

RECONCEPTUALISING PUBLIC INTERNATIONAL LAW: CONVERGENCE WITH THE EUROPEAN UNION MODEL?

MICHAEL LONGO*

I INTRODUCTION

Approximately 39 years have passed since the European Court of Justice ('ECJ') ruled in *NV Algemene Transport – en Expeditie Onderneming van Gend en Loos v Nederlandse administratie der Belastingen* ('*Van Gend*')¹ that provisions of the *European Community Treaty* ('*EC Treaty*')² can be directly effective; that is, they can apply in the Member States and be invoked by individuals as a matter of European Community ('EC' or 'Community') law before a national court, without the intervention of national legislatures or governments.³ It has been over 25 years since the ECJ decided in *Van Duyn v*

* BA, LLB (Melb); LLM (Monash). Lecturer, School of Law, Victoria University; Fellow, Contemporary Europe Research Centre, The University of Melbourne. The views expressed in this article are those of the author alone.

1 (C-26/62) [1963] ECR 1.

2 The *Treaty Establishing the European Economic Community*, opened for signature 25 March 1957, 298 UNTS 11 (entered into force 1 January 1958) is also commonly known as the *Treaty of Rome*. The *Treaty on European Union*, opened for signature 7 February 1992, [1992] OJ C 224/1, title II art G (entered into force 1 November 1993) ('*TEU*' or '*Maastricht Treaty*') dropped the word 'Economic' from the title in order to establish a European Community (reflecting the now broader scope of EC activity). This article refers to the consolidated version of the *Treaty Establishing the European Community* [1997] OJ C 340/173 (entered into force 10 November 1997) ('*EC Treaty*') which incorporates amendments effected by the *Single European Act* [1987] OJ L 169/1, the *TEU* and the *Treaty of Amsterdam*, opened for signature 2 October 1997, [1997] OJ C 340/1 (entered into force 1 May 1999).

3 In *Van Gend*, direct effect was taken to mean that Community law (assuming it fulfils certain conditions) gives rights to individuals who are then entitled to invoke such rights before the national courts of the Member States. The ECJ has not drawn a clear distinction between direct effect and direct applicability (ie, that the provision of Community law is incorporated into national law without the need for national legislation) which was also contemplated in *Van Gend*. This article recognises that the ECJ's construction of direct effect contemplates both concepts and their meanings. Thus, both the manner in which Community law is received in the Member States and the individual rights which arise from such laws are encapsulated within the ECJ's broad construction of direct effect. As the capacity of individuals to assert their legal rights in a national court without reference to national laws (direct effect) is the consequence of the direct application of certain Community provisions in national law, the former may be viewed as the consequence of direct applicability. This article will, unless otherwise stated, adopt the broader understanding of direct effect.

*Home Office*⁴ that EC directives can also be directly effective. In the years that have passed, the ECJ has been virtually unswerving in its quest to enhance the position of Community law as compared with national law. While maintaining and consolidating the *acquis communautaire*,⁵ the ECJ has built on its power and prestige so that today it operates as the Community's supreme constitutional court. This article will assume, contentious as it may be, that the EC legal order is as it ought to be; that the legal and constitutional construction of the EC is firmly based; and that the EC legal product emanates entirely from the principles and values encapsulated in the *EC Treaty* which have been correctly construed by the ECJ.

With the 20th century now behind us, it may be appropriate to reappraise the nature and effect of *Van Gend*, one of the ECJ's more formative decisions. The purpose in so doing, however, is not to provide a retrospective analysis of the decision with a view to explaining or justifying the subsequent development of EC law. Nor is the purpose to question whether *Van Gend* or any other decision of the ECJ has compromised the judicial objectivity of the Court, or whether its decisions have been contrary to the words or sentiments of the *EC Treaty*. These issues have been thoroughly and competently explored by eminent writers, most notably Trevor Hartley.⁶

This article has a dual purpose. First, it seeks to contribute to an understanding of the emergence of a distinct European Union ('EU')⁷ legal order as a means, expression or response to the specific internal logic of postwar Europe. Secondly, it attempts to situate the EU in a global context with a view to generating discussion as to whether the EC legal order (or more pertinently the principles upon which it is founded) holds any promise for the wider community. Specifically, the article challenges the conventional view that, because of its unique historical context and distinctive institutional-legal design forged from its own path-dependent logic, the EU is incapable of informing modes of governance elsewhere. To hold such a view is to be distracted by formal institutional dynamics that conceal the relationship between the EU polity and the global polity, and to deny the possibility of cross-fertilisation between the two. If the EU is being shaped by exogenous and endogenous stimuli, processes or forces, there may be scope to examine the EU legal order in relation to developments in the wider world and vice versa. It may then be possible to conceive of the EU as a European response to longstanding internal and emerging external dynamics, with some, albeit limited, export potential.

4 (C-41/74) [1974] ECR 1337.

5 Broader than the concept of Community law, the *acquis communautaire* comprises the whole body of rules, norms, standards, principles, objectives, agreements, declarations, resolutions, opinions and practices concerning the European Community, whether binding in law or not. Community institutions and Member States, including new members, necessarily accept the *acquis communautaire*.

6 Trevor C Hartley, *Constitutional Problems of the European Union* (1999).

7 The term 'EU' was introduced by the *TEU*. The term describes the union of Member States in various contexts, including the geographic, demographic, economic and political contexts, as well as its representation in international affairs. It does not replace the term 'EC' if the context has to do with matters of law relating to the *EC Treaty* or in respect of events predating the entry into force of the *TEU*.

Knud-Erik Jørgensen states that '[t]he import and export of policy styles and modes of governance is evident'.⁸ Accordingly, the EU may provide a reference point for the emerging global polity. The issue of the exportability of the EC method to the global arena has been the subject of considerable debate and analysis. This line of investigation reached its zenith in the 1960s and early 1970s.⁹ It was a favourite quest of neo-functionalists, federalists and other EC enthusiasts. In the 1980s, the topic lost favour among political scientists and lawyers who perceived the EC as a distinctive construct, arising out of strategic choices made in specific contexts. It was viewed as an organic projection of specific European postwar conditions.¹⁰ At the same time, the EC was losing momentum in the face of imperfect economic integration and a widening gap in the implementation of legal instruments. Attention therefore focused on internal rather than external dynamics.

The presence of supranationalism¹¹ in the EC institutional-legal model has proved to be an obstacle to the exportability of the Community method. It has found no application elsewhere in the world. Indeed, other regional orders have 'deliberately avoided'¹² the EC model of institutionalised supranational integration, preferring to restrict their scope to the establishment of free trade zones. However, the Community model of integration remains a reference point for discussion about regional integration.¹³ This has increased with the emergence of a global polity. By its nature, the EU challenges the status quo and invites discussion of how the prevailing norms of international governance might be reconceptualised within a new form of global polity. With the growing role, exposure and influence of international organisations, the EU can make a significant contribution to the idea of what a 'post-national or supranational actor might look like'¹⁴ and suggest directions for further research on 'governance in a globalised era'.¹⁵ However, it is beyond the scope of this article to enter the debate on the legitimacy of governance above the nation-state, or to

8 Knud-Erik Jørgensen, 'Europe: Regional Laboratory for a Global Polity?' (Paper presented at the 2000-01 European Forum Weekly Seminar 'Between Europe and the Nation State', Robert Schuman Centre for Advanced Studies, European University Institute, 23 November 2000) 14.

9 See, eg, Jean Monnet, 'A Ferment of Change' (1962) 1 *Journal of Common Market Studies* 203; James Richardson, 'The Concept of Atlantic Community' (1964) 3 *Journal of Common Market Studies* 1; Friedrich Von Krosigk, 'A Reconsideration of Federalism in the Scope of the Present Discussion on European Integration' (1970) 9 *Journal of Common Market Studies* 197.

10 The 1980s were characterised by initiatives to complete the internal market. Jørgensen, above n 8, 5, observes that the single market program and the resulting expansion of EU regulatory and policy competence can be explained by 'the playing out of the EU's "everyday politics"'. He contrasts this period with the 1960s and the present period where European integration was, and is, often conceived as a stimulus to regional integration.

11 Derek Bowett states that the ability of EC institutions, specifically the Commission of the European Communities ('the Commission'), to make decisions that bind states without the intervention of the states is a hallmark of a supranational authority: Derek Bowett, *The Law of International Institutions* (4th ed, 1982) 211.

12 Jørgensen, above n 8, 5.

13 Ibid.

14 Ibid 9.

15 Ibid 14.

examine the state of the EU's putative constitution and the substantial literature that already exists in respect of both these issues.¹⁶

Although the Monnet method of supranational integration¹⁷ may find no application elsewhere, the emergence of autonomous international law (in limited fields) and significant developments in the area of global human rights foreshadow the rise of an international regime that truly respects fundamental rights. Such a system acknowledges the individual as a subject of international law rather than its object. There is ample scope to examine the ECJ's conception of individual standing and the possible relationships between international law and domestic law. The ECJ's pronouncements on direct effect and the supremacy of EC law over conflicting national laws hint at the principles and values that resonate with the privileging of the individual in the EU. These, incidentally, are the principles and values that are informing current developments in international law, illustrated principally by the establishment of the International Criminal Court. This suggests that international law in the future may be increasingly concerned with transnational or supranational relations, rather than simply interstate or intergovernmental forms of interaction. The capacity of international organisations such as the World Trade Organisation ('WTO') to impose sanctions on errant states forecasts this general trend. Regionalisation and globalisation (processes that are often complementary but sometimes in competition) are strengthening these developments and producing a 'partially internationalised'¹⁸ state, especially (but certainly not exclusively) in the EU. The question arises as to whether it may be possible to predict institutional changes and the adaptation of international law and mechanisms for the preservation of security in the global sphere as a response to a new globalised political economy.

The conditions that gave rise to the specific structural realities in the EU may not be replicated on a global scale in a world of cultural, social, political and economic heterogeneity. Indeed, the complete EU institutional-legal model of

16 Many volumes have been written on the question of governance beyond the nation-state: see, eg, Daniele Archibugi, David Held and Martin Köhler (eds), *Re-Imagining Political Community Studies in Cosmopolitan Democracy* (1998); Charles Sampford and Tom Round (eds), *Beyond the Republic: Meeting the Global Challenges to Constitutionalism* (2001); Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (2000); Michael Th Greven and Louis Pauly (eds) *Democracy Beyond the State? The European Dilemma and the Emerging Global Order* (2000). Similarly, the important issue of the constitutionalisation of the EU regime has been the subject of extensive analysis. See Philip Alston and Joseph Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights' (Jean Monnet Working Paper No 1/99, Harvard Law School, 1999) <<http://www.jeanmonnetprogram.org/papers/99/990101.html>> at 26 April 2002; Christian Joerges, Yves Mény and J H H Weiler (eds), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fisher* (2000) <<http://www.jeanmonnetprogram.org/papers/00/symp.html>> at 9 July 2002; Michael Longo, 'The European Union's Search for a Constitutional Future' (Working Paper No 3/2001, Contemporary Europe Research Centre, The University of Melbourne, 2001).

17 Jean Monnet is regarded as the architect of the EC system. The so-called 'Monnet (Community) method' creates procedures for the adoption of Community legislation pursuant to the activities of three supranational institutions: the Commission, the Council of the EC and the European Parliament (formerly Assembly). The method provides a means to arbitrate between different interests within a framework of joint institutions and cooperative institutional processes.

18 Jørgensen, above n 8, 7.

integration in its entirety will probably never be adopted globally, nor is it necessarily desirable to do so. However, this should not obscure the possibility that aspects of EU integration might be perceived by the international community as providing a solution, albeit partial, to entrenched problems of international law. The international community may one day genuinely and unequivocally desire to improve the effectiveness of international law, and agree to surrender sovereignty to international institutions over a discreet, but expanding, range of issues. This may be prompted by factors such as:

- Threats to global peace or security – whether military, environmental, political or economic. For instance, the primary rationale for EU integration was to eliminate the prospect of war between France and Germany. Such threats demand a concerted response and increased regulatory cooperation.
- Convergence of economic and political interests over time precipitated by globalisation.
- A desire on the part of other regional and perhaps global associations to emulate some of the EU's empirically verifiable outcomes, and its production of different public goods whether economic or social.

By characterising the EC legal order as unprecedented, the ECJ has effectively extricated itself from the traditional understandings of international law¹⁹ that would have constrained the judicial development of EC law. The underlying premise of this contention is that aspects of traditional international law have to be sidestepped if international law is to progress. This article takes this concept one step further by arguing that the principles and norms of international law will have to *change* if it is to progress. It is further argued that globalisation is internationalising the form of the state, rendering it more receptive to the idea of an autonomous international law. At the same time, progress in the field of human rights is complementing the process.

The following discussion explores the different approaches taken by traditional international law and Community law to address questions concerning the relationship between international and national law, with a view to extracting principles that may promote change in the global sphere. Implicit in the claim that international law *will* change is the premise that it *must* change because in certain respects it is deficient or incapable of achieving its objectives. By identifying the underlying weaknesses of the system, this article seeks to inform or forecast possible changes, rather than provide definitive answers. It uses the EU as a point of reference, not because it is perfect or because it presents a model for the international system, but because it is the only entity which has grappled with the idea of post-national sovereignty and found a solution, albeit one which is still imperfect and evolving.

19 Particularly the notion that domestic constitutional law determines the relationship between international and national law.

A International Law and Community Law: Divergent Approaches

It is well established that the application of international treaties within the legal order of a state depends on the rules of domestic law. Domestic constitutional law is therefore instructive in this area.²⁰ International law requires the ratification of treaties at national level, but this does not modify or affect the principle that their application is a matter of domestic law.

If the constitution of a state provides that a treaty may be binding on the state without incorporation into domestic law, it is described as 'monist'. International law and domestic law are viewed as part of a greater unity. An international rule which is agreed to by a monist state – for example, by assent of the legislature – will automatically be considered as part of the law of that state, and be applied by national courts as such. Direct effect is possible in principle²¹ as an international obligation may be invoked before national courts.

In the case of a 'dualist' state, international law and domestic law are completely separate. The direct effect of treaty obligations is not possible. Treaty obligations are usually incorporated into domestic law (assuming that a change in national law is necessary to give effect to an international obligation) by specific acts of legislative transformation. Only then may the rule be invoked before a national court, and it will only apply as part of national law. The international treaty will have been transformed into national law. The constitutions of many states, including the *Australian Constitution*, adopt the dualist approach. Although a monist state permits the application of treaties nationally without incorporation into domestic law, this still occurs pursuant to a rule of domestic constitutional law. As such, the traditional principle is that the application of treaties within states is a matter of domestic law.

Notwithstanding this principle, and despite the fact that the *EC Treaty* did not deal with the relationship between its provisions and national law, the ECJ ruled in *Van Gend* that certain articles of the *EC Treaty* would have direct effect. This is consistent with the monist approach. However, not all EU Member States are monist by constitutional tradition. As far as the ECJ is concerned, the result is that Community law, rather than the domestic law of each Member State, determines whether a treaty provision is directly effective. In *Van Gend*, the ECJ thus departed from the traditional principle. Hartley has suggested that the reasons behind this decision are clear:

If the traditional principle had been applied by the European Court, the result would have been that the effect of the Treaties in the domestic law of the Member States would have varied from State to State. A given provision would have been directly effective in one but not in another; consequently, it would have been easier to enforce in one Member State than in another. Such a situation would have been undesirable; nevertheless, it is the normal situation in international law ... Though undesirable, it would not have prevented the Communities from functioning ...²²

20 Hartley, above n 6, 24–6; Francis G Jacobs, 'Introduction' in Francis G Jacobs and Shelley Roberts (eds), *The Effect of Treaties in Domestic Law* (1987) xxii, xxiv, cited in Hartley, above n 6, 25.

21 Hartley, above n 6, 31 (fn 33).

22 Ibid 25–6.

It is worth noting that in *Van Gend*, Advocate-General Roemer foreshadowed constitutional difficulties within some EC states if direct effect was accorded to the provisions of the *EC Treaty*.²³ Although consistent with the traditional monist-dualist distinction, his cautionary opinion was not followed by the Court.

As indicated earlier, it is beyond the scope of this article to consider whether the ECJ was justified or correct in reaching the decision in *Van Gend* and later similar cases. The fact is that two divergent rules operate internationally: one within mainstream international law, the other not. One (the traditional approach) acknowledges the right of states to determine the question of the application of treaties within the domestic legal order; the other (the *Van Gend* approach) maintains that it is not for states to determine the relationship between *EC Treaty* provisions and domestic law. In the former case, it is possible for treaties to have direct effect if a state adopts a monist approach and prescribes such a result. In the latter, direct effect is the rule rather than the exception, provided that the treaty provisions fulfil certain conditions.²⁴ Community law decides whether a treaty provision is directly effective in the Member States. The traditional approach produces inconsistency in the application of laws and creates a 'hit and miss' regime of enforcement. The *Van Gend* approach is capable of producing laws that are consistently applied and more easily enforced within each Member State's domestic legal order. This rudimentary comparison will be shown to apply equally to international and Community law, as well as explain some of the differences between them.

Although this is clearly well-trodden ground, a brief outline of direct effect as it operates in the EC, and its relationship to the supremacy of Community law, is instructive. The features that distinguish the EC legal order from the international system will be identified with a view to suggesting new possibilities for the future development of international law and generating further discussion of how the international order might be improved.

The intention is not to give a complete picture of direct effect and its reception into the legal systems of the Member States, but rather to give an overview of the position adopted by the ECJ. Certainly, the diversity that characterises the social and political spheres of the Member States is just as pronounced in the legal sphere. Not all of the Member States' national constitutional courts subscribe entirely to the analysis of the ECJ in respect of direct effect. Nor is the ECJ's version of the transfer of sovereignty by the Member States to the EC accepted unconditionally by the courts of Member States, particularly those of Germany and Italy.²⁵ It is not difficult to envisage an amplification of resistance in the

23 (C-26/62) [1963] ECR 1, 16–30, see especially 23–4.

24 That is, they impose clear and precise obligations on the Member States to abstain from something such as an increase in customs duties: *Van Gend* (C-26/62) [1963] ECR 1, 12–13.

25 See, eg, *Internationale Handelsgesellschaft mbH v Einfuhr – Und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540, in which the German Constitutional Court declared that it would check Community rules against the standards of fundamental rights protection set out in the German Constitution. In *Re the Application of Wünsche Handelsgesellschaft* [1987] 3 CMLR 225, the German Constitutional Court ruled that it would no longer subject Community rules to constitutional review in light of the improvements to fundamental rights protection under Community law. In *Brunner v The European Union Treaty* [1994] 1 CMLR 57, the German Constitutional Court, warning the ECJ and the

international sphere, although it is argued that conditions favourable to internationalisation will make the search for a more effective international legal order mandatory. In this environment, the ECJ's jurisprudence may provide an ideational starting point, rather than lead to groundbreaking legal conclusions.

II DIRECT EFFECT UNDER COMMUNITY LAW

The question before the ECJ in *Van Gend* was whether art 25 {formerly art 12}²⁶ of the *EC Treaty* (prohibiting Member States from introducing between themselves any new customs duties or charges having equivalent effect) had direct application in national law. In particular, it was questioned whether nationals of Member States could, on the basis of this article alone, lay claim to rights which the national courts were obliged to protect.

The ECJ affirmed its jurisdiction to interpret art 25{12} of the *EC Treaty* within the broader context of Community law and with reference to its effect on individuals. It stated that:

The objective of the *EEC Treaty*, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting parties. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples ...²⁷

The ECJ confirmed that the nationals of Member States were concerned directly with Community law and concluded that the:

Community constitutes a New Legal Order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals. *Independently of the legislation of Member States*, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes, in a clearly defined way upon individuals as well as upon Member States and upon the institutions of the Community.²⁸

Van Gend affirms that individuals are the subjects of the EC legal order and not merely its objects. This is in contrast to the usual approach in international law in which individuals belonging to a state are commonly recognised as the

political institutions about the excesses of judicial activism, declared that if the EU were to develop in a form other than that envisaged by the Act of accession to the European Union, 'the resultant legislative instruments would not be legally binding within the sphere of German sovereignty': [49]–[99]. Finally, in *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372 the Italian Constitutional Court ruled that it would continue to review the exercise of power by European Economic Community ('EEC') organs to ensure the continuing compatibility of the *EEC Treaty* with the fundamental principles of the Italian constitutional order.

26 The articles in the *EC Treaty* were renumbered by the *Treaty of Amsterdam*, opened for signature 2 October 1997, [1997] OJ C 340/1 (entered into force 1 May 1999). In view of this, the old numbers are inserted in curly brackets after the new ones throughout this article.

27 *Van Gend* (C-26/62) [1963] ECR 1, 12.

28 *Ibid* (emphasis added).

ultimate objects of international law rather than direct subjects thereof.²⁹ It should be noted, however, that this is no longer the exclusive approach in international law. Individuals are increasingly being treated as subjects of international law in the field of human rights.³⁰ The difference between this position and the position under Community law is that provisions of Community law operate as a direct source of individual rights when they are clear, precise and unambiguous. Individuals have rights under Community law as a matter of course.

The effect of *Van Gend* is that individuals, by protecting their rights under Community law, become instruments for enforcing the obligations of Member States under the *EC Treaty*. Before this decision, only the Commission of the European Communities ('the Commission') and Member States were able to bring the matter before the ECJ if a Member State had failed to fulfil an obligation under the *EC Treaty* (arts 226{169}, 227{170} respectively). Direct effect increases the level of enforcement and compliance with Community law, because private individuals can apply to their national court requesting it not to apply provisions of national law that contravene directly effective Community law.³¹ This judicially protected, individual enforcement function has substantially contributed to the effective application of the *EC Treaty*³² and has breathed life into the Community legal system. The doctrine of direct effect, as expounded by the ECJ, may lead to new possibilities for improving the effectiveness of the international legal order.

While the implications for international law of EC jurisprudence relating to the direct effect of *EC Treaty* provisions is evident, a clear picture of direct effect cannot be discerned from *Van Gend* alone. It is also necessary to consider the direct effect of additional *EC Treaty* provisions. Furthermore, as most of the ECJ's rulings on direct effect have concerned secondary legislation emanating from Brussels, it is necessary to consider some of the ECJ's more notable

29 Lassa Oppenheim, *International Law (A Treatise)*, rev H Lauterpacht (first published 1912, 8th ed, 1955) 636–42.

30 See the judgment of the ad hoc International Criminal Tribunal for the former Yugoslavia in *The Prosecutor v Kunarac, Kovac and Vukovic* (2001) (International Criminal Court for the Former Yugoslavia, Judges Mumba, Hunt and Pocar, 22 February 2001, IT-96-23-T and IT-96-23/1-T) <<http://www.un.org/icty/foca/trialc2/judgement/index.htm>> at 7 May 2002. In this case, the rape and sexual enslavement of Muslim girls and women by three Bosnian Serbs in the town of Foca in 1992 was treated as a crime against humanity. Thus, while the ICJ deals exclusively with disputes between states, rather than criminal acts perpetrated by individuals against humanity, the establishment by the UN Security Council of ad hoc Criminal Tribunals for the former Yugoslavia (and Rwanda) indicates a preparedness to prosecute individuals for breaches of international human rights law. A new International Criminal Court to try persons charged with genocide, or other crimes of similar gravity against humanity, has now been established. The *Rome Statute of the International Criminal Court* entered into force on 1 July 2002.

31 Jean-Victor Louis, *The Community Legal Order* (1993) 110.

32 Henry G Schermers, 'Community Law and International Law' (1975) 12 *Common Market Law Review* 77, 89.

judgments in respect of regulations, directives and decisions.³³ These decisions generally confirm direct effect in Community law as the rule, rather than the exception.

III SUPREMACY OF COMMUNITY LAW AND DIRECT EFFECT: COMPLEMENTARY DOCTRINES

The foundations of the doctrine of the supremacy of Community law over inconsistent national law were laid down in *Costa v ENEL* ('Costa').³⁴ In *Costa*, the ECJ pointed out that the national parliaments of the Member States are no longer 'sovereign' over many aspects of commercial and social life. This characteristic of Community law served to set it apart from mainstream international law. Furthermore, it was noted that:

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

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane, and more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.³⁵

The passage is instructive in two major respects. First, it demonstrates the close link between the concepts of 'direct effect' and the 'supremacy of Community law' that follow directly from the 'pooling of sovereignty in a supranational authority'.³⁶ It suggests that the decision in *Van Gend* required the establishment of the principle of supremacy in *Costa* if the new legal order was to succeed. Membership of the EU necessarily brought with it a substantial limitation of

33 See, eg, *Van Duyn v Home Office* [1974] (C-41/74) ECR 1337; *Defrenne v SA Belge de Navigation Aérienne Sabena* (C-43/75) [1976] ECR 455; *Politi v Ministry for Finance of the Italian Republic* (C-43/71) [1971] ECR 1039; *Flli Variola SpA v Amministrazione Italiana delle Finanze* (C-34/73) [1973] ECR 981; *Becker v Finanzamt Münster-Innenstadt* (C-8/81) [1982] ECR 0053; *Francovich v Italy* (C-6/90) and *Bonifaci v Italy* (C-9/90) [1991] ECR I-5357 ('Francovich'); *Marshall v Southampton and South West Hampshire Area Health Authority* (C-271/91) (No 2) [1993] ECR I-4367; *Grad v Finanzamt Traunstein* (C-9/70) [1970] ECR 825.

34 (C-6/64) [1964] ECR 585. In this case, the Giudice Conciliatore di Milano, acceding to a request by Costa, had referred a matter to the ECJ for a preliminary ruling under the *EC Treaty*, [1997] OJ C 340/173, art 234{177} (entered into force 10 November 1997). Italy had, by law and subsequent decrees, nationalised the production and distribution of electricity and created a company (ENEL) to take care of the administration. Costa argued that his interests had been adversely affected by the nationalisation and refused to pay an electricity invoice to ENEL. He denied the validity of the Italian nationalisation law, arguing that it constituted an infringement of the *EC Treaty*. He requested interpretation of various articles of the *EC Treaty*, which he alleged had been infringed by the Italian nationalisation law. The Italian Government and ENEL submitted that the application for a preliminary ruling was inadmissible and that there were no grounds for raising the questions referred, as the Italian court was obliged to apply the national law. The ECJ ruled that the article was to be applied regardless of any domestic law.

35 *Costa* (C-6/64) [1964] ECR 585, 593.

36 Louis, above n 31, 136.

state sovereignty. Neil MacCormick has described the resulting approach to governance as a 'complex interaction of overlapping legalities'.³⁷ Secondly, by contrasting the *EC Treaty* 'with ordinary international treaties', the ECJ is suggesting that its relationship with national law emanates from the character of the 'new legal order' rather than international law.

The ECJ, in *Costa*, then attempted to show that the words and spirit of the *EC Treaty* necessarily implied that it is 'impossible for the States ... to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity'.³⁸ It followed that 'the executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty'.³⁹

Indeed, 'the precedence of Community law' was confirmed by the designation of Community regulations, made under art 249{189} of the *EC Treaty*, as 'binding and directly applicable in all Member States'.⁴⁰ Again, the ECJ stressed the link between 'direct applicability' or effect and supremacy, highlighting the relationship between supremacy and the Community's legislative powers. The ECJ noted that 'this provision [art 249{189}], which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law'.⁴¹ Accordingly

the transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty [carried] with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community [could not] prevail.⁴²

The decisions of the ECJ on the supremacy of Community law in relation to the states are directed at national courts and have a didactic purpose. In *Amministrazione delle Finanze dello Stato v Simmenthal SpA* ('*Simmenthal*')⁴³ the Court ruled that:

A national court which is called upon within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the Court to request or await the prior setting aside of such provisions by legislative or other constitutional means.⁴⁴

The supremacy of Community law is a rule applicable to the national courts by virtue of the inherent nature of EC law. On this analysis, there is no need to refer to written or unwritten constitutional rules governing the relationship between Community and domestic law.

37 Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1, 16.

38 (C-6/64) [1964] ECR 585, 594.

39 *Ibid.*

40 *Ibid.*

41 *Ibid.*

42 *Ibid.*

43 (C-106/77) [1978] ECR 629.

44 *Ibid.* 645.

Understandably, the ECJ has urged Member States to accept this monist interpretation of the absolute supremacy of directly effective Community law over national law, and even over fundamental rules of national constitutional law.⁴⁵ However, not all the national superior courts have accepted this view on the ECJ's terms. Some Member States have expressed reservations as to the supremacy of Community law over national constitutional provisions.⁴⁶ Yet they have generally recognised the supremacy of Community law either by special constitutional provisions (as in Germany, Italy and France) or an act of Parliament (as in the United Kingdom ('UK')).⁴⁷ In doing so, they have affirmed their authority to decide the issue in accordance with 'domestic legal processes and legal theory'.⁴⁸ In any event, *R v Secretary of State for Transport; Ex parte Factortame (No 1)*⁴⁹ has recently affirmed that the supremacy of EC law is a fact of life in the EU.

However it may be explained or justified, the doctrine of supremacy of EC law over domestic law represents a successful realignment of the relationship between international and national law. Accordingly, it demands attention as a possible paradigm of transnational or supranational-national relations.

IV ENFORCEMENT: LEGAL ORDERS COMPARED

The ECJ has added to the underdeveloped enforcement mechanisms provided for in the *EC Treaty* by its rulings on direct effect, indirect effect⁵⁰ and state liability in damages.⁵¹ As noted above, individuals are able to enforce EC law

45 The question of whether EC law takes precedence over national constitutions is a controversial matter. In *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] (C-11/70) ECR 1125, 1134 the ECJ stated that 'the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure'. Thus, neither can be invoked to challenge a directly effective Community law.

46 Such as Germany and Italy: see above n 25.

47 *European Communities Act 1972* (UK).

48 Paul Craig and Gráinne de Búrca, *EU Law Text, Cases and Materials* (2nd ed, 1998) 281.

49 (C-213/89) [1990] ECR I-2433. The case confirms that any Act of the British Parliament passed since Britain joined the Community in 1973 must be read as subject to directly enforceable rights under Community law.

50 Even where a directive does not have direct effect, national courts are still required to interpret national laws adopted to implement it in conformity with the wording and purpose of the directive. Thus the ECJ has developed the concept of 'indirect effect' to ensure the better implementation of directives not having direct effect. *Von Colson and Kamann v Land Nordrhein-Westfalen* (C-14/83) [1984] ECR 1891 dealt with the provisions of a national law introduced to implement *Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions* [1976] OJ L 39/40. The ECJ ruled that in applying national laws, national courts are required to give an interpretation which best achieves the result referred to in the *EC Treaty*, [1997] OJ C 340/173, 249[189] para 3 (entered into force 10 November 1997) - a 'directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'.

51 *Francovich* (C-6/90), (C-9/90) [1991] ECR I-5357.

within their national courts. Consequently, the extent to which EC law infiltrates domestic law is exceptional, as is the degree of enforcement.

A A Sui Generis Legal Order?

Van Gend and subsequent decisions have distinguished the EU as a bold experiment. Some have referred to it as sui generis or unique. This has attracted criticism from political scientists⁵² and legal analysts⁵³ who see this description as inhibiting appropriate and possibly enlightening comparison with other units of organisation.⁵⁴

While it is commonly acknowledged that the Community legal order emanates from the international order, there are sufficient differences to justify the conclusion that the Community constitutes a separate legal system that may be contrasted with traditional public international law in terms of institutional structures and outcomes.⁵⁵ However, the view so often expressed by the ECJ – that *EC Treaty* provisions are not conditional upon national measures of implementation and prevail even in the face of inconsistent national legislation – does not strictly represent a unique contribution to jurisprudence, as noted by Derrick Wyatt.⁵⁶ This principle is also well established in public international law. Article 27 of the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*')⁵⁷ states that a 'party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. The principle is also illustrated in the *Treatment of Polish Nationals in Danzig (Advisory Opinion)*⁵⁸ of the Permanent Court of International Justice ('PCIJ'). In this case, the PCIJ declared that 'a State cannot adduce as against another State its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force'.⁵⁹ Despite the similarities, the differences in approach and outcome between the two systems are nonetheless marked.

Supranational law cannot be supreme over domestic law unless it is received within domestic law and enforced by public or private action. The unparalleled theoretical basis for supremacy of Community law over conflicting national law was initiated by *Van Gend* and developed in *Costa*. There is a firm connection between direct effect, supremacy and the strengthening of the Community order.

52 Alberta Sbragia, 'Introduction' in Alberta Sbragia (ed), *Euro-Politics: Institutions and Policy-Making in the 'New' European Community* (1992) 1, 12–13.

53 Derrick Wyatt, 'New Legal Order, or Old?' (1982) 7 *European Law Review* 147.

54 As long as the designation of the Community legal order as sui generis does not impede rigorous analysis and comparison with other systems, the term may be considered inoffensive. Even accepting the sui generis nature of the polity and legal system of the EU, the pertinent inquiry must surely be: can it be reproduced to any significant degree at a broader international level? If so, can it help to make international law more effective by qualifying the reliance of international law on domestic acceptance and implementation?

55 Michael Longo, 'The European Union: A "Ferment of Change" in the World' (1998) 7 *Griffith Law Review* 124, 127.

56 Wyatt, above n 53.

57 Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

58 [1932] PCIJ (ser A/B) No 44.

59 Ibid 24.

The combined effect of these factors is unique. Individuals assert and seek protection of their Community law rights in actions before their national courts even in the face of conflicting national law. A national court of a Member State is required to enforce directly applicable Community law upon application by aggrieved individuals, as a matter of *Community law*, irrespective of whether specific constitutional laws accord primacy to international treaties over national law.

By drawing on the idea of effectiveness in constructing the doctrines of direct effect and supremacy, the ECJ laid the foundation for an effective and efficient system of enforcement. There would be no point obtaining agreement on the broad aims and objectives of the *EC Treaty* if there was no means of ensuring that the Member States complied in practice with the provisions. Hence, unlike international law in its present form, the enforcement of a provision of Community law may be achieved a number of ways: directly (by the ECJ) or indirectly (in the national courts); by public action (by the state or an organ of the state) or by private action (by a natural or legal person). Unlike international law, Community law is directly effective if it imposes clear, precise and unambiguous obligations on the Member States. It does not suffer from differing national constitutional approaches to direct effect that compromise uniformity and consistency. Therefore, the ECJ has correctly stressed the unique legal character of Community law, against which the weaker international legal order may be contrasted.⁶⁰

B Failings of International Law

Pierre Pescatore has persuasively argued that international law 'represents a state of legal relationships that is too little developed to provide a useful basis for the solution of ... complex problems' of interdependence.⁶¹ Foremost among its weaknesses are the absence of mandatory jurisdiction in the International Court of Justice ('ICJ')⁶² and the lack of effective mechanisms ensuring enforcement of its decisions.⁶³ Other identified weaknesses include its

60 Longo, above n 55, 128.

61 Pierre Pescatore, 'International Law and Community Law: A Comparative Analysis' (1970) 7 *Common Market Law Review* 167, 168.

62 The ICJ can only contribute to the development of international law if it is given the opportunity to do so. There is a scarcity of judicial pronouncements in international law. Article 36 of the *Statute of the International Court of Justice* sets out the principal means by which a state can submit to the ICJ's jurisdiction as follows:

- (1) by states referring any matter to the court;
- (2) on all matters specially provided for in the UN Charter or in treaties in force; or
- (3) by states declaring that they expressly recognise the court's jurisdiction.

63 The ICJ cannot enforce its own judgments and has to rely upon the good faith of states to uphold its authority. Article 94 of the *Charter of the United Nations* ('UN Charter') states that its members undertake to comply with the decision of the ICJ in any case to which they are a party (the decision is binding between the parties – an arrangement confirmed by the *ICJ Statute* art 59). Non-compliance constitutes violation of the *UN Charter*, which permits the other party to seek recourse to the Security Council. The Security Council may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment. Only a Security Council decision will be binding and failure to comply therewith may, in certain circumstances, give rise to enforcement measures under the

dependence on the consent of individual states,⁶⁴ the weakness of its law-making system⁶⁵ and a less than effective political apparatus (issues that are not the principal concern of this article).

The fundamental principles of the law of treaties, found in art 26 of the *Vienna Convention*, are that a treaty is binding upon the parties to it and that obligations under it must be performed in good faith. Inevitably, the legal principle of good faith is occasionally violated, giving rise to an enforcement quandary. The international system is characterised by the weakness of the international enforcement strategies available to it. This makes it necessary for the system to attain rule-compliance through a variety of non-coercive means.⁶⁶

The fact that compliance occurs regularly without police-like enforcement suggests that the international regime exercises issue-specific international dominion, obviating the need for a radical overhaul of the system. By reinforcing the importance of specific legal principles in the international legal sphere consistently and authoritatively, through its judgments and advisory opinions, the ICJ may be seen to encourage adherence of the law. While the didactic techniques directed at the promotion and the gradual strengthening of the international rule of law are important and necessary, they do not always provide solutions to the resolution of disputes once they arise. The virtually voluntary nature of compliance with judicial decisions and opinions, necessitated and encouraged by this state of affairs, presupposes either a matching of expectations and interests as between state and supranational actors or the success of politics and the rule of law over divergent interests. Neither can be guaranteed in the real world. Thus, while it is acknowledged that police-like enforcement (including institutionalised supervision) is only one means by which power may be exercised, and that it is not free of negative overtones, it would nonetheless be an important addition to the international legal arsenal. Clearly, this discussion cannot be isolated from broader questions regarding the legitimacy of governing structures⁶⁷ and the enforcement mechanisms available to them, although these questions are beyond the scope of this article.

International law is potentially open to sabotage as it almost completely defers to domestic enforcement and is consensual in nature. The ECJ has laid down the foundations of a very different edifice. As already observed, it has deliberately and methodically constructed an effective legal order through its case law which

UN Charter arts 39, 41, 42. Enforcement measures are, however, subject to the veto power of the permanent members. Thus, action will only be taken in cases in which the permanent members can agree to force compliance with the ICJ's judgment. Ultimately, enforcement cannot be disassociated from politics.

64 See especially Pescatore, above n 61, 170.

65 A real legislative process is absent from the system, which has to rely instead on 'a clumsy and ineffectual apparatus of negotiated treaties': *ibid.*

66 Jens Steffek, 'The Power of Rational Discourse and the Legitimacy of International Governance' (Working Paper No RSC 2000/46, European University Institute, 2000), 9 <http://www.iue.it/RSC/WP-Texts/00_46.pdf> at 9 June 2002.

67 See, eg, Michael Th Greven, 'Can the European Union Finally Become a Democracy?' in Michael Th Greven and Louis W Pauly (eds), *Democracy Beyond the State? The European Dilemma and the Emerging Global Order* (2000) 35.

affirms that the *EC Treaty* system is policed by individuals together with the Commission and Member States. In addition to its rulings on direct effect and supremacy, the Court has made further landmark rulings aimed at ensuring the practical effectiveness of Community law.

The judgment in *Francovich v Italy*; *Bonifaci v Italy* ('*Francovich*')⁶⁸ established that the principle of state liability for harm caused to individuals by breaches of Community law was inherent in the *EC Treaty* system. Compensation was to be provided to the applicants for Italy's failure to implement a directive of the EC intended to guarantee employees a minimum level of protection in the event of the insolvency of their employer. This was a matter of Community law – it was no longer up to the national court to decide the remedy. The foundation for the obligation of a Member State to pay compensation to individuals adversely affected by its breaches of Community law was found in art 10{5} of the *EC Treaty*, under which the Member States are required to 'take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty'. This provision may be compared in intent with the 'good faith' provisions in arts 26 and 31(1) of the *Vienna Convention*. It is also comparable with art 94 of the *United Nations Charter* ('*UN Charter*'), which requires state compliance with any decision of the ICJ to which the state is a party.

The teleological approach taken by the ECJ in *Francovich* (among many other cases) to the interpretation of the *EC Treaty* is not unique. The ICJ has also shown a marked preference for effective construction of the *UN Charter* and has embraced the teleological and *effet utile* techniques favoured by the ECJ,⁶⁹ giving further scope for the parallel development of international law. A teleological approach, while essential for the further judicial development of public international law, clearly will not produce a satisfactory result on its own. There are additional features which have contributed to the dynamic development of Community law.

C The EU: An Advanced Form of Legal Integration with Multiple Means of Enforcement

The EC model features an advanced degree of integration and willing cooperation between national and supranational legal orders, as demonstrated by the preliminary ruling procedure set out in art 234{177} of the *EC Treaty*. This is partly attributable to the ECJ's rulings on direct effect and supremacy, since the new legal order demands a high degree of cooperation between national and supranational institutions to give effect to its innovations. Cooperation is rarely, if ever, withheld. Even where a procedure appears to rely exclusively on the support and cooperation of national courts, as with the preliminary ruling

⁶⁸ (C-6/90), (C-9/90) [1991] ECR I-5357.

⁶⁹ See, eg, Wyatt, above n 53; Anna Bredimas, *Methods of Interpretation and Community Law* (1978) 23. Bredimas cites *The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion) [1970] ICJ Rep 16 as an example of the ICJ's commitment to a teleological approach.

procedure, the frequency with which it is employed confirms and reinforces its effectiveness.⁷⁰

While the enforcement of Community law is usually before the national courts, the *EC Treaty* provides for the enforcement of Community law by judicial review before the ECJ. These judicial remedies are predominantly found in arts 226{169}, 227{170} (which concern actions against Member States) and 228{171} (which provides, on the instigation of the Commission, for the imposition of penalties if a Member State fails to comply with a judgment of the ECJ). The *EC Treaty* also authorises Member States, EC institutions and sometimes individuals to seek judicial review of acts and omissions of EC institutions⁷¹ although access by individuals is limited.⁷² Unlike international law,⁷³ Community law does not allow a party that has been injured by the failure of another party to perform its obligations, to withhold performance of its own. This was confirmed in *Commission of the European Economic Community v Luxembourg and Belgium*.⁷⁴ In *Commission of the European Communities v United Kingdom*⁷⁵ the ECJ stated that the *EC Treaty* prevents Member States from 'acting as judges in their own cause'.⁷⁶ The *EC Treaty* requires that the Member States 'shall not take the law into their own hands'.⁷⁷ The treaty-based mechanisms available to the ECJ to enforce Community law against Member States or Community institutions may not be comprehensive. However, the protection of individuals' Community rights before their national courts, secured by the rulings of the ECJ, has significantly augmented the enforcement of Community law.

70 References to the *EC Treaty*, [1997] OJ C 340/173, art 234{177} (entered into force 10 November 1997) have provided the ECJ with around half of the total number of cases and have provided the means for developing core areas of Community law, including direct effect and supremacy of Community law over national law. See Mads Andenas, *Article 177 References to the European Court Policy and Practice* (1994) 3.

71 The provision in the *EC Treaty*, [1997] OJ C 340/173, art 230 {173} (entered into force 10 November 1997) should not be confused with the rights given to individuals to take action for non-compliance with Community law in a national court, the consequence of direct effect. In addition, see arts 232{175}, 241{184}, 235{178}, 288{215}.

72 It is apparent from the restrictive wording of the *EC Treaty*, [1997] OJ C 340/173, art 230{173} para 4 (entered into force 10 November 1997) that judicial review by individual applicants is quite limited. Natural or legal persons are able to:

[I]nstitute proceedings [generally within two months of publication of the measure or of its notification to the plaintiff] against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The ECJ's rulings in this area have tended to confirm the restrictive criteria regarding standing (see *Plaumann & Co v Commission of the European Economic Community* (C-25/62) [1963] ECR 95). More recently the Court in *Codorniu SA v Council of the European Union* (C-309/89) [1994] ECR I-1853 demonstrated greater receptiveness to the idea of a wider principle of individual standing before the ECJ.

73 See *Vienna Convention*, opened for signature 23 May 1969, 1155 UNTS 331, art 60 (entered into force 27 January 1980).

74 (C-90/63) [1964] ECR 625.

75 (C-31/77) [1977] ECR 921.

76 *Ibid* 924.

77 *Commission of the European Economic Community v Luxembourg and Belgium* (C-90/63) [1964] ECR 625, 631.

In contrast, international law is characterised by the absence of adequate judicial control to effectively enforce rules of law against offending states. Importantly, the absence of mandatory international judicial control may encourage governments to accept international obligations which they will probably not fulfil.⁷⁸ The resulting gap in implementation cannot be dissociated from enforcement. This is not to say that the EU possesses an impeccable record of implementation. However, in the EU a failure to comply with Community law will be dealt with before the ECJ (pursuant either to judicial review or under the procedure contained in art 234{177} of the *EC Treaty*), or before the national courts on application from individuals seeking to enforce their Community rights. The latter is the legacy of direct effect.

V INTERNATIONAL REFORM: FACT OR FICTION?

The shortcomings of an international legal order underscored by the persistence of national sovereignty, and an emphasis on the consent of individual states, have not escaped the notice of eminent international jurists⁷⁹ and members of the ICJ. In his dissenting opinion on the *International Status of South West Africa (Advisory Opinion)*⁸⁰ in 1950, Judge Alvarez urged the ICJ to be open to new trends. Speaking of the 'new international law' of social interdependence, he called for the progressive development of international law to emphasise 'the obligations of States not only between themselves, but also toward the international community'.⁸¹ He observed somewhat prematurely that 'the new law is in formation: it is for the International Court of Justice to develop it by its judgments or its advisory opinions, and in laying down valuable precedents. The theories of jurists must also share in the development of this law'.⁸²

His humanistic assertion that interdependence between states had advanced to a point where a 'universal global community perspective could be said to exist as an empirical matter'⁸³ was generally viewed as well-intended but naive.⁸⁴ Subsequent realities, including the reluctance of states to submit to the jurisdiction of the ICJ, the persistence of nationalistic sentiment and the virtually static nature of international relations during the Cold War, confirmed Alvarez's assessment as idealistic. Nonetheless, the convergence of interests between supranational and state actors (a product of increasing interdependence) appears to be pulling states towards the widespread internationalisation of governance.

78 Schermers, above n 32, 78.

79 See, eg, Sir Ninian Stephen, 'The Growth of International Environmental Law' (1991) 8 *Environmental and Planning Law Journal* 183.

80 [1950] ICJ Rep 128.

81 Ibid 176.

82 Ibid.

83 Richard Falk, *Reviving the World Court* (1986) 183.

84 Ibid 184.

A The Impact of Globalisation

The process of globalisation has a single justification. Nation-states are unable to attain desired outcomes through independent action. Globalisation provides external pressure to integrate and counters the desire of nation-states to remain sovereign. Much has been written about the exportability of the EU model and whether the global polity can benefit from research on European integration.⁸⁵ The prospect of superimposing the European experience on other societies with diverse cultures, histories and institutions (a new global 'colonisation') is highly unlikely and sociologically abhorrent. However, analysts are now contemplating the EU multi-level governance ('MLG') structures as 'less EU-specific'⁸⁶ than first imagined. This raises the possibility of analogous development in the international sphere. Gary Marks et al describe MLG in the following terms:

The point of departure for this multi-level governance (MLG) approach is the existence of overlapping competencies among multiple levels of governments and the interaction of political actors across those levels. Member state executives, while powerful, are only one set among a variety of actors in the European polity. States are not an exclusive link between domestic politics and intergovernmental bargaining in the EU. Instead of the two level game assumptions adopted by state centrists, MLG theorists posit a set of overarching, multi-level policy networks. The structure of political control is variable, not constant, across policy areas.⁸⁷

On one hand, MLG is viewed as a hallmark of the EU polity and described 'as a metaphor for the non-state-centric, multi-actor and rather fluid system of governance characterised by multiple loci of public and private authority currently evolving in Europe'.⁸⁸ However, this description 'draws on a ... pluralistic and organisational conception of the state'⁸⁹ inviting comparison with the modern state beyond the EU in the context of globalisation. Questions arise as to whether globalisation is a parallel process to European integration or whether European integration is one illustration, among many, of globalisation. Francis Snyder conceptualises Europeanisation (the process by which EU rules, norms and practices are incorporated into the domestic systems of Member States) and globalisation as 'complementary, partly overlapping, mutually reinforcing, but also competing processes'.⁹⁰ Considering the impact of globalisation on Europeanisation, Snyder notes that the 'impact and implications of globalisation [are] exemplified by economic and monetary union'.⁹¹

As frequently noted, globalisation has wide-ranging legal, political, economic, social and cultural dimensions. Whatever globalisation may mean and whatever

85 Recent works include: Longo, above n 55; Jørgensen, above n 8.

86 Jørgensen, above n 8, 7.

87 Gary Marks et al, 'Competencies, Cracks and Conflicts: Regional Mobilization in the European Union' in Gary Marks et al (eds), *Governance in the European Union* (1996) 40, 41.

88 Jørgensen, above n 8, 7.

89 Ibid.

90 Francis Snyder, 'Globalisation and Europeanisation as Friends and Rivals: European Union Law in Global Economic Networks' (Working Paper No Law 99/8, European University Institute, 1999) 4, <http://www.iue.it/LAW/WP-Texts/law99_8.pdf> at 9 July 2002.

91 Ibid 57-8.

its effects,⁹² it promotes interdependence between worldwide networks over the full range of public and personal relations. Globalisation disperses power between various governmental and non-governmental actors, shifts the locus and changes the nature of decision-making and government. Accordingly, there is an emerging view that governance in the future will not predominantly be the product of traditional nation-state institutions.⁹³ Consequently, globalisation is likely to render the issue of nation-state sovereignty and its retention redundant, as states increasingly withdraw from traditional sites of decision-making, or at least share them with other actors. Such a development would provide an opportunity to reconceptualise governance in previously unimagined ways. Jan Zielonka suggests that:

[G]lobalisation has eroded the capacity of any integrated political unit to maintain a discrete political, cultural or economic space within its administrative boundary. Economic sovereignty, in particular, has been eroded by massive international labour and capital flows that constrain individual abilities of governments to defend the economic interests of their units. Territorial defence along border lines has been made largely obsolete by modern weapons technology. Migration and other forms of cross-border movements are on the rise, despite all the efforts of border guards and surveillance technology to seal the frontiers. Normative models and cultural habits are spreading via satellite television and the internet in a largely uncontrolled manner. Both the Union and its Member States are losing control over the legal and administrative regimes within their respective borders because they are increasingly being defined by supranational bodies such as the WTO.⁹⁴

92 It is generally accepted that globalisation puts states in competition with each other for investment capital. States attract capital by providing the most attractive inducements, which often take the form of low taxes and limited governmental intervention in the market place. While the process of globalisation is said to generate wealth, opinion is divided as to its economic and sociological merit and its value as a normative model.

93 See, eg: Archibugi, Held and Köhler (eds), above n 16; Anne-Marie Slaughter, 'Government Networks: the Heart of the Liberal Democratic Order' in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (2000) 199.

94 Jan Zielonka, 'Enlargement and the Finality of European Integration' in Christian Joerges, Yves Mény and J H H Weiler (eds), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fisher* (2000) 151, 160 <<http://www.jeanmonnetprogram.org/papers/00/symp.html>> at 9 July 2002. There is a growing body of literature addressing the evolving WTO system and the applicability of its rulings within domestic legal orders and the EC legal order itself. Legal analysts have detected 'a degree of convergence' or at least 'some degree of mutual influence' between the EC and the WTO, which is perhaps not surprising given that both organisations were 'established primarily to promote trade between states'. Greater convergence is envisaged as the WTO appellate body 'begins to develop its jurisprudence through the disputes coming before it': see Gráinne de Búrca and Joanne Scott, 'The Impact of the WTO on EU Decision-Making' (Jean Monnet Working Paper 6/00, Harvard Law School, 2000) 2–3, <<http://www.jeanmonnetprogram.org/papers/00/000601.html>> at 9 July 2002. Without engaging in a detailed analysis of the question of the spill-over of WTO law to the EC legal order, it is worth noting that certain EC directives have been amended to make specific legislative provisions WTO compliant. For instance, *Council Directive 76/768/EEC on the Approximation of the Laws of the Member States Relating to Cosmetic Products* [1976] OJ L 262/169 has been amended numerous times for this purpose. This highlights the growing potential for global organisations to influence domestic (and in the case of the EU, regional) legal systems and supports the Snyder conception of Europeanisation and globalisation as complementary, mutually reinforcing, though perhaps also competing, processes: see Snyder, above n 90.

Zielonka concludes that 'the instruments of a Westphalian type state are no longer available to contemporary territorial units'.⁹⁵ Globalisation may be seen as presenting a threat to the continuation of the concept of the 'sovereign' nation-state to the extent that governmental authority is eroded in matters of administration and replaced by external forms. The notion of undiluted sovereignty in the Westphalian sense⁹⁶ has passed its use-by date, leading some to question whether it is still a requirement of governance.⁹⁷ At the same time, the meaning of sovereignty itself is undergoing a semantic shift from 'state-based sovereignty' to a 'human rights-based conception of popular sovereignty'.⁹⁸ As W Michael Reisman states, '[i]n modern international law, what counts is the sovereignty of the people and not a metaphysical abstraction called the State'.⁹⁹ If it is accepted that 'only highly diversified and pluralistic societies acting in a complex web of institutional arrangements are able to succeed in conditions of modern competition,'¹⁰⁰ then a multi-layered, pluralistic polity, with a sophisticated understanding of complex, interactive decision-making, and in which sovereignty is pooled, has a distinct advantage over other units of governmental organisation. Equally, it has been observed that the same circumstances that fuel globalisation also encourage the development of a common enforcement approach between nations.¹⁰¹ The search for new perspectives of governance detached from statehood, often thought of as elective and somewhat radical, acquires a new compelling force in light of the seemingly irresistible pull of globalisation. The search for this perspective is ultimately not a separate discourse from the quest to find a more effective legal order.

B Advancing Supranationality Through Direct Effect, Human Rights and Democracy

Individual empowerment may be seen as a stop on the route towards the protection of human rights. The ECJ's construction of direct effect in *Van Gend* (which entrusts the supervision of Community law to the individual) is the constitutional and administrative law equivalent of self-rule and fundamental rights in international law. This 'new legal order' (in which individual participation or empowerment is the key to the effectiveness of the legal and constitutional regimes) transcends perhaps more than any other notion in Community law, the jurisdictional boundaries of the EU. The novelty of this approach, and thus its applicability at a broader level, is that it qualifies, if not

95 Zielonka, above n 94, 160.

96 The concept of the sovereign nation-state was legally recognised by the *Treaty of Westphalia* (signed 24 October 1648), the Peace Treaty between the Holy Roman Emperor and the King of France and their respective allies. It was concluded at Munster in Westphalia. More information can be obtained at *The Avalon Project: Treaty of Westphalia*, Yale Law School, <<http://www.yale.edu/lawweb/avalon/westphal.htm>> at 13 August 2002.

97 See, eg, MacCormick, above n 37.

98 W Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (2000) 239, 244.

99 Ibid 252.

100 Zielonka, above n 94, 161.

101 Slaughter, above n 93, 217.

severs, the reliance of international law on domestic acceptance and implementation. Therefore, individual empowerment through the medium of direct effect invites discussion on how the individual's interests might be reconceptualised, protected or enhanced within a global framework.

The substance of 'fundamental rights' encompasses, but also expands upon, the 'inalienable rights' of the individual. This concept is central to the theory of natural law championed by John Locke,¹⁰² which has been progressively entrenched in international law throughout the second half of the 20th century. The relevance of this theory to the ECJ's jurisprudence in establishing 'direct effect' as the 'law of the land'¹⁰³ should not be underestimated. Direct effect is founded on the same values of participation and liberalism that underpin democracy. The furtherance of human rights, democracy and the 'normative status of a democratic entitlement'¹⁰⁴ has been the subject of vigorous debate in the public sphere for some time.¹⁰⁵ Thomas Franck states that the 'symbiotic linkage among democracy, human rights and peace is now widely recognised'.¹⁰⁶ This leads him to the conclusion that democracy is emerging as a global normative entitlement 'with national governance validated by international standards and systematic monitoring of compliance'.¹⁰⁷ Even if they are not yet practised or pursued universally, human rights and democracy are increasingly viewed as mutually supportive 'international standards'.¹⁰⁸ Arguably, direct effect is an important means by which human rights and democracy can be advanced in the international arena. Progress in these areas will, in turn, lead to the entrenchment of direct effect in international jurisprudence as it becomes increasingly evident that challenges by individuals (or groups representing individuals) are a potent means of drawing attention to alleged breaches of human rights and ultimately of securing compliance with international instruments. There has already been significant development in the concept of

102 The theory assumed that certain rights inhered in every individual, such as religious freedom, freedom of speech, freedom to acquire property and freedom against unfair criminal procedures. Governments were incapable of taking them away since the rights were derived from elsewhere. The theory postulated that governments had to be organised in such a way as to effectively protect the individual's rights. This was to be achieved largely through the separation of legislative, executive and judicial functions. See John Locke, *Two Treatises of Government* (first published 1690, 1988 ed).

103 Joseph Weiler, 'Epilogue Fischer: The Dark Side' in Christian Joerges, Yves Mény and J H H Weiler (eds), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fisher* (2000) 235, 239, <http://www.jeanmonnetprogram.org/papers/00/symp.html> at 9 July 2002.

104 Gregory Fox and Georg Nolte, 'Intolerant Democracies' in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (2000) 389, 390.

105 Ibid; Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46; Reisman, above n 99; James Crawford, 'Democracy and the Body of International Law' in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (2000) 91; Susan Marks, 'International Law, Democracy and the End of History' in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (2000) 532; Brad Roth, *Governmental Illegitimacy in International Law* (2000).

106 Franck, above n 105, 89.

107 Ibid 91.

108 Tom Round and Charles Sampford, 'Introduction: Globalisation and Constitutionalism' in Charles Sampford and Tom Round (eds), *Beyond the Republic: Meeting the Global Challenges to Constitutionalism* (2001) 1, 2.

the individual as a subject of international law, most notably in individual complaint mechanisms contained in United Nations human rights treaties including the *Optional Protocol to the International Covenant on Civil and Political Rights* ('*Optional Protocol*').¹⁰⁹ This forecasts the increasing relevance and applicability of the EU's emblematic principle of direct effect to the emerging global polity.

VI PROSPECTS AND DIRECTIONS

Direct effect in international law is a pale version of its EU counterpart. It is subject to domestic constitutional norms and becomes relevant only when specific treaties confer direct effect (in the sense that their provisions regulate the rights of individuals) or impose clearly defined obligations capable of direct implementation. Nevertheless, the recognition given to the concept at international law (however limited) and the internationalisation of the state (most evident in the EU) foreshadows the possibility of employing a broader European approach in international law.¹¹⁰ Direct effect increases the level of enforcement and compliance with Community law by granting private parties the right to bring an offending state, or sometimes another individual or legal person, before national courts and to request that courts do not apply domestic laws that contravene directly effective Community laws. Accordingly, the doctrine of direct effect, and the empowerment of the individual that flows from it, provides the basis for debate on how public international law might overcome its problems with enforcement and consensual jurisdiction.¹¹¹

If it becomes accepted that the EC version of direct effect should be considered by the international community with a view to assimilating its

109 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Under the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'), specific rights are prescribed to freedom of thought, conscience and religion, expression and association: arts 18, 19(2), 22. It establishes rights of political participation and an entitlement to equal protection of the law: arts 25, 26. The United Nations Human Rights Committee was established under art 28 of the *ICCPR* to study reports submitted by parties to the *ICCPR* (art 40) and to receive and consider communications in accordance with arts 41, 42. It has 'repeatedly found that States have a duty to investigate and prosecute those committing disappearances, summary executions, ill-treatment, and arbitrary arrest and detention' notwithstanding the absence of a specific treaty-based duty to prosecute and punish abusers of human rights: see Steven Ratner, 'Democracy and Accountability: The Criss-Crossing Paths of Two Emerging Norms' in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (2000) 449, 462. Relevantly, the UN Human Rights Committee considers individual communications under the *Optional Protocol* (only when the state party to the *ICCPR* also becomes a party to the *Optional Protocol*, thereby enabling its citizens to bring individual petitions) involving alleged violations of any of the rights set forth in the *ICCPR*. For instance, in *Mpaka-Nsusu v Zaire* (*Communication No 157/1983*) (1986) 94 ILR 411 the UN Human Rights Committee ruled that Zaire had violated the political rights set out in art 25 of the *ICCPR* by denying the petitioner the right to run for President, notwithstanding his entitlement to do so under Zairian law. The views of the UN Human Rights Committee are not legally binding on states, although most will attempt to comply.

110 Longo, above n 55.

111 Ibid 138.

characteristics within international law and practice, the question arises: how might this be done? Direct effect and supremacy have no foundation in the *UN Charter*. However, this is not critical.¹¹² The *EC Treaty* does not specifically refer to direct effect or supremacy either.¹¹³ Nonetheless, it may be argued that the concepts are embodied in the provisions of the *EC Treaty* in the sense that the objectives that it seeks to achieve cannot be realised in the absence of direct effect and supremacy. Both are products of the ECJ's creativity. The answer to this question may therefore lie, partially, in future judicial pronouncements of the ICJ. Article 38(d) of the *Statute of the International Court of Justice* identifies judicial decisions and the teachings of the most highly qualified publicists as a source of international law. This invites the possibility of further juridical development of international law along the lines envisaged by Judge Alvarez in the *International Status of South West Africa (Advisory Opinion)*.¹¹⁴ However, on its own this would not increase the effectiveness of international law, given the consensual jurisdiction of the ICJ and its inability to enforce its own decisions.¹¹⁵ Substantive institutional changes are therefore required.

The forces, principles and processes currently giving shape to a new international discourse — globalisation, human rights and democracy — are neither complete nor fully understood. It follows that the substantive issue of international reform is open-ended and will remain so for some time yet. However, recognition of this fact should not stymie debate on possible directions or foil attempts to give focus to current developments.

A Fundamental Principles of an Alternative International Legal Order

It has been argued in this article that greater interdependence between states will lead to increased international governance, as they are encouraged to surrender further sovereignty on matters that are best dealt with at the international level. At present, it is taken for granted that issues such as environmental protection, human rights, trade and developmental aid are within the legitimate scope of international governance. Of course, international governance is not limited to these issues. International treaties cover matters as varied as conditions of employment and international travel.¹¹⁶ Their effectiveness may, however, be challenged by inadequate domestic implementation and enforcement mechanisms, and by the lack of direct effect

112 Ibid fn 61.

113 Subject to the rather vague reference to the direct applicability of regulations in *EC Treaty*, [1997] OJ C 340/173, art 249(189) (entered into force 10 November 1997).

114 See above n 80 and accompanying text.

115 Longo, above n 55.

116 Such as International Labour Organization Conventions and the *International Convention for the Unification of Certain Rules Relating to International Carriage By Air 1929*, opened for signature 1 December 1959, 137 LNTS 11 (entered into force 13 February 1933).

which affects compliance.¹¹⁷ Trends in international governance point to the eventual adoption of new, alternative modes of organisation. While there may be many competing visions of a new world legal order,¹¹⁸ the transition to a more effective system might conform to the following reforms.

All states could be invited to join an alternative supranational world legal order, which will be established alongside the existing system. States would be able to this new legal order at any time. All participating states must have ratified or must agree to ratify a discrete portfolio of international legal instruments in core areas where the primacy of international governance is assumed. Initially, this might include human rights (broadly defined to include second generation economic and social rights), international environmental law and international security. All other treaties upon which international political, social and economic life currently revolves would remain, for the time being, subject to the current rules of international law. A commitment would be required from the participating states that the core areas will be expanded and refined over time, through the treaty-making process. Non-core issues within international law would be subsumed gradually into the new legal order, and thus transformed into core issues. States that agree to join the new international order would naturally be required to comply with the obligations imposed under international law. Such obligations would take precedence over conflicting national laws and would be directly applicable within those states, irrespective of intervention on the part of the national legislatures. This would require recognition of the supremacy principle and recognition that international law has a force of its own which governs the relations between the international and domestic legal orders. In other words, following a European approach, national constitutional law would no longer determine relations between supranational and national actors.

Failure to comply with international laws domestically and within set time limits has the potential to adversely affect citizens of the defaulting state. Accordingly, the aggrieved citizen would be empowered to enforce the state's obligations under the treaty in question, where these are sufficiently precise and unconditional, in a national court. The procedure would be coupled with a right, exercisable by an appropriate international institution, to subject the offending state to the jurisdiction of a supranational world court. The judgments of this

117 An example of this is the mandatory sentencing laws of the Northern Territory and Western Australia, which are allegedly in breach of international conventions to which Australia is a party, such as the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 1 (entered into force 2 September 1990) and the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). The Australian government is reluctant to override the offending laws, despite condemnation by the UN Committee for Elimination of Racial Discrimination and the United Nations Human Rights Committee. The UN Human Rights Committee has called on Australia to review the mandatory sentencing laws, among other things: see, eg. Simon Mann and Kerry Taylor, 'Work With Us On Rights, Pleads UN', *The Age* (Melbourne), 22 July 2000, 9; Simon Mann, 'UN Fires Another Salvo Over Blacks', *The Age* (Melbourne), 23 July 2000, 3; Rob Taylor and Trevor Marshallsea, 'Canberra Opposes UN Rights Report', *The Age* (Melbourne), 30 July 2000, 2.

118 See, eg. Slaughter, above n 93.

court would be enforceable within the legal orders of the participating states. The world court would have jurisdiction to impose sanctions.¹¹⁹

These proposals are, in essence, a synthesis of Community law and international law principles. The consensual nature of international law would be maintained at the threshold, to the extent that states would have to agree to join the alternative supranational world legal order. However, once consent was given and ratified by a state, the relations between that state and the supranational organisation would cease to be consensual. Membership would entail acceptance of the idea that it is *international law* rather than domestic constitutional law that designates a treaty provision as directly effective in the Member States. The right of individual applicants to bring an action before their national courts (if not the ICJ) to enforce their states' international obligations would constitute effective supervision of international law – an immediate consequence of direct effect. It is acknowledged that radical theoretical, political, social and institutional changes would be necessary at both the international and state levels to give effect to these ideas.

Ultimately, the proposals, even if utopian, may serve to elicit debate on possible reforms. It may be argued by some that states would react against this hierarchical mode of organisation and its underlying 'federalist' or 'liberal internationalist' intent, which challenges the primacy of state governance structures and decision-making. However, there is a precedent for this model and ample demonstration of the state-centric reactions to it – the EC legal order.¹²⁰

In any event, globalisation appears to be duplicating these conditions. Both the model and the reactions are instructive. Nonetheless, the fate of this specific proposal is of little consequence. Should it be immediately rejected, the main premise of this article would remain unaffected. The European legal integration experience (or at least its twin pillars of direct effect and supremacy) offers an ideational starting point. It is argued that the demands of globalisation coupled with the entrenchment of individual rights within international jurisprudence¹²¹ will increasingly incline the states in this general direction, accentuating the need for a common enforcement approach among nations.

VII CONCLUSION

On one interpretation, the rulings of the ECJ that have established that certain *EC Treaty* provisions are directly effective may not be consistent with the settled principles of international law. Indeed the Court's actions aimed at enhancing

119 Some of the features of this alternative legal order were briefly described in Longo, above n 55, 138–9.

120 It should be recalled that the vesting of power in the supranational institutions of the EU has been carefully circumscribed by the Member States of the EU and that the Member States remain nation-states. The EU is therefore not a form of 'government' but rather a form of 'governance' that includes multiple actors. Similarly, this article does not advocate an international government, as such, but rather a more effective form of international governance.

121 Illustrated by the fact that individuals are increasingly being treated as subjects of international law in the field of human rights: see above n 30.

the effectiveness of Community law by establishing the direct effect of directives have not escaped criticism from many of the Member States.¹²² However, the need and desire for participation in the internal market, with its obvious material benefits, have discouraged those Member States disenchanted with the Court's creative interpretive techniques from withdrawing. It is yet another illustration of the oft-made point that the EU is predominantly about compromise and negotiation. The Member States have arguably all benefited materially and in other ways from their participation in the EU; the original objectives of peace between the Member States and prosperity have been achieved. It is questionable whether the story would have been the same had the ECJ ruled otherwise. It is probable that Court rulings in accordance with the settled principles would have resulted in a debased and certainly less effective version of the EC legal construction. Devoid of its compelling or binding elements, and not being subject to supervision by the individual applicant, it would have been more akin to an ordinary international association than is the case today. Rather than offering a possible alternative paradigm of international organisation, it would have represented yet another instance of a weakly organised, narrowly focused and less than effective organisation within a homogenous or undifferentiated broader system.

Nevertheless, a distorted application of the principles regarding the application of treaties within the domestic legal orders of states in the future development of public international law is not advocated. However, principles are only 'established principles' until they are modified by agreement. This, then, is not a case for arguing that the end justifies the means. It is evident that the current international law regime has not proved to be as effective as many had hoped in the period following World War II. Divergent national interests have not readily converged in a politically fragmented system, and altruism has proved, as ever, an elusive goal. Yet the settled principles of international law will not change without the broad consent of states. Given that globalisation through international trade is bringing about an environment in which states (which are otherwise averse to any change resulting in further erosion of national sovereignty) may be persuaded to concede some sovereignty in return for improved trading conditions, states may be more amenable today and in the future to the idea of supranational integration. Developments in the EU, particularly those relating to enlargement,¹²³ monetary and political integration, have the potential to influence the organisational structures of other regional associations, especially if these developments are regarded as successful. The vision begets the questions.

Clearly there are those who would reject such a vision for a myriad of reasons. First, it may be argued that it does not offer a real choice to states, and that it maintains the coercion and unequal bargaining power that have traditionally

122 Hartley, above n 6, 29.

123 An EU of 27 or even 33 members will be a very important player in world politics. Internationally, the EU would be expected to enjoy greater clout than it does today. Commensurate with its increased influence in the geopolitical sphere, the opportunity to contribute to and even shape global governance structures may well be enhanced.

characterised relations between the rich and powerful industrialised states and the rest of the world. Secondly, the proposal may be characterised as a further transfer of national sovereignty to a prospective, monolithic supranational authority, with the centralisation that this would bring serving to distance citizens from the decisions that affect them. Thirdly, it is arguable that national diversity will be 'swallowed up' and replaced by a single dominant culture. It may be feared that this proposal would accentuate Western cultural hegemony.¹²⁴ These are plausible arguments, which would need to be addressed by the international community with a view to developing proposals that are reflective of cultural pluralism. It must be remembered however, that the institutions of the EU are interconnected with national institutions, legal systems and systems of political decision-making. Such a system highlights the need for cooperation and the accommodation of interests, which does not presuppose the exercise of executive authority over nation-states. Similarly, the 'cooperation' of nation-states is the desideratum of international law.

Pressing questions arise as to the 'judicial style and jurisprudence suitable for a world system'.¹²⁵ The interactions between European national courts and the ECJ, pursuant to the referral procedure in art 234{177} of the *EC Treaty*, again suggest fresh possibilities for global interactions to reinforce common values and interests. Ultimately, the question of legitimacy cannot be separated from institutional reform. Before a more holistic discussion of these issues can take place, it is necessary to outline proposed changes to the existing legal and institutional framework and the likely consequences thereof in order to define the perimeters of the broader debate on legitimacy. Accordingly, this article has been primarily concerned with describing the benefits of a broader conception of direct effect and its potential to improve the effectiveness of public international law. The rudimentary proposals for reform of international law outlined in this article have their origin in EC jurisprudence. For the purpose of the quest for new theories of governance beyond the state and, in particular, for greater effectiveness and legitimacy of international governance structures and norms, the EU regime represents fertile ground. Moreover, the partial internationalisation of the state and the emergence of a global polity in discreet, though distinct fields, suggests that the experience of EU integration may be more relevant on a world scale than once thought.

124 See, eg, Martti Koskeniemi, 'Whose Intolerance, Which Democracy?' in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (2000) 436.

125 Falk, above n 83, 181.