2 If there is a conflict between customary international law and a binding judicial precedent laying down a rule of English law, the judicial precedent prevails. But following the *Trendtex* case the English courts may now depart from earlier judicial precedent which lays down a rule of international law if the international law has changed in the meantime.

One final point about the incorporation doctrine is that since customary international law is considered to be part of English law it does not need to be proved as fact by expert evidence, unlike the position with regard to rules of foreign municipal law. The British courts will take judicial notice of international rules, and may of their own volition refer to textbooks and other sources for evidence thereof.

Treaties

The British practice regarding treaties is different from that regarding customary law. The main reason for this is that the conclusion and ratification of treaties are matters for the executive, coming as they do under the scope of the prerogative. Parliament has no say in the making of treaties. If they were to have direct effect, the Crown could alter the law without recourse to Parliament: therefore it is established that treaties only become part of English law if an enabling act of Parliament has been passed. This point has been reiterated by the courts in a number of cases and should be familiar to those who have studied the doctrine of Parliamentary supremacy and the effect of British membership of the European Union.

Recent discussion of the place of treaties in English law took place in the House of Lords in *Department of Trade v Maclaine Watson* (1990).[18] The question for the courts was whether a member state of an international organisation could be sued directly for the liabilities of the organisation. As has already been stated the Court of Appeal saw the matter as raising issues of customary international law. The House of Lords viewed the matter differently – they saw it as an issue of treaty rights, and explicitly confirmed that a treaty to which the United Kingdom is a party cannot automatically alter the laws of the UK. Only if a treaty is transformed into UK law by statute can it be enforced by the courts in this country; hence the need for the European Communities Act 1972 to transform the Treaty of Rome.

> A treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.[19]

18 [1990] 2 AC 418.

19 *International Tin Council* case [1990] 2 AC 418 *per* Lord Templeman.

The usual way in which treaties are transformed into English law is by the passing of an enabling act to which a schedule is attached containing the provisions of the treaty to be enacted. For example the Diplomatic Privileges Act 1964 enacts the Vienna Convention on Diplomatic Relations 1961. Where the treaty is contained in a schedule it is an integral part of the Act and any interpretation of the statute will involve interpretation of provisions of the treaty. Full discussion of the international law rules on treaty interpretation is to be found in Chapter 4. The issue here is the rules of interpretation that the English courts use when considering the provisions of a treaty. The leading case is *Fothergill v Monarch Airlines Ltd* (1980).[20] In that case the House of Lords was called upon to interpret the provisions of the Warsaw Convention for the Unification of Certain Regulations concerning International Air Travel 1929 which formed part of the Carriage by Air Act 1961. The House of Lords held that it was entitled to use the rules of treaty interpretation found in the Vienna Convention on the Law of Treaties 1969 even though such rules conflicted with the English rules of statutory interpretation.

On some occasions, Parliament may pass legislation to give effect to the terms of a treaty without enacting the treaty itself in a schedule. In such cases the question arises as to the extent to which the courts can have regard to the treaty in interpreting the statute. The leading case here is *Salomon v Commissioners of Customs and Excise* (1967)[21] in which the Court of Appeal had to interpret the Customs and Excise Act 1952. The Act was intended to give effect to the Convention on Valuation of Good for Customs Services 1950, although no specific mention was made of the Convention in the Act. The court set down three principles to be applied in such cases. First, if the terms of the statute are clear and unambiguous, the court must give effect to them even if they conflict with the treaty provisions. Secondly, if the provisions of the statute are not clear and are capable of more than one meaning, the treaty can be used as an aid to interpretation and a presumption operates that Parliament cannot have intended to legislate contrary to international law. Thirdly, the court may refer to the treaty in such cases even if there is no reference to it anywhere in the statute. Extrinsic evidence can be brought to show that the statute was intended to give effect to the treaty. It must be noted that the rules regarding European law are different and reference should be made to the House of Lords decision in *R v Secretary of State for Transport ex p Factortame (No 2)* (1990)[22] for a discussion of the relationship between English statute and European law.

Finally, there is the situation where an act of Parliament, while not intended to give effect to any specific treaty, deals with the same subject matter as a treaty to which the UK is a party. Again, it should be noted that there are specific rules dealing with the position of European law and reference should be made to textbooks on Constitutional law and European law for the position with regard to conflict between statute and law derived from the Treaty of Rome. In other situations the rules are fairly straightforward. The courts will

20 [1981] AC 251.

21 [1967] 2 QB 116.

22 [1991] 1 AC 603.

always give effect to clear and unambiguous words contained in a statute even if they conflict with a treaty to which the UK is a party. Therefore in *R v Secretary of State for the Home Department ex p Brind* (1991)[23] the House of Lords upheld the broadcasting ban on certain 'terrorist' organisations introduced under the provisions of the Broadcasting Act 1981 even though it was argued that it breached provisions of the European Convention on Human Rights 1950 to which the UK is a party. However, where there is some ambiguity in the statute the courts will endeavour to interpret it so as to conform with the UK's international obligations. Similarly, if the common law is uncertain the courts should approach the issue on the basis that any decision should be in conformity with international obligations. Thus in *Derbyshire County Council v Times Newspapers Ltd* (1992),[24] the Court of Appeal was asked to decided whether a local authority could sue for libel. The court held that it could not and in the course of his judgment Balcombe LJ expressed the view that since the domestic law was uncertain the court could take into account the provisions of Article 10 of the European Convention on Human Rights.

2.3.3.3 The practice of other states

It is impossible to discern any uniform practice among states, although a number of similarities in approach can be identified. The majority of states with a common law system adopt an approach similar to that in Britain. Those states which have a written constitution do have the opportunity to make the situation clear by making specific reference to the status of international law. For example, although US practice concerning customary law is similar to Britain, the US Constitution provides:

> ... all treaties made or which shall be made with the authority of the United states, shall be the supreme law of the land and the Judges in every state shall be bound thereby, anything in the Constitution or Law of any state to the contrary notwithstanding.[25]

To mitigate the effects of this rule, the US courts have distinguished 'self-executing treaties' which automatically become law and 'non-self-executing treaties' which require legislation by Congress to become law. Discussion of the distinction between self-executing and non-self-executing treaties has taken up much American court time and the implication of the various cases is that the distinction depends on the political content of the treaty. Where a treaty involves political questions the issue should be left to Congress but where a treaty contains provisions which are capable of enforcement as between private parties then it will be regarded as self-executing. Treaties in conflict with the US Constitution are not regarded as binding.

The constitutions of Austria, Germany and Italy all declare that the generally recognised rules of international law form part of the domestic system. For example, Article 25 of the Basic Law of Germany states:

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23 [1991] 1 AC 696.

24 [1992] QB 770.

25 US Constitution Article VI, s 2.

> ... the general rules of public international law are an integral part of federal law. They shall take precedence over the laws and shall create rights and duties for the inhabitants of the federal territory.

The courts in all three states have found that while such provision may apply to customary international law, the provisions of treaties do not automatically become part of municipal law. A different approach is taken by the Dutch constitution which provides that international treaties to which the Netherlands is a party become part of municipal law and prevail over incompatible provisions of Dutch law. No mention is made of the rules of customary international law and the Dutch courts have not considered international custom to be automatically part of Dutch law. As a general observation it can be said that few municipal courts have upheld the priority of international law over municipal law.

2.3.4 The relationship between international law and European law

An area of developing interest is the relationship between European law and international law although it has not yet been subject to the same degree of analysis as that given to the relationship between international law and municipal law. It is generally accepted that the European Union has a separate legal personality under international law and that European law constitutes a distinct legal order. Article 177 of the Treaty of Rome allows the European Court of Justice to rule on questions of the validity of European law and this can involve discussion of the relationship between it and international law. According to Article 228 of the Treaty of Rome, treaties concluded by the EU are binding on its institutions and on member states. They are regarded as forming an integral part of European law. Rules of customary international law will be upheld and applied by the European Court provided they are not incompatible with provisions of European law. A particular point which arises in respect of the EU is the extent to which a member state can rely on a rule of international law as a defence against it failing to fulfil obligations under European law. Article 234 of the Treaty of Rome provides that Community law leaves unaffected the treaty rights and obligations entered into between member states and non-member states if the conclusion of such agreements predates Community competence.

> The monist conception is more in line with the ECJ's conception of the European Community legal system,[26] and it has applied it in its consideration of the relationship between international agreements and community law.
>
> The ECJ has applied a very extensive interpretation of Article 177 in the context of international agreements. A Council Decision or Regulation concluding an international agreement (in the sense of internal EC acceptance) is one of the

26 See K Meessen, 'The Application of Rules of Public International Law within Community Law' (1976) 13 *CMLR* 485–501, pp 500–1; J Groux and P Manin, *The European Communities in the International Order* (Brussels, EC Commission, European Perspective Series, 1985); Hancher, 'Constitutionalism, the Community Court and International Law' (1994) 25 *NYIL* at pp 276–77.

'acts' of a Community institution for the purposes of Article 177(1)(b).[27] So too are the decisions of an Association Council since they give effect and the Association Council is entrusted with responsibility for the implementation of the agreement.[28] Therefore, the ECJ has jurisdiction to rule on the 'validity' and 'interpretation' of those acts under the preliminary reference procedure.[29] In the *SPI and SAMI* case the ECJ ruled that jurisdiction also extended to an agreement, the GATT, to which the EC had succeeded as a matter of law and so there was no Community act at all.[30]

In the *International Fruit Co* case it was submitted that validity extended to 'validity under international law'.[31] The ECJ accepted this. Thus the validity of a measure, 'may be affected by reason of the fact that it was contrary to a rule of international law'.[32] The 'rule of international law' could be derived from an international agreement, customary international law, or be a general principle of international law.[33] However, only rules deriving from international agreements have been argued before the ECJ. Moreover, the ECJ has in fact never held a community measure invalid because it was contrary to international law. As the Court of the Community it is institutionally disposed to uphold the validity of community measures against rules in international agreements.[34] However, where an international agreement can be given effect without having to invalidate a community measure, then the ECJ has been more receptive.[35] It is also interesting to note two arguments of the Commission in cases decided in 1982. In *Kupferberg* it submitted that, 'As a subject of international law particularly dependent on the proper functioning of the international legal order the Community has no interest in impeding that process by an *a priori* restrictive attitude to the direct effect of international agreements'.[36] At the same time,

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27 Case 181/73, *Haegeman v Belgium* [1974] ECR 449 pr 4 (hereinafter *Haegeman*); Case 104/81, *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641 (hereinafter *Kupferberg*). Often a '*sui generis* decision' is used. 'If the agreement contains provisions which are capable of having direct effect, or which, if promulgated as internal legislation within the Community, would take the form of a regulation, the Council act concluding the agreement will often take the form of a Regulation. Otherwise, the *sui generis* decision is used', I Macleod: *A Manual of Law and Practice*, 1996, Oxford: Oxford University Press at p 81.

28 Case C-192/89, *Sevince v Staatssecretaris van Justitie* [1990] ECR I-3461 prs 9–10 (hereinafter *Sevince*); Case 30/88, *Greece v Commission* [1989] ECR 63 pr 13; Case 351/95, *Selma Kadiman v Freistaat Bayern* on the interpretation of Article 7 of Decision 1/80 of the EEC/Turkey Association Council.

29 For a claim of alleged illegality of a bilateral fishing agreement concluded between the EC and Canada see Case T-194/95, *Area Cova and Others v Council*.

30 Joined Cases 267 and 269/81, *Amministrazione delle Finanze dello Stato v SPI and SAMI* [1983] ECR 801. The succession by the Community is thus treated as having the same effect as an act of the Community. See AG Reisch in 'The *SPI and SAMI* case'; TC Hartley, 'International Agreements and the Community Legal System: Some Recent Developments' (1983) 8 *EL Rev* at pp 383–92.

31 Joined Cases, 21 and 24/72, *International Fruit Company NV v Produktschap voor Groentend en Fruit* [1972] ECR 1219 (hereinafter *IFC* case).

32 *IFC* case, para 5.

33 See Article 38 of the ICJ.

34 This partially explains why the ECJ's restrictive interpretation of *locus standi* under Article 173. See TC Hartley, *The Foundations of European Community Law*, 3rd edn, 1994, Oxford: Clarendon Press at pp 361–92.

35 See P Craig and G De Burca, *EC Law – Texts, Cases and Materials*, 1995, Oxford: Oxford University Press at pp 171–72.

36 *Kupferberg*, p 3654.

however, the Commission argued in the *Polydor* case that 'the concept of direct effect, as developed in Community law, must not as such be transposed to the field of the Community's international relations'.[37]

In the *International Fruit Co* case the ECJ stated two conditions that would have to be satisfied before a Community measure could be held invalid due to its incompatibility with international law. First, the Community must be bound by the provision of international law concerned. Secondly, the provision of international law must have direct effect in Community law. We consider these conditions in turn.

The Community must be bound by the provision of international law concerned: the binding nature of Treaties concluded by the Community

Treaties concluded by the Community and one or more states or international organisations, 'shall be binding on the institutions of the Community and on member states' (Article 228(7)).[38] As a consequence of this, 'it is incumbent upon the Community institutions, as well as upon the member states, to ensure compliance with the obligations arising from such agreements'.[39] When the member states ensure respect for such obligations they are fulfilling obligations in relation to the Community as well as to the non-member country concerned.[40] This obligation to the Community explains the ECJ's view that when an international agreement to which the EC is a party comes into force its provisions 'form an integral part of Community law',[41] and of the 'community legal system'.[42] So too the Decisions of an Association Council.[43] This integration into community law means that the provisions have, for the purposes of community law, a community nature or character. Given this character, the interpretation and effect of such provisions should not vary between member states, for example, by having direct effect in some but not others.[44] Similarly it should not be dependent on whether the application of the provisions is the responsibility of the Community institutions or the member states.[45]

The requirements of consistent and 'uniform application throughout the Community',[46] is ensured by the ECJ, through its jurisdiction to interpret the provisions of such agreements.[47] However, it is important to be clear that the ECJ has no direct jurisdiction under the EC Treaty to interpret an international

37 Case 270/80, *Polydor Ltd v Harlequin Record Shops Ltd* [1982] ECR 329, p 343 (hereinafter *Polydor*).

38 Formerly Article 228(2).

39 *Kupferberg*, pr 11.

40 *Ibid*, p 12.

41 *Haegeman*, pr 5. Internal implementation does not appear to be necessary as a matter of principle.

42 *Kupferberg*, pr 13.

43 *Sevince*, pr 9; *Greece v Commission* [1989] ECR 63 pr 13.

44 The concept appears elsewhere in EC law, for example, over regulations not being transposed by national laws and thereby losing their community character, Case 39/72, *Commission v Italy* [1973] ECR 101.

45 *Kupferberg*, pr 14; Case 12/86, *Demeril v Stadt Schwabisch Gmund* [1987] ECR 3719 pr 10 (hereinafter *Demeril*).

46 *Kupferberg*, pr 14.

47 See also *Sevince*, pr 11. Jurisdiction to interpret an international agreement could arise by way of a preliminary ruling or in a direct action, see Opinion 1/91 (First EEA Opinion), pr 38.

agreement as between the EC and a non-member state party.[48] It only has jurisdiction to interpret an international agreement 'where its interpretation is relevant to the question of the validity of an act of a Community institution or to the question of the interpretation to be given for such an act'.[49] Its interpretation of the provisions concerned is 'for the purposes of [their] application in the Community'[50] and 'in so far as that agreement is an integral part of the Community legal order'.[51] That interpretation is obviously not binding on the non-member state, though in practice it may be very influential.[52] An international agreement could confer jurisdiction on the ECJ to interpret it for the purposes of its application in non-member countries.[53] The original EEA Agreement did this. However, the ECJ has taken the view that such jurisdiction would only be compatible with the EC Treaty if the ECJ's judgments have binding effect.[54] Alternatively, an international court could be established or given jurisdiction to interpret an international agreement to which the EC is a party. The decisions of such a court would be binding on the community institutions, including the ECJ.[55] Such a system or courts is, in principle, compatible with Community law:

> The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions.[56]

As well as being bound as a treaty, the ECJ has also accepted that the EC can become bound by an international agreement by a process of substitution or replacement for the member states.[57] This has been the case with the

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48 Only states can be parties before the ICJ. A third state could refer a dispute over the interpretation of a Community agreement to the ICJ. Presumably a member state could also do in relation to the interpretation of the Agreement itself rather than matters of EC competence. Under Article 219 EC only the ECJ is to have jurisdiction over EC matters, see Opinion 1/91 (First EEA Opinion), pr 35, and the discussion in Opinion 2/94 (ECHR). A dispute over CFSP could also go to the ICJ although this is unlikely.

49 AG Warner, in *Haegeman*, p 473.

50 *Kupferberg*, pr 45.

51 Opinion 1/91 (First EEA Opinion), pr 39.

52 In effect the position of the ECJ is the same position as that of a national court interpreting an international agreement.

53 Opinion 1/91 (First EEA Opinion), pr 59. Note also the 1971 Protocol to the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968) which provides for the ECJ to have jurisdiction to interpret the Convention. Only member states are parties. See C-389-92, *Mund and Fester v Hatrex International Transport* [1994] ECR 1-467.

54 Opinion 1/91 (First EEA Opinion), pr 61. The agreement was changed to make the judgments of the ECJ binding, see Opinion 1/92 (Second EEA Opinion) [1992] ECR I-2821 See also Case C-188/91, *Deutsche Shell AG v Hauptzollamt Hamburg-Harburg* [1993] ECR I-363.

55 Opinion 1/91 (First EEA Opinion), pr 39.

56 Opinion 1/91 (First EEA Opinion), pr 40. See Schermers 29 *CML Rev*, 991–1010. This would be of significance in relation to the jurisdiction of the European Court of Human Rights to interpret the ECHR in relation to the EC. See the discussion in Opinion 2/94 (ECHR).

57 There are a number of possible explanations for this process including an analogy with Article 228 or the transfer of sovereignty from the member state to the EC with the consent of the third parties concerned. See Cheyne, 'International Agreements and the European Community Legal System' (1994) 18 *EL Rev* at pp 581–98.

GATT,[58] and two customs conventions.[59] Thus in the *International Fruit Co* case the ECJ found that the provisions of the GATT agreement were binding on the Community.[60] The ECJ appears to treat such agreements as an integral part of the Community legal order in the same way as agreements expressly adopted by the EC.[61] The ECJ has not accepted that the EC has succeeded to the European Convention on Human Rights.[62]

In the 1990s the EC has increasingly been faced with questions of state succession to treaties. German reunification, the disintegration of the USSR[63] and of Yugoslavia, the separation of Czechoslovakia and the agreed secession of Eritrea from Ethiopia raised a series of issues for which Community practice has to develop. The results were inevitably variable and pragmatic with the 1978 Vienna Convention on Succession of States in Respect of Treaties providing analogous rules which have served 'as a useful point of reference but no more'.[64] The international law rules of state succession are themselves far from clear.

In *Demirel* the UK and Germany argued that in the case of a mixed agreement the ECJ's jurisdiction only extends to those parts of the agreement which are within EC competence. Arguably, it does not extend to those parts of the agreement which are within member state competence.[65] The ECJ responded that the question did not arise because Article 238 empowered the Community to guarantee commitments towards non-member countries in all fields covered by the Treaty. That obviously included the provisions on the free movement of workers that were in issue in the case. It made no difference to this conclusion that it was for member states to lay down rules which were necessary for giving effect in their territory to the provisions of an international agreement or the decisions adopted by an Association Council.[66] The ECJ recalled its ruling in

58 *IFC* case. The ECJ has also held that it has exclusive competence to interpret the GATT for the purposes of EC law, *SIOT v Ministero delle Finanze* [1983] ECR 731 (hereinafter *SIOT*).

59 The Convention on the Nomenclature for the Classification of Goods in Customs Tariffs and the Convention Establishing the Customs Co-operation Council. See Case 38/75, *Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der Invoerrechten en Accijzen* [1975] ECR 1439.

60 See also Joined Cases 267 and 269/81 *Amministrazione delle Finanze dello Stato v SPI and SAMI* [1983] ECR 801.

61 See Cheyne, 'International Agreements and the European Community Legal System', p 5878; G Bebr, 'Agreements Concluded by the Community and their Possible Direct Effect: from *International Fruit Company* to *Kupferberg*' (1983) 20 *CMLR* 35–73, p 43; Case C-69/89, *Nakajima All Precision Co v Council* [1991] ECR I-2069 concerning the GATT Anti-dumping Code to which the EC is a party. ELM Volker, 'The Direct Effect of International Agreements in the Community's Legal Order', *Legal Issues of European Integration,* 1983/1, 131–45, pp 142–43, expresses a contrary view.

62 See Cases 50-52/82, *Administrateur des Affaires Maritimes, Bayonne v Dorca Marina* [1982] ECR 3949. Opinion 2/94 (ECHR) would seem to reinforce that view.

63 On the application of the Community's anti-dumping procedures to a successor state see Case T-164/94, *Ferchimex SA v Council* [1995] ECR II-2681.

64 See PJ Kuyper, 'The Community and State Succession in Respect of Treaties', in D Curtin and T Heukels (eds), *Institutional Dynamics of European Integration: Essays in Honour of HG Schermers*, Vol II, 1994, Dordrecht: Nijhoff at p 640. See also HG Schermers and NM Blocker, *International Institutional Law*, 3rd edn, 1995, The Hague: Nijhoff at pp 986–88.

65 *Demirel*, see p 3725 (Germany) and p 3729 (UK).

66 *Demirel*, pr 10.

Kupferberg that the obligation of member states to lay down such rules was a community obligation.[67]

Pre-existing international commitments and the EC legal order

Article 234 protects third states by providing for the continuing effect of pre-existing international agreements:

> The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more member states on the one hand, and one or more third countries on the other, shall not be affected by this Treaty.

Those international agreements with third states do not become part of the EC legal order. Whether the agreement has direct effect will depend on the national law of the member state concerned rather than on EC law.[68] The agreements do not become binding on the EC,[69] subject to the rare possibility of succession. Article 234 continues by providing that if there are incompatibilities between the international agreements and the EC Treaty then the member state concerned 'shall take all appropriate steps to eliminate the incompatibilities concerned'. Member states are to 'assist each other to this end' and, 'where appropriate, to adopt a common attitude'.[70] This obligation should not be interpreted to the point of requiring member states to denounce agreements with third states.[71] The number of cases in which member states seek to rely on Article 234 is increasing steadily.

Article 234 will effectively provide a member state with a defence when they would otherwise be in breach of their obligations under the EC Treaty.[72] For example, in the *Levy*[73] and *Minne*[74] cases the effect of Article 234 was that Article 5 of the Equal Treatment Directive 76/207 could not be relied upon to prevail over the national provisions adopted to comply with an ILO Convention of 1948. The institutions of the Community are bound not to impede the performance of those obligations by the member state concerned.[75] The third paragraph of Article 234 emphasises the common advantages to member states of EC membership. This would be consistent with an interpretation of Article 234 which only allows member states to rely on it when it has an obligation to a third state that is relevant. A member state should not be able to rely on Article 234 to

67 *Ibid*, pr 11. See TC Hartley, 'International Agreements and the Community Legal System: Some Recent Developments' (1983) 8 *EL Rev* 383–92, p 389.

68 See Case 812/79, *Attorney General v Burgoa* [1980] ECR 2787, pr 10 (hereinafter *Burgoa*).

69 *Ibid*, at 2808.

70 A particular problem that can arise is where one member state interprets similar international obligations in a different way to other member states, see JM Grimes, 'Conflicts Between EC Law and International Treaty Obligations: A Case Study of the German Telecommunications Dispute' (1994) 35 *Harv ILJ* 535–64, pp 554–5.

71 See Grimes, 'Conflicts Between EC Law and International Treaty Obligations'. See also Opinion 1/76 (*Rhine Navigation* case), pr 2, on Article 234 justifying participation in an international agreement.

72 See R Churchill and N Foster, 'European Community Law and Prior Treaty Obligations of Member States: *The Spanish Fisherman's* cases' (1987) 36 *ICLQ* 504–24.

73 Case C-158/91, *Ministère public et direction du travail et l'emploi v Levy* [1993] ECR I-4287.

74 Case C-13/93, *Office nationale de l'emploi v Minne* [1994] ECR I-371.

75 *Burgoa*, at 2808.

gain a benefit or advantage.[76] Article 234 cannot be relied upon in intra-community relations if the rights of non-member states are not involved.[77]

The direct effect of international agreements

The concept of direct effect has been of fundamental importance in the development of the European Community Law system. The EC Treaty does not contain the concept of 'direct effect'. There is a similar sounding concept of 'direct applicability' in Article 189 EC but that only refers to Regulations. The subject matter is similar to, but more extensive than, the international law concept of 'self-executing treaties'.[78] The ECJ uses the terms 'directly effective' and 'directly applicable' interchangeably.[79] This work uses the term 'directly effective'. If a provision of an international agreement is directly effective, as a matter of EC law, then it grants natural and legal persons rights that must be upheld by the national courts of the member states.[80] One or more of the provisions of an international agreement can have direct effect even if the other provisions of the same agreement do not have direct effect.[81]

In accordance with *Van Gend En Loos*[82] and subsequent case law, the general test for direct effect of community law measures is threefold:

1 The provision must be clear and unambiguous.

2 It must be unconditional.

3 Its operation must not be dependent on further action being taken (by the community or by national authorities or international bodies such as an Association Council).

These strict criteria were intended to make the doctrine more acceptable to states. In practice, although these tests appeared rigorous when first introduced, over time they have been considerably relaxed in their application. To an extent they are not even applied as successive tests anymore. For internal measures direct effect may now be regarded as the norm rather than the exception. The test is essentially a practical one. If a provision lends itself to judicial application it will be held to be directly effective. Only when direct effect would create serious practical problems will the provision be held not to be directly effective. This supports the view that the test has become little more than one of justiciability:' A rule can have direct effect whenever its characteristics are such that it is

76 See Case 10/61, *Commission v Italian Republic* [1962] ECR 1, at 10; Case 812/79, *Attorney General v Burgoa* [1980] ECR 2787; Case C-158/91, *Ministère public et direction du travail et l'emploi v Levy* [1993] ECR I-4287.

77 Cases C-241/91P and C-242/91P, *Radio Telefis Eireann (RTE) and Independent Television Publications v Commission* [1995] ECR I-743. On the replacement by Community regulations of social security conventions concluded between member states see Case C-475/93, *Jean-Louis Thevenon and Others v Landesversicherrungsanstalt* [1995] ECR I-3813.

78 See J Jackson, 'Status of Treaties in Domestic Legal Systems' (1992) 86 *AJIL* 310–40.

79 In Case C-58/93, *Yousfi v Belgian State* [1994] ECR I-1353, A-G Tesauro considered the alleged distinction between direct applicability and direct effect and stated that 'the difference between the expressions used, at least in the case law, is merely terminological and non-substantive', pp 1357–58.

80 See Bebr, 'Agreements Concluded by the Community'; Volker, *op cit*; Bourgeois, 'Effects of International Agreements in European Community Law' (1984) 82 *MichLRev* 1250–73.

81 So *Polydor* and *Kupferberg* concerned the same agreement with Portugal.

82 Case 26/62 [1963] ECR 1.

capable of judicial application'.[83] It is possible that only part of an EC law can have direct effect.

This jurisprudence on direct effect of EC measures is important because there has been substantial legislative implementation of international agreements within Community law by means of Regulations and Directives. If a provision in such a measure has direct effect there may be no need to consider as a separate issue whether the international agreement concerned can have direct effect in its own right. This issue is particularly important, however, if no internal implementation measures have been taken.

Does the general test for direct effect apply to international agreements?

Formally, the answer appears to be yes.[84] According to the ECJ's well-established jurisprudence:

> A provision in an international agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.[85]

The decisions of an Association Council must satisfy the same conditions as those applicable to the provisions of the agreement itself.[86] However, the result of the practical application of this test has been that direct effect of international agreements has been the exception rather than the norm. This is the reverse of the situation with internal EC measures. We need to consider closely the ECJ's approach to the interpretation of international agreements.

How does the ECJ approach the interpretation of international agreements?

The ECJ has rarely referred expressly to the generally accepted rules of interpretation in international law in the Vienna Convention on the Law of Treaties (1969).[87] According to the ECJ, to determine the effect in the community legal system of the provisions of an international agreement, its 'international origin' has to be taken into account.[88] Parties to an agreement can '[i]n conformity with principles of public international law' expressly specify the

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83 See P Pescatore, 'The Doctrine of Direct Effect – An Infant Disease of Community Law' (1983) *ELRev* 155–77.

84 *Ibid*, pp 171–74.

85 *Demirel*, pr 14; Case C-18/90, *Office National de l'Emploi v Kziber* [1991] ECR I-199, pr 15. N Neuwahl suggests that it is 'not clear whether these criteria are sufficient in the case of an international agreement', 'Individuals and the GATT: Direct Effect and Indirect Effects of the General Agreement on Tariffs and Trade in Community Law', in N Emiliou and D O'Keeffe (eds), *The European Union and World Trade Law – After the GATT Uruguay Round*, 1996, Chichester: Wiley at p 319.

86 *Sevince*, prs 14–15.

87 Examples are Opinion 1/91 (First EEA Opinion), pr 14, and C-432/92, *R v Ministry of Agriculture, Fisheries and Food, ex p Anastasiou*, [1994] ECR I-3087, both referring to Article 31 VCLT. The Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (1986) contains broadly analogous rules. The EC is not a party. See P Manin, 'The European Communities and the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations' (1987) 24 *CMLR* 457–81.

88 *Kupferberg*, pr 17.