

THE ICJ, THE ECJ, AND THE INTEGRITY OF INTERNATIONAL LAW¹

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I. INTRODUCTORY

The European Court of Justice and the International Court of Justice are both courts born of war, established by interstate treaties and having their seats in European cities. The relationship between Luxembourg and Strasbourg has been well explored, and has developed over the years. The major issue today seems to be one of the coherence of human rights protection in Europe—an issue addressed with knowledge, depth, and insight by Krüger and Polakiewicz in the October *Human Rights Law Journal*.²

Lord Slynn has had the idea that something should be said to this year's Lecture about the relationship between Luxembourg and The Hague and has enlisted me for the task. I approach it with some trepidation, for I cannot claim any specialist knowledge of the ECJ. But when Lord Slynn asks, one does one's best.

The European Communities were established as the institutional embodiment of the determination to prevent in the future the conditions which allowed the build up to the Second World War.³ Economic integration, free and fair trade among members, access to resources, and mobility of goods and labour formed the bedrock of the initial undertakings of the interlocking Community Treaties. Later there was added the drive for monetary union and other forms of closer integration as the European Union began to see itself as a counterweight, politically and economically, to the United States. The widening and deepening of the sources of Community Law has reflected these developments. Thus the original Community Treaties and their protocols have been added to by later special treaties on particular topics, often of an institutional character. The regulations, acts, and decisions of the Community institutions have enlarged the sources of law.

The European Court of Justice, as the judicial body created by the Treaties establishing the Coal and Steel Community,⁴ the European Economic

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² HC Krüger and Jörg Polakiewicz, 'Proposals for a Coherent Human Rights Protection System in Europe/The European Convention on Human Rights and the EU Charter of Fundamental Rights' (2001), vol 22, no 1–4 HRLJ 1–13.

³ J Steiner and L Woods, *Textbook on EC Law*, 7th edn (London: Blackstone Press, 2000), See generally P Fontaine, *A New Idea for Europe: The Schuman Declaration: 1950–2000*, 2nd edn (Luxembourg: Office for Official Publications of the European Communities, 2000).

⁴ Treaty instituting the European Coal and Steel Community (1951), Art 7.

Community,⁵ and the Atomic Energy Community,⁶ has since its inception sat in Luxembourg. The founding Treaties were in due course to be amended by the Single European Act so as to provide for the creation of a Court of First Instance attached to the Court of Justice.⁷ The ECJ has had a role of the greatest importance in the development of the Community which it serves and this it has achieved through its large and important case law, the impact of which has reached deep into the life of the Member States.

The International Court of Justice was also established in the wake of war, as part of international plans for a better world.⁸ But it also had its intellectual origins in the war clouds of the early twentieth century. The Czar of Russia called in 1907 for an International Peace Conference to which the leading nations of the day were invited. Among the eight points agreed by The Hague Peace Conference was the establishment of a 'Peace Palace', within which would be an arbitral court and an outstanding library of International Law. These were the origins of the remarkable Vredespaleis, pure Disney gothic and beautiful in its own special way, which houses the Permanent Court of Arbitration (which consists of a secretariat and standing arbitrators list, and expertise, all on standby for use by requesting parties) and also the famous Peace Palace Library of International Law. All this was done as the First World War began.

After the First World War, there was a move to establish a Permanent Court of International Justice, which mirrored the work for the establishment of a League of Nations. Initially, British, and South African thoughts ran to an arbitration tribunal. President Wilson's first draft for the League was lukewarm as to either a judicial or arbitral tribunal. Only the initial Scandinavian draft envisaged a Court. By 1919 the British were circulating, at the Paris Peace Conference, the idea of a permanent court that would be manned from the panel of arbitrators of the existing Permanent Court of Arbitration at The Hague. But Robert Cecil then began to develop the idea of the creation of a new court. The historical record shows that the basic parameters within which the International Court of Justice still operates today were hammered out from predominantly British, French, Italian, and American proposals. In its second session of 1920 the Council of the League proposed an International Conference of Jurists to establish the Court. Later in that same year a distinguished committee of international jurists, from a yet wider group of nations met in the Peace Palace at The Hague. By 1922, after much work, the Court

⁵ Treaty establishing the European Economic Community (1957), Art 7 (ex 4).

⁶ Treaty establishing the European Atomic Energy Community (1957), Art 3.

⁷ Single European Act (1986), Arts 4, 11, and 26.

⁸ On the history of the International Court of Justice see generally A Eyffinger, *The International Court of Justice: 1946–1996* (The Hague: Kluwer Law International, 1996); id, *The 1899 Hague Peace Conference: 'The Parliament of Man, the Federation of the World'* (The Hague: Kluwer Law International, 1999); id, *The Peace Palace: Residence for Justice, Domicile for Learning* (The Hague: Carnegie Foundation, 1988); F Knipping, H von Mangoldt, and V Rittberger (eds), *The United Nations System and its Predecessors* (Oxford: Oxford University Press, 1997).

was inaugurated and the Assembly of the League of Nations approved its Statute.

The United States—in a pattern of treaty participation that was to occur many times later in history, down to this very day—was a major player in the formulation of the Protocol and Statute, and then failed to endorse their terms because Senate approval was not forthcoming. Although refusing to approve the Paris Peace Treaties whose terms it had done so much to secure, a Judge of American nationality nonetheless served on the Bench of the PCIJ throughout its lifetime. The Soviet Union took no formal part in the League of Nations until 1934. It never signed the Statute and never had a Judge on the Bench.

The Statute of the Permanent Court remains essentially unchanged, as the Statute of the International Court of Justice; the ICJ is the legal successor to the PCIJ, and the jurisprudence of the latter remains pertinent and compelling to this day. Naturally, the roles of the two Courts have slowly evolved over time, and indeed the new International Court of Justice was made one of the major organs of the United Nations. Its symbiotic relationship to the United Nations is even closer than was that of the Permanent Court to the League. But the essential structures have remained the same.

Both the Soviet Union, and now Russia, and also the United States, have been active members of the United Nations from the outset. And the nationals of both countries have played important roles on the Bench of the International Court.

The European Court of Justice is the Court of all the members of the European Union. These have, and will again, grow in number, though definitionally the membership will remain European. But, of course, our perceptions of what *is* 'European' have changed and spread eastwards. The clientele of the International Court of Justice has spread as the membership of the United Nations has grown from the markedly European and 'first world' origins of the Permanent Court. The International Court is now a Court available to the 19 members of the United Nations. The basic treaty of the United Nations is the Charter,⁹ Articles 92–6 of which refer to the International Court of Justice;¹⁰ and attached to the Charter is the Statute of that International Court.¹¹

These great international courts, having their seats in Luxembourg and in The Hague, are courts born largely of European tragic experience. They remain to this day courts in Europe. But the ECJ is also a court of and *for* Europe, while the ICJ is not. *Its* service has increasingly been to the wider world.

The International Court prides itself on the global character of its clientele. The current docket affords a quick snapshot. Our last case was between the Congo and Belgium, on Foreign Minister Immunities.¹² Our current case is

⁹ Charter of the United Nations (1945).

¹⁰ *Ibid*, Arts 92–6.

¹¹ Statute of the International Court of Justice (1945).

¹² *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, ICJ Reports 2002, 3* (publication forthcoming; available at <<http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm>>). Since this lecture was delivered, judgment has been given in *Cameroon v Nigeria*: see www.icj-cij.org/icjwww/idocket/icn/icnframe.htm.

between Cameroon and Nigeria.¹³ Our next case will be between Indonesia and Malaysia.¹⁴ And then will follow litigation between Bosnia-Herzegovina and the former Yugoslavia.¹⁵ Colombia and Nicaragua are in the heavy pending list,¹⁶ as are Iran and the United States.¹⁷ But the International Court remains at the service of European Union nations for legal disputes that they are not precluded by the Community treaties from resolving at the ECJ.

II. EUROPEAN DISPUTES AND THE ICJ

States that are now members of the European Union have contested their legal disputes before the International Court of Justice both before and after the establishment of the European Community and before and after their membership of it. The determining factor, quite simply, has been subject matter. Thus in 1951 France and the United Kingdom were contesting title to the *Minquiers and Ecrehos*¹⁸ islands before the International Court; and Greece and the United Kingdom were litigants in the *Ambatielos* affair.¹⁹ Italy on the one side, and France, the United Kingdom on the other (along with the United States) were in 1953 embroiled in the awkward matter of the *Monetary Gold Removed from Rome*.²⁰ In 1957 the Netherlands and Sweden were in dispute before the Court over the *Guardianship Convention of Infants of 1902*,²¹ while Belgium and the Netherlands still needed final answers as to title to *Certain Frontier Lands*.²² From the late 1950s through to the 1970s the sometimes rancorous dispute between Belgium and Spain over the *Barcelona Traction Company* was before the Court.²³ And in 1969 the International Court gave one of its most famous Judgments in the two sets of *North Sea Continental Shelf* cases, between Federal Republic of Germany and Denmark, and between Federal Republic of Germany and the Netherlands.²⁴ Those of us who at some stage of our careers have advised oil companies as to whether towed oil rigs

¹³ *Land and Maritime Boundary between Cameroon and Nigeria*, see *ICJ Reports*, 2002.

¹⁴ *Sovereignty over Palau Ligitan and Palau Sipadan (Indonesia/Malaysia)*, see *ICJ Yearbook 1998–1999*, at 230–1.

¹⁵ *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, Preliminary Objections (*Yugoslavia v Bosnia and Herzegovina*), see <<http://www.icj-cij.org/icjwww/idecisions.htm>>.

¹⁶ *Territorial and Maritime Dispute (Nicaragua v Colombia)*, see <<http://www.icj-cij.org/icjwww/idecisions.htm>>.

¹⁷ *Oil Platforms (Islamic Republic of Iran v United States of America)*, see <<http://www.icj-cij.org/icjwww/idecisions.htm>>.

¹⁸ *ICJ Yearbook, 1951–1952*, at 71–2.

¹⁹ *Ibid.*, at 69–70.

²⁰ *Ibid. 1952–1953*, at 68.

²¹ *Ibid., 1956–1957*, at 74.

²² *Ibid., 1957–1958*, at 81.

²³ *Ibid., 1958–1959*, at 83; *Barcelona Traction, Light and Power Company, Limited, Order of 10 April 1961, ICJ Reports, 1961*, 9 at 10; *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, ICJ Reports, 1970*, 3.

²⁴ *North Sea Continental Shelf; Judgment, ICJ Reports, 1969*, 3.

are ships for tax, maritime passage, or other purposes, had our hopes of an authoritative answer raised by the *Finland v Denmark* dispute of 1991 over *Passage Through the Great Belt*²⁵—but the case was settled.²⁶

If EU fisheries quotas would be matters to be settled by the Luxembourg Court, the maritime entitlements underlying the fisheries agreements are a matter of general international law, as the *North Sea Continental Shelf* cases show.²⁷ Again, the cautious steps so far taken on an EU energy regime are properly matters for the European Court; but the legal regime of the Continental Shelf on which so much oil exploration takes place is a matter of general international law and is frequently in issue before the International Court of Justice.²⁸

A particularly interesting example of the complications inherent in this interface arose in the *Fisheries Jurisdiction* case brought by Spain against Canada.²⁹ On 9 March 1995 a Spanish fishing vessel was intercepted and boarded some 245 miles from the Canadian coast by Canadian Governmental vessel. The vessel was seized and its master arrested on charges of violations of the Coastal Fisheries Protection Act. Charges were laid of illegal fishing for Greenland halibut. Spain rapidly secured European Community support and the very next day a Note Verbale was sent from ‘the European Community and its Members’ challenging the legality of the Canadian action in terms both of the North Atlantic Fisheries Convention and Customary International Law. Within a month an agreement had been signed between Canada and the European Community on ‘fisheries in the context of the NAFO Convention’. Its essence was that the European Community would immediately implement, on a provisional basis, certain control and enforcement measures in the NAFO regulatory area; and Canada would take out reference to European Community member state vessels from its legislation allowing arrest from fishing of identified species.³⁰

Nonetheless, Spain proceeded to bring a legal action against Canada before the International Court. Canada, for its part, insisted that the dispute between them had been settled, being encompassed within the EU–Canada agreement of 20 April 1995.³¹ Referring to the Notes of Protest addressed to it by the EU and Spain, Canada claimed that they contained ‘no trace of any distinction between a dispute with the European Community and a dispute with Spain’ and that that

²⁵ *ICJ Yearbook, 1990–1991*, at 155–9.

²⁶ *Passage through the Great Belt (Finland v Denmark), Order of 10 Sept 1992, ICJ Reports, 1992*, 348, at 348–9.

²⁷ Above, n 24.

²⁸ See, eg, *ICJ Yearbook, 1967–1968*, at 85–6 (*North Sea Continental Shelf*); *ICJ Yearbook, 1976–1977*, at 110–13 (*Aegean Sea Continental Shelf*); *ICJ Yearbook, 1978–1979*, at 124 (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*).

²⁹ *Fisheries Jurisdiction (Spain v Canada), Jurisdiction of the Court, Judgment, ICJ Reports, 1998*, 432.

³⁰ *Ibid*, at paras 13–22.

³¹ *Ibid*, at paras 23–8.

was confirmed by the agreement of all relevant questions relating to fisheries and State Jurisdiction between the EU and Canada.³² Whether the EU agreement on the subject matter of Spain's complaint precluded recourse to it by Spain was clearly sensitive ground for the International Court. Perhaps understandably it sidestepped the issue (which was essentially one of EU law)—something it was able to do because there were other strong grounds, beyond the scope of this lecture, for declining to adjudicate on the matter.

III. THE ECJ AND THE ICJ

No set of legal rules exists in a systemic vacuum. The international case law on oil concessions has graphically shown that applicable law provisions that refer to the provisions of the concessions alone are not watertight. The interpretation, application and indeed validity of those very provisions necessarily depend upon a governing system of law within which they are located. And so it is with courts that deal with a specialised subject matter. The European Court of Justice is concerned with the treaties and agreements establishing and refurbishing the European Communities. Past precedent, and the social and economic context will be a guide to interpretation of their terms as particular disputes arise. But at the end of the day international agreements are usually agreements governed by international law.

Moreover, public international law is regarded by the European Court of Justice as part of the legal order of European law. In 1992 the ECJ had affirmed in terms that the European Community must respect international law in the exercise of its powers. Equally, it has long been established that public international law is part of the legal public order of the European Community. These two principles seem to form the necessary starting point in any given case where public international law is involved.

The purposes for which public international law is involved before the European Court are various and interesting. And it is fascinating for an international lawyer to see, through the prism of the jurisprudence of the European Court, the place of public international law in the legal disputes of the Community.

I may mention a few recent examples. In 1992 the Court of Justice of the European Communities gave judgment in what I will call—lacking proficiency in the Danish language—the *Poulsen and Diva Navigation Corporation* case.³³ Regulation No 3094/86 had prohibited transportation and storage on board of salmon caught in certain areas not under the sovereignty and jurisdiction of Member States. But was this Regulation applicable to a vessel registered in a non-Member State (even if its 'real link' was with a

³² Ibid, at para 27.

³³ *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp (Case C-286/90)* [1992] ECR I-6019.

Member State) that entered the port of a Member State because it was in distress? The case was referred by the Criminal and Probate Court of Denmark to the Court under Article 177, and it held that, there being no community rules which addressed this situation, it is for the national court to determine, in accordance with international law, the legal consequences flowing from such a situation.³⁴

It would seem, however, that the European Court of Justice did not hesitate to give a rather substantial steer to the national court on the points of public international law involved. It briskly found that registration and not ‘genuine link’ would determine the nationality of the vessel, and cited specific articles of the 1958 and 1982 Law of the Sea Conventions for the proposition that a vessel has only one nationality.³⁵ As to the rules of international law that would deal with transit passage through territorial waters and the position on inland waters, the Court made reference to certain detailed provisions from various of the Geneva Conventions of 1958 and the 1982 UN Convention³⁶ (not yet in force at that time, though it now is). It declared that the former ‘codify general rules recognised by international custom’ and that, as regards the latter,

many of its provisions are considered to express the current state of international maritime law.

—a proposition for which three cases of the International Court of Justice, with full paragraph references, are cited. (*Gulf of Maine (Canada/United States of America)*; *Continental Shelf (Libya Arab Jamahiriya/Malta)*; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*).³⁷

A more technical point of International Law arose for the Court of First Instance (4th Chamber) in the judgment which it gave in 1997 on *Opel Austria v Council of the European Union*.³⁸ Underlying the dispute was the State aid being given by Austria to its motor industry; the European Economic Area Agreement between the European Communities, their Member States, and Austria, Finland, Iceland, Liechtenstein, Sweden, and Switzerland, and a contested Regulation of the Council introducing duty on certain car gearboxes produced in Austria. Opel-Austria sought the annulment of the Regulation and Austria intervened to the same end, on the grounds that the Regulation essentially undermined concessions that had been made in the EEA Agreement.³⁹

The sequencing of the various legal obligations was thus the key issue. I

³⁴ Ibid, at paras 1–8.

³⁶ Ibid, at paras 21–9.

³⁸ *Opel Austria GmbH v Council of the European Union (Case T-115/94)* [1997] ECR II-39.

³⁹ Ibid, generally at paras 1–68.

³⁵ Ibid, at paras 12–16.

³⁷ Ibid, at para 10.

will leave aside the judicial allusions to the somewhat curious practice of apparently not-altogether-accidental misdatings of the Official Journal, in which the Council's regulations are published—I confine myself to noting that the Council claimed that its regulation was adopted before the EEA entered into force; to which argument the Court of First Instance had some interesting comments to make. Of particular interest was its statement that

the principle of good faith . . . is a rule of customary international law, whose existence is recognised by the International Court of Justice . . . and is therefore binding on the Community.

. . . the principle of good faith is the corollary in public international law of the principle of protection of legitimate expectations which . . . forms part of the Community legal order and on which '[a]ny economic operation to whom an institution has given justified hopes may rely'.⁴⁰

The Court of First Instance treated the Vienna Convention on the Law of Treaties of 1969 and the Vienna Convention on the Law of Treaties between States and International Organisations of 1986 as of the same legal rank⁴¹—which I believe the International Court would never do, though the reasons for a Court of the EC to choose so to do are perhaps obvious. But in any event, it was found that the former had been stated by the International Court of Justice to represent customary international law and 'hence the Community is bound by the rules codified by the Convention'.⁴² Further, Article 18 of the 1969 Convention 'constitute[d] an expression of the general principle of protection of legitimate expectations in public international law'.⁴³ It prohibited acts that were incompatible with the aims and objects of international agreements.⁴⁴ In a further interesting observation it rejected the argument that Opel-Austria had no direct rights under the EEA treaty—which had been agreed and ratified just before the Council Regulation, though it was still not yet technically in force at that date.⁴⁵

The Court of First Instance ordered that when national agreements are an integral part of the Community legal order 'it is the task of the Community institutions . . . to ensure they are observed'.⁴⁶ This was not affected by the fact that the treaty was not directly applicable.⁴⁷

As a third and final example of the perception by the European Court of international law as part of the European legal order, and citation of the International Court of Justice as the short route to ensuring that a claimed rule

⁴⁰ Ibid, at paras 90 and 93.

⁴¹ Ibid, at para 78: 'Art 18 of the First Vienna Convention and Art 18 of the Second Vienna Convention constitute an expression of the general principle of protection of legitimate expectations in public international law.'

⁴³ Ibid, at para 78.

⁴⁵ Ibid, at paras 79 and ff.

⁴⁷ Ibid.

⁴² Ibid, at para 77.

⁴⁴ Ibid.

⁴⁶ Ibid, at para 79.

was indeed customary international law, I may refer to the 1998 Judgment of the Court of Justice in the *Racke GmbH v Hauptzollamt Mainz* case.⁴⁸ An issue in this Article 177 reference was the validity of Council Regulation 3300 of 1991 suspending trade concessions which had been provided for by the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia.⁴⁹ The Court held that questions of validity were to be determined not only by Community acts but by the rules of international law.⁵⁰ Indeed, the rules of customary international law concerning the termination and suspension of treaty relations by reasons of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order.⁵¹

However, the Court here became more cautious. It stated that

because of the complexity of the rules . . . and the imprecision of some of the concepts to which they refer, judicial review must necessarily . . . be limited to the question whether, by adopting the suspending regulation, the Council made manifest errors of assessment concerning the conditions for applying those rules.⁵²

This seems to me in marked contrast to the confidence shown as to its capabilities in international law shown by the Court in other cases.

In this case, too, the Court relied on a finding by the International Court of Justice, in the *UK–Iceland Fisheries Jurisdiction* case (1973), that the treaty termination provisions listed in the Vienna Convention on Treaties of 1969 reflected customary international law, and were thus relevant for the Community, too.⁵³ At the same time, the European Court noted that the International Court, in the *Gabcikovo-Nagymaros Project* case (1997), had emphasised that stability of treaty relations required that the Vienna Convention provisions on fundamental change of circumstances were to be applied only in exceptional cases.⁵⁴

I would duly add that the underlying facts in this case look, to a public international lawyer, as much a question of counter measures for non-compliance with obligations (that is, the law of state responsibility) as fundamental change in the law of treaties.

IV. THE ‘THIRD COURT IN EUROPE’ AND THE ICJ

I find it extremely interesting to see how important courts, dealing with specialised legal issues of the first rank of significance, see the importance

⁴⁸ *Racke GmbH & Co v Hauptzollamt Mainz (Case C-162/96)* [1998] ECR I-3655.

⁴⁹ *Ibid.*, at paras 1–23.

⁵¹ *Ibid.*, at paras 44–6.

⁵³ *Ibid.*, at paras 24 and ff.

⁵⁰ *Ibid.*, at para 27.

⁵² *Ibid.*, at para 52.

⁵⁴ *Ibid.*, at para 50.

nonetheless of locating themselves within the embrace of general international law. Furthermore, they find their own different ways to do this, according to their particular culture.

The European Court, as we have seen, regards the provisions of customary international law as part of the legal order of the European Communities, and the International Court of Justice's findings as a useful short-route to identifying what customary international law on a given topic may be.

The European Court of Human Rights—if I may detour for a few moments to make an observation on a third 'Court in Europe'—uses a different technique. Its starting point is that human rights law, including The Convention on Human Rights, is *part* of international law. Accordingly, 'The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part'.⁵⁵ As was said in the *Loizidou v Turkey* judgment (1996), the Strasbourg Court must on the one hand be mindful of the Convention's special character as a human rights treaty while also taking the relevant rules of international law into account.⁵⁶

In a recent series of cases the application of the law of state immunity by national courts has appeared to be incompatible with substantive provisions of the Convention on Human Rights, whereby the ratifying States of the Council of Europe undertake to guarantee prohibition to torture (the issue in the *Al-Adsani* case)⁵⁷ or access to court as a component element of fair trial (the *Fogarty*⁵⁸ and *McElhinney*⁵⁹ cases). The tension between the human right enshrined in the European Convention, and the international law of state immunity was particularly marked, because the right under Article 3 of the Convention not to be subjected to torture is an absolute one, permitting of no exception whatever.⁶⁰

The European Court of Human Rights added that nonetheless the law of state immunity 'is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right'.⁶¹ Let me parenthetically observe that the International Court, at The Hague, in its recent Judgment in the *Congo v Belgium* case, has made the identical observation about the character of Foreign Minister immunity.⁶²

The European Court of Human Rights now uses its well-established tests to reconcile the requirements of international law with the requirements of the Convention: first, it decides whether the limitation effected by the international law rule pursues a legitimate aim. It 'considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate

⁵⁵ *Al-Adsani v United Kingdom* (2002) 34 EHRR 27 at para 55.

⁵⁶ *Loizidou v Turkey* (1995) 20 EHRR 99 at paras 70 ff.

⁵⁷ *op cit* above n 55.

⁵⁸ *Fogarty v United Kingdom* (2002) 34 EHRR 302.

⁵⁹ *McElhinney v Ireland* (2002) 34 EHRR 02.

⁶⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Art 3.

⁶¹ *Al-Adsani*, above n 59 at para 48.

⁶² *Arrest Warrant of 11 Apr 2000*, above n 12 at paras 58–61.

aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty'.⁶³ It then proceeds to determine, as it must, whether the restriction was proportionate to the aim pursued. The critical point is the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of 1969, which states in its Article 31(3)(c) that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties'.⁶⁴ Thus the Court proceeds to the next steps of finding that neither Article 6 of the European Convention on fair trial, nor even the unqualified Article 3 on torture, could be interpreted in a vacuum: 'the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity' (*Al-Adsani*, para 55).⁶⁵ It therefore followed for the Court that the generally recognised rules of public international law on state immunity 'cannot in principle be regarded as imposing a disproportionate restriction' on the claimed rights under the European Convention.⁶⁶

I am not sure what rules of international law *would* be 'disproportionate' restrictions—but *that* is an observation that goes to the somewhat subjective nature of proportionality. But this is an interesting exercise in legal reasoning, paralleling (though quite different from) the International Court's recent finding that the availability or not of an immunity from legal process is not dependent on whether the offence was an egregious violation of human rights (*Congo v Belgium*).⁶⁷

Before leaving this point I would merely add that, unlike the European Court of Justice, the European Court of Human Rights made no use of references to the International Court of Justice to ascertain the international law of state immunity—perhaps because, until very recently in the *Congo v Belgium* case, which was too late to be useful to Strasbourg, the ICJ has had no occasion to pronounce on these matters. But, like the ECJ, it has on many occasions referred to the ICJ as authority for the proposition that parts of the Vienna Convention on the Law of Treaties—and notably the rules regarding the object and purpose of a treaty as a guide to interpretation—are part of customary international law. By that route the European Court on Human Rights has had recourse to rules codified in a treaty that was concluded *after* the entry into force of the European Convention itself.

⁶³ *Ibid.*, at para 54.

⁶⁵ *Ibid.*

⁶⁷ *Arrest Warrant of 11 Apr 2000*, *op cit*, n 12 at para 58.

⁶⁴ *Ibid.*, at para 55.

⁶⁶ *Ibid.*, at para 56.

V. GLOBALISATION AND THE MULTIPLICATION OF TRIBUNALS

In our interrelated world, with a largely horizontal legal order (to which the European Union is a partial exception), globalisation has meant that there is a widely spread legitimate interest in international law.

Today the corpus of norms is vast, the subject matter apparently expanding indefinitely. Further, this ever-expanding subject matter, which is being regulated across national boundaries, concerns not only States but other actors too. The component elements of these phenomena go hand in hand. The more our world is globalised, the less the State retains its monopoly as an international actor and the more systems of dispute settlement we are likely to find.

The International Court settles disputes between States.⁶⁸ Cases cannot be brought by individuals and indeed, neither they nor non-governmental organisations have any standing to intervene in inter-State litigation by *amicus* briefs.⁶⁹ That is how it is today. And, so far as the classic issues that engage States in their relations with each other—territory, boundaries, treaties, etc—that fact probably does not matter too much.

But the effects of globalisation have encouraged the realisation that at least in certain other areas of international law, actors other than States are entitled to access the legal procedures; and indeed, assisted by the revolution in information technology, they have become themselves important players in the international system. From the operational point of view, we are seeing an erosion of national boundaries. Globalisation has not meant the end of the State, as was so facilely prophesied. Rather, as Anne-Marie Slaughter has aptly put it, we are instead witnessing a disaggregation of the State, with many of its traditional functions being performed by private parties, based on transnational networks.⁷⁰

This phenomenon has many implications. One is that international law is now increasingly being invoked by corporations and human rights activists in their own courts and in foreign courts. The increasing familiarity of domestic courts with the substance of international law is a phenomenon of our times that is to be welcomed.

Another is that the breakdown of the old structures has led inexorably to a multiplication of international legal institutions. From 1922 to 1960 the International Court of Justice at The Hague stood alone as the forum for the resolution of international disputes. Now there are a plethora of well-developed judicial or quasi-judicial institutions operating under the great human rights treaties of the UN, as well as under the regional treaties. I refer to the European Court of Human Rights, the Committee on Human Rights under the

⁶⁸ 'Only States may be parties in cases before the Court', Statute of the International Court of Justice, 1945, Art 34(1).

⁶⁹ *Ibid.*

⁷⁰ See AM Slaughter, 'The Real New World Order', (1997) 76 *Foreign Aff.* 183; ead, 'International Law in a World of Liberal States' (1995) 6 *Eur J Int'l L.* 503.

International Covenant for Civil and Political Rights,⁷¹ the various special topic committees, for example both the UN and the European Committee on Torture; the Inter-American Court and Commission on Human Rights; and the new African Court on Human and Peoples' Rights. There is also the new Hamburg Law of the Sea Tribunal, which is open, in certain types of disputes, to individuals, corporations, State enterprises, and international organisations.⁷²

If the human rights courts and the Law of the Sea Tribunal predate globalisation, their accessibility to non-State parties is consonant with it. More recently, the Inspection Panels established by the World Bank and other multilateral development banks encourage both recourse to a highly specialised group of decision makers and access, by individuals, or groups, in cases involving States or international organisations.

There is the new World Trade Organisation (WTO) dispute settlement system. Panel decisions are binding, and an Appellate Body receives appeals on points of law from the panels.

The ability to compete in a globalised world, without losing all sense of identity, has led to further regional free trade groupings (NAFTA) or indeed attempts at regional integration (ASEAN, MERCOSUR,⁷³ SICA). Dispute settlement has been an important building block, with sophisticated structures working well in NAFTA.

The need for Courts, and the type and scope of those Courts is proving a difficult issue to newer regional economic groupings, too.

South America has more than one for regional integration and trade. MERCOSUR, the Common Market of the Southern countries, was created in 1991 by the Treaty of Asunasm, to which Argentina, Brazil, Paraguay, and Uruguay are parties. The fledgling organisation was under considerable pressure to model itself on the EU, including the ECJ.

The European Court was perceived by its South American admirers as providing for a community legal order, and guaranteeing uniform interpretation of treaties and other community acts. These advocates of integration were attracted by the idea of a community law which may be directly applied by national courts, and not just at the supreme level. This was perceived as entailing periodic adaptations of national law, while also allowing the development of new law, which assists the process of economic integration. But MERCOSUR has gone its own way. It has different institutions, none of which can be called supranational. It provides for three distinct methods of dispute resolution that may be utilised separately, simultaneously, or sequentially. The first is consultation through the MERCOSUR Trade Commission (CEM). The second is litigation in the national Courts of the members. The third is binding arbitration. Though MERCOSUR operates within a network of important

⁷¹ International Covenant on Civil and Political Rights (1966).

⁷² Statute of the International Tribunal for the Law of the Sea (1982), Art 20(2); United Nations Convention on the Law of the Sea, 1982, Part XI.

⁷³ 'MERCOSUR' in Spanish; 'MERCOSUL' in Portuguese.

international law conventions, no supranational court yet ensures their uniform application.⁷⁴

Nor was the European Community model turned to when the Protocol of Ouro Preto provided for a revised institutional structure for MERCOSUR. This made MERCOSUR's rules mandatory, but the route is very much the national legal one. My Brazilian colleague on the International Court of Justice, Francisco Rezek, has mentioned that the reliance on national (and necessarily variable) rule making means that MERCOSUR rules cannot be denominated community laws, for they lack hierarchical superiority; automatic reception by domestic legal orders; and auto-applicability.⁷⁵

The Central America Integration System (SICA), designed for the central isthmus, has had to face some of the same questions. Economic integration in Central America had a longer history, with earlier attempts starting in 1824. A new attempt was made to respond to MERCOSUR to the South and NAFTA to the North, and in 1991 Costa Rica, Guatemala, Honduras, Nicaragua, El Salvador, and Panama established SICA. In the event, Panama has never ratified the key treaties. Costa Rica stands back from monetary union and from political integration: the United Kingdom of Central America. There is as yet no free-movement of labour (though Costa Rica seeks it) but—with quite a few significant exceptions—tariff-free trade in goods, subject to rule of origin requirements. Article 12 of the Protocol of Tegueigalpa called for the creation of a Central American Court of Justice 'to guarantee respect for the law, the interpretation and implementation of the Protocol and its associated instruments or acts arising thereunder'. It is given other very important—indeed, far reaching—powers⁷⁶. It can settle disputes generally between the member States—even territorial or border disputes if the parties agree—and can offer advisory opinions to all Central American courts on SICA-related matters.⁷⁷

This potentially powerful court, with its impressive and detailed Statute,

⁷⁴ See, eg, Protocol of Jurisdictional Co-operation and Assistance in Civil, Commercial, Labor and Administrative Matters (Protocol of Las Leñas), 1992; Protocol of Buenos Aires on International Jurisdiction in Disputes Relating to Contracts, 1994.

⁷⁵ See N de Araujo, 'Dispute Resolution in MERCOSUL: The Protocol of Las Leñas and the Case Law of the Brazilian Supreme Court' (2001) *U Miami Inter-Am. L Rev*, 25–56, at 35. Also HR Rodrigues, Mercosul: 'Alguns Conceitos Básicos Necessários à Susa Compreensão', in *Soucao de Controversias No Mercosul* 29 (1997).

⁷⁶ See TA O'Keefe, 'The Central American Integration System (SICA) at the Dawn of a New Century: Will the Central American Isthmus Finally be Able to Achieve Economic and Political Unity?' (2001) *13 Fla J Int'l L*, 243 at 251–6. The SICA includes Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.

⁷⁷ *Estatuto de la Corte Centroamericana de Justicia* (1992), Arts 22(b), 22(c), 22(e), 22(g), 22(j), 22(k), and 24.

The Court of Central American Justice (*Corte de Justicia Centroamericana*), in place from 1908 to 1918, was the first permanent international court in the world. States, individuals, and legal entities were allowed to bring actions before that Court. See HM Mill Central American Court of Justice, in: Bernhardt (ed), *Encyclopaedia of Public International Law* [Volume I (1992), 551–554].

appears to have powers that outstrip the institutions within which it resides.

If the judicial story is not the same in the Central and South America organisations seeking better integration, it is different yet again in South East Asia. In the ASEAN, too, attention has been paid to the NAFTA and EU models for dispute settlement. But a very different dispute settlement mechanism has been chosen. So far as the settlement of intergovernmental disputes are concerned, the initial steps are good offices, conciliation, and mediation. After a period of time has run by a Dispute Settlement Panel is established, which can either deal with the matter itself or establish yet another body so to do. Panel Rulings eventually go to the Senior Economic Officials meeting and appeals against the decision of that body go to the ASEAN Economic Ministers' meeting—and failures to comply require negotiation by the parties. This is clearly a very, very different dispute settlement mechanism from either the EU or NAFTA. So far as the resolution of State-individual disputes are concerned, an option of fora are provided for—but if they are not in the event agreed upon, or if it is not possible to establish an arbitration tribunal, then the President of the International Court of Justice may be requested to make the required appointments. But the subject matter jurisdiction extends only to investment disputes. And there is no redress at all for disputes relating to investments or other matters between members and non-members.⁷⁸

In short, there is simply no supranational judicial body in ASEAN and the contrasts with EU Law and structures are all too apparent.

What does one conclude from this most cursory survey? First, there is no point whatsoever in urging a particular type of court or tribunal upon a regional system where the culture and current political ethos is against a real integration, with the impact upon sovereignty that that entails. Secondly, and conversely, a judicial body must be fashioned to reflect the purpose and structures of institutions it serves. Thirdly, there seems much to be said, in institutions where regional sensitivities in sovereignty pooling are so great, for having a regional judicial body. External reference to the International Court of Justice for this type of matter is unrealistic on all the grounds, and the EU Court, which might have been a more pertinent model, is clearly too much for those institutions to envisage. But, finally, without such a judicial body the impetus for integration will not progress.

And then there are the new International Criminal Courts. The existing Criminal Court for the Former Yugoslavia and for Rwanda have been set up by the Security Council to bring justice those individuals who have perpetrated major violations of humanitarian law in those countries. The establishment of other ad hoc tribunals is considered from time to time. And before too long there will come into being a standing, permanent International Criminal Court.⁷⁹

⁷⁸ ASEAN Protocol on Dispute Settlement Mechanism, see Lim YN, 'Restoring Foreign Investor Confidence in ASEAN: Legal Framework for Dispute Settlement Processes' (1998) 19 *Sing LR*, 145–65.

⁷⁹ The Rome Statute of the International Criminal Court entered into force on 1 July 2002 in accordance with Art126; see <<http://www.icc.int>>.

We thus today have a certain decentralisation of some of the topics with which the ICJ *can* in principle deal to new highly specialised bodies, whose members are experts in a subject matter which becomes ever more complex, which are more open to non-State actors, and which can respond rapidly. I think this is an inevitable consequence of the busy and complex world in which we live and is not a cause of regret.

If the European Court of Justice, and indeed also the European Court on Human Rights, have easily located the *lex specialis* for which they have responsibility within the general corpus of international law, using intellectual methodology most appropriate to each, this is not always so painlessly accomplished. For the WTO these issues are causing considerable stress, with panel and appellate decisions (not to mention academic literature) providing a very visible battleground. The debate seems to be many faceted. That the WTO treaty is not a totally sealed system seems to be generally accepted. It is agreed, too, that WTO rules are part of the wider corpus of international law, as is international trade law, international economic law, international environmental law and human rights law. But beyond that the consensus ends.⁸⁰

One controversy is as to whether the WTO rules are a *lex specialis* in which the participating States have chosen to ‘opt out’ of many substantive rules of international law, particularly, it is argued, in the field of State responsibility. The examples I see most commonly offered—that the implementation of the rules of liberalised trade may adversely impact the environment, or human rights or both—do not to my untutored eye look like a ‘contracting out’ matter at all, but I know that often it is seen by some protagonists in that light.

Then there are those who take the explicit confirmation in the Dispute Settlement Understanding (DSU 3.2, that WTO treaty interpretation is to be governed by customary international law rules on interpretation)⁸¹ as an argument that *all* other rules of international law are contracted out from, on the basis of *expressio unius est exclusio alterius*.

On the other side, there are those who make the point that the stepping stone of reference to the Vienna Convention on the Law of Treaties as a codification of the customary rules, includes the requirement that interpretation be not only by reference to technical treaty rules but also ‘any relevant rules of international law applicable in the relations between the parties’ (Article 31(3)(c)).⁸²

It is evident that the panels, and the Appellate Body, have found great difficulty, in particular, in dealing with competing obligations in other treaties—whether those on energy law, environmental law, the IMF, or the WIPO

⁸⁰ See generally J Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’ (2001) 95 *AJIL* 535.

⁸¹ Understanding on Rules and Procedures Governing the Settlement of Disputes (1994), Art 3(2).

⁸² Vienna Convention on the Law of Treaties (1969), Art 31(3)(c).

Conventions. They have been uncertain whether general international law requires that the *lex posterior* applies, or whether intentions of the parties govern. Fierce debates about the WTO Rules and the Maastricht and Amsterdam Treaties have been the order of the day. WTO Panels have noted that the Statute of the International Court of Justice mentions writings and jurisprudence as a subsidiary source of international law. That WTO jurisprudence itself may have a role to play as an international law source seems only to provide a circularity and to add to the difficulties. *The EC–Hormones* case,⁸³ the *Argentina Footwear* case,⁸⁴ the *Korea Government Procurement* case⁸⁵ all evidence that the WTO does not yet feel at ease in its place in general international law.

In a recent article in the *AJIL* (2001), Joost Pauwelyn, of the WTO Legal Affairs Division (a protagonist of deference to the rules of public international law) has written:

the interaction between WTO law and public international law is not one-sided. It is a continuing process of cross-fertilization. Just as public international law enriches WTO law, so WTO law should further develop international law.⁸⁶

True. But who are to be the guardians of international law as it is developed in Courts and Tribunals of specialist competence? And it is to this issue that I now turn.

VI. THE INTEGRITY OF INTERNATIONAL LAW

If the general competence *ratione materiae* of the International Court of Justice is today little exercised in the field of economic law; and if the European Court of Justice seeks to exercise its functions within the framework of customary international law, particularly as it applies to treaties; and if the WTO wrestles with perceived incompatibilities with other norms of international law, as well as a vision of international law to ‘fill the gaps’ in its own rules; and if the important outlines of human rights law commenced by the Permanent Court in its work on human rights treaties, and developed by the International Court in its pioneer cases on self determination are being filled in as to detail by the European Court on Human Rights, the Inter American Court and the Committee under the Covenant on Civil and Political Rights;

⁸³ WTO case *DS26 European Communities: Measures concerning meat and meat products (hormones)* (Brought by US); WTO case *DS48 European Communities: Measures affecting meat and meat products (hormones)* (Brought by Canada).

⁸⁴ WTO case *DS56 Argentina: Measures affecting imports of footwear, textiles, apparel and other items* (brought by US); WTO case *DS77 Argentina: Measures affecting textiles, clothing and footwear* (Brought by EC); WTO case *DS121 Argentina: Safeguard measures on imports of footwear* (Brought by EC); WTO case *DS123 Argentina: Safeguard measures on imports of footwear* (Brought by Indonesia); WTO case *DS164 Argentina: Measures affecting imports of footwear* (Brought by US).

⁸⁵ WTO case *DS163 Korea: Measures affecting government procurement* (Brought by US).

⁸⁶ Pauwelyn, above n 80, at 578.

and if the Law of the Sea Tribunal in Hamburg is in due course fully to play its intended role; and if the International Criminal Tribunal for Yugoslavia develops its own vision of international humanitarian law as it exercises its criminal jurisdiction over individuals: How then is the integrity of the subject matter of international law to be guaranteed?

Could the move from the half century monopoly of the International Court over these matters, through the easy and unproblematic co-existence of the three International Courts in Europe, to the present co-existence of larger numbers of judicial bodies, lead to contradictory jurisprudence, with all the negative implications that would imply? Even those of us who have perceived the new judicial map of the last 20 years as generally healthy, reflecting a desirable trend to resolve disputes by peaceful means, must recognise that the question is a real one. However understandable the reasons for the arrival of the new tribunals on the international scene, and however true it is that in large part they do what the International Court, because of its Statute and nature cannot do, the potential for divergent jurisprudence is real. This is because, in these various judicial bodies, in the varying and different ways I have tried to describe, the very same legal question can come up before them in the application and interpretation of international law.

Judicial findings that are inconsistent with the judgments of the International Court of Justice would present particular problems for the role of international law in international relations, given that the International Court is the judicial arm of the United Nations and the only judicial body vested with a universal and general subject matter jurisdiction.

There are those who see some tendencies that they believe give cause for concern.

The President of the International Court of Justice has, in recent annual addresses to the General Assembly and its Sixth Committee, referred in this context to three perceived examples.⁸⁷ The first was case of *Loizidou v Turkey*,⁸⁸ in which, he stated, the Strasbourg Court took a different position from the International Court on the question of reservations to Treaties. My own respectful comment is that any perceived bifurcation depends upon what one believes to have *been* the scope of the International Court's judgment in the Reservations Case in 1952.⁸⁹ I do not see that bifurcation so clearly.

The second example offered of conflicting international law jurisprudence

⁸⁷ Address by HE Judge Gilbert Guillaume, President of the International Court of Justice, to the United Nations General Assembly, 26 Oct 2000, A/55/PV 41; The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order—Speech by the President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, 27 Oct 2000, available at <http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident_Guillaume_SixthCommittee_20001027.htm>.

⁸⁸ ECHR case *Loizidou v Turkey*, above n 56, at paras 65–89.

⁸⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports, 1951, 15.*

was *the Blue Fin Arbitration*.⁹⁰ It is true that the Law of the Sea Tribunal granted provisional measures,⁹¹ which an arbitration tribunal, to which the merits then went, revoked.⁹² But this is surely not an example of fragmenting the substance of international law. The provisional measures were revoked not on substantive grounds, but because the arbitral tribunal that was to have dealt with the merits found in fact it did not have jurisdiction. In my opinion, all that this case shows is how anomalous it is for the Law of the Sea Convention to have given the Hamburg Tribunal injunctive powers in respect of cases always intended by the parties to go elsewhere for their merits to be determined. Moreover, the arbitrators concerned, the President of whom was a former Judge of the International Court, made copious and knowledgeable reference to the jurisprudence of the International Court in carrying out their task.

The one 'real example' that I see is the *Tadic* case before the International Criminal Tribunal for the Former Yugoslavia in 1999.⁹³ In order to determine its competence the Tribunal had to establish whether there was an international armed conflict in Bosnia-Herzegovina, which in turn required a finding that certain of the internal participants in that country were acting under the conduct of a foreign power, Yugoslavia. The Tribunal in terms referred to, but did not follow, the decision of the International Court to the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*. In that case, the International Court had articulated a test of effective control by the United States of the activities of the *contras*.⁹⁴ The Yugoslavia Tribunal rejected this approach, preferring less strict criteria in relation to the imputation of responsibility.⁹⁵

Those who believe that context plays a major part in the fashioning of new norms—and it *was* a new expression of an element in the Law of State Responsibility being made by the ICJ in the *Nicaragua v USA* case—might think that it is not surprising that in these diverse sets of circumstances the law was seen differently. Whether the *Tadic* affair is a major matter will become more apparent when judgment is eventually reached in the Milošević trial.

I hope that friendly mutual respect will remain the order of the day. Sight should not be lost of the abundant reliance on ICJ law by the Inter-American Court of Human Rights, by the WTO Appellate Body, by the Iran–US Claims Tribunal, and—as I have sought to show this evening—by the European Court of Justice in the particular manner that it has found appropriate for the grounding of the European legal order.

With the greatest respect to the past two Presidents of the International

⁹⁰ *Southern Bluefin Tuna Case (Australia and New Zealand v Japan)* available at <<http://www.worldbank.org/icsid/>>.

⁹¹ See *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)*, *Provisional Measures*, International Tribunal for the Law of the Sea judgment of 27 Aug 1999.

⁹² *Southern Bluefin Tuna Case*, above n 90.

⁹³ *Prosecutor v Dusko Tadic*, ICTY Appeals Chamber judgment of 15 July 1999.

⁹⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Merits, Judgment*, ICJ Reports, 1986, 14 at 64–5.

⁹⁵ *Prosecutor v Dusko Tadic*, above n 93, at paras 68–171.

Court,⁹⁶ I do not share their view that the model of Article 234 (the renumbered Article 177) of the Rome Treaty⁹⁷ provides an answer. It is simply cumbersome and unrealistic to suppose that other tribunals would wish to refer points of general international law to the International Court of Justice. Indeed, the very reason for their establishment as separate judicial instances militates against a notion of intra-judicial reference.

The better way forward, in my view, is for us all to keep ourselves well informed. Thus the European Court of Justice will want to keep abreast of the case law of the International Court, particularly when it deals with treaty law or matters of customary international law; and the International Court will want to make sure it fully understands the circumstances in which these issues arise for its sister court in Luxembourg. Many ways of achieving this can be suggested; and events such as this lecture may perhaps be seen as counting among them.

⁹⁶ Address to the Plenary Session of the General Assembly of the United Nations by Judge Stephen M Schwebel, President of the International Court of Justice, 26 Oct 1999, A/54/PV 39; *The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order—Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, 27 Oct 2000*, above n 87.

⁹⁷ Treaty Establishing the European Economic Community, above n 5, Art 234 (ex 177).