Principles of Responsibility within the European Community

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I. Introduction

The purpose of this article is to examine the principles that are applied by the European Court of Justice (ECJ) to the responsibility of member states of the European Community (EC)[1] for the implementation of their obligations arising from the EC Treaty and to compare these principles with those that are applied by the Court in cases concerning the responsibility for the implementation of

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1 Originally established by the European Economic Community Treaty; 1958 EEC Treaty, 298 *UN Treaty Series* 3. The description European Community in this article will refer to the arrangements first established by the EEC Treaty, as amended by the later acts of accession and treaties of amendment, including the Maastricht Treaty of 1992 on European Union and the 1997 Treaty of Amsterdam; for the text of these instruments see Rudden and Wyatt, *Basic Community Laws*, 7th edit, (1999). The European Union, which comprises the arrangements established by the Maastricht Treaty, includes policies and forms of cooperation in common foreign and security policy and police and judicial cooperation fields in supplement of the European Communities structure. Therefore, the form of cooperation that characterize the Union in these additional fields is largely inter-governmental, *i.e.* venues for political arrangement involving direct state control *via* the European Council, and outside the organizational structure of the European Community, except in the fields of visas, asylums, immigration and other policies related to the free movement of persons which have been brought within the Title IV of the EC Treaty, see Bethlehem, 'International Law, European Community Law, National Law: Three Systems in Search of a Framework', *International Law Aspects of the European Union*, (1998) 181-2.

international obligations arising from international agreements to which the Community is considered to be a party. The idea is to discover the extent of the parallelism between the principles applied to the former and the later obligations. As will be seen, the case law of the Court shows that the principles concerning the responsibility of member states for fulfilling obligations in international agreements concluded by the Community are similar to those that are applied to their responsibility for obligations arising from the EC Treaty, as both of these are international treaties subject to the supervision of an international court, namely the ECJ, which has to act in accordance with the relevant international laws.[2] Finally, in the last section, I will try to answer the question if the Community and the member states can be held internationally responsible *vis-à-vis* a non-member state if the Community fails to fulfill an obligation undertaken in an international agreement made with that state.

II. ECJ's Criteria for the Implementation of EC Treaty by the Member States

In international law, if a state's internal law is such as to prevent it from fulfilling its international obligations, that failure is a matter for which it will be held responsible in international

2 Bethlehem argues that Community law is a conduit for the interaction of international law and municipal law, forging a unity between international law and municipal law, *ibid.* 173; Conway, 'Breaches of EC Law and the International Responsibility of Member States', 13 *European Journal of International Law (EJIL)* (2002) 681. For a detailed analysis of so-called objective regimes in international law in general and the EC in particular, see Toluner, 'Objektif Hukuki Durum Yaratan Andlaşmalar Kavramı Gerekli Midir?', *Public and Private International Law Bulletin*, No. 1-2, (2005-6) 519; Şimşek, 'The Legal Nature of the European Community', *Public and Private International Law Bulletin*, No. 1-2, (2004) 675. This is also true for the European Court of Human Rights, the sources of which comprises, apart from its Convention and the Protocols, other treaty law (including the Vienna Convention on the Law of Treaties and international treaties to which the States parties to the Human Rights Convention are signatories) and general international law, see *Al-Adsani v. UK*, 34 *European Human Rights Reports* [2002] 27, para 55. See Higgins, 'The ICJ, the ECJ, and the Integrity of International Law', *International and Comparative Law Quarterly* (2002) 11-6. However, this Court differs from other international courts mainly in terms of its so-called autonomous interpretation. This latter method of interpretation gives the Court a leverage to take into account cultural and sociological notions by incorporating European consensus on the relevant issues in deciding if a state's measure limiting Convention rights was necessary and proportional. This approach has been criticised as preventing the articulation of the reasons on which the reviewing court decides whether or not intervention into a state's discretion in a particular case is justifiable, see Yourow, C., *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, (1996) 195; Singh, Hunt and Demetriou, 'Current Topic: Is there a Role for the "Margin of Appreciation" in National Law after the Human Rights Act?', [1999] *European Human Rights Law Reports*, Issue 1, 20-1.

law.[3] Consequently international responsibility enables the injured party to avail itself of the measures and procedures available to it to compel the responsible party to fulfill its obligations or to obtain reparation for the failure.[4] Similarly, within the Community legal order, the ECJ supervises the member states' proper and effective implementation of their obligations arising from the EC Treaty[5] in accordance with the relevant international state responsibility rules.[6]

The ECJ does this on the basis of their contractual responsibility, as enshrined in Article 10 of the EC Treaty,[7] through Articles

3 In this respect, a state whose responsibility for breach of an international obligation is in issue will be viewed as a single entity, irrespective of whether the breach is attributable to the legislature, the judiciary or the executive, *Oppenheim's International Law*, Jennings and Watts 9th edit, (1992) 84, 501 and 542-45; ILC Draft Articles on State Responsibility, 37 *International Legal Materials* [1998] 440.

4 In international law of state responsibility, a violation of a treaty obligation can be composed of both a 'legal injury' as well as damages, see ILC First Report on State Responsibility, A/CN.4/490/Add.4; and a state can absolve itself from international responsibility if by its subsequent internal conduct it fulfils the relevant international obligation in the form of a restitution or creates an equivalent result, by rendering full and complete compensation, see *Yearbook of International Law Commission* (YILC), [1977], Vol. II, Part Two, 29; *Chorzow Factory* Case, Permanent Court of Justice (PCIJ) [1928] Rep. Series A, paras. 46-8; *Third Restatement of the Law, The Foreign Relations Law of the US*, (1990) 227. For the reparation of legal and material injury on the basis of state responsibility in international law, see the Dissenting Opinion of Judge Schwebel in *ELSI* case, International Court of Justice (ICJ) [1989] Rep. 119; *La Grand* Case, [2001] ICJ Rep. paras. 42 and 48.

5 For the purposes of this article the term 'obligations arising from the EC Treaty' comprises both the so-called primary law, *i.e.*, EC Treaty and its amendments, and the so-called secondary law, *i.e.*, regulation, directive or decision (or measures having some other name but found to be binding by virtue of its content), which are issued by the Community organs for legislative or executive reasons on the basis of powers conferred by the provisions of EC Treaty and are binding upon the member states. For further analyses, see Lenaerts and Desomer, 'Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures', 11 *European Law Journal*, No. 6, 744.

6 See the ECJ's judgement in the Joined Cases 46 and 48/93, *Brasserie du Pecheur and Factortame*, [1996] ECR I- 1145, para. 34, where the Court has explained the basis of member states' responsibility within the Community to fulfill their Community obligations in terms of the principles of state responsibility in international law.

7 The ECJ has construed this Article to concretize the principle duty of member states to take all appropriate measures to ensure the effective implementation of their obligations under Community law and to facilitate the achievement of the Community's tasks. See Bethlehem, *supra* note 1, at 173; Lasok & Bridge, *Law & Institutions of the European Union*, Sixth Edit, (1994) 152-3 and 323; White, 'The Impact of EC Law on International Law', *International Law Teach-*

226, 227 and 228 by declaring that the failure to implement or execute Community obligations correctly by member states should be remedied.[8] Under Article 234 procedure, the ECJ has asserted that the so-called directly effective Community laws can be invoked by individuals before national courts[9] against their own state[10] or even against each other.[11] In this regard, it has been expressed that the direct effect concept has been devised to secure compliance with the Community law by member states by utilizing individuals'

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ing and Practice, (1982) 89-90; Gray, C., *Judicial Remedies in International Law,* (1990) 121-26; Waelbroeck, 'Treaty Violations and Liability of Member States and the European Community: Convergence or Divergence?' *Institutional Dynamics of European Integration*, Vol. II, (1994) 47; Swaine, 'Subsidiarity and Self-Interest: Federalism at the ECJ', 41 *Harvard International Law Journal*, (2000) 4. Similarly, within the European Human Rights context, the national authorities are required to apply Human Rights Convention and are responsible for their Convention obligations, and the Human Rights Court can only apply the law of the Convention but not interpret or cancel national law in the national appeals court mode, see Yourow, *supra* note 2, at 189.

8 Since the amendment in 1992 of Article 228, the ECJ has also a jurisdiction for imposing a fine on member states if they fail to obey the Court's ruling against them.

9 The same development has taken place within the European Human Rights context since the granting of individual petitioning right directly to the European Court of Human Rights in 1991, Protocol No. 9, 30 ILM [1991] 693. One must note that rules of an international treaty may well apply in relations between states and individuals or between individuals *inter se* as long as the treaty in question was intended to be applied to private parties, see Oppenheim's *supra* note 3, at 85-6; Iwasawa, Y., 'The Doctrine of Self-Executing Treaties in the US', 1986 26; 3 *Virginia Journal of International Law*, (1986) 646 and 661-62. For international courts' rulings in this respect, see *Advisory Opinion on Jurisdiction of the Courts of Danzig*, [1928] PCIJ Rep. Ser. B, No. 15, 17-8; *Steiner and Gross v. Poland*, 4 *Annual Digest of Public International Law Cases*, 291; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, [1932] PCIJ Rep. Series A/B, No. 44, 20; *US, France, UK and USSR v. Goring and Others*, 1 *Trial of the Major War Criminals* 171, 223; *La Grand Case*, [2001] ICJ Rep. paras. 75-77. For various US Court's decisions in this respect, *Third Restatement of the Law, The Foreign Relations Law of the US*, (1990), 395-99. For cases concerning the protection of an individual's financial interests on the basis of a treaty, see the *Mavrommatis Jerusalem Concessions* Case, [1925] PCIJ Rep. Series A, No 5; *ELSI* case, [1989] ICJ Rep.

10 Case 6/60, *Humblet,* [1960] ECR 559, at 569; Case 9/70, *Grad*, [1970] ECR 825, at 837; Case 106/77, *Simmenthal*, [1978] ECR 629, at 643 and 647; Case 8/81, *Becker,* [1982] ECR 53; Case 103/88, *Costanzo*, [1989] ECR 1839; Case C-91/92, *Faccini Dori*, [1994] ECR I- 3325, para. 14. See Lasok & Bridge, *supra* note 7, at 125, 262 and 299; Prechal, 'Does Direct Effect Still Matter?', 37 *Common Market Law Review* (CMLR), (2000) 1059.

11 Only in case of the provisions of the EC Treaty or regulations having direct effect, see Case C-281/98, *Angonese,* [2000] ECR I-4139; Case C-398/92, *Mund & Fester,* [1994] ECR I-467. For the possibility of a directive having such effect, see Case C-177/88, *Dekker,* [1990] ECR I-3941.

legal position, thus direct effect is used as a remedy for preventing the member states from taking advantage of a failure to fulfill their obligations under Community.[12] Moreover, the Court has also found itself empowered to tell national courts that they need to offer compensation to persons under their jurisdiction, if the infringement of a directly effective Community provision by a member state causes damages to individuals.[13] An analysis of the case law of the ECJ as regards the concept of direct effect with respect to Community law shows the transformation of this concept from the 'granting individual rights' quality of some Community rules[14] to a concept more generally understood in international law under the concept of self-executing treaties, where the conferral on rights on individuals is a consequence of, but not a condition of an enforcement of an international obligation before national courts.[15]

12 See Advocate General Tesauro's Opinion in Joined Cases C-46 and 48/93, *Brasserie du Pecheur and Factortame*, [1996] ECR I-1066, paras. 28-9 and footnote 36 there. Schmid writes that "whereas in international law judicial review may only take place *ex post* with the purpose of finding a state liable for non-compliance in the European context, by means of Article 234 EC procedure, an *ex ante* judicial review may take place. Thus, a state can be constrained to give immediate effect to its EC law obligation", Schmid, C.U., 'From Pont d'Avignon to Ponte Vecchio: The Resolution of Constitutional Conflicts between the European Union and the Member States through the Principles of Public International Law', *EUI-LAW Working Papers*, European University Institute, (1998) 424; Thomas de la Mare, 'Article 177 in Social and Political Context', *The Evolution of EU Law*, Craig and Burca edit, (1999) 219.

13 The responsibility of member states, in this respect, may be incurred by all of its organs, *i.e.* by the legislature as well as by the administration and the judiciary, Joined Cases C-46/93 and 48/93, *Brasserie du Pecheur and Factortame*, [1996] ECR I-1145, para 33. See Köck and Hintersteininger, 'The Concept of Member State Liability for Violation of Community Law and Its Shortcomings An Analysis of the Case Law of the European Court of Justice on this Matter' 3 *Austrian Review of International & European Law* (1998) 21. The Court has inferred this ancillary duty of member state liability for damages from EC Treaty itself and in particular from Article 10, see Joined Cases C-6/90 and 9/90, *Francovich*, [1991] ECR I-5357, paras. 33-36; Joined Cases C-46/93 and 48/93, *Brasserie du Pecheur and Factortame*, [1996] ECR I-1145, para. 34. See also Advocate General Tesauro' Opinion, *ibid.*, at paras. 12-16 and 37-42; Advocate General Darmon's Opinion in Case 241/87, *Maclaine Watson*, [1990] ECR I-1808, para. 95. See Waelbroeck, *supra* note 7, at 473 and 476; Gasparon, 'The Transposition of the Principle of Member State Liability into the Context of External Relations', 10 EJIL (1999) 616.

14 Case 26/62, *Van Gend & Loos*, [1963] ECR 1, para. 12.

15 Case 41/74, *Van Duyn*, [1974] ECR 1337, at 1355; Case C-431/92, *Commission v Germany*, [1995] ECR I-2189, para. 26; Case C-72/95, *Kraaijeveld*, [1996] ECR I-5403, para. 56. According to this latter understanding, international provisions that can be relied before national courts do not always specifically aim at the creation of particular rights for individuals but create a justiciable standard for courts that can be relied on by individuals for deter-

Regarding the conditions for the above-mentioned responsibility of member states, the ECJ has exercised its jurisdiction on the basis of the following principles. The ECJ reviews member states' failure to implement Community rules according to the content of the relevant Community rule.[16] In the case of a sufficiently clear, precise and unconditional Community provision leaving no further discretion of implementation to national authorities, the ECJ has ruled that, in application of the principle of co-operation laid down in Article 10, member states' courts were required to set aside all contrary national legislative, administrative or judicial measures, which were incompatible with the Community rule in question.[17] Furthermore, when individuals invoked these provisions in cases before national courts under Article 234 procedures, the Court has consistently held that although remedies and procedures for the enforcement of Community law rights belong to an area reserved for national legislation,[18] this national autonomy was, nevertheless, subject to minimum requirements imposed by Community principles of effectiveness and non-discrimination.[19] Where the rel-

mining whether the national authorities in attaining the result envisaged in the relevant rule acted within the limits of their discretion, thus guaranteeing the rule of law within the Community by enabling the courts to review the member states' conduct in the light of what has been internationally agreed. See Prechal, *supra* note 11, at 1051, 1057 and 1066; Iwasawa, *supra* note 9, at 631.

16 Köck and Hintersteininger, *supra* note 13, at 18.

17 Case 77/69, *Commission v Belgium,* [1970] ECR 237, para. 15; Case 8/70, *Commission v Italy*, [1970] ECR 961, para. 9; See also Case 39/72, *Commission v Italy*, [1973] ECR 101, at 114; Case 52/75, *Commission v Italy*, [1976] ECR 277, para. 14; Case 128/78, *Commission v UK*, [1979] ECR 419, para. 9. See also Advocate General Tesauro' Opinion in Joined Cases C-46/93 and 48/93, *Brasserie du Pecheur and Factortame,* [1996] ECR I-1131, paras. 38-39, footnote 42. In this regard, the ECJ has also ruled that national courts should have a jurisdiction to grant *interim* measures suspending the enforcement of national law alleged to be incompatible with Community law, see Case C-213/89, *Factortame,* [1990] ECR I-2433 (this should not be confused with the suspension of national measures implementing Community regulations against the validity of which there are serious doubts, see Cases C-143/88 and C-92/89, *Zuckerfabrik*, [1991] ECR I-415).

18 Case 33/76, *Rewe Zentralfinanz,* [1976] ECR 1989.

19 According to the principle of effectiveness, limitation periods and any requirement of proof provided for by domestic rules of procedure should not have the effect of making it virtually impossible or excessively difficult to exercise Community rights which the national courts have a duty to protect. The second limitation imposed by the principle of non-discrimination preculdes domestic remedies and procedures applicable to the enforcement of Community law rights being less favourable than those relating to similar actions concerning national law disputes. See Case 33/76, *Rewe Zentralfinanz*, [1976] ECR 1989; Case 179/84, *Bozzetti*, [1985] ECR 2301; Case 45/76, *Comet*, [1976] ECR 2043; Case 199/82, *San Giorgio*, [1983] ECR 3595.

evant Community provision aimed at achieving an objective within the Community legal order, thus leaving a margin of discretion to national authorities, the ECJ has ruled that the member states' authorities and courts were required to take all adequate and appropriate steps to produce the required result specifically set out in the relevant Community provision.[20] Moreover, individuals could invoke those provisions for the purpose of control of the legality of national laws.[21]

As regards member states' responsibility for damages to individuals, the ECJ has decided that this responsibility would be engaged for untimely or incorrect implementation of a Community provision leaving no margin of discretion.[22] On the other hand, in

20 This may involve setting aside national measures, which were disregarding the limits of discretion imposed by the objective of the Community rule in question, Case C-431/92, *Commission v Germany,* [1995] ECR I-2189, paras. 23, 26 and 40. In this respect, the Court has sometimes only emphasized the member states courts' obligation to interpret national measures in conformity with the wording and purpose of the relevant Community provision, see Case C-106/89, *Marleasing*, [1990] ECR I-4135, para. 8 and Case C-91/92, *Faccini Dori,* [1994] ECR I- 3325, para. 26. For a deeper analysis, see Betlem and Nollkaemper, 'Giving Effect to Public International Law and the European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation', 14 EJIL, (2003), No. 3, 569.

21 Case C-72/95, *Kraajieveld*, [1996] ECR I-5431, paras. 55-61; Case 51/76, *Verbond,* [1977] ECR 113, at 127. Lasok & Bridge, *supra* note 7, at 124-25 and 300; Prechal, *supra* note 11, at 1061-64. In this regard, one may draw an analogy from the European Court of Human Rights' case law. National discretion analysis has been made by this Court on the basis of margin of appreciation doctrine. This doctrine has allowed the Court to categorize different groups of Convention articles. In this respect some precisely worded articles involving fundamental rights, which are protected by an absolute prohibition against their violation, like those on torture, slavery, non-discrimination and due process, has been interpreted by the Court as allowing national authorities no margin or very few. On the other hand, personal freedom Articles in 8-11 and Protocol 1, which are characterized by open ended wordings and subject to certain limitation clauses, have been interpreted by the Court as granting certain amount of margin to national authorities in the application of relevant rights. However, in the supervision of this margin, the Court can still condone or condemn national action depending on the necessity for and the proportionality of the rights restrictions imposed by the state, see Yourow, *supra* note 2, at 192.

22 Joined Cases C-6/90 and 9/90, *Francovich,* [1991] ECR I-5357, paras. 33-36; Case 5/94, *Hedley Lomas,* [1996] ECR I-2613, para. 28; Cases C-178, 179, 188, 189, 190/94, *Dillenkofer*, [1996] ECR I-4845. In claiming this responsibility, an individual, as well as proving the unlawfulness of the conduct of the national authorities by showing an infringement of the relevant Community provision (illegality), must also prove the fact of damage and the existence of a causal link between the conduct and the damage, Joined Cases C-46/93 and 48/93, *Brasserie du Pecheur and Factortame,* [1996] ECR I-1066, paras. 51-55. Again, due to the fact that the claim has to be brought by way of domestic legal

the case of a Community provision leaving a margin of discretion, a manifest and serious disregard of the limits of discretion or manifestly incorrect interpretation of the Community rule in question by the member state's authorities would be required.[23] For the purposes of this responsibility, an individual's entitlement to compensation is defined broadly in accordance with the proper understanding of direct effect. According to this, if the relevant provision is capable of conferring a legal position upon an individual, which has been monetarily affected by a national authorities' disregard of the limits of discretion, then, national courts should award damages to protect an individual's interest.[24]

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procedure, member state must ensure that its law does not make impossible or render unnecessarily difficult the recovery of damages, *ibid.*, para. 67. As concerns the extent of the reparation the Court stated that "[r]eparation for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained so as to ensure the effective protection for their rights", however, the Court has also emphasized a corresponding duty of the injured person to show reasonable diligence in order to avoid or limit the damages in question, *ibid.*, paras. 82-4.

23 In the wording of the Court, the violation of Community law has to be sufficiently serious, and "a breach is sufficiently serious where, in the exercise of its legislative powers, an institution or a member state has manifestly and gravely disregarded the limits on the exercise of its powers", Case 392/93, *BT*, [1996] ECR I- 1668, paras. 42-5; Joined Cases 283/94 & 291-92/94, *Denkavit* [1996] ECR I-5101, para. 53. The Court does not accept discretion as justifying violation if the excess or abuse of discretion has been evident and substantial, Joined Cases C-46/93 and 48/93, *Brasserie du Pecheur and Factortame*, [1996] ECR I-1066, paras. 55-6. In this regard, although the Court allows a member state to invoke the lack of clarity of the rule of Community law concerned as a defense against alleged violation, the simple plea of mistake of law is not sufficient to release a member state from its responsibility especially if the Court had already given a ruling on the correct interpretation of the provision of Community law in question, Case 392/93, *BT*, [1996] ECR I-1668, para. 42; Joined Cases C-46/93 and 48/93, *Brasserie du Pecheur and Factortame*, [1996] ECR I-1066, para. 57. For a detailed analysis, see Advocate General Tesauro's Opinion in Joined Cases C-46/93 and 48/93, *Brasserie du Pecheur and Factortame*, [1996] ECR I-1066, paras. 78-84; Köck and Hintersteininger, *supra* note 13, at 25-7; Gasparon, *supra* note 13, at 617; Prechal, *supra* note 10, at 1067; Chalmers, 'Judicial Preferences and the Community Legal Order', 60 *Modern Law Review*, (1997) 193.

24 Advocate General Tesauro even argues that the question of direct effect is not relevant for claiming damages, since a state is under a duty to remedy a situation in every case arising from its failure to fulfill an obligation, which has a financial consequence upon an individual's interest, see his Opinion in Joined Cases C-46/93 and 48/93, *Brasserie du Pecheur and Factortame*, [1996] ECR I-1066, paras. 31, 75 and 82. In this regard, Prechal argues that the protection of individual 'interest' in the general sense plays a pivotal role in the question of whether a provision of Community law as a matter of its content creates direct effect, *supra* note 11, at 1056, footnote 49.

III. ECJ's Criteria for the Implementation of International Treaty Obligations within the Community

In analyzing the implementation of international treaty obligations within the Community,[25] one must first note that the ECJ's duty of supervision and sanctioning of the failures of implementation of international obligations arising from international agreements is based upon the principle that an international agreement concluded by the Community will almost always be binding on the Community as a matter of international law. In international law, the principle of *pacta sunt servanda* requires that every treaty is binding on the parties to it and must be performed by them in good faith, the failure of which involves the responsibility of the state concerned. Thus, provisions of international agreements must be

25 As regards the relation between the legal order established by the EC Treaty and the general rules and principles of international law, the ECJ referred to the 1969 Vienna Convention on the Law of Treaties in controlling the validity of a secondary Community law, as the former was considered a codification of customary international law, Case-162/96, *Racke,* [1998] ECR I-3655, paras. 53-9. In Case C-327/91, *France v. Commission*, [1994] ECR I-3641, the ECJ held that the Commission's conclusion of competition agreement in breach of Community's competence rules did not affect the validity of the agreement in international law in accordance with Article 46 of the 1969 Vienna Convention on the Law of Treaties; in Case C-286/90, *Poulsen/Diva,* [1992] ECR 6019, para. 10, the ECJ decided that Community competence had to be exercised in conformity with the pertinent rules of customary international law of the sea; and in *Opinion 2/94*, [1996] ECR I-1759, paras. 34-5, the Court found that fundamental rights form an integral part of the general principles of law whose observance the Court ensures and respect for human rights is a condition of the lawfulness of the Community acts. Advocate General Mayras in his Opinion in Case 48/69, *ICI,* [1972] ECR 619, at 693, explained the basis of the binding nature of general rules of international law upon the Community as follows, "the Community cannot exercise all the powers that a state possess but only those powers vested on it by member states. That said, when the Community exercises such powers it must comply with international law, which specifies the conditions and limits of the powers of member states in the relevant area". In this regard, it is submitted that states in relations between themselves can abrogate most of the rules of general international law, which constitutes *jus dispositivum*, by a treaty as far as the latter does not affect the rights and obligations of third parties arising from those general rules in international law. Also, it must be pointed out that between the sources of international law, there is no hierarchy and all the relevant rules of international law are applicable in case of a legal dispute, as long as an intention to the contrary between the parties to an international agreement cannot be inferred, hence, treaties are generally be interpreted so as not to conflict with customary international laws, see Wolfke, 'Treaties and Custom: Aspects of Interrelation', *Essays on the Law of Treaties*, Klabbers & Lefeber edit, (1998) 36-7; Mendelson, 'The Impact of EC Law on the Implementation of the ECHR', 3 *Yearbook of European Law*, (1983) 105; and Wright, 'Conflicts between International Law and Treaties', 11 *American Journal of International Law,* (1917) 575-76.

carried out in good faith and the Community is obligated to perform fully its international agreements and may not unilaterally free itself from the commitments undertaken in such agreement or decide to modify its terms, without the consent of the other party or parties to the agreement.[26]

In the *Kupferberg* case, the ECJ gave judicial consideration to the question of the effect of an international agreement concluded by the Community within the Community legal order.[27] In its judgment, the Court said that,

The Treaty establishing the Community has conferred upon the institutions the power not only of adopting measures applicable in the Community but also of making agreements with non-member countries and international organizations in accordance with the provisions of the Treaty. According to Article 300 (7) these agreements are binding on the institutions of the Community and on Member States. Consequently, it is incumbent upon the Community institutions, as well as upon the Member States, to ensure compliance with the obligations arising from such agreements...

26 In this respect, the Community, however, can take into notice the substantial reciprocity within the implementation stage, *i.e.,* when the implementation by the other party would take the manifest form of non-performance of the agreement in question. However, this form of reciprocity is different from material reciprocity, *i.e.* the imbalance between the concession of the parties inherent in many international agreements of the Community, and rejected by the Court as a possible criteria affecting the effect of the relevant agreement within the Community legal order in Case 87/75, *Bresciani,* [1976] ECR 129, para. 23. In respect of reciprocity in the observance stage, see Wils, 'The Concept of Reciprocity in EEC Law: An Exploration into These Realms', 28 CMLR (1991) 257-58; Bourgeois, 'Effects of International Agreements in European Community Law: Are the Dice Cast?', 82 *Michigan Law Revi*ew, (1984) 1266.

27 As far as the basis of the Community's treaty-making power is concerned, although, on the one hand, Article 281 of the EC Treaty grants legal personality to the Community, it does not mention any capacities that can be entertained by the Community as a result of this personality. On the other hand, Article 133 provides for treaty making competence in the field of common commercial policy, Article 310 provides the competence to conclude association agreements with states or international organizations in fields covered by the Treaty. Even though this structure of the EC Treaty created some confusion in the early case law of the EJC as to the exact legal basis of the Community's treaty making power, later on the Court clearly established that " [W]henever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective, [in this sense] the power to bind the Community *vis-à-vis* third countries flows by implication from the provisions of the Treaty creating the internal power and insofar as the participation of the Community in the international agreement is necessary for the attainment of one of the objectives of the Community", *Opinion 1/76*, [1977] ECR 741, paras. 3-4.

According to the general rules of international law there must be *bona fide* performance of every agreement.[28]

Moreover, in this context, the Court has also ruled that an international agreement with a third state becomes an integral part of Community law as soon as it is concluded by the Council and no additional legislative action or internal measures is required within the Community legal order to give effect to the international agreement concerned.[29] Therefore, the ECJ is required to interpret and apply international treaty obligations, which are binding on the Community and the member states *vis-à-vis* non-member states on the international plane, in conjunction with the EC Treaty,[30] and according to the relevant international law principles.[31]

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28 Case 104/81, *Hauptzollamt Mainz v. Kupferberg,* [1982] ECR 3641, paras. 11 and 18.

29 Case 87/75, *Bresciani*, [1976] ECR 121, paras. 16-8. It needs to be pointed out that conclusion in this regard covers simultaneously both the internal and the international measures concluding the relevant international agreement. See Bourgeois, *supra* note 26, at 1256; Arnull, A., 'The European Court and Judicial Objectivity: A Reply to Professor Hartley', 112 *The Law Quarterly Review*, (1996) 418. Moreover, the ECJ has considered acts (including decisions of a dispute settlement body established in an agreement) directly connected with international agreements to form part of the Community legal order in the same way as the agreement itself and binding upon the Community and the member states, Case 30/88, *Greece v Commission*, [1989] ECR 3711, para. 12; Case C-192/89, *Sevince*, [1990] ECR I-3461, para. 8; *Opinion 1/91*, [1991] ECR I-6079, para. 39. However, the Court's some case law regarding GATT is not wholly consistent with this approach, cf. Case 70/87, *Fediol*, [1989] ECR 1781, para. 19 and Case C-69/89, *Nakajima*, [1991] ECR I-2069, paras. 26-31, where the Court reviewed the compatibility of the Community act in question with the relevant international agreement on the grounds that either the Community act in question expressly referred to a specific provision of international law or is intended to implement a particular international obligation, thus requiring some form implementation for granting any effect to the relevant international agreement within the Community legal order. In this matter, see Advocate General Tesauro's Opinion in Case C-53/96, *Hermes,* [1998] ECR I-3606, footnote 45.

30 In this regard, a useful reference point is Article 31(3) (c) of the Vienna Convention on the Law of Treaties, according to which in the interpretation of a treaty any relevant rules of international law applicable to the relation between the parties should be taken into account.

31 In *Haegeman*, the Court decided that it is competent to interpret an agreement in the framework of the legal order of the Community, Case 181/73, *Haegeman II*, [1974] ECR 459, paras. 2-6. However, this monism should not be understood as meaning that agreements concluded by the Community and regarded as part of Community law loose their character of being international instruments as the Court's following decisions show. As the ECJ stated "It is true that the effects within the Community of provisions of an agreement concluded by the Community with a non-member country may not be determined without taking account of the international origin of the provisions in question", Case 104/81, *Kupferberg,* [1982] ECR 3641, para. 17.

As regards mixed agreements, which are concluded both by the Community and the member States, and which lie partly within the jurisdiction of the Community and partly within that of national governments, the ECJ has considered the Community bound by such agreements in their entirety. The Court has emphasized that the Council act signing the agreement binds the Community for the whole of the agreement (unless otherwise specified to third parties). Therefore, the Community assumes responsibility for the due performance of the whole agreement in ensuring respect for the commitments arising from such an agreement.[32]

As to the question of the relation between international agreements concluded by the Community and the obligations arising from the EC Treaty, one must remember that the Court is not competent to review the legality of the primary Community law, *i.e.,* the founding treaties, the acts of accession and the treaties amending the founding treaties, by virtue of the fact that primary Community law is not an act subject to such judicial review under the Community system.[33] However, in terms of the secondary Community

32 Case 12/86, *Demirel*, [1987] ECR 3719, para. 11. This state of affairs results in the joint liability of the Community and the member States on the international plane, as it was acknowledged by the ECJ in Case C-316/91, *Parliament v. Council,* [1994] ECR I-625, para. 29. In this regard, Groux and Manin argue that in the case of an agreement that does not explicitly enumerate the obligations devolving upon the Community and those devolving on the member states, non-member state can choose to call either the Community or its member states to implement any part of the agreement, yet if the agreement explicitly enumerate the obligations devolving on the member states, non-member state cannot call on the Community for the implementation of those obligations, Groux & Manin, *The European Communities in the International Order*, (1984) 128. Moreover, the 1982 UN Convention on the Law of the Sea in Annex IX adopted the formula that information concerning the division of powers between the organization and its member states should be provided beforehand to the third parties, or, in the event of failure to provide such information or if the information is contradictory the consequence will be joint and several liability towards third parties, 21 ILM [1982] 1261.

33 Case C-253/94, *Roujansky*, [1995] ECR I-10, para. 11. It can, nevertheless, be argued that since international obligations of the Community are valid in international law and binding upon the Community *vis-à-vis* non-member states, they should be taken into account in the interpretation of the obligations in primary Community law. In other words, the relation between the Community Treaty and international agreements is a matter of compatibility but not superiority. However, Advocate General Lenz and Advocate General Tesauro in their Opinions in Case 165/87, *Commission v Council,* [1988] ECR 5545, and Case C-327/91, *France v Commission*, [1994] ECR I-3641 respectively argued that the Community's internal law could not stand in the way of the honoring of the international obligations contracted under an international agreement and the Community and the member states have to align the internal and external effects of that agreement, either by withdrawing from that agreement or by recti-

law and national laws, the ECJ, from its earlier cases,[34] ruled that its jurisdiction to give rulings concerning the validity of acts of the institutions of the Community extended to all grounds, including a rule of international law, capable of invalidating those measures.[35] Thus, the Court has made it clear that the legal acts of the Community or member states alleged to be contrary to international commitments of the Community would be declared invalid if a violation of international law could be established. [36]

When we examine the ECJ's case law with regard to the conditions of responsibility for the implementation of international obligations in international agreements, we discover that the Court has applied principles analogous to those examined above with respect to member states' responsibility for the implementation

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fying the defect of Community. In this respect, see Hancher, 'Constitutionalism within EC', XXV *Netherlands Yearbook of International Law,* (1994) 292-95; Macleod, Hendry and Hyett, *The External Relations of the European Communities*, (1996) 132; Lasok & Bridge, *supra* note 7, at 125 and footnote 3.

34 Joined Cases 21-24/72, *International Fruit Company*, [1972] ECR 1219, paras. 6-7; Case 181/73, *Haegeman,* [1974] ECR 449; Case 104/81, *Kupferberg* [1982] ECR 3641, para. 11 and 13.

35 Article 300(7) of the EC Treaty provides that the provisions of international agreements concluded by the Community are binding on the institutions of the Community and its member states, therefore, the Court, being one of the institutions of the Community, which has been given the duty within the Community legal order to ensure that the law is observed, belongs to the potential addressees of these obligations and must ensure compliance with them, cf. the Opinion of Advocate Saggio in Case C-149/96, *Portugal v Council*, [1999] ECR I-8395. Kuijper, P.J., 'The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties', 25 *Legal Issues of European Integration*, (1998/1) 13; Macleod, Hendry and Hyett, *supra* note 33, at 131-32; Stein, 'External Relations of the EC', *Collected Courses of the Academy of European Law*, (1990) 176. Lenaerts and Smijter, 'Some Reflections on the Status of International Agreements in the Community Legal Order', in *Melanges en hommage a Fernand Schockweiler*, (1999) 351.

36 Joined Cases 21-24/72, *International Fruit Company*, [1972] ECR 1225, paras. 6-7; Case 104/81, *Kupferberg,* [1982] ECR 3659, paras. 13-4; Joined Cases C-228-334, 39, 53/90, *Simba,* [1992] ECR I-3713, para. 22; Joined Cases 267-69, *SPI/SAMI*, [1983] ECR 801, para. 18. In Case C-61/94, *Commission v. Germany*, [1996] ECJ 4006, para. 52, the ECJ, while deciding that "[T]he primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements," has also emphasized the member states' obligation to fulfill an international obligation according to the terms of that agreement notwithstanding the existence of a secondary Community legislation containing an obscure provision implementing the relevant obligation. See also Macleod, Hendry and Hyett, *supra* note 33, at 131-32; Kuijper, *supra* note 35, at 12-3; Craig and Burca, *EC Law*, (1995) 500.

of obligations arising from the EC Treaty.[37] In reviewing the Community's secondary measures and national measures, the Court has exercised its jurisdiction in this respect on the basis of clear, precise and unconditional international obligations, as well as other international obligations which are capable of affecting the outcome of the legal proceedings.[38] In this latter sense, the analysis of the ECJ's case law regarding the direct effect of provisions of international agreements concluded by the Community shows the same transformation described above in terms of the direct effect of Community laws. Thus, the direct effect of international provisions has transformed from their 'granting individual rights' quality[39] toward justiciability of the relevant provision. This has enabled the Court to allow an international provision to be invoked by anybody if the application of it to his/her case would have an effect on the outcome of the legal proceedings in question.[40]

37 In this regard, see the ECJ's judgment that the question of the effect of provisions of international agreements concluded by the Community has to be decided in the same manner as any question of interpretation applicable within the Community legal order to the rules of Community law, Case 104/81, *Kupferberg,* [1982] ECR 3641, para. 11, 13 and 17; Case 17/81, *Pabst & Richarz,* [1982] ECR 1331, para. 26 and Case 65/79, *Chatain,* [1980] ECR 1379, para. 22. For further analysis, see Kuijper, *supra* note 35, at 4-5; Lenaerts and Smijter, *supra* note 35, at 355; Cheyne, 'International Agreements and the EC Legal System', 19 *European Law Review* (1994) 597; Meessen, 'The Application of Rules of Public International Law within Community Law', 13 CMLR (1976) 494; Giardina, 'International Agreements of the Member States and their Construction by the Court of Justice', in *Du droit international au droit de l'integration, Liber Amicorum Pierre Pescatore,* Capotorti edit. (1987) 270-71.

38 Case 87/75, *Bresciani*, [1976] ECR 129; Case 104/81, *Kupferberg,* [1982] ECR 3641; Case 12/86, *Demirel,* [1987] ECR 3719; Case C-18/90, *Kziber,* [1991] ECR I-199. In this regard, one must also take notice of the Community's so-called general principles of law, the basis of which was considered by the ECJ as partly arising from the EC Treaty and also from international customary law, see Case T-115/94, *Opel Austria*, [1997] ECR II-39, para. 93; *Opinion 2/94*, [1996] ECR I-1759, paras. 33-5; Case T-572/93, *Odigitria*, [1995] ECR II-2045, para. 48; Case C-135/92, *Fiskano*, [1994] ECR I-2885, paras. 38-44. However, the Court, by arguing the complexity and the imprecision of the concepts to which these principles refer, restricted its judicial review in these respects only to the manifest errors of assessment of the relevant authority or to their manifest breaches of the limits of discretion, see Case C-162/96, *Racke,* [1998] ECR I-3655, para. 52 and Case T-572/93, *Odigitra*, [1995] ECR II-2041, para. 36.

39 Joined Cases 21-24/72, *International Fruit Company*, [1972] ECR 1219, para. 20; Case 48/74, *Charmason*, [1974] ECR 1383.

40 Case 126/83, *STS v. Commission*, [1984] ECR 2769; Case 218/83, *Rapides Savoyards*, [1984] ECR 3105; Case 70/87, *Fediol*, [1989] ECR 1781, para. 20; Case C-432/92, *Anastasiou*, [1994] ECR I-3087, paras. 21-7. See also the Opinion of Advocate General Lenz in Case C-69/89, *Nakajima*, [1991] ECR I-4973,

Yet, the Court's case law with regard to some international agreements (mostly GATT/WTO) binding the Community creates confusion in terms of the question of the criteria for implementation of these agreements. This is especially so in cases where the Court has avoided reviewing the legality of a Community or national measure alleged to be contradictory to an international agreement binding the Community by denying any effect on the whole agreement within the Community on the basis of the so-called systemic approach to the agreement concerned.[41] The application of this approach by the Court has been criticized for giving the implementing authority too much discretion regarding the execution of the international obligations of the Community within the Community legal order,[42] and for allowing the member States to avoid or limit compliance with their international obligations.[43]

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para. 53 and the Opinion of Advocate General Gulmann in Case C-280/93, *Germany v. Council*, [1994] ECR I-4973, paras. 135-7. See Vedder and Folz, 'A Survey of Principle Decisions of the ECJ Pertaining to International Law', 7 EJIL (1996), No.1, 122-23. As far as international law is concerned, this latter understanding of direct effect is in line with its usage in international law under the concept of self-executing treaties, according to which a particular treaty can be applied to produce effects in domestic law, especially for determining the legality of domestic laws, Iwasawa, *supra* note 9, at 691-92.

41 Joined Cases 21-24/72, *International Fruit Company*, [1972] ECR 1219, paras. 20-1; Case C-469/93, *Chiquita,* [1995] ECR I-4558, paras. 24-9; Case C-280/93, *Germany v Council,* [1994] ECR I-5043, paras. 105-10; Case C-149/96, *Portugal v Council*, [1999] ECR I-8395.

42 For the criticism of the Court's approach, cf. the Opinion of Advocate General Tesauro in Case C-61/94, *Commission v. Germany,* [1996] ECR I-3992, footnote 17, where he argues that this attitude is incompatible under Article 220 with the Court's duty of ensuring that the law is observed. See also the Opinion of Advocate General Saggio in Case C-149/96, *Portugal v Council*, [1999] ECR I-8395. For further analysis, see Waelbroeck, *supra* note 7, at 481; Kuijper, *supra* note 35, at 6-7; Bourgeois, *supra* note 26, at 1250; Cheyne, *supra* note 37, at 589-90; Zonnekeyn, 'The Status of WTO Law in the Community Legal Order', 25 *European Law Review* (2000) 298; Canor, I., 'Can Two Walk Together, Except They Be Agreed? The Relationship Between International Law and European Law: The Incorporation of United Nations Sanctions Against Yugoslavia into European Community Law Through the Perspective of the ECJ', 35 CMLR (1998) 162. Also, Groux & Manin argues that this approach of the Court is capable of engaging the international responsibility of the Community and the member states if the result within the Community law is different from what has been internationally agreed on, *supra* note 32, at 128. For such a converse effect on other parties to international agreements concluded by the Community by denying individuals access to judicial protection on the basis of agreements, which are capable of invoked by individuals, cf. Toth, A., *The Oxford Encyclopaedia of EC Law*, Vol. I, (1990) 266; Stein, *supra* note 35, at 177.

43 Mastellone, 'Note on Cases 266/81 and Joined Cases 267-269/81', 20 CMLR (1983) 579 and Wils, *supra* note 26, at 193, footnote 11. However, the Court's some case law offers another possibility, according to which the primacy of

IV. The Question of International Responsibility of Member States Towards Third Parties

The analysis of Community law shows that international obligations undertaken by the Community in an international agreement are considered as binding upon the Community and the member states.[44] Consequently, these international obligations are among the laws according to which the Court reviews the Community institutions' and member states' performances in exercising its duty that the law is observed and the protection of the rights are guaranteed within the Community.[45] Here, the Court has emphasized the responsibility of the Community and its member states to fulfill these obligations on the basis of the principle of *pacta sunt servanda,*[46] and it has supervised the implementation of

international agreements concluded by the Community within the Community legal order can be ensured within the Community by way of requiring the national courts to interpret the provisions of secondary and national laws in a manner that is consistent with those international obligations. Such a requirement by the Court, regardless of whether the relevant provision has direct effect or not, would be useful for reviewing the relevant national provision in the light of the provision of the agreement concerned. This approach also gives the Court the leverage to review the executive institution's discretion on the external field by means of the judicial review of national measures, see Case C-53/96, *Hermes v. FHT*, [1998] ECR I- 3606, para. 35. Advocate General Lenz criticizes this view on the ground that such a view gives the individuals the possibility of indirectly enforcing compliance with GATT through cases against member states, see the Opinion of Advocate General Lenz in Case C-469/83, *Chiquita,* [1995] ECR I- 4536, para. 21.

44 In Case C-327/91, *France v. Commission*, [1994] ECR I- 3641 at para. 25, the ECJ assessed the validity and effects of an act creating an international obligation in relation to a non-member state in terms of international law. There, the Court found the Commission's conclusion of competition agreement in breach of Community's competence rules but held that that finding did not affect the validity of the agreement in international law, in accordance with Article 46 of the 1969 Vienna Convention on the Law of Treaties. See also the Opinion of Advocate General Tesauro, *ibid.* at para. 12.

45 In this regard, it needs to be remembered that the arguments to the effect of establishing the autonomy and the superiority of the constitution of an organization over the provisions of international agreements adopted within the framework of an organization on the basis of the special characteristics of its constitutive treaty has not found much support in international law, see Seidl-Hohenveldern, 'Hierarchy of Treaties', *Essays on the Law of Treaties*, Klabbers and Lefeber edit. (1998) 15-6; Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edit. (1984) 96; Brownlie, *Principles of Public International Law*, 5th edit. (1998) 690-2.

46 The basis of member state responsibility within the Community law has been based upon Article 10 of the EC Treaty, which is the Community counterpart of the principle of *pacta sunt servanda*. An illuminating reference in this regard can be made to the ECJ's judgment in the Joined Cases 46 and 48/93, *Brasserie du Pecheur and Factortame*, [1996] ECR I-1145, para. 34, where the

these obligations within the Community in accordance with the relevant international principles. Furthermore, by virtue of the ECJ's ultimate supervisory authority within the Community legal order, member states have a right to demand an effective performance of international obligations within the Community.

On the basis of observations above, it is possible to argue that both the Community and its member states can be held internationally responsible by a non-member state if the Community fails to fulfill an international obligation undertaken in an international agreement with that non-member state.[47] As far as the Community is concerned, the ECJ has clearly recognized this responsibility in its case law.[48] As to the member states' responsibility, one can infer this possibility from the Court's reasoning in the *Kupferberg* case where it stated that,

According to Article 300 (7) these agreements are binding on the institutions of the Community and on Member States. Consequently, it is incumbent upon the Community institutions, as well as upon the Member States, to ensure compliance with the obligations arising from such agreements… In ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfill an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement.[49]

Court argued member states' responsibility within the Community to fulfill their Community obligations in terms of the principles of state responsibility in international law; cf. the Opinion of Advocate General Tesauro Opinion, *ibid.* at p. 1079 and 1090. Also see White, *supra* note 7, at 89-90; Waelbroeck, *supra* note 7, at 471; Swaine, *supra* note 7, at 4.

47 In the cases of so-called direct breaches of non-member countries' rights, the Community primarily and the member States secondarily could be held responsible, *i.e.*, the claim should be brought first against the Community and then against the member states.

48 In Case C-327/91, *France v. Commission* [1994] ECR I-3641, at para. 25, the Court, after finding that the Commission had no power internally to conclude the relevant agreement, stated that, "[T]he Agreement is [nevertheless] binding on the European Communities. It falls squarely within the definition of an international agreement concluded between an international organization and a State, within the meaning of Article 2 (I)(a)(i) of the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organizations or between International Organizations. In the event of non-performance of the Agreement by the Commission, therefore, the Community could incur liability at international level".

49 Case 104/81, *Hauptzollamt Mainz v. Kupferberg,* [1982] ECR 3641, paras. 11-13. See also the Opinion of Advocate General Tesauro in Case C-53/96, *Hermes v. FHT,* [1998] ECR I-3606, para. 20 and footnotes 23 and 31, where

This responsibility also follows whenever an international obligation binding the Community in an agreement is meant to be directly effective upon individuals but the measures of a Community institution or a member state acting pursuant to Community laws does not take into account the provisions of that agreement. [50] However, in the latter case, it is necessary to exhaust judicial remedies[51] within the Community legal order before an international claim may be pressed by the other state party to that agreement. [52] Within the

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he argued that under Article 300 of the Treaty, an international agreement concluded by the Community is binding on the institutions of the Community and on the member States. Therefore, in the event of any failure to perform the agreement, the member States as well as the Community would be held internationally responsible, this means that the Court has a duty towards the member states as well for the due performance of the agreement in question to prevent international responsibility in this respect, which also gives a reason to the member States to ask the Court to ensure that the Community's institutions, and other failing member states, act within the constraints of those international rules; similarly cf. the Opinion of Advocate General Darmon in Case C-241/87, *Maclaine Watson*, [1990] ECR I-1798, at footnote 104. A comments to this effect by the EEC delegate in the Conference Participant's Comments adopting the final text of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations can be found at Provisions A/CONF.129/C1/SR.25, 6. For similar views, see Groux & Manin, *supra* note 32, at 127 and 145; Lenaerts and Smijter, *supra* note 35, at 349; Cheyne, *supra* note 37, at 597; Canor, *supra* note 42, at 157, footnote 71; Toth, *supra* note 42, at 265-66; Louis, *The Community Legal Order*, 2nd edit. (1990) 79.

50 A practical solution to such problems has already been addressed by some commentators, which has been defined in the following terms, "The difficulty and the risk of fully asymmetric interpretations [of international obligations], with their implications for the balance of advantages between contracting parties, require increased efforts to establish appropriate dispute settlement mechanisms, a greater willingness to use such mechanisms and the readiness to abide by their results.", see Bourgeois, *supra* note 26, at 1250.

51 Article 22 of the ILC's Draft on State Responsibility, 37 ILM [1998] 440; Oppenheim's *supra* note 3, at 86. In *Interhandel* case, the ICJ stated that before a state adopts the cause of its national whose rights are claimed to have been disregarded in another state in violation of international law, that other state should have the opportunity to redress it by its own means, within the framework of its own democratic legal system, ICJ [1959] Rep. 27; Dissenting Opinion of Judge Schwebel in *ELSI* case, ICJ [1989] Rep. 119; *Chorzow Factory* Case, PCIJ [1928] Rep. Series A, paras. 46-8; *Third Restatement of the Law, The Foreign Relations Law of the US*, 227. However, the ICJ has also recognised that a state's own failure may result in the prevention of the exhaustion of local remedies, *La Grand* case, [2001] ICJ Rep. paras. 60 and 75-7.

52 In this respect, it is to be noted that the ECJ's jurisdiction to interpret and apply agreements concluded by the Community remain binding only within the Community legal order and they have no effect on third parties in international law, except to the extent to which such parties have consented to be bound by the Court's jurisdiction, and even in such a case the principle of *nemo judex in causa sua* can be relevant. For the same opinion, see Toth, *supra* note 42, at 268.

context of the Community legal system, the exhaustion of remedies will involve the institution of an individual action both before the national courts and before the ECJ against the relevant measures constituting an infringement of an international obligation in an international agreement binding the Community.[53] Where such an action does not result in the proper and effective fulfillment of the relevant obligation,[54] the other state party may then proceed with its claim at the level of international law against the Community and the member states on the basis of this violation.

V. Conclusion

Within the Community, the principles determining the responsibility for fulfilling international obligations in international agreements concluded by the Community are similar to those that are applied to the member states' responsibility for obligations arising from the EC Treaty, as both of these are international treaties subject to the supervision of the ECJ. Moreover, the Community and the member states can be held internationally responsible *vis-à-vis* a non-member state if the Community fails to fulfill an obligation undertaken in an international agreement made with that state.

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53 These would involve both infringement and tort actions in Community law, since in international law of state responsibility, a violation of a treaty obligation can be composed of both a 'legal injury' as well as damages, see ILC First Report on State Responsibility, A/CN.4/490/Add.4. In terms of non-contractual responsibility of member states, Gasparon argues that (which is based upon Advocate General Darmon's opinion in *Maclane Watson, supra* note 49) since there is no principle common to the member States which excludes liability for actions in the field of international relations, it may be possible for the Court to extend the principle of member State liability to the field of external affairs. In this manner, the Court could in principle request from each member State the very liability it imposes on the Community, see Gasparon, *supra* note 13, at 608.

54 For a state's responsibility in case of an erroneous application of a treaty rule by its judicial authorities, see Oppenheim's, *supra* note 3, at 545; and McNair, who writes that "[A] State has a right to delegate to its judicial department the application and interpretation of treaties. If, however, the courts commit errors in that task... their judgments involve the State in a breach of treaty", McNair, *The Law of Treaties*, (1961) 346 and 351. See also the Dissenting Opinion of Judge Schwebel in *ELSI* case, where he argued that in case of treaty obligations concerning the protection of individuals or their interest, these constitute an obligation of result, therefore, for the purposes of the law of international responsibility, the fact that legal proceedings took place within the state party to such a treaty is not determining, but the result of those proceeding in terms of its compatibility with the provisions of the treaty is, ICJ [1989] Rep. 116-19.