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# Breaches of EC Law and the International Responsibility of Member States

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## Abstract

*The role of subsystems or special regimes, of which the European Community (EC) has been cited as the most striking example, within public international law has been a focus of attention of academic writing in recent years. Such regimes, strictly understood, exclude the operation of secondary rules of general international law, substituting their own rules. As well as providing a useful descriptive framework for certain aspects of international law, subsystems analysis poses the issue of the effect on the overall efficacy of the international law system of such regimes. Applied to the EC, use of the term ‘subsystem’ as strictly understood is debatable. A number of scenarios indicate the potential applicability and need for the regime of state responsibility of general international law. First, a member state may be liable in international law for breach of EC law where that EC law is an international agreement to which the Community is a party. Secondly, Simma’s 1985 conclusions concerning the EC as a self-contained regime, assessed in light of recent developments in EC law on state liability, arguably remain applicable, suggesting that international responsibility for breaches of EC law by member states, in extremis, cannot be absolutely excluded.*

## 1 Introduction

The unique or *sui generis* character in public international law of the European Community (EC) has been the subject of much commentary.<sup>1</sup> What is special about

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<sup>1</sup> See e.g. Case 26/62, *Van Gend en Loos* [1963] ECR 1, at 12 ('the Community constitutes a new legal order of international law'); Case 6/64, *Costa v. ENEL* [1964] ECR 585, at 593 ('By contrast with ordinary international treaties, the EEC Treaty has created its own legal system'); and see also Joined Cases 142 and 143/80, *Amministrazione delle Finanze Dello Stato v. Essevi* [1981] ECR 1413, at 1431 ('Above all, it must be pointed out that in no circumstances may the Member State rely on similar infringements by other Member States in order to escape their own obligations under the provisions of the Treaty'). For academic commentary, see e.g. Allain, 'The European Court of Justice as an International Court', 68 *Nordic Journal of International Law* (1999) 249; Snyder, 'General Course on Constitutional Law of the

the EC from the standpoint of public international law is the way in which the Community institutions were given powers of a legislative and governmental nature independent of the member states, traditionally seen as the ultimate actors or subjects in public international law.<sup>2</sup> In particular, the European Court of Justice (ECJ) acted as a driving force behind community integration through the development of its case law and, particularly, the doctrines of the direct effect and supremacy of EC law.<sup>3</sup> This transfer to Community bodies of governmental competence normally exclusively enjoyed by states was reflected in the debate as to whether the member states could be said to be ‘masters of the treaties’<sup>4</sup> or, in other words, could ultimately control the content of the treaties and the pace of integration (or, conversely, the extent to which control of the latter had been transferred to Community institutions in an alienation of member state sovereignty). One issue posed by this special character of EC law is the extent to which the EC is a self-contained regime, that is, a distinct system or subsystem of international law whose secondary rules (the rules of change or the rules governing the implementation, operation and amendment of the Treaties)<sup>5</sup> are determined by the regime itself, that is, are special to the regime itself and are not simply the application of conventional secondary rules of general public international law.<sup>6</sup> One aspect of the secondary rules of public international law is state

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European Union’, VI-1 *Collected Courses of the Academy of European Law* (1995) 41; Sørensen, ‘Autonomous Legal Orders: Some Considerations Relating to a Systems Analysis of International Organisations in the World Legal Order’, 32 *ICLQ* (1983) 559; and J.H.H. Weiler, *The Constitution of Europe* (1999) 10–96.

<sup>2</sup> See e.g. L. Oppenheim, *International Law: A Treatise*, vol. 1 (2nd ed., 1912) 19: ‘Since the law of nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are subjects of international law.’ Quoted in P. Malanczuk (ed.), *Akehurst’s Modern Introduction to International Law* (7th ed., 1997) 91. It is now increasingly accepted that other entities — multinational organizations and, more controversially, individuals — may also be capable of acting as subjects in international law: see *ibid.*, at 91–117; R. Higgins, *Problems and Process* (1994) 39–56; Leben, ‘Hans Kelsen and the Advancement of International Law’, 9 *EJIL* (1998) 287, at 299–305.

<sup>3</sup> The adoption of the pillar structure of the EU at Maastricht put on a more conventional public international law footing cooperation in the areas of justice and home affairs (narrowed to cooperation in criminal and judicial matters by the Treaty of Amsterdam, OJ 1997 C 340/145) ('Third Pillar') and common foreign and security policy ('Second Pillar'); cooperation in these areas operates at an intergovernmental, rather than Community level. See e.g. Curtin, ‘The Constitutional Structure of the Union: A Europe of Bits and Pieces’, 30 *CMLR* (1993) 17, at 62–66; Lysén, ‘The EC as a Self-Contained Regime’, 1 *Europärättslig tidskrift* (1999) 128, at 132–134; and Leben, *supra* note 2, at 292. On the role of the ECJ as a political actor, see generally H. Rasmussen, *On Law and Policy of the European Court of Justice* (1986).

<sup>4</sup> Often referred to by the German translation *Herren der Verträge* ('Masters of the Treaties'): Allain, *supra* note 1, at 269–271.

<sup>5</sup> The distinction between primary rules (rules of substantive content, e.g. the free movement of goods and services in EC law) and secondary rules (including rules of change, e.g. the rules concerning Treaty amendment) is originally attributable to Hart: see H.L.A. Hart, *The Concept of Law* (2nd ed., 1984) 80–81.

<sup>6</sup> Simma, ‘Self-Contained Regimes’, 16 *NYIL* (1985) 111, discussing the views of W. Riphagen, the former International Law Commission (ILC) Special Rapporteur on State Responsibility, contained in *ILC Yearbook*, vol. 2, Part 2 (1980) 30 *et seq.* The concept of a self-contained regime in international law was introduced by the International Court of Justice (ICJ), referring to diplomatic law, in its ruling in *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports (1980) 3, at 40: ‘The rules of diplomatic law, in short, constitute a self-contained regime, which, on the one hand, lays down the receiving State’s

responsibility, that is, the responsibility of a state in international law for the infringement of an international obligation.<sup>7</sup> The issue posed is whether or not, independently of liability in EC law of a member state for a breach of an EC obligation over which the ECJ would have jurisdiction,<sup>8</sup> the state may also be liable or responsible in international law for the breach of that EC obligation (which is also an obligation of international law, albeit international law of a special or unique character).<sup>9</sup>

The traditional view expressed on this point and one apparently endorsed by the ECJ

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obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are by their nature, entirely efficacious.' Sørensen proposed an evaluation of system autonomy by reference to the extent to which the special features of a system (relating to organizational structures and the procedural processes) have a distinctive impact on substantive law. In the EC context, the non-consensual jurisdiction of the ECJ and the status of the Court as the authoritative or ultimate arbiter of EC law, which allowed for the development of the doctrines of direct effect and supremacy, are distinctive among transnational legal systems: Sørensen, *supra* note 1, at 571. Sørensen also identified (citing H. Kutscher, *Thesen zu den Methoden der Auslegung des Gemeinschaftsrechts, aus der Sicht eines Richters* (1976)) the strong tendency of the ECJ towards teleological interpretation as a distinctive feature among international tribunals: *ibid.*, at 573 (see also e.g. Rasmussen, *supra* note 3). The Draft Articles on State Responsibility of the International Law Commission, in Article 55 (entitled 'Lex specialis'), General Provisions, leave open the question of how to determine whether or not particular or special rules of state responsibility apply, rather than the general regime of state responsibility set out in the Draft Articles: 'These Articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law' (Draft Articles on State Responsibility and Commentaries, GAOR, 56th Session, Supplement No. 10 (A/56/10) (A/CN.4/L.602, Corr.1, L/602/Rev.1 and ILC(LIII)/SR/CRD.1, Adds 1–3); and see also Special Rapporteur James Crawford, Fourth Report on State Responsibility, A/CN.4/517.

<sup>7</sup> As defined in Articles 1 and 3 of the Draft Articles on State Responsibility, *supra* note 6. For a comparison of member state liability in EC law and the regime of state responsibility in international law, see Köck and Hintersteiner, '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 JIEL* (1998) 17, at 31–35.

<sup>8</sup> Originally, the ECJ had a declaratory jurisdiction only, and had no means of enforcing its decisions against member states. This situation has changed with the possibility of a fine (under Article 228, ex Article 171, discussed below) on member states for failure to adhere to the Court's judgments (although the Court has no way of enforcing in turn a failure to pay any fine so ordered) and the availability to the Court of an order for interim measures against a member state (developed by the ECJ itself in such cases as Case C-213/89, *Factortame I* [1990] ECR I-2433; see Hoskins, 'The Relationship Between the Action for Damages and the Award of Interim Measures', in T. Heukels and A. McDonnell (eds), *The Action for Damages in Community Law* (1997)). The effect of Article 228 was largely pre-empted by the ECJ decision in Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357, that member states were obliged, as a principle inherent in the system of the EC Treaty, to compensate individuals who suffered loss as a result of a member state's failure to adhere to Treaty obligations. See generally A. Arnulf, *The European Union and Its Court of Justice* (1999) 29–30 and 143–189; and L. Neville-Brown and T. Kennedy, *The Court of Justice of the European Communities* (5th ed., 2000) 285–289.

<sup>9</sup> The term 'international liability' is usually used to denote possible liability in international law for the consequences of acts not in themselves unlawful under international law (state responsibility indicating liability for breaches of international law obligations): see the discussion in G. Lysén, *State Responsibility and International Liability of States for Lawful Acts* (1997) 46–51. See also the ILC's Draft Preamble and Draft Articles on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (Prevention of Transboundary Damage from Hazardous Activities), A/CN.4/L.601; and the Draft Report on International Liability, A/CN.4/L.607, Add.1 and Add.1/Corr.1.

itself in its earlier case law is that the EC is a self-contained regime and resort to public international law measures, such as countermeasures, is therefore precluded.<sup>10</sup> The effect is that breaches of an EC obligation by a member state may only be remedied, if at all, by resort to the mechanisms specifically provided for by EC law. In a leading article, Simma questioned this conventional view and proposed that, although in practice the EC was the closest existing entity to a self-contained regime, resort to general principles of public international law was not absolutely excluded.<sup>11</sup> Despite recent developments augmenting the EC's own system of state liability, it can be argued that Simma's conclusion still stands. Moreover, the move away from the *sui generis* nature of the Community in the Union structure points to a stronger link between the Union and general public international law. For example, the jurisdiction of the ECJ is considerably more limited under the Third Pillar and, especially, the Second Pillar.<sup>12</sup> Less scope exists, therefore, for holding to account a state in breach of measures adopted under these structures, potentially making more important and necessary the application of general public international law measures. The adoption of more flexible structures in the Treaty on European Union (TEU) reflects the expansion of Union competence into fields that are more traditionally linked to state sovereignty and, consequently, that states are unwilling to transfer entirely to the Community structure. Such a trend is likely to be strengthened by the enlargement of the Union and the admission of new member states with their own sense of sovereignty and the limits on Community competence, and points to a greater relevance and applicability of general international law.

This article is structured as follows. First, the direct effect of international agreements concluded by the EC is briefly discussed. A member state may be liable in international law for breach of EC law where that EC law is an international agreement to which the Community is a party. Secondly, Simma's arguments concerning the EC as a self-contained regime are assessed in light of recent developments in EC law on state liability. The issue of the EC as a self-contained regime is the primary focus of debate concerning the relationship between the law of international responsibility and EC law. The conclusion is drawn that, despite the enhancement in a number of ways of the Community regime of state liability since

<sup>10</sup> See e.g. Case 6/64, *Costa v. ENEL* [1964] ECR 585; Cases C-90 and 91/63, *Commission v. Luxembourg and Belgium* [1964] ECR 625; and Case 232/78, *Commission v. France* [1979] ECR 2729. For academic commentary, see e.g. Schwarze, 'Das allgemeine Völkerrecht in den Innengemeinschaftlichen Rechtsbeziehungen', 18 *Europarecht* (1983) 1 (as cited in Simma, *supra* note 6, n. 58 and see additional references therein).

<sup>11</sup> *Ibid.*

<sup>12</sup> See Article 46 (ex Article L) of the TEU, as amended by the Treaty of Amsterdam. The Court is generally denied any jurisdiction under the Second Pillar (Common Foreign and Security Policy), but has jurisdiction under the Third Pillar (Article 35, ex Article K.7) to give preliminary rulings on the validity and interpretation of framework decisions and decisions on the interpretation of conventions, and on the validity and interpretation of the measures implementing them. Notably, Article 35(3) provides that member states must make a declaration accepting the jurisdiction of the ECJ to deliver preliminary rulings before the Court may exercise jurisdiction (a requirement comparable to the need for state party consent to the jurisdiction of the ICIJ). For a comprehensive discussion, see Albors-Llorens, 'Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam', 35 *CMLR* (1998) 595.

Simma's 1985 analysis, international responsibility for such breaches, *in extremis*, cannot be absolutely excluded. Thirdly, the potential international responsibility of a member state in the event of withdrawal from or denunciation of the Treaties (a scenario illustrating the fault line between EC law and general international law) is examined.

## 2 Direct Effect of International Agreements in EC Law

International agreements concluded by the EC have direct effect in EC law, that is, they do not require Community implementing legislation to be justiciable before the Community courts.<sup>13</sup> The EC is, therefore, essentially monist.<sup>14</sup> It has now become the norm for both member states individually and the EC to become a party to the same international agreement in a mixed agreement.<sup>15</sup> It is possible that breach by the

<sup>13</sup> First held in Case 181/73, *Haegmean v. Belgium* [1974] ECR 449, at 459–460. For more recent case law, see e.g. Case C-416/96, *Eddline El-Yassini v. Secretary of State for the Home Department* [1999] ECR I-1209; and Case C-262/96, *Sürlü v. Bundesanstalt für Arbeit* [1999] ECR I-2685. See also generally Stein, 'External Relations of the EC: Structure and Process', I-1 *Collected Courses of the Academy of European Law* (1990) 115, at 164–175.

<sup>14</sup> McGoldrick, 'EU Law and International Law: The Interface for the New Millennium', in I. Cameron and A. Simoni (eds), *Dealing with Integration*, vol. 2 (1998) 133. McGoldrick comments that the test for the direct effect of such international agreements appears to be identical to that for provisions of internal EC law — clear, precise and affording individual rights (*ibid*); see also Stein, *supra* note 13, at 174. Timmermans suggests that the test for direct effect may be modified to a stricter standard in the case of international agreements, taking into account the system and context of the international treaty relationship (citing Case 104/81, *Hauptzollamt Mainz v. CA Kupferberg & Cie KG* [1982] ECR I-3641; and Case C-469/93, *Chiquita Italia* [1995] ECR I-4558); Timmermans, 'The International Lawyer and the EU', in C. Wickremasinghe (ed.), *The International Lawyer as Practitioner* (2000) 95. See also 'Reconsidering the Direct Effect of International Law in the EU Legal Order', 27 *LIEI* (2000) 213. Generally, among the rules of general public international law that the ECJ (or the Court of First Instance) has applied, or accepted the status of, are law-making international treaties to which it is not a party, including rules concerning treaty interpretation (e.g. *Hauptzollamt Mainz v. CA Kupferberg & Cie KG* [1982] ECR I-3641; and Case T-115/94, *Opel Austria v. Council* [1997] ECR II-39 concerning the 1969 Vienna Convention on the Law of Treaties, 8 *ILM* (1969) 683; 1155 UNTS 331; 63 *AJIL* (1969) 875); rules of nationality (e.g. Case 41/74, *Van Duyn v. Home Office* [1974] ECR 1337); rules concerning the law of the sea (e.g. Case C-286/90, *Anklagemyndigheden v. Poulsen Diva Navigation Corp.* [1992] ECR I-601); rules concerning treaty suspension (e.g. Case C-162/96, *Racke v. Hauptzollamt Mainz* [1998] ECR I-3655); and rules concerning the allocation of extraterritorial jurisdiction (e.g. Case T-102/96, *Gencor v. Commission* [1999] ECR II-753). For an overview of the interaction of international and EC/EU law, see e.g. Boulois, 'Le Droit des Communautés Européennes dans ces Rapports avec le Droit International Général', 235-IV *Recueil des Cours* (1992) 19; A. Dashwood and C. Hillion, *The General Law of EC External Relations* (2000); Denza, 'Two Legal Orders: Divergent or Convergent', 48 *ICLQ* (1999) 257; M. Koskenniemi, *International Law Aspects of the EU* (1998); McGoldrick, *supra*; McGoldrick, *International Relations Law of the EU* (1997); I.H. MacLeod and S. Hyett, *The External Relations of the European Communities: A Manual of Law and Practice* (1996); D.R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community* (1997); and Stein, *supra* note 13.

<sup>15</sup> McGoldrick, 'EU Law and International Law: The Interface for the New Millennium', in I. Cameron and A. Simoni (eds), *Dealing with Integration*, vol. 2 (1998) 129–130; and MacLeod and Hyett, *supra* note 14, at 142–164. See also O'Keefe, 'Community and Member State Competence in External Relations Agreements of the EU', 4 *European Foreign Affairs Review* (1999) 7, at 27–35; Rosas, 'Mixed Agreements', in Koskenniemi, *supra* note 14; and Weiler, *supra* note 1, at 168–184.

member state of such an agreement, which is a part of EC law, will entail the international responsibility of the state, since the agreement is simultaneously a measure in international law giving rise to international law obligations.<sup>16</sup> Any such international responsibility may arise even without any declaration by the ECJ (in an action initiated under Articles 226 or 227) that the member state has breached EC law in failing to adhere as required to the agreement in question (for example, if a dispute between a member state and a non-member state concerning an international treaty to which both were a party was submitted to the International Court of Justice (ICJ) for resolution).<sup>17</sup>

In this context, a second possibility for international responsibility of member states is that the member state could be responsible vicariously for the consequences of the conduct of the organization to which the member state belongs<sup>18</sup> (particularly in the case of non-mixed agreements, i.e. agreements to which the EC is a party as a legal actor in its own right, without separate membership of the member states).<sup>19</sup> Article 300(7) (ex Article 228(2)) states that agreements concluded by the Community shall be binding on the institutions of the Community *and* the member states. Disagreement exists as to the effect of the Article, although the thrust of opinion appears to be that it does not impose any liability on member states on foot of a bilateral agreement between the Community and a third party. Stein concludes that:

At any rate, whether or not one concludes that Article 228(2) [now Article 300(7)] as an exclusively internal rule, binds the member states only *vis-à-vis* the Community, with the Community alone answering the non-member state, the member states would still be held

<sup>16</sup> Gaja comments that a better approach here would be the assumption by the Community, through a special agreement, of responsibility in such an instance; in that case, there would be no need, he suggests, to envisage the international responsibility of the member states: Gaja, ‘Some Reflections on the EC’s International Responsibility’, in Heukels and McDonnell, *supra* note 8, at 357–358 and see note 24 therein. In Case C-316/91, *Parliament v. Council* [1994] ECR I-625, the ECJ concluded that, in the absence of derogations expressly laid down in the Fourth Lomé Convention (Lomé IV, OJ 1991 L 229; OJ 1998 L 156), the Communities and its member states as partners of the ACP (African, Caribbean and Pacific states) are jointly liable to those latter states for the fulfilment of every obligation arising from the commitments undertaken ([1994] ECR I-625, at 661–662). On the potential liability of a member state in *Community* law for breach of an international agreement concluded by the Community under Article 300 of the Treaty, see Gasparon, ‘The Transposition of the Principle of Member State Liability in the Context of External Relations’, 10 *EJIL* (1999) 605.

<sup>17</sup> Article 292 of the EC Treaty (discussed below) prevents member state consenting to ICJ jurisdiction over breaches of EC law generally.

<sup>18</sup> See Gaja, *supra* note 16, especially at 351 n. 1 and 358.

<sup>19</sup> See the discussion in Stein, *supra* note 13, at 166–168. It appears that the EU does not possess a legal personality in that it is not competent to conclude international agreements (the Community is expressly conferred with such competence by Article 281 (ex Article 210) of the EC Treaty): see McGoldrick, ‘EU Law and International Law: The Interface for the New Millennium’, in I. Cameron and A. Simoni (eds), *Dealing with Integration*, vol. 2 (1998) 125–129; and, for a contrary view, Wessel, ‘Revisiting the International Legal Status of the EU’, 5 *European Foreign Affairs Review* (2000) 507 (who argues in favour of the conclusion that the EU may have legal personality in the sense of a capacity to conclude international agreements; see especially *ibid.*, at 527–535). See also O’Keefe, *supra* note 15, for a discussion of Community competence and powers in external relations agreements.

subsidiarily liable under general international law for obligations undertaken by the Community.<sup>20</sup>

These scenarios are different to that primarily envisaged in the debate concerning the status of the EC as a self-contained regime,<sup>21</sup> the thrust of which relates to the consequences as between the member states of breaches of *internal* EC law and the potential application in that situation of public international law rules (rather than the application of the latter for breaches of obligations, owed to third states, that are simultaneously a part of EC law and conventional public international law).<sup>22</sup>

### 3 The EC: Now a Self-Contained Regime?

#### A *Self-Contained Regimes*

Discussing the findings on state responsibility of Special Rapporteur Riphagen of the International Law Commission (ILC), Simma defines a subsystem of international law as a regime with its own, express or implied, secondary rules designed for its primary rules, but which does not exclude the application of general customary international law as a possible fallback in the event of the failure of the regime's own secondary rules.<sup>23</sup> Notably, in the *Chorzów Factory (Indemnity) Case*,<sup>24</sup> the Permanent Court of International Justice held that international responsibility goes with a treaty unless the treaty specifically excludes it; the EC Treaty does not exclude international responsibility in this way. A self-contained regime is one that does exclude 'more or less totally' any fallback on general customary international law rules.<sup>25</sup> The significance of the concept of self-contained regimes is twofold: first, the greater the exclusion of the general public international law rules, the greater the legal

<sup>20</sup> Stein, *supra* note 13, at 168.

<sup>21</sup> Generally see Simma, *supra* note 6; L.A. Baarnhoorn and K.C. Wellens, *Diversity in Secondary Rules and the Unity of International Law* (1995); and Marschick, 'Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System', 9 *EJIL* (1998) 212.

<sup>22</sup> These scenarios can be distinguished in turn from: (1) the potential international responsibility of a member state for breach, through adherence to the requirements of EC law, of an international law obligation (in the event of inconsistency between EC and other international law obligations) (see Canor, 'Primus Inter Pares. Who is the Ultimate Guardian of Fundamental Rights in Europe?', 25 *ELR* (2000) 3, for a discussion of the Court of Human Rights' decisions in *Matthews v. UK* (1999) 28 EHRR 361 and *Waite and Kennedy v. Germany* (2000) 30 EHRR 261; and Mus, 'Conflicts Between Treaties in International Law', 45 *NILR* (1998) 28, for a general review of conflicts between international treaties); and (2) the potential international responsibility of the EC, as an independent legal actor in its own right, incurred independently of any international responsibility of a member state: see Gaja, *supra* note 16; and Stein, *supra* note 13, at 177–179.

<sup>23</sup> Simma, *supra* note 6, at 116. For a contrary view, see Weiler, *supra* note 1, at 28–29, who proposes that, first, the means of judicial settlement provided for in the EC Treaty, and, secondly, the prejudicial or harmful effect on innocent third parties of resort to general international law measures, should operate to exclude state responsibility traditionally understood in the context of EC law (discussed below).

<sup>24</sup> PCII Series A, No. 9, 21. On the other hand, it might be argued that, by specifying that the Treaty does not preclude other measures taken by states to protect their essential security interests (Article 296), the Treaty by implication confines such other applicable measures to this specific instance and excludes them generally.

<sup>25</sup> Simma, *supra* note 6, at 117.

complexity within the regime; and, secondly, the more such regimes, the greater the risk of conflicts between them. In the latter context, authors discuss whether such regimes adversely affect the efficiency of public international law.<sup>26</sup> The question posed here, therefore, is whether the EC is a self-contained regime or whether customary rules of international law on state responsibility may ever be applied in the context of a breach by a member state of EC obligations.

## B *Interpreting Article 292*

The EC Treaty itself might be thought to dispose of the issue in Article 292 (ex Article 219), according to which the member states undertake not to submit a dispute concerning the interpretation or application of the Treaty to any method of settlement other than those provided for therein. However, this wording may be subject to different interpretations.<sup>27</sup> The law of international responsibility may not necessarily be included in ‘method of settlement’, which could arguably be taken to refer only to judicial or institutional methods of resolving disagreements (that is, primarily to proceedings before the ECJ, pursuant mainly to Articles 226 and 227 (ex Articles 169 and 170), but also to Articles 93 and 95(9) (ex Articles 99 and 100a8)).<sup>28</sup> Interpreted teleologically, Article 292 arguably only precludes resort by the member states to the jurisdiction of the ICJ or of an arbitral body; on this view, the purpose of Article 292 was to establish the exclusive jurisdiction of the ECJ and thereby to preclude a competing jurisdiction of other international tribunals.<sup>29</sup> The fact that resort to non-Community bodies is precluded does not mean international responsibility does not arise; the justiciability of international responsibility before the ICJ is a different

<sup>26</sup> Baarnhoorn and Wellens, *supra* note 21, *passim*; and Marschick, *supra* note 21, at 214. These regimes could potentially also *augment* the efficiency of international law by providing for a more detailed, elaborate or specific regime within a particular field of activity when general public international law is thought to be inadequate.

<sup>27</sup> Simma, *supra* note 6, at 127: ‘An intention [thereby] to exclude the applicability of the general legal consequences of internationally wrongful acts to the Community treaties under all circumstances can hardly be established through accepted methods of treaty interpretation.’

<sup>28</sup> The main provisions in the Treaties concerning actions against member states are Articles 226 (actions brought by the Commission) and 227 (actions brought by member states). Article 93 operates in the particular context of state aids in competition law cases, and Article 95(9) permits the Commission or any member state to bring an action if either considers that another member state is making improper use of a measure of harmonization as provided for in that Article. See generally Arnulf, *supra* note 8, at 21–74 and 143–189; and Neville-Brown and Kennedy, *supra* note 8, at 113–134.

<sup>29</sup> Such a purposive interpretation is consistent with a literal reading of the reference to ‘methods of settlement’. Different methods of interpretation may not be mutually exclusive. Bobbitt, in the context of a discussion of interpretation by the US Supreme Court of the US Constitution, noted that, if someone took different colour pens to highlight different methods of interpretation expressly or impliedly adopted in any one Supreme Court decision, the result would be a multi-coloured picture; much the same may be said of interpretation of legal documents generally: see P. Bobbitt, *Constitutional Interpretation* (1991) 93–94. On treaty interpretation generally in international law, see e.g. D.J. Harris, *Cases and Materials in International Law* (5th ed., 1998) 810–821; and Simma, ‘International Human Rights and General International Law: A Comparative Perspective’, IV-2 *Collected Courses of the Academy of European Law* (1995) 153, at 184–193 (for a discussion of the interpretation of international human rights treaties).

issue to the fact of that responsibility in the first instance. If the Treaty provided a less comprehensive system of state liability than that provided for in general international law, which appears to be the case, the additional, self-help measures afforded by international law may not be absolutely precluded.<sup>30</sup> (Notably, an element of self-help, which can be viewed as a fallback on general international law, was specifically provided for in Article 88 of the Treaty Establishing the European Coal and Steel Community<sup>31</sup> and Article 296 (ex Article 223) of the EC Treaty provides that the EC Treaty shall operate without prejudice to measures by member states to protect their essential security interests, concerning the production of or trade in arms, munitions or war materials.<sup>32</sup>) On the other hand, it may be argued that Article 292 does not limit the scope of disputes referable to the ECJ and that, therefore, the Article is intended to apply to all disputes. Nonetheless, the exact scope of Article 292 does not seem to be sufficiently unequivocal to dispose of the question of the EC as a self-contained regime.

### C The Enhanced Regime of Member State Liability

Simma lists four features of the EC legal order (in addition to Article 292, ex Article 219) that may be cited as evidence of the effectiveness of the EC's own system of remedies for breaches by member states of EC law and, therefore, as evidence of the closed or self-contained nature of the EC subsystem: (1) proceedings before the ECJ; (2) deliberation before the Council of the European Communities; (3) secondary legislation dealing with a breach of Treaty obligations and its consequences; and (4) the direct effect of Community law before the national courts.<sup>33</sup>

Notwithstanding these provisions, Simma argues that 'if and when the remedies provided within this regime definitely fail to put an end to persistent violations of Community law, the situation may reach the point where further fulfilment of

<sup>30</sup> As argued by Simma, *supra* note 6. See also Lysén, *supra* note 3. Custom establishes that a party aggrieved by breach of a treaty may have resort to, depending on the circumstances, a number of remedies, including satisfaction, guarantees of non-repetition, cessation of unlawful conduct (in the case of a continuing wrong, as would be the case here) or restitution in kind: see *Chorzów Factory*, PCIJ Series A, No. 9, 21; and Articles 22 and 49–54 of the ILC Draft Articles on State Responsibility, *supra* note 6. See also e.g. A. Aust, *Modern Treaty Law and Practice* (2000) 300–304; and I. Brownlie, *Principles of Public International Law* (5th ed., 1998) 461–469.

<sup>31</sup> Article 88 of the ECSC Treaty provided that the Commission could, in the event of a refusal by a state to fulfil a treaty obligation as declared by the ECJ, authorize the member states to 'take measures', by way of derogation from the general provisions in Article 4 of the Treaty, in order to correct the effects of the infringements of the obligation.

<sup>32</sup> Although Article 296 could be viewed as merely an exception that proves the rule of the non-applicability of public international law generally in an EC context, its wording suggests that its interpretation and application is primarily a matter for the state itself (there is no duty to consult any Community institution or body before taking measures). The latter suggests a recognition that the EC is not an all-encompassing system that transcends existing international law mechanisms, but is one limited in scope in certain respects. In the context of the Union, Article 11 of Title V of the TEU states that the 'Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity'. It could be said, therefore, that a member state would be under a tacit or moral duty (or as a matter of comity) to consult its partners before taking any measures pursuant to Article 296.

<sup>33</sup> Simma, *supra* note 6, at 125.

community obligations towards a defaulting member state would simply become an intolerable burden on the injured party or parties'.<sup>34</sup> Moreover, Simma points out that international law on state responsibility is sophisticated enough to take into account the particularly integral or multinational dimension of the Community in providing that countermeasures may only be resorted to where the material breach of the Treaty's provisions radically changes the position of every party with respect to the further performance of its obligations under the Treaty.<sup>35</sup>

It could be argued that developments in the EC's regime on state liability since Simma's 1985 article operate to alter this analysis. Specifically, three developments — the decision of the ECJ in the *Francovich* case,<sup>36</sup> Article 228 (ex Article 171) of the EC Treaty concerning fines on member states,<sup>37</sup> and the provision for suspension of a member state's rights in Article 7 of the TEU<sup>38</sup> — provide, it may be argued, the additional elements to 'seal off' the EC as a self-contained regime and remove any possible justification for fallback on general public international law.

Although both *Francovich* and Article 228 extend the Community regime on state liability, they do not represent on their own the completion of a comprehensive Community regime on state liability. It is still very possible (if, at least at the present time, unlikely)<sup>39</sup> that a member state would refuse to provide the remedy established

<sup>34</sup> *Ibid.*, at 127.

<sup>35</sup> *Ibid.*, at 128, citing Article 60(2) of the Vienna Convention on the Law of Treaties, *supra* note 14. James Crawford, the ILC Special Rapporteur for the recent ILC Fourth Report on State Responsibility, notes the parallelism of the language of Article 42(b)(ii) of the ILC Draft Articles on State Responsibility, *supra* note 6, and that of Article 60(2) of the Vienna Convention: see Crawford, Peel and Olleson, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading', 12 *EJIL* (2001) 963.

<sup>36</sup> Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357. The most notable effect of the *Francovich* decision was to require in every member state of the EC a new form of remedy for breaches of EC law by the member state, that is, the remedy of a claim for compensation against the state for the breach (see e.g. the commentary in P. Craig and G. De Burca, *EU Law: Text and Materials* (2nd ed., 1998) 236–254).

<sup>37</sup> Article 228 provides for ECJ jurisdiction to fine a member state in an action initiated by the Commission for failure by the member state to adhere to an ECJ declaration of the obligations of Community law. Article 228 operates without prejudice to Article 227, thereby not affecting the rights of member states under Article 227.

<sup>38</sup> Article 7 provides for a mixed unanimity and qualified majority procedure for the suspension of member state rights. Article 7(1) stipulates that the Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the member states or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a member state of principles mentioned in Article 6(1). When the Council so decides, under Article 7(2), it may then decide by qualified majority to suspend certain of the rights of the member state under the TEU. Here, there is a mixture of intergovernmental and Community-type mechanisms. The initial unanimity requirement is consistent with the former, in that each member state can determine itself ultimately if it is to commit itself to a suspension of rights process; on the other hand, a member state may be bound by qualified majority, despite its own opposition, to a decision as to what particular rights are to be suspended.

<sup>39</sup> The controversy surrounding the admittance to coalition government in Austria of the far-right grouping, the Freedom Party, and the subsequent sanctions effected against Austria by EU states, which operated in this instance outside of the EU/EC framework (as no actual EC/EU law had been broken by Austria), illustrates the potential, at least, for a fundamental conflict between a member state and

in *Francovich* and preferred against it by a ECJ declaration in a particular case, or, perhaps more likely, refuse to pay any lump sum or penalty payment preferred against it under Article 228.<sup>40</sup> In that situation, the only option left to other member states within the EC regime would be to suspend a member's rights under the EC Treaty for serious and persistent breach of basic Community principles.<sup>41</sup> However, even suspension of rights may not be enough to bring a recalcitrant state into line, and the breach of the state's duty may persist after the suspension (there is no reciprocal suspension of the member state's obligations under the Treaties).<sup>42</sup> This presents the scenario in which member states would seemingly be obliged to fulfil their obligations towards a member state in the face of a persistent and continued refusal by a member state to adhere to its obligations towards the member states. In this extreme yet possible situation, no remedy or effective countermeasure is available under current EC law.<sup>43</sup> As Simma expressed it, the balance of mutual advantage between the member states may no longer exist and acquiescence in the continued breach by other member states becomes intolerable. Weiler proposes that state responsibility is excluded from EC law because of, *inter alia*, the harmful effect countermeasures would have on third parties.<sup>44</sup> However, it may not always be the case that countermeasures would prejudice the interests of other parties. It may be that they can be carefully directed as to their effects so as to impact upon the offending state only. Moreover, the law of state responsibility and of its implementation encompasses a number of

Community/Union norms (particularly in the context of the human rights jurisdiction of the ECJ developed in the Court's case law and subsequently given Treaty status in Article 46 of the TEU). [On the Austrian episode, see the discussion in Hofstötter, 'Suspension of Rights by International Organisations — The EU, the European Communities and Other International Organisations', in V. Kronenberger, *The EU and the International Legal Order* (2001).] See generally on human rights and the EC/EU, P. Alston (ed.), *Human Rights and the EU* (1998); Brandtner and Rosas, 'Human Rights and the External Relations of the European Community', 9 *EJIL* (1998) 468; Canor, *supra* note 22; King, 'Human Rights in European Foreign Policy', 10 *EJIL* (1999) 313; Nørgaard, 'General Course on the Protection of Human Rights in Europe', II-2 *Collected Courses of the Academy of European Law* (1991) 21; and Rasmussen, *supra* note 3, at 259–286.

<sup>40</sup> See Curtin, *supra* note 3, at 33, who comments that 'it may prove exceedingly difficult in practice to arrive at a figure which will have a real deterrent effect'.

<sup>41</sup> Under Article 309(1), where voting rights are suspended pursuant to Article 7(2) of the TEU, they will also be suspended under the EC Treaty.

<sup>42</sup> Article 7(2)(2).

<sup>43</sup> Simma's comment that '[t]he EEC Treaty does not answer the question of what may happen if the violator, despite such cumulative condemnation [for which, now substitute "despite such suspension of rights and imposition of pecuniary penalties"], does not desist from its course of action' remains applicable: Simma, *supra* note 6, at 126. Article 1 of the Treaty of Nice (OJ 2001 C 80/01) (which is to replace, if ratified by all member states, Article 7 of the TEU), provides a mechanism whereby a warning could be delivered to a state when there is a 'serious risk' of a breach of fundamental Community principles. These Treaty of Nice provisions are intended to provide a 'graduated response if a situation occurred which gave grounds of concern, even if it fell short of the persistent breach of fundamental principles to which the Treaty refers at present' (Department of Foreign Affairs of Ireland, *Treaty of Nice White Paper* (2001) para. 4.4). Clearly, such a warning would not cater for the extreme scenario envisaged here where a member state is determined to defy its obligations even in the face of the application of the existing regime of sanctions.

<sup>44</sup> Weiler, *supra* note 1, at 28–29, and see *supra* note 23.

instruments other than countermeasures that do not generally affect third parties in a prejudicial way (e.g. guarantees of non-repetition, compensation/damages, or restitution in kind). Finally, it could be argued that the potential prejudice to innocent third parties resulting from countermeasures is a factor to be considered in determining the proportionality of the countermeasures, rather than their legality per se.<sup>45</sup>

Simma's analysis, therefore, arguably still holds true, despite the enhancement of the state liability regime in the Community. This conclusion is supported by the move away from a purely Community structure towards more conventional public international law instruments in the Second and Third Pillars. Although the Community remains theoretically distinct in the First Pillar, it may be that its *sui generis* character has been weakened and diluted by the surrounding structure of the Union in that, for practical purposes, it may be impossible to treat the Union and Community as two different entities.<sup>46</sup> In that context, arguments concerning the exclusiveness of the Community regime on state liability can less plausibly be made. Rather than representing an intrusion of relatively 'primitive' general international law mechanisms into the more sophisticated sphere of EC law, the application of public international law in this context highlights the relative comprehensiveness, at least in the area of self-help, of the public international law system where EC law remains silent.<sup>47</sup>

<sup>45</sup> The ILC Draft Articles on State Responsibility, *supra* note 6, contain in Articles 22 and 49–54 a general provision that reprisals or acts against a state that would normally be illegal may be rendered lawful by the existence of a breach of obligation or unlawful triggering act by that state. The Draft Articles go on to outline a number of restrictions on the entitlement to pursue countermeasures. A state must first seek to resolve the matter by negotiation (Article 48) (this point does not, however, appear to be accepted as a rule of custom). In addition, the countermeasures adopted must be proportionate to the wrong committed (Article 49) (this requirement was confirmed as a matter of custom in the *Gabcikovo Case*, ICJ Reports (1997) 7, at paras 82–87; 37 ILM (1998) 162, at 191). Furthermore, countermeasures are subject to the restrictions set out in Article 2(4) of the UN Charter (UNCIO XV, 335; amendments by General Assembly Resolution in 557 UNTS 143; 638 UNTS 308 and 892 UNTS 119) on the use of force. See e.g. Aust, *supra* note 30, at 300–304. A further issue that arises in this context, noted by Simma, *supra* note 6, at 127–128, is the extent to which Community institutions could review any countermeasures adopted by a member state and the standard of review that would then apply. One approach would be for the ECJ to adopt the proportionality standard outlined by the ICJ in *Gabcikovo* (although discussion of proportionality in the judgment is minimal). See also the discussion of proportionality in Canor, 'UN Sanctions in European Law', 25 *CMLR* (1998) 137, at 175–186; and Jans, 'Proportionality Revisited', 27 *LIEI* (2000) 239.

<sup>46</sup> I am grateful to Professor Lysén for discussion of this point. Marschick, *supra* note 21, at 232, questions whether the term '*sui generis*' is appropriate for even the Community structure, pointing out that several regimes (the United Nations, the Danube Commission and diplomatic law) possess features distinct from general international law, but are nonetheless not regarded as *sui generis* creations; rather they are seen as a part of international law. However, the issue can be seen as one of degree, and it seems fair to say that the supremacy of EC law, its direct effect and, in particular, the role of the ECJ in developing these two doctrines are unique or distinct in international law in terms of their overall impact on domestic legal systems. See also de Witte, 'The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?', in T. Heukels, N. Blokker and M. Brus (eds), *The European Union after Amsterdam: A Legal Analysis* (1999).

<sup>47</sup> See the discussion in Marschick, *supra* 21, at 239; Simma, *supra* note 6, at 128; and generally Baarnhoorn and Wellens, *supra* note 21.

Based on a number of *dicta* from ECJ case law,<sup>48</sup> it seems that one restriction in this context, in addition to the restrictions normally applicable to countermeasures (e.g. concerning the use of force and proportionality), is that the countermeasures could not contravene the obligations normally owed to the offending state under EC law, e.g. to equal treatment of the state's nationals in member states' labour laws. The countermeasures would seem to have to relate to obligations owed to the offending state in general international law, e.g. member states could suspend their respective bilateral treaty obligations towards the offending member state (where such bilateral treaty obligations are not a part of EC law). In that way, the special character of the Community in international law terms might serve to limit, but not entirely to exclude, resort to countermeasures by member states. Nonetheless, in a situation of particular gravity, e.g. where a member state engages in persistent and gross violations of basic human rights (especially if the rights in question were to be characterized as peremptory norms under international law), suspension by other member states of obligations owed in EC law to the offending state may still be justified. Otherwise, other member states, by continuing to fulfil their obligations towards the offending state, may actually be abetting the continuation in power of the offending regime (and thereby the continued abuse of human rights) in permitting the regime to benefit from their continued adherence to EC law.

## 4 Denunciation of or Withdrawal from the Treaties

### A The Treaties and International Law

The as yet hypothetical scenario of denunciation or withdrawal from the Treaties by a member state is another instance when international responsibility of a member state may be theoretically engaged for breach of an obligation under EC law. The Treaties establishing the Communities did not envisage the withdrawal of a member state from the system or the dissolution of the system (they contain no provisions on withdrawal or denunciation); in *Costa v. ENEL*, the ECJ declared the transfer of sovereignty by member states to the Community structure to be 'permanent'.<sup>49</sup> It appears, in light of this authority, that any attempt by a member state to withdraw from the Community would be a breach of implied treaty obligations. The situation in

<sup>48</sup> See Essevi, quoted at *supra* note 1; and Case C-38/89, *Ministere Public v. Guy Balangueron* [1990] I-ECR 83, at 92: '[A]ccording 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' (both cited in Weiler, *supra* note 1, at 28 and n. 42 therein).

<sup>49</sup> Case 6/64, *Costa v. ENEL* [1964] ECR 585, at 594: 'The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.' Moreover, as Arnulf, *supra* note 8, at 160–162, points out, it is implicit in Case 14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR I-1891 and subsequent case law, as a corollary of the general principles developed by the ECJ, that member states have a duty to act to prevent infringements of Community law so that the rights of individuals or Community interests in general are not undermined.

customary international law where there is no express right of withdrawal from a treaty is a grey area. Article 56 of the Vienna Convention on the Law of Treaties<sup>50</sup> provides that:

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.
2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Two grounds for withdrawal or denunciation are thus envisaged: implied intention of the parties or implication from the nature of the treaty. The uncertainty as to the status of Article 56 in custom concerns the basic issue as to whether or not there can ever be an implied right of withdrawal or denunciation.<sup>51</sup> In particular, controversy exists as to whether the *nature* of the treaty could ground, as a matter of custom, an implied right to withdraw (Article 56(1)(b)).

## B Costa, Article 56 and the Treaties

Even assuming that Article 56 in its entirety does represent customary international law, no support appears to exist for the proposition that withdrawal or denunciation was ever implied in the case of the EC Treaty, whether on the basis of the intention of the parties or on the basis of the nature of the founding Treaties,<sup>52</sup> it seems to follow from this that any attempt at withdrawing from or denouncing the Communities by a member state would breach, as well as the fundamental principles of EC law, the international law of treaties. (If a member state did purport to withdraw from or denounce the Treaties, it is perhaps unlikely that the Commission or a member state would bring enforcement action under Articles 226 or 227 respectively, as any state that sought to withdraw or denounce would be unlikely to continue to recognize the authority of the ECJ; however, such an enforcement action would still be possible.<sup>53</sup>)

<sup>50</sup> *Supra* note 14.

<sup>51</sup> Malanczuk, *supra* note 2, at 142; Widdows, 'The Unilateral Denunciation of Treaties Containing no Denunciation Clause', 53 *BYIL* (1982) 83. Malanczuk notes that many British writers support Article 56(1)(a) as a basis for withdrawing or denouncing, but that continental writers tend to deny the existence of any such right. The ICJ appeared to accept the accuracy of Article 56 as a statement of custom in *Nicaragua v. US*, ICJ Reports (1984) 392, at 420. Widdows comments that: 'The result of the deliberations at Vienna appears confusing. On the one hand, there is a test of intention, with no guidance offered as to how to discern intention and arguably no access to the interpretation Article of the Vienna Convention, since what is involved is not interpretation of a treaty provision but ascertainment of the intention of the parties in the absence of treaty provision. On the other, there is the now completely separate and independent criterion of the "nature" of the treaty, again largely unexplained' (at 93).

<sup>52</sup> Even if such a right could be implied, a purported withdrawal from or denunciation of the Treaties by a member state in the absence of the 12-month notice requirement in Article 56(2) of the Vienna Convention would give rise to the international responsibility of the state, i.e. the breach may be procedural, as well as material.

<sup>53</sup> The state would continue to be a member of the EC from the internal perspective of EC law and so would still be subject to the Court's jurisdiction, even if the state did not accept so itself.

For breach of the international law of treaties in such a situation,<sup>54</sup> the member state would incur international responsibility, and, on this view, the state would be obliged under international law to effect a remedy for the breach.

In this context, another potential scenario is that the seceding member state may plead one of the defences available under the Vienna Convention — e.g. *rebus sic stantibus* (or fundamental change of circumstances),<sup>55</sup> impossibility of performance,<sup>56</sup> or material breach by other parties<sup>57</sup> — for its failure to continue to perform treaty obligations.<sup>58</sup> It seems difficult to envisage a situation, in the EC context, in which either of these defences could be credibly invoked as a pretext for refusing to perform Treaty obligations (which would be tantamount to withdrawing from or denouncing the Treaty). Whatever the situation in general international law regarding the circumstances in which state responsibility may be engaged or avoided in the context of withdrawal from a treaty,<sup>59</sup> such withdrawal or denunciation would appear to be equally excluded in the EC context by the characterization in *Costa v. ENEL* of the transfer of sovereignty to European institutions as ‘permanent’. In terms of systems analysis, EC law addresses the permissibility of withdrawal or denunciation, but on this view does not deal with the consequences of an illegal purported withdrawal or denunciation.

### C The Emergence of the Union: No Longer ‘Permanent’?

However, in the context of the development of the pillar structure at Maastricht and the departure from the so-called *sui generis* Community structure as the Union expands its activities into new, broader areas of competence, the nature of the

<sup>54</sup> See generally de Witte, ‘Rules of Change in International Law: How Special is the EC?’, 25 *NYIL* (1994); and Baarnhoorn and Wellens, *supra* note 21, who concludes that rules of change in EC law, concerning treaty amendment and change, are governed by general public international law. For a discussion of the relationship between the international law of treaties and the law of international responsibility, see Lysén, *supra* note 9, at 127–134.

<sup>55</sup> Article 62.

<sup>56</sup> Article 61.

<sup>57</sup> Article 60(2) permits the suspension of a multilateral treaty for breach by one party of the treaty where all of the parties agree unanimously to suspend the treaty. Even if the latter could be seriously envisaged in the context of the EC or EU, suspension of the entire Treaties by agreement of the other member states would appear to be precluded by the ‘permanence’ of the transfer of sovereignty of member states to the Community, at least if the implications of the characterization in *Costa v. ENEL* were to be accepted (on this view, the rules of change governing the Community appear to be governed by the rules of the ‘subsystem’, rather than general public international law: cf. de Witte, *supra* note 54). Other defences under the Vienna Convention are error (Article 48), fraud (Article 49), corruption of the representative of a member state (Article 50) and coercion of a representative of a member state in the conclusion of the treaty (Article 51) — all of which seem inconceivable in the context of the EC. Implied suspension or termination by a later treaty is also a defence (Article 59).

<sup>58</sup> One possibility, that of a war or other circumstances vital to a member state’s security interests, is covered by Article 296.

<sup>59</sup> It seems that the ILC Draft Articles on State Responsibility, *supra* note 6, may permit broader grounds for withdrawal or denunciation (Articles 20–26, including *force majeure*, distress and necessity) than are permitted in the Vienna Convention: see Lysén, *supra* note 9, at 133–134.

Community may have altered fundamentally.<sup>60</sup> The reasoning in *Costa v. ENEL* that the Community structure represented a permanent transfer of sovereignty is based upon the idea, captured in the term '*sui generis*', of the Community as a unique and unparalleled venture in laws governing the relations between states. The new pillar structure takes from this unique character of the European project, in international law terms, and points to the remaining applicability of international law conventionally understood. The emergence of the pillar structure at Maastricht marked an important reorientation of the trend towards constitutionalization<sup>61</sup> of the Community to a more conventional public international law structure in which the balance of power is tilted more clearly in the favour of member states and away from the Community institutions (under the TEU, the jurisdiction of the ECJ is relatively limited, being consensual with respect to Third Pillar preliminary rulings and largely excluded under the Second Pillar;<sup>62</sup> unanimous voting is generally required in the Council;<sup>63</sup> the legal instruments adopted are not attributed with direct effect;<sup>64</sup> and the flexible cooperation procedure, or so-called variable geometry, introduced at Maastricht is consolidated<sup>65</sup>). Although some of the areas of concern initially placed under the intergovernmental structure of the Third Pillar have been 'communitarized' at Amsterdam,<sup>66</sup> it seems unlikely that this communitarization will extend to all areas of concern (the Treaty of Nice retains the pillar structure). Rather, both the Community and the other pillar structures (or at least the underlying concept of different levels of transferred competence) will remain, with some movement as regards the areas of competence over which each holds sway.

The attribution of a permanent transfer of sovereignty to the Community in *Costa v. ENEL*, premised on the notion of the Community as a *sui generis* creation, does not hold true for the overarching structure of the Union, inclusive of the Community. In that context, it may be easier to source a right of withdrawal from both (since they cannot in practical terms be severed for the purposes of withdrawal) in general international law as expressed in Article 56 of the Vienna Convention. Although it

<sup>60</sup> See generally de Witte, *supra* note 46, especially at 65–66; and Wessel, *supra* note 19.

<sup>61</sup> See generally e.g. Weiler, *supra* note 1 and the literature discussed therein.

<sup>62</sup> See *supra* note 12. See also generally in relation to the Second Pillar, R.A. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (1999).

<sup>63</sup> See Article 23(1) (ex Article J.13(1)) of the TEU (Title V, Second Pillar) and Article 34(2) (ex Article K.69(2)) of the TEU (Title VI, Third Pillar).

<sup>64</sup> Article 34(2) expressly denies direct effect to Third Pillar framework decisions and decisions. Under the Second Pillar, joint actions (Article 14(3)) and common positions (Article 15) do not seem to be clearly expressed in binding legal terms (Article 14(3) merely states that joint actions 'shall commit' the member states, while Article 15 states that member states 'shall ensure national policies conform' to common positions); it seems the exact nature of these instruments (whether they are binding legal agreements, or just policy positions, or a *sui generis* creation) is unclear (see e.g. Wessel, *supra* note 19, at 526–527).

<sup>65</sup> See new Title VII of the TEU.

<sup>66</sup> Matters concerning visa, asylum and immigration policy have been transferred to the First Pillar (new Title IV). Article 68 of the EC Treaty introduces some restrictions on the jurisdiction of the ECJ over this aspect of the First Pillar, although Article 67 provides that, at the end of the transitional period for the new provisions, the jurisdiction of the ECJ over the rest of the First Pillar may be extended to Title IV by unanimous decision of the Council.

may be difficult or implausible to source such a right of withdrawal in the intentions of the parties to the Treaty, the *nature* of the Treaty may do so when it is considered that the Preamble to the TEU confirms the attachment of the member states, *inter alia*, to the principle of democracy. If a member state, by a considered, democratic decision of its national institutions, did seek to withdraw from the Community and Union, it would in that context seem difficult to argue that it was legally impermissible for it to do so.

## 5 Conclusion

Despite the uniqueness and comprehensiveness of the system created by the European Communities, it remains the case that the term ‘self-contained regime’, strictly understood, cannot be applied to it. A member state may incur international responsibility for breaches of EC law obligations, albeit in a limited number of ways. First, international responsibility for such breach may arise (through the application of the doctrine of direct effect), in parallel to liability internally in EC law, where the Community and member states have concluded a mixed international agreement or where the member state could be vicariously liable for breach by the Community of a bilateral Community agreement with another state. Secondly, fallback on public international law countermeasures has not been completely precluded by developments in the EC’s regime of state liability since Simma’s original analysis in 1985. Even the imposition of pecuniary penalties on a member state or the suspension of the state’s Treaty rights may not be an effective remedy for other member states when faced, in extreme circumstances, with a persistent breach of EC law obligations by another member state, especially concerning, for example, fundamental human rights obligations. Finally, it might be argued that withdrawal or denunciation by a member state of its Treaty obligations would engage the international responsibility of that state; however, this is uncertain, and an argument can be made that such a right of withdrawal exists in international law and is applicable in the case of the EC Treaty/TEU. Among the issues identified during the Nice negotiations as needing greater clarification in future treaty arrangements was the delimitation of powers between the Union and the member states.<sup>67</sup> In that context, the member states will have an opportunity to clarify the extent of exclusive Union and/or Community competence where the potential application of general public international law by individual states remains uncertain or disputed.

<sup>67</sup> Department of Foreign Affairs of Ireland, *White Paper*, *supra* note 43, at para. 2.45. See also, The Future of the EU: *Declaration of Laeken*, document of the Belgian Presidency, 15 December 2001, part 11A of which identifies a clearer division of competence between the member states and the Union as a priority issue facing the EU.