *SCRITTI GINZIDICI* 419 (1956). And see especially Barile in a particularly clear report presented in Brussels on the occasion of the symposium between the EEC Commission and representatives of the Italian Universities from November 29 to December 1, 1965.

65. Para. 1 states: "The Federation may, by legislation, transfer sovereign powers to international institutions."

66. Carstens, *Der Rang europäischer Verordnungen gegenüber deutschen Rechtsnormen*, *FESTSCHRIFT FÜR OTTO RIESE* 65, 78 (1964); Bulow, *Das Verhältnis des Rechts der europäischen Gemeinschaften zum nationalen Recht*, 29 *BEIHEFT ZUR ZEITSCHRIFT FÜR DAS*

be contrary to the spirit of this Article if the formation of international institutions—for which the article, after all, provides—and their functioning were liable to be upset by other acts of the legislature.

There is another line of thought, based upon the interpretation of constitutions, which differs fundamentally both from the prevailing view which equates Community law with international law and also from the view just described. According to this position, the precedence of Community law springs from the nature of the Communities themselves. The foremost exponent of this theory is Ambassador Carl Friedrich Ophüls, the man who, on the German side, did most to influence the content of the Treaties of Paris and Rome and who has left a deep mark on the shape of the European Communities.⁶⁷ In an impressive series of writings⁶⁸ Ophüls has maintained that the Member States by agreeing to give the Communities certain powers relinquished their own corresponding jurisdiction; they were no longer able to legislate in these fields. This interpretation of the structure of the Community would resolve conflicts between the Community system and national legal systems in a manner analogous to the solution of similar conflicts in a federal system, and quite independently of the constitutional law of the various Member States: thus each body can act validly only in its own field of competence, all measures taken outside this field being invalid from the start. We shall discuss this theory in greater detail below.

Ophüls' view is shared by Wohlfarth⁶⁹ and Catalano,⁷⁰ who differ

GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 28, 51 (1965); Ipsen & Nicolaysen, *Europäischen Gemeinschaftsrecht*, 17 NEUE JURISTISCHE WOCHENSCHRIFT 339, 342 (1964).

67. Even the name "Communities" (as against the name "Union" proposed by the French) comes from him. See Hallstein, *Zu den Grundlagen und Verfassungsprinzipien der europäischen Gemeinschaften*, in *zur Integration Europas*, Festschrift für C. F. OPHÜLS 1 (1965).

68. Ophüls, *Juristische Grundgedanken des Schumanplans*, 4 NEUE JURISTISCHE WOCHENSCHRIFT 289 (1951); *Grundzüge europäischer Wirtschaftsverfassung*, 124 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 136 (1961); *Quellen und Aufbau des europäischen Gemeinschaftsrechts*, 16 NEUE JURISTISCHE WOCHENSCHRIFT 1697 (1963); *Zwischen Völkerrecht und staatlichem Recht*, 4 JURISTEN-JAHRBUCH 137 (1963); *Das Problem der unmittelbaren innerstaatlichen Anwendbarkeit von Bestimmungen völkerrechtlicher Verträge und seine Anwendung auf die Gemeinschaftsverträge*, BERICHT DER WISSENSCHAFTLICHEN GESELLSCHAFT FÜR EUROPARECHT FÜR DIE ZWEITE INTERNATIONALE TAGUNG ÜBER DAS RECHT DER EUROPÄISCHEN GEMEINSCHAFTEN 19 (1963).

69. See Wohlfarth, *Anfänge einer europäischen Rechtsordnung und ihr Verhältnis zum deutschen Recht*, 3 JURISTEN-JAHRBUCH 241, 259-66 (1962).

70. See Catalano, *Le Fonti Normative della Comunità Europea del Carbone e dell'Acciaio*, 2 ACTES OFFICIELS DU CONGRÈS INTERNATIONAL D'ÉTUDES SUR LA CECA (1957); *LE PROBLÈME DE L'APPLICABILITÉ DIRECTE ET IMMÉDIATE DES NORMES DES TRAITÉS INSTITUANT LES COMMUNAUTÉS EUROPÉENNES*, a report prepared by the Associazione Italiana dei

from him only on a few unimportant points. A theory put forward by Ipsen⁷¹ and Zweigert⁷² is, despite superficial differences, in principle close to that of Ophüls. Ipsen and Zweigert argue that the precedence of Community law over any legal ruling laid down by the Member States follows from the Community Treaties themselves. They thus arrive at the same conclusions as Ophüls. This view has also been endorsed by two German Financial Courts⁷³—although in very general terms and without much reflection.

To complete this outline of competing doctrine at the time of the Court's ruling in the *E.N.E.L.* case we must note the opinion of the EEC Commission. As a result of the judgment of the Italian Constitutional Court of March 7, 1964,⁷⁴ and the decision by which the Financial Court of Rheinland-Pflaz on November 14, 1963,⁷⁵ declared certain regulations issued by the EEC Council incompatible with the German Basic Law and submitted the matter to the German Constitutional Court, the EEC Commission felt obliged to state its own views on the questions of principle raised by these two decisions. This was done in President Hallstein's address to the European Parliament on June 18, 1964. President Hallstein said:

I would like to sum up the Commission's opinion on this point (the relationship of Community law to municipal law) as follows:

First: the legal acts of the Community organs can be defined, examined as to their validity and interpreted only in terms of Community law. Assimilating them to categories of State legal systems involves the danger of misunderstandings and erroneous conclusions. Thus we are obviously led astray if regulations of

Guiristi Europei with R. Monaco for the second international symposium on the Law of the European Communities held at the Hague in 1963; *Portata dell'art. 11 della Costituzione in Relazione ai Trattati Istitutivi delle Comunità Europee*, 187 FORO ITALIANO I. 465 (1964) (a comment on judgment No. 14 of the Italian Constitutional Court rendered March 7, 1964); *La Position du Droit Communautaire dans le Droit des États Membres*, 14 CAHIERS DE BRUGES 55 (1965); *MANUEL DE DROIT DES COMMUNAUTÉS EUROPÉENNES* 143 (2d ed. 1965).

71. See Ipsen, *Das Verhältnis des Rechts der europäischen Gemeinschaften zum nationalen Recht*, 29 BEIHEFT ZUR ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT I (1965).

72. See Zweigert, *Der Einfluss des europäischen Gemeinschaftsrechts auf die Rechtsordnungen der Mitgliedstaaten*, 28 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 601, 637 (1964).

73. Judgment of April 9, 1963, Finanzgericht Bremen, [1963] A.B. 281; judgment of July 7, 1965, Finanzgericht Düsseldorf, [1965] A.B. 299 (Ger. Fed. Rep.).

74. 87 FORO ITALIANO I. 465 (1964).

75. Extracts are reproduced in [1964] A.B. 26. See KLEIN, *DIE ÖFFENTLICHE VERWALTUNG* 308-11 (1964); Ophüls, *Deutsches Zustimmungsgesetz zum EWG-Vertrag verfassungswidrig*, [1964] A.B. 65.

the Community organs are designated as derived rules of law applied by delegation from the real lawmaker.

Secondly, the Community's legal order is, on the other hand, dovetailed into the law of the Member States in a great variety of ways. Official bodies, administrative authorities and courts in the Member States are increasingly applying rules of Community law. This interplay of two legal systems is not without precedent. Federal associations of various types and degrees offer examples of it. Here the rule that each part can only lay down valid law in the sphere of competence allotted to it, or which it has retained—a rule which, as we know, also applies to our Community—avoids constant conflict between different legal systems. If, however, an overlap of competence should exceptionally exist and there should be a clash of valid rules apparently requiring equal respect, it necessarily follows from the character of the merger into a wider order that the law of the superior association takes precedence—but, I repeat, only in the sphere of its competence.

Thirdly, the supremacy of Community law means essentially two things: its rules take precedence irrespective of the level of the two orders at which the conflict occurs, and further, Community law not only invalidates previous national law but also limits subsequent national legislation. Both rules of conflict are part of that solidly entrenched body of law applied in comparable cases. Without them, to acknowledge the supremacy of Community law would be no more than a courteous gesture, carrying no obligations. In reality the Member States could do with it what they liked.

Fourthly, and in support of the above, a unified solution valid for the whole Community must be provided for this problem of precedence. Any attempt to solve it in different ways to accord with the idiosyncrasies of the Member States, their constitutions and political structures, runs counter to the unifying character of European integration, and thus to the fundamental principles of our Community. The Commission thinks it particularly important to note this fact.⁷⁶

IV. CONCLUSIONS AND JUDGMENT OF THE COURT OF JUSTICE IN *Costa v. E.N.E.L.*

Article 166 of the EEC Treaty, in conjunction with Article 59(1) of the Rules of Procedure of the Court of Justice, requires the Advocate

76. Verhandlungen des europäischen Parlaments, Sitzungsperiode 1964-65 (IX/64), No. 72, p. 166. At about the same time, that is on June 22, 1964, Hans van der Groben, the German member of the EEC Commission, delivered a lecture at the University of Marburg (EEC Commission Doc. No. 8334/10/64), in which he dealt with these questions in considerable detail. Herr van der Groben, considering among other things the special constitutional situation of the German Federal Republic, reached the same conclusions as those put forward by President Hallstein in his address to the European Parliament.

General to present his reasoned conclusions before the closing of the oral procedure. The presentation of conclusions by an impartial and independent Advocate General is copied from French procedure. Its purpose, according to the wording of Article 166, is to assist the Court of Justice in the performance of its duties.

On June 25, 1964, Advocate General Maurice Lagrange presented his conclusions to the Court of Justice.⁷⁷ These concerned in large part the problem of the relationship between Community law and conflicting municipal law here at issue. His reasoning may be summarized as follows:

The Treaties establishing the European Communities create an independent legal order which partially replaces the legal orders of the Member States. The problem arises from the co-existence of two contradictory legal norms that are equally applicable in the internal legal system, the one of Community origin, the other created by national authorities. The norm created by the Community system must be either a self-executing provision of the Treaty or one for which an executive organ of the Community (Council or Commission) has issued implementing regulations. If the conflict between this norm and a norm of municipal law arises from encroachment by a Community organ on the jurisdiction of the state, the Court of Justice interdicts the encroachment at the request of the Member State or of an individual. But protection is also necessary against interference by the state in the Community's sphere, especially on behalf of private parties who derive individual rights from Community law. The Court of Justice has determined that it is the duty of domestic courts to safeguard these rights. If the domestic norm is a law, and of more recent origin than the relevant provision of Community law, the domestic courts are unavoidably faced with a problem of a constitutional nature. In Germany and Italy especially, no satisfactory solution to this problem has been found. The judgment handed down by the Italian Constitutional Court on March 7, 1964, is particularly revealing in this regard. Such a decision, if it were upheld, would have disastrous consequences on the operation of the constitutional system established by the Treaty. It would create an irreconcilable conflict between the two legal orders, shaking the very foundations of the Treaty. Failure to apply the Treaty in one country would probably produce a chain reaction in the other countries of the Community. In these circumstances the state concerned would either have to amend its constitution to make it compatible with the Treaty or leave the Community.

77. English translation in English sources cited at note 1 *supra*.

It is immediately apparent that this argument rests on two basic premises:⁷⁸ the Community system requires unconditional implementation of its valid legal provisions if it is to function at all; however, whether the domestic courts are able or obliged to apply these provisions unconditionally depends on the constitutions of the various Member States. If, as in the Netherlands, the Constitution allows the courts to subordinate a domestic law to Community law when the two conflict, there is complete harmony between the requirements of the Community and the domestic legal situation. Where this is not the case, the rules of municipal law have precedence. But this disregard of Community law is an infringement of elementary obligations under the Treaty and confronts the Member State concerned with the alternatives of amending its constitution or renouncing its membership. The decisive factor in the resolution of conflicting norms derived from the two sources is the status accorded in each Member State to international law—or, in particular, to Community law. It is, of course, the duty of Member States so to modify this status that the rules of Community law are always applied.

This attitude—it may be called dualistic or at least inspired by dualism—accords with the conclusions of Advocate General Roemer in the first *Tariefcommissie* case.⁷⁹ On the question of admissibility under Article 177, the Advocate General expressed the opinion that the domestic effect of a directly applicable Treaty provision is determined in accordance with the constitutional law of the Member State concerned and that the competence of the Court of Justice to give a preliminary ruling was, therefore, limited to the question of whether the disputed Treaty norm could be considered a law or whether it was merely a mutual undertaking by the Member States.⁸⁰ At that time Advocate General Roemer even deduced an argument against the direct applicability of Article 12 of the Treaty⁸¹ from the fact that constitutional law in the Member States differed regarding the observance of international agreements. Although the Court of Justice rejected this opinion, it nevertheless stated explicitly:

[I]n this instance the Court is not called upon to pronounce judgment regarding the application of the Treaty according to the principles of internal Netherlands law, which remains within the

78. Lagrange has expressed this opinion in greater detail in the report he presented at the 1965 Bruges Week. Lagrange, *La Primauté du Droit Communautaire sur le Droit National*, 14 *CAHIERS DE BRUGES* 21 (1965).

79. First *Tariefcommissie* case, 2 *CCH COMMON MKT. REP.* 7206, 7216 (1963).

80. *Id.* at 7218.

81. *Id.* at 7222.

jurisdiction of the national Courts, but it is only asked in conformity with Article 177 of the Treaty, to interpret the application of Article 12 of the Treaty within the framework of Community law and in the light of its bearing on individuals.⁸²

Lagrange's conclusions correspond to this prudent distinction between the area within which Community law is applicable and the status of Community law according to the legal system of the Member State concerned. It then follows that the Court of Justice is not competent to fix the domestic status of Community norms, which continues to be a matter of municipal law. Moreover, the Court of Justice can apply and interpret Community law only, and not municipal law. In other words, all the Court of Justice can do is to determine by interpretation the abstract character of a Treaty provision. In so doing it can do no more than assert an obligation under the Treaty, namely, that Community law requires that steps be taken to ensure that the norm in question has precedence in the Member State over any conflicting municipal legislation.

Even in the decision in the first *Tariefcommissie* case, the Court of Justice exceeded the narrow limits just described. It did not restrict itself, as might have been assumed from the above-quoted passage on the question of admissibility, to a finding *in abstracto* on the legal character of Article 12, but went on to express a clear opinion on the status of this provision in the Member State's system of law.

[T]he role of the Court of Justice, within the framework of Article 177, whose purpose is to ensure uniformity of interpretation of the Treaty by the national courts, confirms the fact that the States have acknowledged that Community law has an authority which may be invoked before such courts by their nationals.⁸³

It should not therefore surprise us that in the *E.N.E.L.* case the Court of Justice advanced one more step and opposed a definitely monistic concept to the hitherto rather dualistic attitude which was so evident in the observations of the Advocate General. The Court's reasoning on this point can be summarized in the following outline:

(a) By setting up a Community of unlimited duration, with its own institutions and sovereign rights, the Member States have placed limits upon their own sovereignty and created an independent body of law applicable both to their nationals and to themselves.

82. *Id.* at 7214.

83. *Ibid.* Occasional interpretations of this decision as a clear assertion of the precedence of Community law over municipal law are not, therefore, incorrect. See, e.g., Abate, *Rassegna di Giurisprudenza della Corte di Giustizia delle Comunità Europee*, 1964 RIVISTA DELLE SOCIETÀ 1093, 1096-97.

(b) This system of law has been incorporated into the legal system of each member country. It would be incompatible with this incorporation and with the letter and spirit of the Treaty if Community law were to be of differing validity from state to state in accordance with subsequent internal legislation. This argument is more fully developed by the Court with reference to individual Treaty provisions, in particular Articles 5, 7 and 189.

(c) It follows that no Member State can by issuing laws avoid the definitive limitation of its sovereign rights which it effected upon creation of and membership in the Community. Such laws, therefore, do not impede the application of Community law. On the contrary, domestic courts must respect the supremacy of Community law without consideration for municipal laws.

On the basis of this reasoning, the Court of Justice rejected the contention of the Italian Government that the submission of the Milan magistrate is "absolutely inadmissible" because the Italian judge must in every case apply the subsequent Italian law, irrespective of possible infringement of directly applicable Treaty norms.⁸⁴

V. COMMENTARY ON THE *E.N.E.L.* JUDGMENT

An analysis of the reasoning in those parts of the *E.N.E.L.* judgment relevant to our theme illustrates a number of discrete points the soundness and scope of which we shall consider briefly here under separate headings.

In the first place, the Court of Justice rejected the familiar argument that Community law is only one form of international law the status of which is consequently subject to national rules governing the incorporation of international law into municipal law.

The Court of Justice previously resisted this argument in the first *Tariefcommissie* case. Although admittedly it there described the Community as "a new legal order in international law," it made it quite clear nonetheless that there is something essentially new in the Community constitution:

The objective of the EEC Treaty, which is to establish a common market whose operation is of direct concern to everyone within the jurisdiction of the Community, implies that this Treaty is more than an agreement creating reciprocal obligations between the contracting States. This point of view is confirmed by the preamble to the Treaty, which goes beyond governments and refers to nations, and in a more concrete manner by the establishment of

84. See p. 704 *supra*.

bodies which institutionalize sovereign rights the exercise of which affects the Member States as well as their citizens.⁸⁵

The distinctions this passage makes between Community law and traditional international law are obvious: whereas the latter is inter-state law and, broadly speaking, is applied only exceptionally to individual citizens, large areas of Community law (free movement of goods and capital, freedom of establishment and free movement of workers, social security of migrant workers, laws governing competition) are direct sources of rights and obligations of the citizens of the Member States. Clearly it is of no consequence whether these direct effects stem from a provision of the Treaty itself or only from an act of a Community institution. This characteristic feature of the Community order enabled the Court of Justice to convert the usual assumption in international law (that a Treaty rule is not self-executing)⁸⁶ into one favoring the direct applicability of unambiguous Treaty provisions.⁸⁷

A second major distinction between the Communities and ordinary international organizations is the fact that the Community legal order is complete in itself. Unlike the institutions of practically all international organizations, those of the Community are not mere liaison offices where member Governments meet from time to time to discuss the conclusion of international agreements or a procedure to be pursued jointly at the national level. The Community institutions possess and exercise powers of their own which are legally independent of those of the Member States—powers to legislate (the Commission and the Council, in association with the Parliament and the Economic and Social Committee), and to apply law (mainly the Commission, in exceptional cases the Council), and powers of political control (the Parliament over the Commission) and legal control (the Court of Justice). The completeness of the Community legal order is apparent from the fact that it consists of an independent and legally autonomous system comparable to a con-

85. First *Tariefcommissie* case, 2 CCH COMMON MKT. REP. at 7214.

86. Advisory Opinion of March 3, 1928 (*Jurisdiction of the Courts of Danzig*), P.C.I.J., Ser. B, No. 15, at 17-18 (1928):

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.

See also the hesitant conclusions, which come very close to this point of view, put forward by *Generalanwalt Roemer* in the first *Tariefcommissie* case, 2 CCH COMMON MKT. REP. at 7216.

87. These rights, *i.e.*, the rights of individuals, are created not only when they are explicitly stated by the Treaty, but also through obligations which the Treaty expressly lays down for individuals as well as for the Member States and the Community institutions. First *Tariefcommissie* case, 2 CCH COMMON MKT. REP. at 7214.

stitution. It is not merely an accumulation of mutual rights and obligations of the founding states, the maintenance of which requires constant recourse either to municipal law (implementation of decisions) or to instruments of international law (agreements concluded in the framework of international organizations).

True, the legal order of the Communities also includes mutual obligations between the Member States, and decisions of the institutions must in many cases be incorporated into municipal law (directives and those decisions addressed to the Member States).⁸⁸ The system also includes, though these are marginal factors, actual agreements between the Member States within the framework of the Community⁸⁹ and a form of simplified governmental agreement which has gradually developed—the “decision of the representatives of the Governments of the Member States meeting in the Council.”⁹⁰ But the point is that the features noted in this paragraph are not the essence of the legal system of the Communities. If there were no other means of implementing the Treaty, then there could be no reason for doubting that the system is in fact a form—perhaps a particularly intensive form—of international cooperation. The peculiar feature of the legal phenomenon constituted by the Communities is, however, precisely that its institutions create laws which are not only binding on the states but also to a great extent directly applicable to their citizens. Consequently, the Court of Justice appears to be correct when it states: “Unlike ordinary international treaties, the EEC Treaty established its own legal order.” Does this mean that we must not apply the incorporation rules and the corresponding conflict rules of international law to the relationship between Community law and the law of the Member States? For the reasons given below we believe that it does.

The traditional attitude of European states toward international law is almost exclusively the outcome of their endeavors to shield the “impermeable” systems of municipal law from the direct effects of international law. As is well known, voluntaristic ideas (the creation of rules of international law by the consent of sovereigns) were originally the decisive factor in this approach. Associated with the notion of the

88. EEC Treaty, art. 189, paras. 3 and 4.

89. See the subjects of agreements given in EEC Treaty, art. 220.

90. This form is used when the powers conferred upon the Council by the Treaty are not sufficient for the action envisaged, for instance in the decisions on the accelerated reduction of tariff barriers and the accelerated alignment of duties in the common external tariff of May 12, 1960, 1960 OFFICIAL GAZETTE 1217; on the tariff of May 15, 1962, 1962 OFFICIAL GAZETTE 1284; and on the tariff of May 22, 1963, 1963 OFFICIAL GAZETTE 1561.

sovereignty of princes and eventually, in the nineteenth century, with the concept of the nation-state, they evolved into that complex political and legal structure known as the dualistic view of international law. The principal characteristic of this view is, of course, the separation of the two legal spheres: international law applies in dealings with other states; within the state, municipal law is supreme. Legal relationships and infringements of law in the external arena can never entail direct legal consequences in the domestic arena, unless the state as sovereign authority over its own legal system has expressly and without constraint so decided. It is clear that this separation of the two spheres always favors the states: their domestic systems are affected only by those elements of international law the application of which they have expressly accepted.

This view of the relationship of states to international law is the outcome also of specific historical and political circumstances—namely the concert of nations of the nineteenth century, a concert which survived, apart from certain signs of decay, until the Second World War. Two concepts central to this concert were the sole and unconditional control exercised by every state over conditions at home and the greatest possible freedom of action in external relations. Dependent as it is on the same political motives, the dualistic view of international law is very closely associated with the theory of sovereignty. This is not the place to examine in detail this relationship and its impact on innumerable international structures. It is sufficient for us to observe that both the idea of state sovereignty and the dualistic theory of international law—each in its own way—have had a strong impact on the basic legal concepts and the dominant trends in the practice of states. This impact is still felt today, when political conditions have been so completely transformed that neither concept any longer corresponds to an attainable political goal, much less to an historical reality.

Nonetheless, as legal historians have long known, legal concepts often far outlive the social situations of their origin. It is therefore not surprising that among the European states efforts to develop a new approach to international law have so far been decidedly hesitant.⁹¹ For example, at least two of the Member States of the European Community, Germany and Italy, if not Belgium as well, cling to the peculiar precept that a rule of international treaty law is incorporated into the municipal legal system—when all formalities are completed—not as a rule of treaty law but in the form of the statute that converts it into

91. See the outline of the situation in the Member States in Section III of the text.

municipal law or that endows it with internal validity.⁹² It follows from this approach that the rule *lex posterior derogat legi priori* is applied automatically in these countries to the relationship between international treaties and subsequent domestic legislation. The domestic validity of such treaties remains, as the German Federal Constitutional Court has expressed it,⁹³ "the responsibility of the competent legislator," *i.e.*, the appropriate authority is free to rule on the matter as it thinks fit.

Such a view of the relationship of the state to international law cannot do justice to the legal phenomenon of the Communities. For one thing, it offers no satisfactory explanation of how the derived law of the Communities is incorporated into the municipal legal systems. This law—the general decisions of the ECSC High Authority and the regulations of the EEC and Euratom Councils and Commissions—applies "directly in each Member State."⁹⁴ The only way to make this arrangement compatible with the notion that each treaty rule must be formally incorporated into municipal law has been through recourse to devices as artificial as "advance general incorporation"⁹⁵ (*antizipierte General transformation*). This device is a manifest absurdity. For the notion that one can transform a rule of international law into municipal law before the rule has been established, and even that such incorporation need refer to no specific rule, but may operate in advance and in an entirely general manner, contradicts the essential and only meaning of the concept of incorporation—that of a free conscious decision of the competent national institutions incorporating international law into municipal law. Seen in this light, incorporation is no longer incorporation at all, but has become a mere word, designed to veil as best it may the inadequacy of incorporation theory and, consequently, of the dualistic view of international law.

The incorporation of derived Community law into domestic systems on the basis of a national "advance general incorporation" produces distinctly odd results. For if the regulations and general decisions have, as the supporters of this theory claim,⁹⁶ the same status in municipal law

92. See MIGLIAZZA, *LE COMUNITÀ EUROPEE IN RAPPORTO AL DIRITTO INTERNAZIONALE E AL DIRITTO DEGLI STATI MEMBRI* 103 (1964); de Visscher, *La Communauté Européenne du Charbon et de l'Acier et les États Membres*, 2 ACTES OFFICIELS DU CONGRÈS INTERNATIONAL D'ÉTUDES SUR LA CEEA 46 (1957); Schlochauer, *Das Verhältnis des Rechts der europäischen Wirtschaftsgemeinschaft zu den nationalen Rechtsordnungen der Mitgliedstaaten*, 11 ARCHIV DES VÖLKERRECHTS 1 (1963).

93. See p. 713 *supra*.

94. EEC Treaty, art. 189; Euratom Treaty, art. 161. See also ECSC Treaty, art. 14.

95. See Schlochauer, *supra* note 92, at 24; Ipsen & Nicolaysen, *supra* note 66.

96. Carstens, *supra* note 66, at 73; Schlochauer, *supra* note 92, at 24.

as the Treaties establishing the European Communities (that is to say the status of a statute),⁹⁷ then the hierarchy of Treaty, Council regulations and Commission regulations (and in the ECSC that of the Treaty of Paris and the general decisions) is destroyed. The result would be a nonsensical leveling out of Community law quite foreign to its spirit. In municipal law all these acts, having the same status, would be subject to the rule *lex posterior derogat legi priori*. Council regulations infringing the Treaty would supersede the Treaty, Commission regulations infringing Council regulations would supersede Council regulations, and would do so in such a way that the superseded provisions would disappear for good, not be revived on withdrawal of the offending measure. Nor could subordinate domestic courts faced with such a situation find invalid a regulation contrary to Community law without ignoring the fact that the invalid act had in municipal law superseded the act of higher rank. Nor would even supreme courts be able or bound, in accordance with Article 177 of the EEC Treaty, to submit the question of validity to the Court of Justice of the Communities for a preliminary ruling; the very request by such a national court would imply that these courts could measure a rule valid in municipal law (the regulation contrary to Community law) by a rule which had become invalid (the conflicting rule of the Treaty or a higher ranking regulation), a manifestly impossible test.

These absurdities cannot be avoided by applying the doctrine of "advance general incorporation" only to regulations valid at the Community level; for it would then result that the validity of a given norm in a given country would depend on the legality of an act in Community (international) law, an approach which runs directly counter to the dualistic view of international law and to the idea of incorporation as an independent act willed by the national legislature.

These absurdities ought easily to suffice to refute any arguments that Community law and international law in general be treated as one and the same thing. However, this superficial theory seems to be deeply rooted in all the Member States, and it may be well to glance a second time at its general implications. Quite apart from the absurdities in particular cases mentioned above, these implications, if followed to their logical conclusions, would be disastrous for the Communities. As the above summary of constitutional law in the individual Member States has shown, the validity of Community law would exhibit sharp variations from state to state. In one state a judge would be required always

97. According to this view, they can have no other force, for, owing to the cooperation of the legislature, a law that has been incorporated always has the force of statute law.

to respect Community law, even if subsequent municipal legislation ran counter to it, while in a second the legal situation would be precisely the opposite, and in a third a matter for doubt. Such a situation would be wholly incompatible with the tasks of the Community. It would, as the Court of Justice states in the *E.N.E.L.* case, rob the Community law of its specific original nature and jeopardize the legal foundation of the Community itself.⁹⁸

This is no exaggeration. As the latest EEC crisis has shown, progress in the establishment of the Common Market is bringing with it ever greater political and economic difficulties and is forcing into the open conflicts previously concealed. Every attentive observer will concede that there is no lack of such internal strains. Under these conditions, and with the increasingly real possibility of being outvoted in the Council, it is not impossible that Member States may try harder, and more frequently, to escape Community obligations at least temporarily—for it no longer seems possible to escape them for good. The decisive factor here may very often be an internal political one, for example the desire to allay criticism from a specific pressure group.

An excellent instrument for attaining this objective is domestic legislation. As long as legislative measures are certain to be obeyed unquestioningly within a country, one Member State or another is almost sure to succumb to the temptation to bring the whole process of implementing the Treaty in a specific field to a temporary halt. The prestige of the democratic legislator, which, as we know, often provides cover for the skillful maneuvering of the government, may then serve to protect such unilateral measures against the sharpest criticism and perhaps even against unduly energetic action by the Community institutions or by other Member States.⁹⁹

This, then, is a real danger, not an imaginary one. It goes beyond the case of a Member State's desiring temporarily to free itself from obligations incurred. For although its unilateral action represents—as intended, or at least accepted, by those who place Community law on the same footing as international law—a *fait accompli* in municipal law, there are bound to be repercussions on the rest of the Community. Advocate General Lagrange rightly points this out in his conclusions in the *E.N.E.L.* case. And even if one ignores the legal implications of a reciprocity clause such as that contained in Article 55 of the French Constitution,¹⁰⁰ it is nonetheless clear that such behavior hardly en-

98. *Costa v. E.N.E.L.*, 2 CGH COMMON MKT. REP. at 7391.

99. See the procedures provided in the EEC Treaty, arts. 169 and 170.

100. See p. 707 *supra*.

courages the other Member States to remain loyal to the Treaty. In addition, these states might be obliged to take action to defend themselves against the harmful effects produced by infringement of the Treaty. Thus unilateral defiance of the Treaty by one Member State could bring Community action in a specific field to a standstill.

The variety of legal devices to which writers wishing to play down this danger resort cannot alter the fact.¹⁰¹ Although the principle of interpreting municipal law in accordance with treaties, and perhaps also the principle that special rules prevail over general rules, may occasionally enable municipal courts to resolve a potential conflict of laws, such a stratagem is of benefit only in those occasional breakdowns which do not involve a principle of substance. If, on the other hand, a Member State uses legislative powers to avoid burdensome treaty obligations, its actions will be sufficiently precise to preclude the application of measures such as those designed to avoid the clash of the two laws.

Under these conditions, then, the application of the conflict rules valid in international law to Community law would lead to serious dislocation, if not to the temporary disintegration of the Community system. It is hardly necessary to emphasize that legal strains of this kind are quite incompatible with the meaning and purpose of the Communities and are becoming more and more so as the years go by. For the Communities, unlike most international organizations, are not concerned with supplementary problems that have no vital bearing on the execution of major affairs of state: the very purpose for which they were founded was to assume European responsibility in fields of decisive importance—economic and social policy—which were formerly within the purview of the national state. The most important feature of Community authority then is its unity and equal enforcement in all Member States. For the Member States, which have conceded limitations of their sovereign rights in such important areas, this is the only guarantee that their sacrifice has not been in vain.¹⁰² If any express proof of this contention were required, one would need only to refer to Article 234(3) of the EEC Treaty:

101. See WAGNER, *GRUNDBEGRIFFE DES BESCHLUSSRECHTS DER EUROPÄISCHEN GEMEINSCHAFTEN* 334, 356 (1965); Conforti, *Mécanismes Juridiques Assurant la Mise en Oeuvre de la Législation Communautaire par les Autorités Nationales*, RAPPORT GÉNÉRAL PRÉSENTÉ AU 3^e COLLOQUE DE LA FÉDÉRATION INTERNATIONALE POUR LE DROIT EUROPÉEN (1965).

102. Gaudet has repeatedly referred to this important argument. See Gaudet, *Incidences des Communautés sur le Droit Interne des États Membres*, 1963 *ANNALES DE LA FACULTÉ DE DROIT DE LIÈGE* 5, 25; Report to the Legal Committee of the European Parliament, February 18, 1965, document No. PE 13.434 of European Parliament, p. 10, 1 *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN* 198 (1965).

Member States shall, in the application of the conventions referred to in the first paragraph, take due account of the fact that the advantages granted under this Treaty by each Member State form an integral part of the establishment of the Community and are therefore inseparably linked with the creation of common institutions, the conferring of competences upon such institutions and the granting of the same advantages by all other Member States.

The Court of Justice is thus entirely correct in refusing to apply the rules applicable to the incorporation of international law into municipal law to the relationship between Community law and that of the Member States. The arguments against doing so are, as we have seen, the essential and inherent difference between Community law and international law, and the incompatibility with the Community system of according them equal status.

The Court of Justice, however, did not sustain the reasoning advanced by its Advocate General. He pointed out in his conclusions¹⁰³ that Member States are under an obligation to ensure the unconditional application of Community law, but he considered the constitutional law of each Member State to be the decisive factor in fulfilling this obligation. In Italy and in Germany, this law might have to be amended.

Such a view—which may be termed moderately dualistic—avoids the manifest absurdities which bedevil the view of “international law” just discussed. Furthermore, it represents an attempt to conciliate the extremes by seeking a solution based not on Community law itself but on the constitutions of the Member States.¹⁰⁴ Those who attempt to produce a theoretical justification for this solution which transcends mere appeals to juristic postulates,¹⁰⁵ generally devote considerable effort to showing that no rule of conflict can be found in the Community Treaties themselves.¹⁰⁶ The only supporting evidence that can readily be adduced is that the Community Treaties contain no explicit rule of conflict of the kind found in federal constitutions. This cannot be dis-

103. See section IV(1) *supra*.

104. See, e.g., WAGNER, *op. cit. supra* note 101, at 348; Carstens, *supra* note 66, at 65; Lagrange, *supra* note 78, at 25; Barile, report to the Brussels symposium of November 29 to December 1, 1965.

105. Wagner seems to be satisfied with this. When he considers that the necessary constructive arguments can always be found for any juridical objective, he overlooks the fact that the legal analysis of the existing situation cannot do without these arguments, and that there are in this connection both good and bad arguments, the bad arguments generally inviting the conclusion that the theory based on them is incorrect. In the later part of his study Wagner himself uses such constructive arguments, most of which, as we shall see, fall into the latter category. WAGNER, *op. cit. supra* note 101, at 349.

106. See WAGNER, *op. cit. supra* note 101, at 351; Carstens, *supra* note 66, at 67.

puted. The next question ought logically to be whether the Treaties contain an implied rule of conflict. However, those who share the view of Advocate General Lagrange circumvent this obvious question, though it is quite legitimate by normal standards of interpretation, by advancing the rather unconvincing arguments outlined in the succeeding paragraphs:

(a) The legal position with respect to the incorporation of international law differed from one Member State to the next at the time of the signing of the Treaty of Rome; the contracting parties, it is asserted, cannot therefore have assumed that Community law would have absolute precedence over municipal law.¹⁰⁷

(b) Limitations on national sovereignty should be interpreted in a restrictive sense.¹⁰⁸

The basic premise of these two arguments is the identity of Community law and international law, which, as we have already noted, demonstrates a profound misunderstanding of the European Communities.

(c) Although the functioning of the Communities would be facilitated and uniform application of the law assured to the greatest possible extent if Community law were given precedence over municipal law,¹⁰⁹ the same purpose would be served by following the procedure of Article 169 of the EEC Treaty.¹¹⁰

Article 169 provides:

If the Commission considers that a Member State has failed to fulfill any of its obligations under this Treaty, it shall give a reasoned opinion on the matter after requiring such State to submit its comments.

If such State does not comply with the terms of such opinion within the period laid down by the Commission, the latter may refer the matter to the Court of Justice.

It is obvious that the remedies and procedure under this article are insufficient to avert the disruption of Community affairs alluded to above.¹¹¹ The hierarchy of municipal and Community law imposed by

107. Carstens, *supra* note 66, at 67-68.

108. *Id.* at 69.

109. *Id.* at 69-70.

110. Schlochauer, *supra* note 92, at 28; Jaenicke, *Das Verhältnis zwischen Gemeinschaftsrecht und nationalem Recht in der Agrarmarktorganisation der europäischen Wirtschaftsgemeinschaft*, 23 Z.R.V. 485, 519-20 (1963).

111. See Gaudet, *supra* note 102, at 22, who correctly describes this procedure as a belated remedy (*remède tardif*). Also correct is Ipsen, *supra* note 71, at 13-14.

chronology would remain undisturbed in the Member State which had infringed the Treaty.

(d) The fact that Article 169 explicitly provides a procedure for the redress of Treaty violations and that this procedure may be invoked against laws conflicting with the Treaty shows that according to the intent of the contracting parties and the practice of Community organs these laws are assumed at the outset to be valid.¹¹²

This argument is perhaps the most peculiar of all. Its supporters forget the difference between law and the semblance of law or usurpation of rights. If they were consistent, they would have to deduce the validity of unconstitutional laws from the existence of constitutional courts, and the lawfulness of criminal acts from the existence of police and public prosecutors.

(e) On various occasions, for example after the conclusion of the Franco-German Treaty on the Saar, and at the institution of the EEC and Euratom, the Member States amended the ECSC Treaty without following the procedure laid down in Article 96;¹¹³ this proves that the Member States regarded themselves as masters of the Treaties and attributed no higher rank to the Treaties than to ordinary statutes.¹¹⁴

Those who advance this argument base their conclusions on acts whose legality is by no means certain; moreover, they fail to ask whether perhaps different criteria do not apply to the establishment of the Communities and to the enforcement of the Treaty—no one denies that the ratification of the Treaties in all Member States but Luxembourg was authorized by ordinary statute and that the Treaties could naturally be amended by the same procedure.

(f) If Community law had been intended to take precedence, the Member States would have so ensured by employing the same means as certain federal states—empowering the Court of Justice to decide conflicts between Community and municipal law; however, since the competence of the Court of Justice, under Article 177 of the EEC Treaty, is limited to interpretation, there is no question of precedence.¹¹⁵

This argument, too, will not stand up even to cursory examination. Although the authors of the Treaties could have empowered the Court of Justice to resolve these conflicts, they might equally have been con-

112. See WAGNER, *op. cit. supra* note 101, at 353; Carstens, *supra* note 66, at 72.

113. On these amendments see Waelbroeck, *Contribution à l'Etude de la Nature Juridique des Communautés Européennes*, in MÉLANGES OFFERTS À HENRI ROLIN 506, 514-15 (1964).

114. See Carstens, *supra* note 66, at 70-71.

115. *Id.* at 71. See also FUS, *Zur Rechtsstaatlichkeit der europäischen Gemeinschaften*, 1964 DIE ÖFFENTLICHE VERWALTUNG 577, 586.

tent to submit any such conflict to their domestic courts. Indeed, many states today have no constitutional court but entrust the defense of their constitution to ordinary courts. Moreover, as we shall see,¹¹⁶ the interpretative rulings of the Court of Justice are much more of a substitute for the substantive resolution of conflicts than the champions of this view would have us believe.

(g) If Community law is to have precedence, then it must also have precedence over the constitutional law of the Member States. But such an exalted status, it is argued, would not only be undesirable from the juristic standpoint¹¹⁷ but would contradict both positive constitutional law itself¹¹⁸ and the respect which must at all times be accorded to this law.¹¹⁹

The obvious weakness in this argument is that it attempts to channel the solution of the whole problem in a certain direction by concentrating on a single aspect which, though very important psychologically, may be relatively insignificant in practical terms.¹²⁰ It may be that the relationship between the Communities and the constitutional law of the Member States really does require a separate solution,¹²¹ but the existence of this particular problem cannot validly support the pretended relationship between Community law and statute law.

116. See pp. 747-48 *infra*.

117. See WAGNER, *op. cit. supra* note 101, at 349.

118. See Carstens, *Der Rang europäischer Verordnungen gegenüber deutschen Rechtsnormen*, in Festschrift für Otto Riese 65, 72 (1964); Ehle, *Verfassungskontrolle und Gemeinschaftsrecht*, 17 NEUE JURISTISCHE WOCHENSCHRIFT 321 (1964); Kuchenhoff, *Grundrechte und europäisches Staatengemeinschaftsrecht*, 1963 DIE ÖFFENTLICHE VERWALTUNG 161.

119. See WAGNER, *op. cit. supra* note 101, at 249-51.

120. Although during the 14 years since the establishment of the first European Community the institutions of the three Communities have issued several thousand legal acts (the EEC Council and Commission alone have so far adopted over 600 Regulations), there has been no case involving a serious conflict with fundamental rights of the national constitutions. Infringement of fundamental rights has sometimes been pleaded in ECSC cases before the Court of Justice. *E.g.*, Case of Stork, Feb. 4, 1958, 5 Sammlung 63-64 (1964):

The High Authority is only called upon to apply the law of the Community; it has no competence for the application of internal provisions of the Member States Consequently, the charge that the High Authority has by its decision violated basic principles of German constitutional law (particularly Articles 2 and 12 of the Basic Law) . . . cannot be upheld.

See also Case of Präsident and Others (cases nos. 36-38/58 and 40/59), July 15, 1960, 6 Sammlung 920-21 (1960); Case of Schlieker, July 4, 1963, 9 Sammlung 200 (1963). In all of these cases the charges were hardly supported by the facts. The problem has so far not arisen in connection with the EEC.

121. See the speech by President Hallstein to the European Parliament on June 17, 1965. Verhandlungen des Europäischen Parlaments, Sitzungsperiode 1965-66 (IX/65), No. 79, pp. 246-47, 1 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 247 (1965). See also Van der Groeben, *Über das Problem der Grundrechte in der Europäischen Gemeinschaft*, in FESTGABE FÜR WALTER HALLSTEIN (1966).

It is evident that these arguments are of scant value. Quite rightly, the Court of Justice paid them no attention. Since they reflect the political attitude of people who want to retain maximum national independence—an attitude that is, of course, prevalent among more than the writers cited here—we shall no doubt have to resign ourselves to confronting them in varied guises for some time to come.

Rather than equate Community law with international law or rule that Community law derives its validity from the constitutions of the Member States, the Court of Justice relied upon a number of positive Treaty rules and the originality of the Community's constitution to demonstrate the precedence of Community law over any and all domestic legal provisions. The Court refrained from drawing any analogies with federal systems and limited its observations to an assessment of the present state of integration in Europe.

Do the arguments of the Court stand up to legal analysis? What do they mean when scrutinized in detail? How far do they take us?

The Court's view of this problem means, in the first place, that the determination of the rank of Community law in the Member States is a matter for Community law and not for the six systems of law in the Member States. This had not been undisputed. Most writers consider the issue to be one of constitutional law in each state.¹²² Under the procedure of Article 177 of the EEC Treaty, however, the interpretative powers of the Court of Justice are limited to Community law. In the *E.N.E.L.* case, the issue was whether a suit referred to the Court of Justice by a national court was inadmissible because a later domestic statute had introduced new regulations covering the matter to which the question of interpretation related. This called for an interpretation of Article 177 itself, a task solely within the jurisdiction of the Court of Justice since the question is one of Community law.¹²³

If the Court had concluded that the rank of Community law within a given Member State is a matter to be decided from case to case under that state's constitutional law, it would have had to sustain the objection of the Italian Government and dismiss the query referred to it by the Milan court. For the Court of Justice, pursuant to the judg-

122. See Jaenicke, *supra* note 110, at 533-34.

123. See *de Geus v. Bosch*, Court of Justice of the European Communities, April 6, 1962, 8 Recueil 89, 8 Sammlung 97, 2 CCH COMMON MKT. REP. 7133, 7137 (1962):

The meaning of the term "the interpretation of this Treaty" in Article 177 being itself open to interpretation, the domestic judge is free to draft his request in a direct and simple form. This leaves the Court of Justice with the option of deciding upon such request only within the limits of its jurisdiction, that is to say, only to the extent that it contains questions related to the interpretation of the Treaty.

ment of the Italian Constitutional Court in *Costa v. E.N.E.L.* on March 7, 1964, would then have been obliged to recognize the subordination of the Treaty to subsequently enacted Italian law. The compatibility of Italian Law No. 1643 with the EEC Treaty would have been legally irrelevant to the question presented to the Milan magistrate.

But the Court of Justice decided otherwise. It ruled that the relationship of Community law to municipal law within a Member State is a matter to be settled under Community law. Consequently, Italian constitutional law and the judgment of the Constitutional Court of March 7, 1964 were no longer relevant.

These considerations are occasionally misunderstood. Munch¹²⁴ and Frowein,¹²⁵ for example, believe that the Court of Justice, as the judicial organ of the Communities, had no option but to give Community law precedence over municipal law. For the Court of Justice, as for any other international court, provisions of municipal law conflicting with Community law are, they argue, "*de simples faits*,"¹²⁶ without any legal significance. This view is mistaken. As we have seen, the admissibility of the suit depended solely on whether the issue of rank in municipal law—*i.e.*, the precedence to be followed by the courts in case of conflict—should be decided by a Community rule of conflict or by six municipal rules of conflict. The Court of Justice was by no means obliged merely because it is a Community institution to claim that there is such a Community rule. Had the constitution of the Community been somewhat different, the Court of Justice might well have concluded that the obligation on the part of the Member States to remove conflicting laws created corresponding rights in the Community alone—an obligation whose fulfillment could clearly not be supervised by the domestic courts in the Member States. The analogy between the Court of Justice and international courts is also fundamentally mistaken; it erects between the legal order of the Community and those of the Member States barriers lacking all reality which have long since lost their intrinsic justification even in the relationship between international law and national law.¹²⁷

124. In his report for the Brussels symposium between the EEC Commission and representatives of the Italian Universities, Nov. 29 to Dec. 1, 1965.

125. *Zum Verhältnis zwischen dem EWG-Recht und nationalem Recht aus der Sicht des Gerichtshofs der europäischen Gemeinschaften*, [1964] A.B. 233, 234-35.

126. Judgment of May 25, 1926 (Polish Upper Silesia), P.C.I.J., Ser. A, No. 7, p. 19:

From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States. . . .

127. See pp. 723-24 *supra*.

Turning to the merits, the Court began by declaring:

[T]he EEC Treaty established its own legal order, which was incorporated into the legal systems of the Member States at the time the Treaty came into force and to which the courts of the Member States are bound.¹²⁸

Subsequently, in stating the grounds for its decision, the Court amplified its description of the legal order of the Community as "originating from an independent source" and as being "of specific original nature." Previously, in the *Bosch* case and in the first *Tariefcommissie* case, the Court had referred to the difference between Community law and municipal law:

The domestic law of the jurisdiction which applies for a preliminary decision and the Community law are two distinct and different legal systems.¹²⁹

[T]he Community presents a new legal order in international law . . . which is independent of the laws of the Member States. . . .¹³⁰

It is not easy to determine what the Court meant in saying that the legal orders are independent. The concept of "legal order," although in current use, has no generally accepted meaning. In the case in question, the phrase "legal order" as applied to the Community appears to signify, firstly, that Community law is neither municipal law nor international law in the usual sense of that term. This should be clear without further explanation, for even if the point of departure in all Member States were the incorporation theory, the most generally accepted theory in Germany today, no one could maintain that the basis of the Community is really six municipal laws, and that the Community regulations are an amalgam of six national legislative acts. It is in fact obvious that both the establishment of the Community and its current activities extend beyond the sphere of competence of each of the six legislatures, whose acts even in combination cannot have the legal effects of Community law.¹³¹

The reason for this distinction between Community law and municipal law seems to be that the dualistic view of international law, by which every internally valid commitment in international law is held to depend on an autonomous act of the supreme power of the state, was designed for international arrangements which did no more than estab-

128. *Costa v. E.N.E.L.*, 2 CCH COMMON MKT. REP. at 7390.

129. *De Geus v. Bosch*, 2 CCH COMMON MKT. REP. at 7137.

130. First *Tariefcommissie* case, 2 CCH COMMON MKT. REP. at 7214.

131. See pp. 723-24 *supra*.

lish reciprocal rights and duties. This doctrine cannot, however, apply to organizations possessing international powers of their own, organizations whose influence on the national legal orders the proponents of the dualistic theory either cannot account for at all or must explain by resort to such disingenuous *tours de force* as the "advance general incorporation" doctrine.¹³²

As pointed out briefly above,¹³³ the same criteria also apply to the distinction between Community law and the classical concept of international law. Associations that enjoy autonomous sovereign powers capable of directly binding the member states and their nationals are rarely subjects of international law; where similar organizations have existed in the past, they were not only rudimentary and embryonic¹³⁴ but also so short-lived or so specialized that they cannot be compared with the Communities.

To this extent it is therefore correct to distinguish Community law both from municipal law and from international law. A number of consequences follow from the distinction. Firstly, the Treaties establishing the Communities have a formal resemblance to constitutions, although they are not, of course, the product of a constituent assembly.¹³⁵ Secondly, Community law has its own specific criteria for establishment and validity,¹³⁶ and it is therefore not possible for principles contained in the six national constitutions to be applied automatically to the actions of the Community organs.¹³⁷ Lastly, the legal acts of the Com-

132. An instructive parallel to the conflict with which we are here concerned is to be found in the current dispute in Germany as to whether a public institution can be created by a treaty between the *Länder* and whether it can be granted powers of its own. This question has been raised in the dispute over the constitutionality of the *Zweites deutsches Fernsehen* which was established by the treaty of June 6, 1961, between all the *Länder*. See Kölbl, "*Gemeinschaftsaufgaben*" *der Länder und ihre Grenzen*, 15 NEUE JURISTISCHE WOCHENSCHRIFT 1081 (1962); Judgment of June 11, 1964, Bavarian Verwaltungsgerichtshof, [1964] Deutsches Verwaltungsblatt 642. See also the expert memorandum prepared by Bachof-Kisker (Mainz 1965) in the same cases before the *Bundesverwaltungsgericht*. This court gave its ruling on November 5, 1965, but the judgment has not yet been published.

133. See p. 725 *supra*.

134. *E.g.*, the Danube, Rhine, and Straits Commissions; see K. H. KLEIN, *DIE ÜBERTRAGUNG VON HOHEITSRECHTEN*, 29 (1952); PIERRE MATHIJSEN, *LE DROIT DE LA CEEA* 149 (1958).

135. See Hallstein speech, *supra* note 121, at 243, 1 *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN* at 247; Stein, *Towards Supremacy of Treaty-Constitution by Judicial Fiat in the European Economic Community*, 48 *RIVISTA DI DIRITTO INTERNAZIONALE* 3 (1965).

136. Hallstein speech, *supra* note 121, at 243, 1 *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN* at 247.

137. This is in line with repeated findings by the European Court of Justice. See, *e.g.*, the judgments mentioned at note 120 *supra*.

munities should be classified and interpreted exclusively in the light of their own characteristics; they cannot simply be equated with their analogues in the legal systems of the various Member States.

The fact that the Court of Justice considers Community law to create an independent legal order does not mean, however, that Community law is totally unlike municipal law. That would be a fatal misunderstanding, for it would in effect overlook the particular features which distinguish Community law from municipal and international law and would amount to acceptance of a bi-polar relationship between Community law and the law of the Member States that does not differ by one iota from the teachings of the dualistic school.

This danger is indeed implicit in the theory of the autonomous character of Community law.¹³⁸ One need only look to a recent decision of the Italian Constitutional Court—Judgment No. 98 of December 27, 1965,¹³⁹ which bases the constitutionality of the ECSC Treaty solely on the separation of the two legal systems,¹⁴⁰ and appears to conclude from this that matters in the Community sphere either do not concern the Italian legal order at all or else do so only marginally.¹⁴¹

The theory of two distinct legal orders leads to the conclusion that a domestic court is under no obligation to apply Community law rather than municipal law in any case of conflict. On the contrary, the idea that the two legal orders are separate implies that they are equal in rank in their own separate fields and is not a particularly good argument in favor of the precedence of one or the other. The true implications of

138. This appears to have been correctly appreciated by Gori in *La Preminenza del Diritto della Comunità Europea sul Diritto Interno degli Stati Membri*, 116 *GIURISPRUDENZA ITALIANA* I. 1073 (1964).

139. *Steelworks San Michele v. High Authority of the ECSC*, Tribunale di Torino, Dec. 11, 1964 (unpublished). In this decision the Italian Court queried the constitutionality of the law ratifying the ECSC Treaty (No. 766 of June 25, 1952) on the grounds that Articles 33(2), 41 and the last paragraph of Article 92(3) of that Treaty were incompatible with Articles 102 and 113 of the Italian Constitution.

140. The ECSC, having the aim of co-ordinating some economic initiatives occurring on the territory of various States, constitutes an order completely different from the internal order. *Ibid.*

141. In this respect, the judgment of the Italian Constitutional Court contains a rather disquieting sentence:

[The internal order] has recognized the Community order, not in order to incorporate its system but . . . to delimit the cases in which internal effects are produced by the activities which the institutions of the Community are empowered to pursue within their respective spheres of competence. *Ibid.*

This supports the claim that the internal legal effects of the acts of the Community organs are determined not by Community law but by municipal law, although it is admitted at the same time that the Community organs have their spheres of competence within which they are empowered under Community law to issue certain acts.

the argument become clear if we focus upon the opposition between the dualistic and monistic theories of international law: the primacy of international law is accepted only by unswerving monists, for whom international law and national law are not two distinct legal orders but form one integrated system. The independence of Community law as a legal order thus does little or nothing to justify its precedence within the state. As is shown by the judgment of the Italian Constitutional Court of December 27, 1965, this idea is also fully compatible with the view that domestic courts must decide these questions of precedence by municipal law alone.

Perhaps because it was conscious of these difficulties and wished to tone down its previous insistence on the separation of legal orders, the Court of Justice added to this argument in the *E.N.E.L.* case a rider missing from its two previous judgments.¹⁴² A reference to the Community's "own legal order" is qualified by the phrase "which was incorporated into the legal systems of the Member States . . . and to which the courts of the Member States are bound." This phrase cannot be correctly interpreted unless the following explanation is also taken into account:

In fact, by establishing a Community of unlimited duration having its own institutions . . . and, particularly, real powers resulting from a limitation of the jurisdiction of the States or from a transfer of their powers to the Community, the States relinquished, albeit in limited areas, their sovereign rights and thus created a body of law applicable to their nationals and to themselves.

This incorporation into the law of each member country of provisions of a Community origin, and the letter and the spirit of the Treaty in general, have as a corollary the impossibility for the States to assert as against a legal order accepted by them on a reciprocal basis a subsequent unilateral measure

The Court of Justice thereby picked up the thread of the arguments it had advanced in the first *Tariefcommissie* case in order to show that Article 12 of the EEC Treaty was directly applicable:

[T]he Community presents a new legal order in international law for the benefit of which the Member States have, albeit to a limited extent, surrendered their sovereign rights, and whose subjects are not only the Member States but individuals as well.¹⁴³

Although these observations were, it seemed, not absolutely essential to the reasoning behind the Court's judgment in the first *Tariefcom-*

142. *De Geus v. Bosch*, *supra* note 123; first *Tariefcommissie* case, *supra* note 4.

143. First *Tariefcommissie* case, 2 CCH COMMON MKT. REP. at 7214.

missie case, they are of central importance to the *E.N.E.L.* case and to the entire doctrine of the primacy of Community law; for although the Court, in stating the reasons for its judgment in the latter case, includes references to a number of provisions in the Treaty, it is clear that it does so not to provide a basis on which its judgment can rest but only to confirm it.

We must now ask what is meant by the "incorporation" of the Community system, with its delegated sovereign powers, into the legal systems of the Member States, and whether such "incorporation" necessarily means that Community law takes precedence within these states. The concept of incorporation is hardly significant in itself, but it does illustrate the notion that the Community's place is not outside but within the national orders of the Six. It is not possible to deduce from the concept of incorporation what that place is, or how the independence and "supranational" existence of the Community are to be reconciled juridically with its forming a part of the six legal systems of the Member States; nor consequently, does this concept in any way serve to justify the primacy of Community law.

The question therefore arises whether the concept of incorporation acquires a wider meaning on the strength of the second argument put forward by the Court of Justice at this point, that this is a Community with "real powers resulting from a limitation of the jurisdiction of the States or from a transfer of their powers to the Community," by which the Member States have permanently limited their sovereign rights, albeit in a limited field.

Let us look first to the facts: is it correct to say that the Member States have endowed the Community with sovereign rights of its own, i.e., with power to determine matters affecting national and social life by unilateral orders having the force of law? No one seems to have challenged this assertion. The EEC—indeed all three European Communities—have, when acting through their institutions, unusually extensive powers to adopt measures binding upon the Member States as implementing authorities or directly binding on the nationals of these Member States. This is without doubt the most important feature distinguishing the Communities from other international organizations.

There is less agreement concerning the acquisition of these sovereign rights, and the effect of the Communities' possession of these rights on the Member States. Some consider that the Communities' powers spring from a transfer of powers by the states.¹⁴⁴ Others prefer to trace the

144. *E.g.*, Ophüls in the works cited at note 68 *supra*; see also Catalano, *supra* note 70; Catalano and Monaco in their article in *RAPPORT POUR LE 2^e COLLOQUE INTERNATIONAL DE DROIT EUROPÉEN* 9 (1963).

origin to an initial creative act endowing the Communities with these powers,¹⁴⁵ or to a servitude under international law by which national sovereignty is limited.¹⁴⁶ For present purposes, the details of how these powers arose are less important than the legal consequences for the six Member States of the undisputed existence of Community powers.¹⁴⁷ In particular: do the Member States still legally possess their full, undiminished sovereign rights in the fields entrusted to the Communities, or can they no longer exercise these rights within the Communities' sphere of competence?

It is clear that this question goes to the heart of the relationship between what we understand by "the State" and our concept of the international order¹⁴⁸ (which is why hardly anyone but Ophüls has attempted to answer it). People are either content simply to deny the possibility of a material division of the "sole" power of the state,¹⁴⁹ or they reject the idea of "a transfer of sovereign rights" as both untenable and outdated in legal theory and seek to show that neither the text of the Treaties nor the practice of the Communities can support the conclusion that the sovereign rights of the states have been abated.¹⁵⁰

These arguments are, of course, politically or at least emotionally inspired. It is not surprising that their champions make no attempt to examine them in the light of the constitutional provisions of the European countries concerned. An examination of these constitutions shows that the authors of five of the six constitutions of the Member States considered that a material limitation of the "sovereign," "sole," and "supreme" power of the state is perfectly possible. And to that effect they have expressly included the following clauses regarding international institutions similar to the Communities:

- (i) France: Constitution of October 27, 1946, Preamble:
On condition of reciprocity, France accepts the limitations of sovereignty necessary to the organization and defence of peace.¹⁵¹

145. Hallstein, *Zu den Grundlagen und Verfassungsprinzipien der europäischen Gemeinschaften*, in Festschrift für C.F. OPHÜLS 1, 14-15 (1965).

146. Wohlfarth, *Anfänge einer europäischen Rechtsordnung und ihr Verhältnis zum deutschen Recht*, 3 JURISTEN-JAHRBUCH 241, 262-63 (1962-63).

147. Clearly the Court of Justice also leaves this controversy open.

148. Ipsen, *supra* note 71, at 9.

149. E.g., Krüger, *Souveränität und Staatengemeinschaft*, 1 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 1 (1957); 1959 DIE ÖFFENTLICHE VERWALTUNG 725. In his ALLGEMEINE STAATSLAHRE (1964), which contains over one thousand pages, there is not a single reference to the European Communities.

150. E.g., WAGNER, *op. cit. supra* note 101, at 352.

151. The French Memorandum of May 30, 1950, addressed to the British government, expressly mentioned as the focal point of the movement for European unity "the partial merging of sovereignty." See Ophüls, BERICHT FÜR DIE 2. INTERNATIONALE TAGUNG ÜBER DAS

This principle is re-affirmed for the Fifth Republic in paragraph 1 of the Preamble to the Constitution of October 4, 1958.

(ii) Germany: Article 24, paragraph 1 of the Basic Law of May 23, 1949:

The Federation may, by legislation, transfer sovereign powers to international institutions.¹⁵²

(iii) Italy: Article 11 of the Constitution of December 27, 1947: Italy . . . on conditions of equality with the other States, agrees to the limitations of her sovereignty necessary to an organization which will assure peace and justice among nations, and promotes and encourages international organizations constituted for this purpose.

(iv) Luxembourg: Article 49 added to the Constitution of October 17, 1868, by a constitutional amendment of July 27, 1956:

The exercise of powers reserved by the Constitution to the legislature, the executive or the judiciary may be temporarily delegated by treaty to international institutions set up under international law.

(v) Netherlands: Article 67, paragraph 1, added to the Constitution of March 29, 1814, by the constitutional amendment of June 22, 1953:

Subject, where necessary, to the provisions of Article 63, legislative, administrative and judicial powers may be delegated under an agreement, or by virtue of an agreement, to organizations founded upon the law of nations.

(vi) Belgium: As has previously been noted,¹⁵³ definite efforts have been made in the last ten years or more to supplement the Constitution of February 7, 1831, along the lines of the clauses quoted, above. The last proposal,¹⁵⁴ for which detailed support was given, reads:

RECHT DER EUROPÄISCHEN GEMEINSCHAFTEN 17 (1963). The former Prime Minister, Robert Schuman, wrote in his preface to P. REUTER, *LA COMMUNAUTÉ EUROPÉENNE DU CHARBON ET DE L'ACIER* 7 (1953):

The supranational institution . . . possesses and exercises certain sovereign powers.

It is independent of the national Governments within the limits of the Treaty. . . .

152. See also para. 2 of the same provision, which declares that the Federation consents to "limitations of its sovereign rights" in favor of a collective security system.

The German official explanatory memorandum attached to the Treaty of Paris and to the Treaties of Rome contains the following statement by the Federal government:

The Treaty creates . . . a European structure that has features typical of a constitution; functions of sovereignty . . . are removed from the competence of the Member States and transferred to the European Community. The legal order which is founded by the Treaty in a limited but important economic area supersedes the individual domestic orders.

BUNDESTAGSDRUCKSACHE 2401, Wahlperiode 1, p. 4; BUNDESTAGSDRUCKSACHE 3440, Wahlperiode 2, Anlage C, p. 108.

153. See pp. 710-11 *supra*.

154. Waelbroeck-Van der Mensbrugge, *L'Attribution de Compétences Constitutionnelles*

Article 25: The exercise of certain constitutional powers may be conferred upon institutions of international law.

In considering how the creation of sovereign powers in the Communities has affected the scope of the jurisdiction exercised by the states concerned, one cannot simply ignore these constitutional provisions. If the limitation of national sovereignty in favor of international institutions, expressly provided for in five constitutions, meant nothing more than that the states concerned could by treaty commit themselves internationally without being permanently bound in their internal affairs, it would be impossible to understand why the authors of the various constitutions, independently of one another, should have paid particular attention to this problem. The reason why they did so was, rather, that these clauses were deliberately intended to herald the beginning of a new era in international relations¹⁵⁵ and to empower the legislature to ratify treaties under which sovereign powers would be merged.

The constitutions are unambiguous on this point, for they all speak of "limitations of sovereignty" or of "a transfer of sovereign powers." It would be altogether pointless to use these words if they merely meant—as most writers assume—that the Member States remain, as before, in full possession of all their national powers, even though they may have "limited" or "transferred" certain aspects of sovereignty.¹⁵⁶ The theory which is still most widely accepted—which either declares that the material division or limitation of national sovereignty is impossible or else strips it of all specific legal significance—therefore constitutes a crude falsification of the will that has been clearly expressed in the constitutions of the Member States and in their dealings with each other. Anyone who fails to acknowledge that the merging of national powers in the Communities is of greater legal significance than the mere acceptance of the usual obligations under international law is talking politics, not law.

The endowment of the Communities with powers of their own thus marks the point where the sphere of international relations ends and a new legal system begins. A number of terms have been used to describe the unique character of the Communities. Unfortunately, they

à des Institutions de Droit International Public, RAPPORT PRÉSENTÉ AU COLLOQUE SUR L'ADAPTATION DE LA CONSTITUTION BELGE AUX RÉALITÉS INTERNATIONALES CONTEMPORAINES, May 6-7, 1965, p. 22.

155. See the instructive work by VOCEL, DIE VERFASSUNGSENTSCHEIDUNG DES GRUNDGESETZES FÜR EINE INTERNATIONALE ZUSAMMENARBEIT (1964).

156. Ipsen, *supra* note 71, at 8-19; see also WAGNER, *op. cit. supra* note 101, at 350.

do not amount to very much, but rather complicate the discussion with so much ideological dynamite. This is particularly true of the concept of supranationality, but it also applies to such phrases as "pre-federal" or "partially federal." Ophüls, who in his writings has repeatedly and quite rightly pointed out certain similarities between the structure of Community law and federal states, is dubbed a federalist by his opponents and rejected by them as if he had based his theory on the assertion that the Communities are or soon would be federal states.

All this merely obfuscates a discussion that is already difficult enough. The point is not to find new terms with which to describe the originality of the Communities, but to arrive at a clear understanding of their originality and to consider what the legal consequences will be. As we have seen, the uniqueness of the Communities lies in the powers they have been given—not only powers binding on the Member States (as typified in directives, Article 189(3) of the EEC Treaty) but also powers which bypass the domestic authorities and create rights and duties for the nationals of all the Member States (as typified in regulations, Article 189(2) of the EEC Treaty). The powers with which we are here concerned are those of the latter type. Have the Communities inalienable authority to exercise these powers in the Member States, or can the Member States invalidate the acts of the Communities by contradictory laws?

The key to this problem would seem to lie in the concept of competence itself—the power of a particular authority to take particular measures which are legally binding. Competence also implies that the authority concerned bears full responsibility in its allotted field. In a modern constitutional state, all governmental functions are expressed as powers and allotted to institutions and authorities. Under a constitution based on the rule of law, no single institution, not even the state itself, has unlimited powers; each enjoys only the powers attributed to it by the legal order based on the constitution.

Of course, it often happens that various institutions can only exercise their powers jointly. It is one of the basic organizational principles of a constitutional state, however, that the different spheres of competence should neither overlap nor coincide. There are a large number of explicit and unwritten rules applicable to cases where powers conflict, and sometimes there are special organs to resolve such conflicts. It is evident that maintenance of this separation of powers is of particular importance in a federal state. If the competence of two authorities in the same state included the same subject matter and vested both with the same power of decision, the situation would

clearly be impossible. One need only imagine two authorities declaring each other's acts invalid, or two courts each able to set aside the rulings handed down by the other! Such an anarchical situation would not only violate principles of the division of labor and responsibility of each authority in its own sphere, but would even more clearly undermine any certainty in the law.

The importance of a strict separation of competence is so obvious that even modern champions of omnipotence of the state not only admit it without more but attach particular importance to it.¹⁵⁷ It is then all the more surprising that these principles should not be applied to the relationship between the powers of domestic and Community organs. It is claimed that when the Community, acting within its allotted area of competence, has adopted a regulation which would otherwise apply directly (such as social security of migrant workers or restrictions on competition in intra-Community trade), the various states, acting in accordance with their own constitutional law, should be entitled to adopt regulations which run counter to the Community rulings. Such national enactments are said to remain in effect until such time as the protracted and laborious proceedings before the Court of Justice provided for under Article 169 of the Treaty of Rome cause the recalcitrant state to end its opposition, or until the Community promulgates its old regulation afresh. The latter possibility has rightly been described as the game of "legal leapfrog." Does this mean that the legal security of the citizen is really to be given as short shrift as the objective and responsible functioning of the Community in its proper sphere?

Such a view is obviously untenable. Equally untenable is the only argument mounted in support,¹⁵⁸ i.e., that the spheres of competence of the Community and of the Member States are insufficiently distinguishable and that in general both the Community and the Mem-

157. From the point of view of the citizen, sole competence is the condition without which there will be neither certainty as to the law nor objectivity This competence and the fact that it is undivided are not only characteristic of the modern state but above all essential features of any state founded on the Rule of Law. . . . Undivided competence implies its exclusivity. The establishment of competence for one body prevents all other bodies from concerning themselves with problems of the type in question The difficulty of these questions becomes even greater when it occurs in the relationship between the Federation and the individual State [I]t must be pointed out in this connection that responsibility cannot be borne for a particular field when other bodies . . . also concern themselves with questions in that field.

KRÜGER, *ALLGEMEINE STAATSLEHRE* 108 (1964).

158. *E.g.*, WAGNER, *op. cit. supra* note 101, at 352-53.

ber States are competent at the same time. It is, of course, correct that the powers of the Community organs are often not defined in the Treaties with absolute clarity. But one cannot thereby conclude that there is a permanent overlap of competence—something completely unknown in modern constitutional theory. On the contrary, every act of the Community organs presupposes that they are competent. If their competence is not clearly established by the Treaty, it is the interpretation of the Court of Justice which ultimately decides whether or not the Community is competent. If it is found to be competent, there can no longer be any doubt that its competence is exclusive; if it is not found to be competent, the opposite holds true. It therefore follows that the rule by which no act of the Community may exceed the bounds of the Community's sphere of competence¹⁵⁹ excludes any lasting uncertainty as to who is competent, and thus also excludes any possibility of permanent overlap of competence.¹⁶⁰

The division of powers between the Community and the Member States thus means that the states cease to be competent wherever their competence is excluded by some provision of the Treaty or whenever the Communities have exercised their powers. What legal consequences does this entail when the Community law is directly applicable, i.e., is a self-executing provision of the Treaty or a regulation applicable to individuals? The characteristic feature of directly applicable provisions of Community law is that anyone may invoke them before domestic courts. When in proceedings before a domestic court it is found that the national legislature is not competent, does it necessarily follow that the domestic norm is inapplicable? This is the one decisive question in the whole discussion of whether Community law takes precedence over municipal law or not. We cannot stress this too clearly. Precedence in this sense is thus not the general subordination of the domestic legal order to that of the Community. Nor is it a simple acknowledgment of Community precedence of no practical consequence, similar to the lip-service that is paid to the precedence of the constitution in many states where there is no machinery for verifying

159. See, e.g., EEC Treaty, Art. 4: "Each of these institutions shall act within the limits of the powers conferred upon it by this Treaty."

160. Of course, it is necessary in each case to know when and to what extent the exchange of competence provided for by the Treaties takes place. Where Community organs have not exercised their competence or when, for example, they adopt a directive instead of a regulation, the national system, of course, continues to exist. Only a directly applicable measure supersedes a conflicting domestic norm. These points are so simple that it is hard to see why Wagner seeks to derive arguments from them against the separation of the fields of jurisdiction. WAGNER, *op. cit. supra* note 101, at 352-53.

the constitutionality of laws. Nor does the precedence of Community law mean that it must be accorded primacy by the Court of Justice of the Communities only—for that Court has no power to resolve a conflict. Precedence means purely and simply the unconditional implementation by the domestic courts of directly applicable rules of Community law, even when subsequent legislative provisions conflict with that law.

We have already set forth¹⁶¹ the arguments in favor of the unconditional implementation of directly applicable Community law, without which there can be no uniformity in the Member States. We must now consider what arguments can be advanced for the corresponding inapplicability of contradictory domestic legal provisions in case of conflict. The attribution of competence in a certain field implies, in accordance with general principles, the rule that in cases of conflict only the acts of the competent authority are valid. This authority is the only one that can lawfully exercise jurisdiction, and the powers given it exclude the vesting of similar powers in a second authority. A study of the current constitutional practice of states shows, however, that the allocation of powers among the institutions and authorities of a given state does not always mean that the acts of other bodies are *ipso jure* null and void for lack of competence. On closer inspection one finds, for example, that administrative acts exceeding the sphere of competence of the issuing body are normally held merely to be nullifiable, unless competence has been greatly exceeded.¹⁶² In the case of acts which lay down rules, and especially in the case of laws, the situation varies from one Member State to another. In four Member States¹⁶³ the courts have no authority to determine whether the legislature has exceeded its powers. In Germany and Italy, this authority exists, but is reserved to the Constitutional Courts.

The differences in the consequences attendant upon action beyond due powers may spring from deeply rooted traditions, but in most cases they are the outcome of explicit or implicit provisions in the enactment creating the division of competence. Constitutions often specify what happens when one institution of the state exceeds its authority. Laws which create powers specify the relationship between these new powers and those created earlier. In a federal state, the fed-

161. See pp. 726-29 *supra*.

162. The difference is that an act which is null and void can be treated as invalid by every individual and every court, while one that is simply voidable must be overruled by the competent court if it is not to retain its temporary binding force.

163. Belgium, France, Luxembourg and the Netherlands.

eral constitution gives detailed rules governing the precedence which measures adopted by the federal organs take over conflicting law in the individual states, and so on. It would seem, therefore, that a finding that an enactment exceeds the competence of the national legislature is not in itself sufficient grounds to conclude that every domestic court is bound not to apply the law whenever it conflicts with a Community rule. Rather, it is necessary to ascertain whether a specific rule for cases of conflict—and, if so, what rule—can be deduced from the complex of provisions on which the separation of powers is based.

The relevant question then becomes whether the Community Treaties, and particularly the EEC Treaty, must be interpreted to mean that a municipal law is inapplicable when a national authority by adopting it encroaches upon a Community power and thus acts without competence. Until the ruling given by the Court of Justice in the *E.N.E.L.* case, the significance of this question was recognized only by Ipsen¹⁶⁴ and Zweigert.¹⁶⁵ Like the Court of Justice, these two writers deduced from a number of particular provisions in the Treaties and, even more, from the general spirit of these documents that the Treaties themselves contain a rule, by which a conflicting municipal law adopted by a legislature without competence is declared inapplicable. As has already been pointed out,¹⁶⁶ the Communities can in fact fulfill the tasks assigned to them only if the measures they adopt cannot unilaterally be set aside. If subsequent municipal laws were to take precedence, it would render futile the whole endeavor to ensure that competence in economic and social affairs is exercised centrally, and would imply that the Member States, in spite of what they clearly said, wished to create only a semi-effective structure.

On the contrary, as the Court of Justice points out, the Treaty contains sufficient indication that the unconditional application of Community law is intended to be one of the fundamental features of the Communities. There is also a further argument that has not been mentioned by the Court: Under Article 177 of the Treaty of Rome, the Court of Justice is required to give a uniform and binding interpretation of provisions of Community law. Logically, this power pre-

164. Ipsen departs too far from Ophüls' theory of competence and overlooks the fact that recourse can be had only to the rule of conflict based on the *effet utile* when and because the national legislature is not competent in a particular matter. Ipsen, *supra* note 71, at 20.

165. See Zweigert, *Der Einfluss des europäischen Gemeinschaftsrechts auf die Rechtsordnungen der Mitgliedstaaten*, 28 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 601, 637 (1964).

166. See p. 726 *supra*.

supposes that the provisions which are to be interpreted are to be uniformly and equally applied, for if not, uniform interpretation could not help ensure the correct application of Community law, obviously its only purpose.

The procedure that Article 177 of the EEC Treaty establishes for arriving at a preliminary ruling is also important for another reason. It obviates the danger that domestic courts may fail to apply laws because of a presumed conflict with Community law before they are sure that such a conflict really exists. Article 177 makes it possible for every magistrate, and obliges the judge of a court of final judgment, to request an authoritative ruling on the scope of the disputed Community rule. This procedure removes any fear that recognition of the precedence of Community law might produce general legal uncertainty and lead to a decline in the authority of the national legislature.¹⁶⁷ The fact that a procedure exists for obtaining preliminary rulings results in practice in a legal situation very similar to one in which a central appellate court resolves cases of conflict.

There can be no doubt that the Court of Justice was correct in founding its decision in the *E.N.E.L.* case on the idea that the EEC Treaty, correctly interpreted, provides a rule for cases of conflict which ensures that generally binding rules of Community law take precedence over conflicting measures adopted by the legislatures of individual countries, these being without competence in the matter concerned.¹⁶⁸ The Court quite properly based this conclusion on two decisive arguments, the division of competence between the Member States and the Community and the existence of a rule for cases of conflict, which we have described above and which is implicit in the Treaty. Compared with these two arguments, the view that the Community has its "own legal order which was incorporated into the legal systems of the Member States" recedes far into the background. It is important

167. In his speech to the European Parliament on June 17, 1965, President Hallstein referred expressly to this special function of the preliminary ruling provided for in Article 177. Hallstein speech, *supra* note 121, at 246, 1 *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN* at 247.

168. Carstens expresses the view that Community law could not enjoy precedence because the Federal Republic of Germany could not possibly have agreed to it in conformity with its constitutional law. Carstens, *supra* note 118, at 72. What was said above applies to this argument in so far as general conclusions can be drawn from the special relationship between Community law and constitutional law. See p. 732 *supra*. It does not, however, take due account of the scope of Article 24 of the German Basic Law, which, if correctly interpreted, frees the ordinary legislature, when dealing with integration, from the limitations otherwise imposed by the Basic Law. Ipsen, *supra* note 71, at 27; MAUNZ-DÜRIG, *KOMMENTAR ZUM GRUNDGESETZ*, Article 24, Marginal No. 18 (1964); Zweigert, *supra* note 165, at 640.

only because it makes it clear that municipal and Community law are both applicable, each within its own sphere, and are to be observed by the same domestic authorities and courts. In order to avoid misunderstandings which might all too easily arise from the independence of the Community as a "legal order," it would be better to speak only of the Community's own sphere of competence, or of the interlocking of Community and national spheres of competence. These are more appropriate terms in which to express the idea that the situation with which we are here concerned is fundamentally different from the separation of international law and municipal law.

VI. DEVELOPMENTS SINCE THE *E.N.E.L.* CASE

One or two remarks on developments since the *E.N.E.L.* case may be of interest. Obviously it is too early to assess the final impact of the judgment. We must confine ourselves to noting that on the whole it was received with approval—at least there was no adverse criticism from responsible politicians or jurists. On the contrary, the EEC and Euratom Councils, in their answer to Written Question No. 27 from Mr. van der Goes van Naters cited the *E.N.E.L.* decision and concluded:

The Councils consequently take the view that they do not need to comment on the legal aspects of these questions.

The Councils are nonetheless well aware that it is of political importance for the establishment of the Common Market and in general terms for the attainment of the objectives of the European Treaties that Community law should be applied exactly in the Member States. They are therefore following with the greatest attention problems arising in this context.¹⁶⁹

At about the same time as the Councils submitted their answer, the Legal Committee of the European Parliament began to review the questions raised by Judgment No. 14 of the Italian Constitutional Court of March 7, 1964. The Belgian jurist Fernand Dehousse, Senator and subsequently Minister of Education, produced a comprehensive report on the "Primacy of Community law over the law of the Member States."¹⁷⁰ He concluded that if, in the field of European integration, what had already been gained was not to be lost, and if further progress was to be made, the primacy of Community law must be ensured under all circumstances. The report was discussed at a number

169. Reply of July 31, 1964, 1964 OFFICIAL GAZETTE 2161-64.

170. Document No. 43 of 1965-66 session of the European Parliament, 1 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 212 (1965).

of meetings of the Legal Committee and debated in plenary sessions of the European Parliament on June 16, 17 and 18, 1965.¹⁷¹ In a wide-ranging speech on June 17, Professor Hallstein, President of the EEC Commission, explained the Commission's views.¹⁷² Endorsing Mr. Dehousse's report and the *E.N.E.L.* judgment, he observed:

By setting up the Community the Member States have made themselves subject to this new system of law to the extent that they have vested powers in it. When these powers are exercised in conformity with the Treaty, the Member States must comply; this obligation applies to any binding expression of public authority, including the courts.

The question of applicability is thereby decided simply and unequivocally in favour of Community law. Community law created in accordance with the Community's powers must be accepted and enforced through the courts. Conflicting municipal provisions must give way—even if promulgated subsequently—to Community law . . . this conclusion is in complete conformity with the judgment handed down by the European Court of Justice on July 15, 1964.

Mr. Del Bo, President of the ECSC High Authority, and Mr. Sassen, member of the Euratom Commission, also spoke, as did the spokesmen for the Parliamentary groups and other members of the Parliament. Not a single speaker contested the validity and importance of the arguments which the Court of Justice had upheld in the *E.N.E.L.* case. At its plenary session on October 22, 1965, the European Parliament approved, with minor amendments, the "Resolution on the primacy of Community law over the law of the Member States" proposed by Mr. Dehousse:

The European Parliament, conscious that it is charged to see that the Treaties are duly implemented, so that all their objectives shall be achieved and the progressive development of the Communities be made possible;

Concerned at the tendencies shown by certain judicial bodies in Member States, which could jeopardize the implementation of Community provisions . . .

Endorses the conclusions in the report of its Legal Committee, and affirms the need to recognize the primacy of Community law over the municipal law of the Member States. . . .¹⁷³

171. VERHANDLUNGEN DES EUROPÄISCHEN PARLAMENTS, Sitzungsperiode 1965-66 (IX/65), No. 79, pp. 206, 242, 275.

172. Hallstein speech, *supra* note 121, at 242-47, 1 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 247 (1965).

173. VERHANDLUNGEN DES EUROPÄISCHEN PARLAMENTS, Sitzungsperiode 1965-66 (IX/65), No. 81, pp. 212-13.

Only three cases dealing with possible or actual cases of conflict have been decided by domestic courts since the *E.N.E.L.* decision. The judgment of the Cour d'Appel of Paris of July 7, 1965¹⁷⁴ includes the following paragraph, which may well have been influenced by the *E.N.E.L.* decision of the European Court of Justice:

The provisions of the Treaty of Rome have the force of law in France pursuant to Article 55 of the Constitution of October 4, 1958, as do those of all Community regulations because of the very nature of the legal system established by the Treaty, notably Article 5, the second paragraph of Article 189, and Article 219 thereof.

In this context, the decision of the Tribunal de Grande Instance of Strasbourg (Chambre Commerciale) of June 3, 1965¹⁷⁵ also deserves mention. The Court held over a pending dispute because a case involving the same questions was before the European Court of Justice; in view of the "superior authority of the decisions of the Court of Justice of the European Communities," the danger of a decision not in accordance with the decision of the Court of Justice must be avoided.

Finally, the Finance Court of Düsseldorf¹⁷⁶ in the judgment of July 7, 1965 declared the regulation of a Federal Minister inoperative because of its incompatibility with two subsequent relations of the EEC Council and of the EEC Commission. The Court offered no further support for this conclusion, obviously regarding it as self-evident.

The Court of Justice of the European Communities has itself had a further opportunity to re-affirm its position in the *E.N.E.L.* case. The document at issue was the unpublished *Ordonnance* of June 22, 1965 in *Merisider v. ECSC High Authority*. The Italian plaintiff, attacking a decision of the High Authority concerning the payment of compensation for scrap, had requested that the main proceedings be interrupted pending the ruling of the Italian Constitutional Court on the constitutionality of the ECSC Treaty. He argued that this forthcoming decision would have "absolute authority" for all judges exercising jurisdiction over Italian nationals. The Court of Justice refused the request, giving the following reasons:

The force of the acts of ratification, by which the Member States have accepted identical commitments, is that all the Member States have acceded to the Treaty under the same conditions, de-

174. *Société Anonyme La Technique Minière v. Maschinenbau-Ulm Gmb H.*, Cour d'Appel de Paris, July 7, 1965, 85 Gazette du Palais 4, 4-6 (Nos. 230-32) (1965).

175. *Ets. Consten v. W. Leissner*, 85 Gazette du Palais 5-6 (Nos. 261-64) (1965).

176. [1965] A.B. 299.

nitively and with no other reservations than those expressed in the supplementary protocols, and any claim by a national of a Member State to call into question this commitment to the Treaty would conflict with the legal system of the Community;

Such a claim is all the more inadmissible, since, in the case here at issue, a decision to suspend judgment would be tantamount to robbing the Community of all authority, it would enable the act of ratification to be interpreted as either the acceptance of only a part of the Treaty, or as a means whereby legal effects differing from Member State to Member State could be attributed to the Treaty, or as an opportunity for certain nationals to evade its rules;

The participation of the Italian Republic in the joint institutions and its share of the rights and obligations flowing from the Treaty rule out the possibility that its nationals can evade the full and uniform application of this Treaty and thus enjoy treatment differing from that meted out to the nationals of other Community countries.

Consequently, any request designed to elicit approval of such discriminatory concepts—concepts which no law of ratification could introduce into a treaty prohibiting them—must be dismissed as contrary to the *ordre public* of the Community.¹⁷⁷

VII. CONCLUSION

In his speech to the European Parliament, President Hallstein observed that the problem of the relationship between Community law and municipal law was fortunately “more important in principle than in practice”; it could rapidly become a more pressing issue, however, if its fundamental aspects were not clarified in good time.

We can only concur in this opinion, offered by one engaged in political matters. From the jurist’s point of view we might add that the subject of the *E.N.E.L.* judgment, quite apart from its potential or actual importance, compels one to reflect on decisive and fundamental questions concerning the state and the international order, and that it consequently has a legal significance of its own. By reason of their structure, the European Communities stand mid-way between municipal law and international law. They possess characteristics of both, but cannot be said to belong exclusively to the one field or to the other.¹⁷⁸ Hence the difficulty, but also the fascination, of the problem.

177. EEC Court of Justice, Case No. 6/65 (unpublished opinion).

178. Constantinesco recently made effective use of this point. Constantinesco, *Die Eigentümlichkeiten des europäischen Gemeinschaftsrechts*, 1965 *JURISTISCHE SCHULUNG* 289, 290.

For the mere existence of the Communities and their undisputed success despite all crises prove that with them forms have been called into being which are more than just the random by-products of the unfortunate—or fortunate—set of circumstances bequeathed to us by the war. In these forms the desire for peace, political realism, economic courage and organizational inventiveness have been welded into a dynamic whole which may well be the beginnings of a completely new approach to cooperation between states. The beginnings, and no more. But we should not forget that it is beginnings such as these, based on law and civil liberty, which—despite the admonitions of the ever-present “neo-realists,” whose only articles of faith are power and national self-interest¹⁷⁹—have in the last analysis rendered possible all the progress which has so far been made in improving the structure of international society.

In this light the decision of the European Court of Justice in the *E.N.E.L.* case and the new judicial practice to which it has led may be seen as a bold step along the road of legal development. A *bold* step because, as we have seen, the elaboration of legal concepts has failed to keep pace with events, and the theorists have so far made little attempt to review their concepts in the light of the changed political scene and of the new realities. Consequently, one can hardly expect the arguments of the Court of Justice to find the immediate and general approval of the theorists. We shall have to endeavor to put up with this and to comfort ourselves, if need be, with the thought that Chief Justice Marshall’s famous decision of 1803¹⁸⁰ has still not been accepted by all constitutional lawyers in the United States although it has since become part and parcel of the American Constitution.

179. Josef L. Kunz, the great American international lawyer, wrote in 1953: Contrary to the “neo-realists” of today who would like to persuade us that there is nothing but power, force and national self-interest, . . . the impact exercised by these international organisations . . . may pave the way even for a structural change in the law of nations.

Kunz, *General International Law and the Law of International Organizations*, 47 *AM. J. INT’L L.* 456, 462 (1953).

180. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803).