THE LEGAL NATURE OF THE EUROPEAN COMMUNITY

Dr. Galip Engin ŞİMŞEK*

Introduction

It is accepted by most scholars that the European Community[1] has been created, amended, modified and enlarged by international treaties, hence, is subject to the relevant rules and principles of international law applicable to such instruments.[2] However, certain developments within Community law,

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* İ.Ü. Law Faculty. (Bu yazı saygıdeğer Hocam Prof. Dr. Sevin Toluner'e ithaf olunur. Kendisi bir hukukçunun en önemli özelliği olan kişisel bağımsız yargıya varma yeteneğinin en iyi örneği olarak hepimizin yolunu aydınlatmaktadır.)

1 There are in law three Communities, all established by international treaties but having distinct powers. The oldest is the Treaty on the European Coal and Steel Community (signed on 18 April 1951 and entered into force on 25 March 1952), 261 UN Treaty Series (UNTS) 167. This Treaty was concluded for a specific period of 50 years, thus it expired in 2002 and its subject matter fell into the domain of the Community. The European Economic Community and the European Atomic Energy Community were founded by treaties signed on 25 March 1957 and entered into force on 1 January 1958, 298 UNTS 3 and 298 UNTS 167 respectively. These three Communities share their principle organs by virtue of the Convention on Certain Institutions Common to the European Communities (signed on the same day as the founding treaties), which provided a common Parliament and a Court, and the Treaty establishing a Single Council and a Single Commission of the European Communities (the so-called merger treaty of 1967). The description European Community in this article will refer to the arrangements first established by the 1957 Treaty on the European Economic Community, 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.

2 Lasok & Bridge, Law and Institutions of the EU, 6th edit., Butterworths, London, 1994, p. 29 and 103; Stein, E., "External Relations of the EC", Collected Courses of the Academy of European Law, Vol. I-1, 1990, p. 128; Seidl-Hohenveldern, I., "Hierarchy of Treaties", Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag, Klabbers and Lefeber ed., Martinus Nijhoff, Dordrecht, 1998, p. 11; Bethlehem, D., "International Law, European Community Law, National Law: Three Systems in Search of a Framework", International Law Aspects of the European Union, Koskenniemi ed., Kluwer, The Hague, 1998, p. 178-9. For the international treaty character of these instruments, see Berman, Sir Franklin, "Community Law and International Law: How Far Does Either Belong To Each Other?", The Clifford Chance Lectures, Vol.I , Oxford, 1996, p. 244; Pescatore, P., 'International Law and Community Law', 7 Common Market Law Review 1970, p.179,

particularly as a result of the interpretation and application of it by the European Court of Justice (ECJ), have cast doubts on these basic assumptions. In particular, the autonomous and self-contained nature of the Community legal order and the role played by the supremacy and direct effect principles within this legal order have been advanced in order to claim that the Community is no more an international organisation but it has evolved into a federal-like structure. In this article, I will elaborate on the legal nature of the European Community from international law point of view to analyse the validity of this claim. It must be conceded that the answers in this respect are also crucial for third parties which have entered into relations with the Community on the international plane and want to know the functioning of this structure and the laws that apply to it.

However, before proceeding into this complicated issue it is necessary to make certain clarifications about the distinction between the European Community and the European Union. The second entity was created by the Treaty of Maastricht, which also made some changes within the European Economic Community Treaty and renamed it to the European Community.[3] The European Union, as 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, which operates along the traditional procedures established by the original treaties and safeguarding the *acquis communautaire*.[4] The form of cooperation that characterise the Union in these additional fields is largely inter-governmental, *i.e.* venues for political arrangement involving direct state control *via* the European Council,[5] and

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3 The Treaty of Maastricht was signed on 7 February 1992 and entered into force on 1 November 1993, 31 International Legal Materials (ILM) 247; 1992. The Treaty of Maastricht was again amended in 1997 by the Treaty of Amsterdam, which was signed on 2 November 1997 and entered into force on 1 May 1999, 37 ILM 56; 1998. This new treaty renumbered the articles of the Maastricht Treaty and carried some parts of the Union regarding visas, asylums, immigration and other policies related to the free movement of persons within the Title IV of the European Community Treaty. The present article follows the new enumeration.

4 Article 1 of the Treaty on the European Union states:

> By this Treaty, the High Contracting Parties establish themselves a European Union, hereinafter called the "Union"...The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organise, in manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.

5 The Union functions through the action of the European Council on the one hand, which is the only organ established by the Treaty on the European Union and comprised of the Heads of State or Governments of the Member States, and the

outside the organisational structure of the European Community[6]

Moreover, nowhere is to be found in this Treaty an express declaration of the will of the member states to attribute to the new entity legal personality in international law[7] In this sense, the Union is not an international organisation having a separate international legal personality.[8] Consequently, it is safe to assume that the common action envisaged within the Union structure is readily compatible to an intergovernmental farmework treaty, thus, wholly within the realm of international law.[9]

On the basis of the observations above, this article will focus upon the legal structure coming under the heading of the European Community, since this is the only structure which deserves an analysis for the purpose of deciding if it resembles an international organisation or a federal-like entity.

Council and the Commission on the other, the latter belonging to the institutional framework of the Communities but borrowed by the Union to ensure the consistency and the continuity of its activities, see Article 3 of the Treaty on the European Union. As regards the European Council, Gavouneli writes that the statements of this entity do not constitute decisions of a treaty organ binding upon the member states, they are rather the common expression of the joint diplomatic action member states have decided to undertake on a specific issue, Gavouneli, M., "International Law Aspects of the European Union", 8 Tulane Journal of International & Comparative Law , 2000, p. 152.

6 The Treaty also precludes any control of state action in these additional fields by the European Court of Justice of the European Community, albeit allowing for the purview of some aspects of the decisions taken under the police and judicial cooperation, see Article 46 and 35 of the Treaty on the European Union. However, the European Court of Justice retains jurisdiction to establish whether a particular action pertains to a reviewable Community competence, as in the case of a decision reviewing the compatibility of national sanctions implementing a UN Security Council resolution with the common commercial policy of the European Community, which gives the Court a power to touch upon an issue of foreign policy, see Case 124/95, *Centro-Com*, 1997 ECR 81.

7 Indeed, there has been a series of declarations to the contrary, see Gavouneli, op.cit., p. 150.

8 Bethlehem, op.cit., p. 181-2; Betten and Grief, EU Law and Human Rights, Longman, London,1998, p. 130-7.

9 Yet, one must also cognizant of articles like the Article 24 of the Treaty, which authorises the Union to conclude international agreements (subject to the approval of member states in accordance with their own constitutional procedures). For instance, the Union undertook to administer the city of Mostar during the Bosnian crisis by signing a Memorandum of Understanding, which was negotiated and signed by the Troika (comprised of representatives of the member states holding the Presidency of the Council during the previous, the current and the coming six month period) and the Commissioner responsible for external political relations. In this regard, Gavouneli argues that the difference between the Union acting as the representative of the member states and what could be a simplified procedure for the adoption of binding decisions within the framework of the Union may be matter of perception, op.cit., p. 155.

Elements of Internationality

Autonomousness of the Community Legal Order

The first argument challenging the inherently international character of the Community legal order is called the autonomous legal order argument. This argument finds its basis in the case law of the ECJ, which has claimed since 1963 onwards that the Community law constitutes a separate autonomous "legal order"[10] created for an unlimited duration with its own institutions and legal capacities both internally and externally. On this basis, the ECJ also claimed "the EEC Treaty albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law...[The] Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only member States but also their nationals".[11] This presumption has even led the Court to challenge the member states' power to conclude an

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10 Case 26/62, *Van Gend and Loos,* 1963 ECR 1, at p. 12, where the Court has first stated that the Community constitutes a new legal order of international law for the benefit of which states have limited their sovereign rights; in Case 6/64 *Costa v ENEL* 1964 ECR 585, p. 593-4, the Court took the view that the EEC Treaty became an integral part of the legal systems of the member states, and in Case 24/83 *Gewiese v Mackenzie*, 1984 ECR 817, it was held that the powers of the Community, once delegated, could not be withdrawn. Furthermore, see Advocate General Jacobs' observation in *Vaneetveld* case, C-316/93, 1994 ECR I, p. 763, paras. 26-8, where he noted that by virtue of the specific character of Community law as a system of law, it could not be reduced to an arrangement between states, as was often the case in traditional international law; see also Sorensen, "Autonomous Legal Orders", 32 International and Comparative Law Quarterly , 1983, p. 559.

11 *Opinion 1/91,* 1991 ECR 6079, para. 21. An earlier version of this view can be seen in Case 294/83 *Les Verts*, 1986 ECR 1339, para. 23. Against the ECJ's reasoning in *Opinion 1/91*, Kuijper argues that ECJ's invocation of contextual element, where the Court cited the objective of the Community and its own case law to justify its conclusion about the constitutional character of the Community law, is not in conformity with the relevant principles of the treaty interpretation in this respect, *i.e.,* Article 31 of the 1969 Vienna Convention on the Law of Treaties, and the Court cannot lift itself from the restrictions of ordinary treaty interpretation by its own case law. Also, ECJ's recourse to a distinction between normal treaties and the Community treaties, which are interpreted as implying a transfer of sovereignty to reinforce the judicial myth of the special character of the Community legal order, bounds to fail as well, since in reality each and every treaty represents a partial loss of sovereignty and the distinction is a matter of degree, Kuijper, P.J., "The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties", 1998/1 Legal Issues of European Integration, p. 4.

international agreement (European Economic Area Treaty) by way of amending the Community Treaty.[12]

The exact meaning of these statements by the Court has been the subject of wide doctrinal discussion. In this respect, some has argued "...the Community's operating system is no longer governed by general principles of public international law but by a specific interstate governmental structure defined by a constitutional charter and constitutional principles".[13]

However, many others have criticised this view by pointing out that, in much of its case law, the ECJ itself, in its interpretation of the founding treaties, has both drawn upon the experience of other international tribunals and made statements to the effect that the powers of the Community must be exercised within the framework of international law.[14] This practice of the ECJ proves that the legal order established by the Community Treaty is of international law character.[15]

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12 *Opinion 1/91,* 1991 ECR 6079. The Court has corrected this attitude in its later *Opinion 2/94*, where it held that entry into a distinct international institutional system, which would have fundamental institutional implications for the Community could be brought about by way of Treaty amendment, 1996 ECR I-1759, paras. 34-5.

13 Weiler, J.H.H., "The Transformation of Europe", 100 Yale Law Journal, 1991, p. 2407. However, the same writer argues somewhere else that the competence of the Community remains attributed, *i.e.*, the transfer of the powers to the Community is not irreversible as in a constitution, see Weiler and Haltern, "The Autonomy of the Community Legal Order- Through the Looking Glass", 37 Harvard International Law Journal, 1996, No. 2, p. 437. Lachmann claims that member States, even acting collectively, are no longer able to impose on the Community obligations which impose conditions on the exercise of the jurisdiction and powers of the Community, Lachmann, P., "International Legal Personality of the EC: Capacity and Competence" 1984/1 Legal Issues of European Integration, p. 8.

14 Plender, R., "The European Court as an International Tribunal", 42 Cambridge Law Journal 1983, p. 295; Schilling, T., "The Autonomy of the Community Legal Order: An Analysis of Possible Foundations", 37 Harvard International Law Journal, 1996, No. 2, p. 403-4; Spiermann, O., "The Other Side of the Story: An Unpopular Essay on the Making of the EC Legal Order", European Journal of International Law, Vol. 10, 1999. For the functioning of the ECJ as an international court and reshaping the relationship between national law and international law, and also applying the general principles of law in a similar fashion with the ICJ's jurisdiction under Article 38(3) of its Statute, see Bethlehem, op.cit., p. 173 and 182, and Plender, R., "Rules of Procedure in the International Court and the European Court", European Journal of International Law , Vol. 2, 1991, p. 1.

15 For cases where the ECJ has drawn on the Vienna Conventions on the Law of Treaties and other principles of international law as a source of legal principles applicable to the Community legal order, see Case 4/73 *Nold* 1974 ECR 491, para. 13; Case 17/74 *Transocean Marine*, 1974 ECR, p. 1063, Case 149/77 *Defrenne* 1978 ECR 1365, para. 28; Joined Cases 89,104, 114,116,117 and 125-29/85 *Woodpulp*, 1988 ECR 5193, para.

With regard to the amending power of member States, it is generally agreed in current international law that there are no substantive limits to the States' power of amendment and non-State institutions are not in a position to stop treaty amendments which the States have agreed to make.[16] To suggest otherwise for the Community would mean that the Community Treaty has ceased to be the property of its parties and has entered into a special arena which put it beyond the reach of any law-giving body whatsoever.[17] Conversely, it should be accepted that member States of the Community still retain an essential capacity, that of the "constituent power",[18] and reserve for themselves the right to revise the Community Treaty.[19]

18; Case 374/87 *Orkem* 1989 ECR 3283, para. 18; Case C-432/92 *Anastasiou* 1994 ECR I-3087,para.43; Case C-327/91 *France v. Commission* 1994 ECR I-3641, para. 25; Case T-115/94 *Opel Austria* 1997 ECR II-39, para. 79; Case C-162/96 *Racke* 1998 ECR I-3655, paras. 46-7.

16 Seidl-Hohenveldern argues that even a rule in a treaty concerning its amendment does not render it superior to any further agreement between the same parties. It is therefore possible to alter the original treaty by disregarding the latter's amendment rules. This is true also where such treaties establish an international or even supra-national organisation. The masters-of-the-treaty rule will prevail over any amendment clause should the partners of a treaty be willing to assume a juridical commitment incompatible with its amendment clause, op.cit., p. 11. For a similar opinion regarding the Community's accession to the ECHR *via* Article 308 of the Community Treaty, see Betten and Grief, op.cit., p. 114.

17 Berman, op.cit., p. 270-71.

18 Similarly, the amendment and accession treaties to the Community are considered as a political act where the Council functions as an organ representing the collective will of the member states as well as the gathering of the ministers acting in the interests of their own country as separate sovereign states, see Lasok & Bridge, op.cit., p. 29, 31 and 64. This has been confirmed by the Community Court of First Instance in *Roujansky* case, where it held that the Treaty on European Union was not an act of a Community institution subject to the Court's jurisdiction to review its legality, Case T-584/93, 1994 ECR II, p. 585, paras. 12-5.

19 Witte, B., "Rules of Change in International Law: How Special is the European Community", Netherlands Yearbook of International Law, Vol. XXV, 1994, p. 20-21, where the author argues that the amendment of the Treaty is possible by the common accord of all member States. See also Macleod, Hendry and Hyett, The External Relations of the European Communities, Oxford University Press, 1996, p. 34, footnote 28, where the authors argue that, "It is an interesting question whether the powers conferred on the Communities by the Treaties can be returned to the Member States, and, if so, how. If the Member States were to choose to amend the Treaties so as to transfer back to themselves powers now vested in the Communities and their institutions, it is difficult to see what could stop them; and ultimately they could, by agreement, terminate the Treaties and all the institutions they created. Equally, if a Member State were determined to leave the Communities, that would in practice require negotiation and, if possible, agreement (as in fact happened when the territo-

Integration of the Community Legal Order into National Orders

The second argument against the international character of the Community legal order is based upon the combined impact of the two Community principles, *i.e.*, supremacy and direct effect, on the judicial remedies and enforcement of the Community law within the Community legal order. The principle of supremacy has been explained by the ECJ in the following way, "a national court which is called upon to apply provisions of Community law is under a duty to give full effects to those provisions, if necessary refusing of its own motion to apply any conflicting provisions of national legislation, even if adopted subsequently".[20] As regards the principle of direct effect, the ECJ defines this principle as the inherent quality of a relevant Community rule aiming to grant individual rights.[21]

In the opinion of some, these principles has created an effective and efficient form of judicial dispute settlement structure in the Community legal order by integrating the national courts (and consequently the individuals before them) into a quasi-federal system of judicial review. This has made national courts a sub-component of the ECJ in the interpretation and application of Community laws in the cases before national courts. In this sense, these principles are interpreted as setting the EC Treaty wholly apart from other international treaties, where a treaty is a contractual relation between states.[22] Conversely, it is argued that the evolution of the system of judicial remedies within the Community legal order along these lines transformed this legal order from an international organisation based upon an international treaty into a constitutional structure.[23]

In challenging these arguments, it is necessary to examine two questions in

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ry of Greenland seceded)." Similarly, Conway, G., Breaches of EC Law and the International Responsibility of Member States", European Journal of International Law, Vol. 13, 2002, p. 694.

20 Case 106/77 *Simmenthal* 1978 ECR 629, p. 647; in Joined Cases 24 and 97/80 *Commission v. France*, 1980 ECR 1319, the ECJ even stated that its judgement amounted to a prohibition having the full force of law on the competent national authorities and they were required to take the necessary measures to remedy their default and not to create any impediment.

21 Case 26/62 *Van Gend en Loos* 1963 ECR 1, p. 16.

22 Hancher, L., 'Constitutionalism within EC', Netherlands Yearbook of International Law, Vol. XXV, 1994, p. 265; Lasok & Bridge, op.cit., p. 104; Spiermann claims that this developments can be traced back to 1960, when the Court first emphasized that the Treaty establishing the ECSC contained rules capable of being directly implemented in the member states, see Spiermann, op.cit.

23 Advocate General Jacobs' observation in *Vaneetveld* Case, C-316/93, 1994 ECR I, p. 763, paras. 26-8;Hancher, op.cit., p. 265-8 and Lasok & Bridge, op.cit., p. 106.

this regard. Firstly, are the above-mentioned principles unique to Community law or are there examples where similar principles have been employed in an international law context? Secondly, are the above-mentioned views, which argue the quasi-federal integration of the national courts into the Community judicial remedy system, acceptable on the basis of a structural analysis of the relations between the ECJ and the national courts?

As to the first question, it would be noticed with respect to the principle of direct effect that, although the Community law has the characteristic of more often conferring direct effect on natural and legal persons, the principle employed by the Court for such effect is not unique in international law, but it has been employed by international courts for some time.[24] Moreover, the ECJ has transformed, over time, the concept of direct effect, from its earlier understanding into the one as generally understood in international law under the concept of self-executing treaties. According to this latter formula of the ECJ, a member state court is required to apply some provisions of Community law to determine whether the competent national authorities, in adopting the disputed measure or failing to adopt the required measure have observed the limits of their discretion as set out in that Community law provision. In this sense, the ECJ and national courts use some Community rules, which are clear, precise and unconditional, as a norm directly affecting the validity of a measure in dispute[25], and other Community rules, which have an objective legal nature capable of affecting the outcome of a case, as a standard for legal review for determining whether the national authorities in attaining the result envisaged in the relevant rule acted within the limits of discretion set by the provision in question.[26]

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[24] *Advisory Opinion on Jurisdiction of the Courts of Danzig*, 1928 PCIJ, Ser. B, no. 15, p. 17-8; *Steiner and Gross v. Poland*, 4 Annual Digest of Public International Law Cases, p. 291; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, 1932 PCIJ Series A/B, No. 44, p. 20;*US, France, UK and USSR v. Goring and Others*, 1 Trial of the Major War Criminals 171, p. 223; for various US Court's decisions in this respect, Third Restatement of the Law, The Foreign Relations Law of the US, Vol.I-II, p. 395-99. Spiermann argues that the uniqueness idea in this regard is based upon the ECJ's inadequate understanding of international law, which had contained relevant examples since 1920ies, see Spiermann, op.cit; see also Plender, "The European Court as an International Tribunal", p. 279-84.

[25] Case 41/74 *Van Duyn*, 1974 ECR 1337, p. 1355. For the application of the same understanding of the concept to the Community's international obligations, see Case C-432/92 *Anastasiou,* 19 94 ECR I-3078.

[26] Case C-431/92 *Grosskrotzenburg* 1995 ECR I-2189, para.26; Case C-72/95 *Kraaijeveld* 1996 ECR I- 5431, para. 62; Advocate General van Gerven's opinion in Case C-128/92 *Banks*, 1994 ECR I-1209, para. 27. See Prechal, S., "Does Direct Effect Still Matter?",

Similarly, in international law, the concept of self-executing treaties is used to explain cases where some treaty provisions, which are not principally directed at the activities of private persons, may nevertheless be found to be binding on the judicial and administrative authorities of states.[27] Consequently, interests in the subject-matter governed by the relevant provision would breed rights for individuals to lay claims and to bring actions on the basis of that provision.[28]

As regards the principle of supremacy, it should be remembered that under the Treaty system, the ECJ has no power to set aside or declare void the national conflicting measure but it is the duty of national authorities to do so under their general obligation to respect and fulfil their Community obligations by virtue of Article 10 of the EC Treaty. An important point here is that Article 10 of the EC Treaty is addressed to the member states alone. In this sense, Article 10 entrusts the national courts with the duty of ensuring the implementation of the directly effective (self-executing) provisions of Community law,[29] hence, the implementation of Community obligations is

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37 Common Market Law Review 2000, p. 1047; Oppenheim's International Law, 9th edit., Longman, 1992, p. 71-2.

27 Oppenheim, op.cit., p. 85-6; Iwasawa, Y., "The Doctrine of Self-Executing Treaties in the US", 1986 Virginia Journal of International Law, Vol. 26:3, p. 627.

28 *La Grand Case,* ICJ Rep. 2001, para. 77 where the ICJ found the relevant provision of the Vienna Convention on Consular Relations creating individual rights. Spiermann argues that the direct effect of a provision of an international agreement is based upon the international law principles that a national court, being an organ of the state, is obliged to reach decisions that are in accordance with the international obligations of the state, Spiermann, op.cit.

29 In this regard, it is to be remembered that, direct effect does not dictate what kind of remedies are necessary within national orders to give rise to the rights in question but Article 10 requires that member states take necessary steps, see Case C-106/77 *Simmenthal,* 1978 ECR 629; Case 33/76 *Rewe-Zentral-finanz,* 1976 ECR 1989, para. 5; Case C-213/89 *Factortame*, 1990 ECR I-2433, p. 2474; Cases C-6/90 & 9/90 *Francovich,* 1991 ECR I-5357, paras. 36-7 and 42. Swaine, E.T., "Subsidiarity and Self-Interest: Federalism at the ECJ", Harvard International Law Journal, Vol. 41, 2000, p. 15. Therefore, it is not possible to accept the link, as argued by Prechal, between the preliminary ruling procedure and the principle of effective judicial control on the basis of the fundamental legal principles laid down in the ECHR for protecting individuals' right to access to justice and effective protection of their rights in a "competent" court, which is understood by Prechal as the ECJ *via* Article 234 reference procedure, since this formulation disregards the fact that the basis of the national courts' duty to fully implement Community law, which are capable of conferring rights for individuals, in disregard of national substantive or procedural rules is not the decision of the ECJ but Article 10, therefore competent court is still the highest national court, cf. Prechal, S., "Community Law in National Courts", 35 Common

ultimately within the responsibility of the member states.[30] Therefore, it can be argued that the ECJ's supremacy concept based upon Article 10 is actually the Community counterpart of the combination of the international principle of *pacta sunt servanda* and Article 27 of the Vienna Convention on the Law of Treaties, according to which every treaty must be performed by its parties in good faith and a party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform that treaty.[31] Moreover, in terms of the national authorities' duty to implement the Community law, an illuminating parallel can be found between Article 228 and the international principle expounded by the Permanent Court of Justice, which wrote "the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given [by an international court]"[32]

As to the second question regarding the extent of quasi-federal integration of the national judicial systems into the Community judicial review structure, indications contrary to such a view also exist within the Community system. First of all, individuals can not bring actions before the ECJ against their states for establishing the latter's failure to implement the relevant Community rule. They have to rely on the Commission or other member states for bringing such action under Articles 226 and 227 of the EC Treaty, which is not different from other treaties where obligations are owed by one state party to another.[33] Moreover, the ECJ's judgements under Articles 226

Market Law Review 1998, p. 694. La Grand Case, paras. 111-15, where the Court found the US in breach of the obligation to take all the steps (legal and factual) at its disposal for the implementation of an Order of the Court.

30 Case 9/73 *Schluter*, 1973 ECR 1, p. 135. Lasok & Bridge, op.cit., p. 294.

31 In this regard, it is argued that the supremacy of the Community law is based upon the relationship of the national and Community law in the light of the monist theory of international law, see Bethlehem, op.cit., p. 176; for an earlier reference to this theory, see Case 6/60 *Humblet,* 1960 ECR 559, p. 569. The ECJ has sometimes employed Article 10 of the EC Treaty in the sense of Article 18 of the Vienna Convention on the Law of Treaties as well, *ie.,* duty of co-operation for not to jeopardise the attainment of the objectives of a prospective international legislation, Case 804/79 *Commission v. UK*, 1981 ECR 1067, para. 28 and Case 237/86 *Netherlands v. Commission*, 1987 ECR 5264, para. 15.

32 *Electricity Company Case*, 1939 PCIJ, Ser. A/B, p. 199; *La Grand* Case, *loc.cit.*, paras. 89-91 and 125. In this regard, see also ECJ's resort to another international law principle, *ie., ex iniuria*, according to which member states were estopped from asserting a defence of non-implementation by their wrongdoing, see Case C 8/81 *Becker,* 1982 ECR 53, paras. 22-5.

33 An earlier example of such a jurisdictional relation between an international court and national courts can be found in the XII Hague Convention of 1907 establishing the International Prize Court; for an analysis of this Convention in terms of the US

and 227 have only declaratory effect, not unlike the ICJ's in international law, thus, they do not create individual rights.[34] In this regard, it has to be emphasised that it is not the ECJ's judgements declaring the national measure incompatible with Community law under Articles 226 or 227 that give rights to individuals under national law but the actual provision of Community law having direct effect,[35] which has to be effectively implemented by the member states by virtue of their responsibility under the EC Treaty.[36]

In terms of the nature of the preliminary ruling structure established under Article 234 of the EC Treaty, it is to be noted that under this Article the choice to refer the matter to the ECJ is within the discretion of the national courts and this procedure does not constitute a means of redress available to the parties,[37] and the judgements given by the ECJ under this procedure

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Constitution, see Wright, Q., "Treaties and the Constitutional Separation of Powers in the US", 12 American Journal of International Law 1918, p. 85-90.

34 Lasok & Bridge, *op.cit.*, p. 255 and Gray, C., Judicial Remedies in International Law 1990, p. 124-25. The ICJ has expressed that when the Court is required to address the asserted violations by a state's administration of justice, it is not acting as a court of appeal but merely applying the relevant rules of international law to the issues in dispute between the parties, see *La Grand* Case, *loc.cit.*, para. 52.

35 Case 314-16/81 and 83/82 *Waterkeyn* 1982 ECR 4337.

36 For the international law basis of the member states' responsibility to implement the Community Treaty, see Advocate General Tesauro's opinion in Joined Cases C-46/93 & C-48/93 *Brasserie du Pecheur*, 1996 ECR I-1029. The procedural rule in this regard is non-discrimination and effective remedy; White, G., "The Impact of EC Law on International Law", International Law Teaching and Practice, edit. by Bin Cheng, 1982, p. 89; Waelbroeck, D.F., "Treaty Violation's and Liability of Member States and the European Community: Convergence or Divergence?", 2 Institutional Dynamics of European Integration: Essays in Honour of H.G. Schermers, 1994, p. 471; Swaine, op.cit., p. 4. For the reparation of legal and material injury on the basis of state responsibility in international law, see Yearbook of International Law Commission 1977, Vol. II, Part Two, p. 29; Dissenting Opinion of Judge Schwebel in *ELSI* case, ICJ Rep., 1989, p. 119; *Chorzow Factory* Case, PCIJ Rep., 1928, Series A, paras. 46-8; Third Restatement of the Law, The Foreign Relations Law of the US, Vol. I-II, p. 227; *La Grand* Case, loc.cit., paras. 42 and 48.

37 See Lasok & Bridge, op.cit., p.31, 299 and 313, where the authors argue that the national courts can not be compelled to refer but they may do so on their own motion. Therefore, the reference structure within the Community does not function in the form of federal court of appeal. Furthermore, the denial of such reference by national courts to the ECJ would only involve the breach of Article 10 of the Treaty, which is of inter-governmental character.

have again only declaratory effect.[38] In other words, the ECJ cannot apply the Community rule to the particular situation or determine the validity of a national measure and the ruling given by the ECJ is limited to the determination of the incompatibility of the national measure with Community law, hence, the obvious inference that national measure ought not to be applied is left to the referring court.[39]

Consequently, on the basis of the observations above, it can be argued that supervision of the implementation of Community rules is essentially within the powers of the member states and the Community institutions,[40] thus, the judicial review structure established by the EC Treaty is inherently intergovernmental and the principles applied within this structure are based upon relevant international laws.[41] Therefore, the Community legal order is essentially not very different from international legal systems created by other international treaties.

Self-Contained Character of the Community Legal Order

Finally, the last argument rejecting the international character of the Community's legal order is related with the extent of which unilateral remedy mechanisms of state responsibility, *i.e.* countermeasures, can be resorted to by the member states *vis-à-vis* each other in case of a failure to implement Community obligations. In this regard, some decisions of the ECJ clearly state "except where otherwise provided, the basic concept of the Treaty requires that the Member States shall not take the law into their own hands. Therefore, the fact that the Council failed to carry out its obligations

38 Rasmussen writes that "between the ECJ's feeble position under [this Article], and many federal supreme courts' competence to declare a state law null and void if incompatible with federal constitution, the gap is conspicuously wide", Rasmussen, H., On Law and Policy in the ECJ 1986, p. 240-41.

39 See Lasok & Bridge, op.cit., p. 310 and 316; Hartley, T.C., The Foundations of EC Law, 4th edit., 1994, p. 299 and Oppenheim, op.cit., p. 71. However, Gray argues that the difference between the interpretation of the Community law by the ECJ in a preliminary ruling under Article 234 and the application of Community law to a particular set of fact is not absolute, Gray, op.cit., p. 108, footnote 9 there.

40 The duty to supervise the implementation of the Community law is within the discretion of the Commission and the Commission can not be forced to proceed under the pressure of a private party, Case 247/87 *Star Fruit Company* 1989 ECR 291, paras. 11-2.

41 See Schilling, op.cit., p. 403-4, where he argues that the relationship between the laws of the Community and of the member States is an instance of the relationship between international and municipal law.

cannot relieve the defendants from carrying out theirs"[42] and "According to settled case law, a Member State cannot justify failure to fulfil its obligation...by the fact that other Member States have also failed to fulfil theirs...Under the legal system laid down by the Treaty the implementation of Community law by Member States cannot be subject to a condition of reciprocity."[43]

Accordingly, some argue that these decisions rule out any possibiliy of applying countermeasures or other international rules of state responsibility within the Community legal order. Hence, the Community legal order must be understood as constituting a fully self-contained regime, where the availability of the procedures necessary for determining and adjudicating violations of Community law prohibits the member states' inherent right of self help *inter partes*.[44] According to the proponents of this view, the only available avenues of recompense for the member state injured by the failure of another member state party involve either bringing its case before the Court or to put pressure on the Commission to bring the case before the Court (or putting pressure on the other member state party through press and public opinion with threats of illegal retaliation).[45]

Contrary to these arguments, it can be argued that the main weakness of reserving to Community institutions the exclusive competence to deal with the implementation of the obligations lies in the fact that their functioning is contingent upon the continuous discharge of the Treaty obligations by the member states.[46] Consequently, some have rejected the arguments favouring

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42 Cases 90 and 91/63, *Joined Cases of Commission v. Luxembourg & Belgium*, 1964 ECR 1217, p. 1232; also see Case 232/78, *Commission v. French Republic*, 1979 ECR 2729, p. 2739.

43 Case C-38/89, Case *Ministere Public v. Guy Blanguernon* , 1990 I- ECR 83, p. 92.

44 Weiler, J.H.H., The Constitution of Europe, Cambridge University Press, 1999, p. 29, footnote 42. Also, Volker and Steenbergen consider the principle of self-help as a general principle of international law, which has been disposed by the Community Treaty, Volker and Steenbergen, Leading Cases and Materials on the External Relations Law of the EC, Kluwer, 1985, p. 76.

45 Lasok & Bridge, op.cit., p. 106; Wils, G., "The Concept of Reciprocity in EEC Law: An Exploration into These Realms", 28 Common Market Law Review 1991, p. 262.

46 Lasok & Bridge, op.cit., p. 104. In this respect, Smith argue "Care has been taken by the ECJ to point out that within the EC this particular aspect of state sovereignty (unilaterally adopt corrective or protective measures to obviate any breach by another member state of rules of Community law) has been curtailed. The very fact that cases such as these arise indicates, however, that trust may not be a realistic requirement where domestic enforcement remains variable and suggests a lack of maturity in the Community system of remedies.", Smith, R.C., "Remedies for Breaches of EU Law in National Courts", The Evolution of EU Law, (Craig and de Burca eds.), Kluwer,1999, p. 293.

the self-contained nature of the Community[47] on the grounds that this view does not take into consideration the circumstances where the Community legal system fails to provide an effective remedy. Therefore, in circumstances where the Community legal system fails to provide an effective remedy or sanction under Articles 228 and 233 of the EC Treaty, it is both possible and appropriate to fall back on the guidance of international law which recognises the injured state's rights to resort to countermeasures on the basis of the international responsibility of the defaulting state.[48] Hence, the fact that within the Community legal structure the effective implementation of Community law is guaranteed by national legal orders, in many cases *via* the judicial self-restraint approach adopted by national courts on their own discretion,[49] makes this state of affairs less likely to arise, does not alter the basic international nature of the Community.

Conclusion

In summing up this article, on the basis of observations above, it can be

[47] Simma, B., "Self-Contained Regimes", Netherlands Year Book of International Law, Vol. XVI, 1985, p. 127; Audretsch, H.A.H., Supervision in EC Law, Second Revised Edit., 1986, p. 413; Hancher, op.cit., p. 270; Berman, op.cit., p. 274; Schilling, op.cit., p. 403-4.

[48] Hancher writes " ...given the absence from the original EEC Treaty of any provision for sanctions, and even in its amended form, the absence of any procedure in an extreme case, for expulsion or suspension of a member state, and the absence of any practically effective remedy where the Council or the Commission fails to act, then resort to international law principles should not be ruled out.", Hancher, op.cit., p. 270. White also asserts the idea that a residual inherent right of self-help of states remains available, as a last resort, for an aggrieved member state should Community procedures, which that state has exhausted, fail to produce an effective remedy. However, a prior finding to the effect that there had been a violation of Community law by the member state concerned subject to the judicial review by the ECJ, any use of countermeasures in Community law would be more objective than is possible in general international law, White, op.cit., p. 79; similarly, Conway, op.cit., p. 688-90. A more original idea in this respect comes from Waelbroeck, who proposes that in order to compensate for the absence of any possibility within the EC Treaty to apply the principles of international law, which allow retaliation if a contracting state does not abide by a treaty obligation, an action for damages in one member State against another within the courts of the former for breach of Community law should be possible when a member State has been found to be in breach of its Community obligations by the ECJ, Waelbroeck, op.cit., p. 480-81.

[49] However, this may not always be the case as the contrary approach of the German Constitutional Court proved, see *Solange*, *Maastricht* and *Banana* cases of this court; Betten and Grief, op.cit., p. 64-8.

safely presumed that the Community is still an international organisation[50] subject to the relevant rules of international treaty and responsibility laws applicable to the relations between the member states.[51]

The Draft Treaty establishing a Constitution for Europe

In Nice European Council of 2000, EU leaders adopted a declaration calling for a deeper and wider debate about the future of the European Union. In the Laeken Declaration of 2001, they called for a Convention to be established in order to prepare the ground for member states to make their decisions about the future of the Union. Delegations from member states, candidate countries as well as national parliamentarians and various political groups debated a year and a half in this convention and finally produced a draft Treaty establishing a Constitution for Europe. After the EU leaders reached agreement on this draft with some changes, the Constitution was signed by Heads of States and Governments in Rome in 29 October 2004. The Treaty shall enter into force after ratified by all the member states, constitutions of some of which require referandum.

The Treaty establishing a Constitution for Europe sets out for the first time, in one single instrument, the powers, rights and duties of the EU. It does away with the old structure of pillars and extends its rights into some new areas, most importantly into justice policy, asylum and immigration. The principle of voting by qualified majority will be generally applied, including justice and home affairs.[52] There will however be a veto for members in foreign policy, defence and taxation. The European Parliament will have an equal say on decisions requiring majority voting (co-decision procedure).[53] Moreover, the Treaty provides that the EU will have a legal personality, which enables it, as an organisation, to enter into international agreements.

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50 Lasok & Bridge, op.cit., p. 31. This has further been confirmed at the diplomatic conference which approved 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, 25 International Legal Materials 1986, p. 543.

51 Macleod, Hendry and Hyett, op.cit., p. 32 and Lasok & Bridge, op.cit., p. 27 and 106-7. Also, see Adv. Gen. Mayras' Opinion in *ICI* Case, where he stated that the fact that the EC has legal personality and powers on the level of international law does not turn the Community into a state and when the Community exercises its powers it must comply with international law, Case 48/69, *ICI* 1972 ECR 619, p. 692-3.

52 The Qualified majority is defined as at least 55% of the members of the Council, comprising at least15 of them and representing member states comprising at least 65% of the population of the Union.

53 The Treaty also includes a new role for national Parliaments to opine on Commission proposals in draft.

At the moment, the Council presidency rotates through the member states every six months. The Treaty establishes a new Presidency for the Union, which will be a permanent figure chosen by the members of the Council, subject to the approval of the European Parliament, for a term of two and a half years. The president will chair the Council and ensure the external representation of the Union. The European Council, with the agreement of the Commission, shall also appoint the Union Minister of Foreign Affairs, who shall conduct the Union's common foreign and security policy as well as negotiating trade and aid agreements. However, the powers of both of these posts are limited since they will be subject to the Council. The Commission will consist of one national from each member state for its first term of five years, after that it will be slimmed down to a number of members corresponding to two thirds of the number of member states, unless the Council decides to alter this figure.

The Union shall have competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy. Yet, each member state will retain a right of veto on these policies. Defence policy also reference to the primacy of Nato for relevant members.

Finally, the Treaty incorporates the Charter of Human Rights, which include a whole list from the right to life and the right to liberty down to the right to strike.

As regards the nature of the relationship between the EU and the member states under the new Treaty, it can be asserted that it would only restructure and consolidate the present arragements but not fundamentally alter them. The Treaty makes it clear that the EU is a union of nation states and has only those powers that member states have chosen to confer upon it. Moreover, a new procedure in the Treaty describes how a member would leave the EU.[54] Although, it was always possible for a member state to leave the Union, now there is a formal procedure designed to show that the EU is not a superstate.

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54 A member state which decides to withdraw shall notify the Council of its intention. The Union then negotiate and conclude an agreement with that state, setting out the arrangements for its withdrawal.