

# Rules of Procedure in the International Court and the European Court

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## I. Introduction

We have it on good authority<sup>1</sup> that the Rules of Procedure of the Court of Justice of the European Coal and Steel Community,<sup>2</sup> which have matured into those of the Court of Justice of the European Communities,<sup>3</sup> had their origin in the Rules of Procedure of the International Court of Justice.<sup>4</sup> Indeed, the most casual reading of the two sets of the rules confirms that this is the case, even though both have been amended since the rules of the International Court were first used as a model for the European Court.<sup>5</sup>

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<sup>1</sup> A. van Houtte, former Registrar of the Court of Justice of the European Communities, 'La Cour de Justice des Communautés européennes', [1963] *Cah. dr. eur.* 3, 5.

<sup>2</sup> OJ (7 March 1953) 37.

<sup>3</sup> OJ (1982) C 39/1. The Court of Justice of the European Communities is referred to hereafter as 'the European Court'.

<sup>4</sup> 6 May 1946, [1946-51] ICJ Ybk. 235.

<sup>5</sup> The ICJ Rules of Procedure were first amended on 10 May 1972: 11 ILM (1972) 899. They were re-amended on 14 April 1978: 17 ILM (1978) 1286. See J.G. Starke, *The New Rules of Court of the International Court of Justice* (1973); G. Guyomar, *Commentaire du règlement de la cour internationale de justice* (1973); S. Roseme, *Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice*, (1983). The Rules of Procedure of the Court of Justice of the European Coal and Steel Community (*supra* note 2) were replaced by those of the Court of Justice of the European Communities of 3 March 1959, as amended by the Decision of the European Court of 11 November 1959 (OJ (1960) 17). These were replaced by the Rules of Procedure of 26 November 1974, OJ (1974) L 350/1 (corrigendum OJ (1975) L 102/24) which were amended on 12 September 1979 (OJ (1979) L 238/1) and 27 May 1981 (OJ (1981) L 199/1) and republished in consolidated form in OJ (1982) C 39/1. They were further amended 8 May 1987 (OJ (1987) L 165/1). Supplementary Rules dated 26 November 1974 (OJ (1974) L 350/29) were amended on 16 September 1981 (OJ (1981) L 282/1) and published in consolidated form (OJ (1981) C 39/1) before further amendment on 8 May 1987 (OJ (1987) L 165/4). See L. Brinkhorst and G. Wittenberg, *The Rules of Procedure of the Court* (1962); C. van Reepingen and P. Orienne, *La procédure devant la Cour de justice des Communautés européennes* (1961).

The three Statutes of the European Court<sup>6</sup> also bear such resemblance to the Statute of the International Court<sup>7</sup> that it is fair to deduce that the former were based in large part on the latter. But the textual similarity of the Statutes is less pronounced than that of the rules, for three reasons. Firstly, many of the matters which, in the case of the International Court of Justice, are addressed in the Statute, are, in the case of the European Court, addressed in the founding treaties<sup>8</sup> or Rules of Procedure. In particular, the provisions governing the International Court's competence and sources of law, which form Part II of its Statute, have no counterpart in the Statutes of the European Court, whose jurisdiction and sources of law are set out in the treaties, to the extent that they are specified in a legislative text. Secondly, the provisions in the International Court's statute dealing with advisory opinions<sup>9</sup> are not matched in corresponding provisions of the statute of the European Court, which has no true advisory jurisdiction. Thirdly, in order to accommodate the Court of First Instance,<sup>10</sup> the Member States of the European Communities have amended the Statute of the European Court, thereby causing them to depart from the pattern established for the International Court.

The common genesis of the Rules of Procedure of the two Courts invites their comparison; and with the reservation expressed in the previous paragraph, the same is true of the two Courts' Statutes. Such a comparison may shed light on the meaning of disputed or ambiguous provisions in those rules or statutes. For where a rule applicable to two Courts is identically phrased, the construction placed upon it by one Court must merit serious consideration by the other, notwithstanding the latter's protestation of its distinctive function.<sup>11</sup> Moreover, differences in the phraseology of the corresponding rules applicable to two Courts are of the greatest interest for the scholar, since they are apt to reveal the essential characteristics of those institu-

6 Statute of the Court of Justice of the European Coal and Steel Community, 18 April 1951, 1 EYB 435 (hereafter referred to as 'the ECSC Statute'); Statute of the Court of Justice of the European Atomic Energy Community, 17 April 1957, 5 EYB 561 (hereafter referred to as 'the Euratom Statute'); Statute of the Court of Justice of the European Economic Community, 17 April 1957, 5 EYB 427 (hereafter referred to as the 'EEC Statute').

7 26 June 1945, UKTS 67 (1946); JORF 13 January 1946.

8 Treaty establishing the European Coal and Steel Community, 18 April 1951, 261 UNTS 140, 1 EY.13. 358 (hereafter referred to as 'the ECSC Treaty'); Treaty establishing the European Atomic Energy Community, 25 March 1957, 298 UNTS 167, 5 EYB 454 (hereafter referred to as 'the Euratom Treaty'); Treaty establishing the European Economic Community, 25 March 1957, 298 UNTS 11, 4 EYB 412 (hereafter referred to as 'the EEC Treaty').

9 Articles 65-68. See Lachs, 'Some Reflections on the Contribution of the International Court of Justice to the Development of International Law', 10 *Syr J Int L. and Comm.* (1983) 239, 246-262.

10 For the establishment of the Court of First Instance, see Article 32(d) of the ECSC Treaty, Article 140A of the Euratom Treaty, and Article 168A of the EEC Treaty, added by the Single European Act, 17 February and 28 February 1986, UKTS 47 (1988), Articles 4, 26 and 11 respectively. See Millett, 'The New European Court of First Instance', 38 *ICLQ* (1989) 811.

11 For the European Court's expression of the distinctive character of Community law, when compared with international law, see Case 6/64, *Costa v. Enel* [1964] ECR 585, 594. See further Plender, 'The European Court as an International Tribunal', 42 *Camb L.J.* (1983) 279. For proce-

tions. They are also of value for those concerned with the reform of the jurisdiction of either Court, since lessons may be drawn from practical experience.

## II. The Judicial Function

The International Court, designated by the UN Charter as 'the principal judicial organ of the United Nations'<sup>12</sup> is the judicial counterpart of the political organs (the General Assembly and Security Council) and the economic and social organ (the Economic and Social Council).<sup>13</sup> In common with all of these, it has as its function the promotion, within its sphere of competence, of the purposes and principles of the Charter which are set out in Chapter I. Among these are the peaceful adjustment or settlement of international disputes in conformity with the principles of justice and international law<sup>14</sup> and the promotion of human rights and fundamental freedoms.<sup>15</sup> The United Nations are specifically charged with the protection of certain fundamental interests of the state: they are based on the principle of sovereign equality of all members; and may not intervene in matters falling essentially within the domestic jurisdiction of a state.<sup>16</sup> The Court therefore as an organ of the UN acted in accordance with the purposes for which it was established when it observed, in connection with diplomatic asylum, that this entailed a derogation from territorial sovereignty, and that any such derogation 'cannot be recognized unless its legal basis is established in each particular case'.<sup>17</sup>

The contrast with the European Court is marked. The latter is an institution of the European Communities<sup>18</sup> whose tasks include the promotion of 'closer relations between the States belonging to it'.<sup>19</sup> That phrase gains colour and meaning from

cedure in the European Court generally, see D. Lasok, *The European Court of Justice: Practice and Procedure* (1984) and J. Usher, *European Court Practice* (1983).

12 26 June 1945, 1 UNTS; xvii UKTS 67 (1946) Article 92.

13 Article 7(1).

14 Article 1(1).

15 Article 1(3).

16 Article 2(1), (7). See *Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco*, PCIJ Series B. No. 4 (1923) 24; *Interpretation of Peace Treaties (First Phase)*, ICJ Rep. (1950) 65, 7071; *North-East Coast Atlantic Fisheries case*, 1 *Scott* 141, 156; *Lotus case*, PCIJ Series A No. 10 (1927) 18; *Asylum case*, ICJ Rep. (1959) 266, 275; *Minquiers and Ecrehos case*, ICJ Rep. (1953) 47, 52. In the ample literature on the subject, the following merit particular attention: E. Dickinson, *The Equality of States* (1972); L. Delupis, *International Law and the Independent State* (1974); Lalive, 'Note on the *Peace Treaties case*', 77 *JDI* (1950) 1246; and Fitzmaurice, 'The Law and Procedure of the International Court of Justice', 34 *BYIL* (1958) 1. See further the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970 UNGA Res. 2625 (XXV).

17 *Asylum case*, *supra* note 16, loc. cit. The Court's language echoed that of the Permanent Court in the *Lotus case* (*supra* note 16, loc. cit.): 'Restrictions upon the independence of states cannot be presumed'.

18 EEC Treaty, Article 4.

19 EEC Treaty, Article 2.

the preambles to the EEC Treaty and the Single European Act, which speak of the ambition to secure 'an ever closer union among the peoples of Europe', 'to eliminate the barriers which divide Europe' and 'to transform relations as a whole among their States into a European Union'. According to the Tindemans Report on European Union,<sup>20</sup> the function of the Court in a Community having these ambitions is to protect the 'state of law', and therefore individuals must be able to appeal directly to the Court against an act of one of the institutions of the Union which infringes their basic rights.

In such a Court, presumptions of national sovereignty of the kind expressed by the International Court of Justice appear misplaced. Rather, the European Court insists that

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of power from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.<sup>21</sup>

In view of this difference in the functions of the two Courts it is, to the novice, surprising that Article 2 of the Statute of the International Court declares that it shall be composed of 'independent judges elected regardless of nationality', whereas Article 167 of the EEC Treaty records that Judges and Advocates General 'shall be chosen from persons whose independence is beyond doubt': nothing is said about the disregard of nationality.

### III. Composition of the Courts

Article 2 of the International Court's Statute gives, of course, only part of the picture. By Article 3(1), the Court is to consist of fifteen members, no two of whom may be nationals of the same state. By Article 4, members are to be elected by the General Assembly and Security Council from a list of persons nominated by the National Groups in the Permanent Court of Arbitration: or in the case of member states which do not have such formally constituted National Groups, by *ad hoc* groups appointed for the purpose. By Article 5, no National Group may nominate more than four persons, and not more than two of these are to be of the National Group's own nationality. By Article 9, the General Assembly and Security Council are to bear in mind, when proceeding to the election, that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured. In practice, these rules have served to ensure a degree

<sup>20</sup> 29 December 1975, *Bull. EC Suppl.* 1/76.

<sup>21</sup> Case 6/64, *Costa v. Enel*, *supra* note 11, *loc. cit.* See further, J. Usher, *European Community Law and National Law: The Irreversible Transfer?* (1981).

## Rules of Procedure

of consistency in the allocation of seats on the bench to nationals of member states, as follows:

Four West European seats	(France, the United Kingdom, a North European and a South European judge)
Two Latin American seats	
Two sub-Saharan African seats	(one francophonic, Civil law seat and one anglo- phonic, Common law seat)
Three Asian seats	(China, Japan, India)
One Soviet seat	
One East European seat	
One Arab seat	
One United States seat. <sup>22</sup>	

Furthermore, in providing for the appointment of a judge *ad hoc* when the Court fails to include a judge of the nationality of the parties,<sup>23</sup> the Statute and Rules acknowledge the fact that the states parties to the litigation in the International Court attribute the greatest of importance to the presence of one of their nationals on the bench.<sup>24</sup> The emphasis which the United Nations places, in its practice, upon the presence in the International Court of judges whose nationalities reflect those of the litigant states and of the main forms of civilization is wholly comprehensible in view of the stated functions of the Court, and the foreseeable reluctance of states to submit to the judgment of a tribunal consisting entirely of foreign judges. As Judge Lachs has observed, the confidence of the litigant states must be ensured if the Court is to function at all; and if this is to be achieved, those states must be satisfied that the Court will have among its members at least one whose education, training and experience will equip him to understand fully the interests and submissions of the state from which he comes.<sup>25</sup>

In the case of the European Court, members are appointed 'by common accord of the Governments of the Member States'.<sup>26</sup> The established practice is that each Member State nominates one of its nationals as Judge, and each of the large Member States nominates one of its nationals as Advocate General; the right to nominate the remaining Judge and Advocates General passes in succession to each of the larger and smaller states respectively. Candidates so nominated are appointed by common accord.<sup>27</sup> Nevertheless, in the case of the European Court national rep-

<sup>22</sup> McWhinney, 'Law, Politics and "Regionalism" in the Nomination and Election of World Court Judges', 13 *Syr J Int L. and Comm.* (1986) 10.

<sup>23</sup> ICJ Statute, Article 31; ICJ Rules, Articles 1(2) and 7-8.

<sup>24</sup> Huber, 'Etude des amendements à apporter au Statut de la CIJ', 45 (2) *Ann. IIL* (1954) 406, 428.

<sup>25</sup> Lachs, 'Independence of Judges in the International Court of Justice': 25 *Colum. J. Trans. L.* (1987) 593; see also Cordon, 'Independence and Impartiality of Judges of the International Court of Justice' 2 *Conn. J. Int. L.* (1987) 397; Rosenne, 'Election of Five Members of the ICJ in 1981', 76 *AJIL* (1982) 364; Waldock, 'The ICJ from Bar and Bench', 54 *BYIL* (1983) 1; Gross, 'The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order', 65 *AJIL* (1971) 253.

<sup>26</sup> EEC Treaty Article 167.

<sup>27</sup> P. Kapteyn and P. Verloren van Themaat, *Introduction to the Law of the European Communities after the Coming into Force of the Single European Act* (2nd. ed., Gormley ed., 1989) 146; P.

resentation plays a smaller part than in the International Court. The former can sit in plenary session with a *quorum* of only seven judges, even in cases to which states are parties<sup>28</sup> and it maintains the rule that the Advocate General will not (except in very exceptional circumstances) participate in a case brought by or against his own state.<sup>29</sup> The International Court, on the other hand, is required to sit as a full Court, save in the specific instances allowed by the statute, and the *quorum* may never be reduced below nine.<sup>30</sup> Furthermore, the tendency to appoint to the International Court former civil servants<sup>31</sup> is not matched in the case of the European Court, whose members include a higher proportion of former national judges.<sup>32</sup>

The draftsmen of the EEC Treaty have adopted with only minor modifications<sup>33</sup> the provisions in the ICJ Statute governing the qualifications of members of the Court.<sup>34</sup> Candidates must 'possess the qualifications required in their respective countries for appointment to the highest judicial office, or [be] jurisconsults of recognized competence'.<sup>35</sup> Judges of the new European Court of First Instance, on the other hand, must 'possess the ability required for appointment to judicial office'.<sup>36</sup> This language does not appear designed to permit the appointment of those suited only for inferior judicial office at the national level, but rather to authorize the appointment of experts in fields other than law, such as economists, who could bring to the Court of First Instance skills not possessed by jurisconsults.<sup>37</sup>

Lasok, *supra* note 11, at 4-5; H. Rasmussen, *On Law and Policy in the European Court of Justice* (1986) 230.

28 EEC Statutes, Article 15; Euratom Statute, Article 15; ECSC Statute, Article 18.

29 Dashwood, 'The Advocate General in the Court of Justice of the European Communities', 2 *LIEJ* (1982) 202; Lenz, 'The Court of Justice of the European Communities', 14 *EL Rev.* (1989) 127; Gori, 'L'avocat général à la Cour de justice des Communautés européennes', [1976] *Cah. dr. eur.* 375.

30 ICJ Statute, Article 25; ICJ Rules, Article 20.

31 The tendency is identified by McWhinney, *supra* note 22.

32 Rasmussen, *supra* note 27, at 226; L.N. Brown and F.G. Jacobs, *The Court of Justice of the European Communities* (3rd. ed., 1990).

33 The ICJ Statute stipulates that those not possessing the qualifications for appointment to the highest judicial office must be jurisconsults or have recognized competence 'in international law'. In the case of Article 167 of the EEC Treaty, the last three words are omitted. The ICJ Statute provides that candidates should be 'persons of high moral character': the EEC Treaty omits those words. The form of the judicial oath reflects this curious difference. Judges of the International Court promise to perform their duties 'honourably, faithfully, impartially and conscientiously': ICJ Rules, Article 4. Those in the European Court merely promise to perform their duties 'impartially and conscientiously'.

34 EEC Treaty, Article 167; ICJ Statute, Article 2.

35 In the case of Judge Chloros, the first judge of Greek nationality appointed to the European Court, his qualification appears to have been that of a 'jurisconsult of recognized competence', for as an English barrister and a professor at London University he was not eligible for appointment to the highest judicial office in Greece.

36 EEC Treaty, Article 168A(3).

37 Analogy may be drawn with assessors in the International Court of Justice, save of course that the latter cannot vote: ICJ Statute, Article 30(2); ICJ Rules, Articles 9 and 21(2). See also United Nations Law of the Sea Convention 1982, A/CONF. 62/122, Article 189.

## Rules of Procedure

The Statute of the European Court also follows the wording of the International Court in addressing the vexed question of the recusal of judges. In each case, the relevant provisions fall into two parts. Firstly, members are disqualified from taking part in the disposal of any case in which they have previously taken part as agent, counsel or advocate for one of the parties, or on which they have been called upon to express an opinion as a member of a court or tribunal or commission of enquiry 'or in any other capacity'. Secondly, it is stipulated that if, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he should so inform the President. Moreover, if the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly. If in any such case the President and the member of the Court disagree, the matter is to be settled by the Court.<sup>38</sup>

The practice of the two Courts in applying these provisions has been remarkably consistent (although it must be acknowledged that the circumstances presented by the cases are so dissimilar that conclusions can be offered only with reserve). Judge Klaestad was not disqualified from participating in the *Anglo-Norwegian Fisheries case*<sup>39</sup> by reason of the fact that as a member of the Supreme Court of Norway he had decided cases involving Norwegian territorial waters; as the case before the International Court was not one in which he had previously taken part. Sir Gordon Slynn declined to take part as Advocate General in *Jenkins v. Kingsgate (Clothing Productions) Limited*,<sup>40</sup> a case that he had referred to the Court for preliminary ruling in his former capacity as President of the Employment Appeals Tribunal. His action appears consonant with that of Judge Klaestad, and indeed of Sir Bengal Rau, who considered himself disqualified from participating in the *Anglo-Iranian Oil Company case (Meris)* on the ground that he had represented India on the Security Council when dealing with the United Kingdom's complaint against Iran in respect of the interim measures prescribed by the Court.<sup>41</sup> In the case of the more broadly-phrased provision enabling members of the two Courts to recuse themselves 'for some special reason', there are once again some close analogies between the practice of the two institutions. Thus, Judge Basdevant did not take part in the case con-

38 ICJ Statute, Articles 17(2) and 24; EEC Statute, Article 16; ICJ Rules, Article 20; CJEC Rules, Article 16. Similar rules also apply in respect of the occupancy of political, administrative or other post by Members of the two Courts (ICJ Statute, Article 16; EEC Statute, Article 4); the removal of Members (ICJ Statute, Article 18; EEC Statute, Article 6); their privileges and immunities (ICJ Statute, Article 19; EEC Statute, Article 3: the latter stipulates however that privileges shall continue, in respect of acts done during occupancy of office, after its termination: cf *Zoernsch v. Waldock* [1964] 2 All ER 256); the appointment of the Registrar (ICJ Statute, Article 21(2); EEC Treaty, Article 168); and the seat of the Court (ICJ Statute, Article 22; Decision of Certain of the Institutions and Departments of the Communities, 8 April 1965, *Encyclopaedia of European Community Law*, BI para B8-094.

39 ICJ Rep. (1951)116.

40 Case 96/80, [1981] ECR 911.

41 ICJ Rep. (1951) 89 (Interim Measures); ICJ Rep. (1952) 93 (Meris).

cerning the *United Nations Administrative Tribunal*<sup>42</sup> of which his daughter was President<sup>43</sup> and Judge Mackenzie-Stuart did not take part in a case concerning the European School in England, his wife being governor of the European School in Luxembourg.<sup>44</sup>

#### IV. Chambers

The Statute of the International Court of Justice provides for the establishment of chambers for dealing with 'particular categories of cases: for example, labour cases and cases relating to transit and communications';<sup>45</sup> and for the purpose of summary proceedings 'with a view to the speedy despatch of business'.<sup>46</sup> Hitherto the International Court has not made use of chambers of this kind, but in recent years there have been several instances of the use of a third kind of chamber of the International Court which is envisaged in Article 26(2) of the Statute. This reads as follows:

The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties.

Article 17 of the Rules of Procedure adds the following:

- (1) A request for the formation of a chamber to deal with a particular case, as provided for in Article 26, paragraph 2 of the Statute, may be filed at any time until the closure of the written proceedings. Upon receipt of a request made by one party, the President shall ascertain whether the other party assents.
- (2) When the parties have agreed, the President shall ascertain their views regarding the composition of the chamber, and shall report to the Court accordingly. He shall also take such steps as may be necessary to give effect to the provisions of Article 31, paragraph 4 of the Statute...

By Article 31(4) the President may call on one or two members of a chamber to give way to members having the nationality of the parties concerned.

<sup>42</sup> ICJ Rep.(1954) 47.

<sup>43</sup> S. Rosenne, *The Law and Practice of the International Court* (1985) 197.

<sup>44</sup> Case 44/84, *Hurd v. Jones*, [1986] ECR 29. Judge Pescatore, who had been a Governor of the European School in Luxembourg some twenty years previously, took part in the oral hearing. His name does not appear in the judgment, from which we may infer that he took no part in the deliberation of the case, presumably because it became apparent during the course of the hearing that one of the parties placed reliance upon a decision taken by the board of Governors of the School in Luxembourg at a time when Judge Pescatore was a Governor.

<sup>45</sup> Article 26(1).

<sup>46</sup> Article 29. There is a growing literature on the subject. See Zoller, 'La première constitution d'une Chambre spéciale par la Cour internationale de justice', 86 *RGDIP* (1982) 305; Ostrihansky, 'Chambers of the International Court of Justice', 37 *ICLQ* (1988) 30; Rigaldes, 'Le Canada et les Etats-Unis se soumettent à une chambre spéciale de la CIJ', 6 *RJT* (1981-2) 544.



## Rules of Procedure

These provisions are to be contrasted with Article 32 of the ECSC Treaty, Article 137 of the Euratom Treaty and Article 165 of the EEC Treaty, which provide as follows:

The Court of Justice shall sit in plenary session. It may, however, form chambers, each consisting of three or five judges, either to undertake certain preparatory enquiries or to adjudicate on particular categories of cases in accordance with rules laid down for these purposes.

Whenever the Court of Justice hears cases brought before it by a Member State or by one of the institutions of the Community, or, to the extent that the chambers of the Court do not have requisite jurisdiction under the Rules of Procedure, has to give preliminary rulings on questions submitted to it pursuant to Article 177, it shall sit in plenary session...

The Statutes add that decisions of chambers are valid when three judges are sitting<sup>47</sup> and that a party may not apply for a change in the composition of a chamber on the grounds either of the nationality of a judge or the absence from the Court of a judge of the nationality of that party.<sup>48</sup> Under the Rules of Procedure<sup>49</sup> chambers are to be established periodically on a continuing basis (not *ad hoc*). Proceedings commenced by officials of Community institutions against those institutions must be heard in a chamber designated each year by the Court for this purpose.<sup>50</sup> (Here lies an analogy with the permanent chambers of the International Court, envisaged in Article 26(1) of its statute.) But the European Court has power to assign to a chamber any reference for a preliminary ruling, or any appeal against fines imposed by the Commission, or any action for annulment or for a failure to act, any claim for damages or action pursuant to an arbitration clause when these have been initiated by an individual, and when the difficulty or importance of the case or the particular circumstances are not such as to require that the Court decide it in plenary session.<sup>51</sup> However, a case may not be so assigned if a Member State or an institution of the Communities, being a party to the proceedings, has requested that the case be decided in plenary session.<sup>52</sup> In this context, the expression 'party to the proceedings' means any Member State or institution which is a party to or intervener in the proceedings or which has submitted written observations in any reference for preliminary ruling.

The most striking point which emerges from the comparison is the extreme reticence of the Member States of the European Communities with regard to the use of chambers for cases in which states are parties. Indeed, it occasionally happens that the same dispute is presented to the European Court more or less simultaneously by two means: by a direct action brought in the Court by or against a Member State,

<sup>47</sup> EEC Statute, Article 15; Euratom Statute, Article 15; ECSC Statute, Article 18.

<sup>48</sup> EEC Statute, Article 16; Euratom Statute, Article 16; ECSC Statute, Article 19.

<sup>49</sup> Article 8.

<sup>50</sup> CJEC Rules, Article 95(3).

<sup>51</sup> CJEC Rules, Article 59(1).

<sup>52</sup> CJEC Rules, Article 95(2).

and by a reference for preliminary ruling from a national court in which the state's action is put in issue by a natural or legal person.<sup>53</sup> Cases brought by the first of these means can only be heard before the full Court. Those brought by the second means can be remitted to a chamber, and commonly will be, unless the actions are initiated more or less simultaneously, so that they can be heard together.

In the light of Article 26(2) of the Statute of the International Court, the question arises whether a case should be reserved for determination in the European Court in plenary session by reason of the fact that a Member State or Community institution is a party. It is appreciated that there are at least two differences between the international system and the Community system of dispute resolution which account for the maintenance of distinctive rules relating to chambers. Firstly, the disputes subject to the international system are, in principle, bilateral, whereas in the Community a judicial determination of Community law is apt to affect the interests of all Member States, including those not parties to the dispute. Secondly, recourse to the International Court is facultative, whereas in the Community it is, for a state, inherent in membership.<sup>54</sup> On the other hand, the interests of a Member State of the European Communities may be affected by a reference for preliminary ruling no less than by a direct action against itself or another state; and for this reason the rules preserve the right of Member States to demand in any case that it shall be heard before a full Court.<sup>55</sup> Moreover, since a full Court can consist of only nine or even seven of the thirteen judges (and nowadays commonly does so), a Member State is not assured that one of its nationals will sit on the bench, even in a case to which it is a party.<sup>56</sup> If the interest of a Member State is advanced by ensuring that the Court will, whenever possible, include one of its nationals, whenever its vital interests are at stake, this might be achieved by dispensing with the rule which prohibits the use of chambers when a state or Community institution is a party, and preserving the rule which authorizes the state to demand that a case be heard in plenary session when circumstances so require.<sup>57</sup>

53 See for instance Case 95/81, *Commission v. Italy*, [1982] ECR 2187 and Joined Cases 206, 207, 209 and 210/80, *Orlandi Italo e Figlio and Others v. Italian Ministry of Foreign Trade*, [1982] ECR 2147 (both of which concerned the compatibility with Community law of a national system requiring the lodging of security in the event of advance payments for imports). See also Case 68/86, *United Kingdom v. Council, 'Hormones'*, [1988] CMLR 543, and Case 331/88, *R v. Secretary of State ex parte FEDESA*, pending.

54 On this point see Judge Jimenez de Arechega, 'The Amendments to the Rules of Procedure of the International Court of Justice', 67 *AJIL* (1973) 1, 2-3.

55 *Supra*, note 52.

56 See for example Case 348/85, *Denmark v. Commission*, [1987] ECR 5243 (9 judges, excluding Judge Due); Case 325/85, *Ireland v. Commission* [1987] ECR 5041 (9 judges, excluding Judge O'Higgins); Case 54/55, *United Kingdom v. Commission*, [1987] ECR 3765 (7 judges, excluding Lord Mackenzie Stuart).

57 The saving of judicial time involved by the rescinding of the first of these rules should enable the Court to avoid using the 'petit plenum' whenever a Member State has indicated that it attaches particular importance to a case, by means of a request pursuant to Article 95(2) of the Rules.

## Rules of Procedure

If this suggestion were to be accepted by the Council, cases would be referred to the full Court where, in the assessment of the Court or of a Member State, it appears from their difficulty or importance or from the surrounding circumstances that use of a chamber would be inappropriate. It is not suggested that the use of chambers of the International Court is available only in cases which do not appear to present special difficulty or importance or significance for universal principles.<sup>58</sup> The right of the International Court to form an *ad hoc* chamber is unlimited by subject matter. This is emphasized by the opening words of Article 26(2) of the Statute: 'The Court may at any time form a chamber...'. Nevertheless, recent practice suggests that the use of a chamber is particularly suitable for disputes of a technical character, as in the *Gulf of Maine case*<sup>59</sup> or the *Italian Electricity*<sup>60</sup> case, or for cases having a regional character, as in the border dispute between Burkina-Faso and Mali<sup>61</sup> and between El Salvador and Honduras.<sup>62</sup> Likewise, in the European Court, the use of a chamber appears particularly appropriate in cases concerned with technical matters, such as customs classification or calculation of monetary compensatory amounts and for disputes of an essentially bilateral character.<sup>63</sup>

As regards the constitution of the chamber, greater difficulties are presented in the International Court than in the European Court. For it is only in the former case that the chamber is convened for the purpose of determining a particular dispute; and here the question may arise whether a chamber need be representative of the main forms of civilization and the principal legal systems of the world. There is excellent authority for the proposition that it need not be representative. Indeed, when the Statute of the Permanent Court was adopted for the International Court of Justice, that desideratum was deleted,<sup>64</sup> and Judge Oda has contended, both in his judicial capacity<sup>65</sup> and in writing<sup>66</sup> that nothing other than the views of the parties can reasonably be taken into account by the Court in composing the chamber.

58 See Schwebel, 'Ad Hoc Chambers of the International Court of Justice', 81 *AJIL* (1987) 831, 851. See further, McWhinney, 'Special Chambers within the ICJ', 12 *Syr J Int L. and Comm.* (1985) 1.

59 *Canada-U.S.*, ICJ Rep. (1982) 3.

60 *Elektronica Sicula SpA (ELSI), U.S. Italy*, ICJ Rep. (1987) 3.

61 ICJ Rep. (1985) 6.

62 ICJ Rep. (1987) 10.

63 See Case 131/87, *United Kingdom v. Council*, ('Glands'), 16 November 1989, Case 84/85, *United Kingdom v. Commission* ('European Social Funds: Aid for part-time work'), *supra* note 56.

64 Schwebel, *supra* note 58, loc. cit.

65 *Gulf of Maine case*, ICJ Rep. (1982) 10.

66 'Further thoughts on the Chambers Procedure of the International Court of Justice', 82 *AJIL* (1988) 556, 558. Furthermore, some of those charged with the task of litigating before a chamber have contended 'that the make-up of a chamber should be based upon the views of the parties as to its ability to settle a dispute between them in an acceptable manner – not upon some abstract notion of geographic balance or blending of various legal systems': Robinson *et al*, 'Some Perspectives on Adjudicating before the World Court *The Gulf of Maine case*', 79 *AJIL* (1985) 578, 583.

## V. Initiation of Proceedings

The Statutes of the European Court follow that of the International Court in providing that the procedure is to consist of two parts: written and oral. The written procedure consists in the communication to the Court, to the parties and, in the case of the European Court, to the Community institutions, of memorials, counter-memorials and replies (known in the European Court as applications, defences, replies and rejoinders). The oral procedure consists of the hearing of witnesses and experts (although in the European Court these hearings are relatively infrequent) and of agents, counsel and advocates (or as the European Court's Statute puts it, 'agents, advisers and lawyers entitled to practise before a court of a Member State').<sup>67</sup> The Statutes of the European Court add that the oral procedure also comprises the reading of a report prepared by the Judge Rapporteur, which sets out in concise form the facts and submissions of the parties.<sup>68</sup> For many years, however, the practice has been to circulate these reports in writing in advance of the hearing and to dispense with a reading at the oral stage; so for practical purposes they may be regarded as the end of the written procedure. Indeed, the *Court's Notes for Guidance of Counsel* specifically request the parties to inform the Court of any inaccuracies in the report before the oral hearing.<sup>69</sup>

The distinctive function of the European Court in the process of integration is reflected in the rules governing the language of the case. On the principle that it must be accessible not only to states but also to individuals affected by Community law, the European Court adopts as its languages all of the working languages of the Community and the Irish language. By contrast, the International Court uses only two of the official languages of the United Nations.<sup>70</sup>

The same distinctive feature of the European Court is discernible in the rules governing the procedure for bringing cases before it. By contrast with the rules applicable in the International Court, those applying in the European Court must provide for references for preliminary rulings from national courts, but fail to provide for the Court to be seized by 'special agreement'.<sup>71</sup> Moreover, the European Court's rules stipulate that the application must at least contain certain formal information together with 'the subject matter of the dispute, the submission made and a brief statement of the grounds on which the application is based'. The defendant has a right to be obliged to reply only to facts explicitly defined and to refute only clear

<sup>67</sup> ICJ Statute, Article 43; EEC Statute, Article 17; Euratom Statute, Article 17; ECSC Statute, Article 20.

<sup>68</sup> EEC Statute, Article 18; Euratom Statute, Article 18; ECSC Statute, Article 21.

<sup>69</sup> Usher, *supra* note 11, at 228-9.

<sup>70</sup> *Infra*, text at notes 133-137.

<sup>71</sup> ICJ Statute, Article 40; EEC Statute, Articles 19-20.

clear and precise allegations.<sup>72</sup> Equally, he is entitled to know precisely the breach of Community law attributed to him.<sup>73</sup>

The Rules of Procedure of the International Court of Justice provide that, as far as possible, the Applicant should specify the provision on which he founds the jurisdiction of the Court, state the precise nature of the claim and give a succinct statement of the facts and grounds on which a claim is based.<sup>74</sup> The reference to jurisdiction, made in the case of the International Court and not in the case of the European Court, assumes special significance in the light of the *Norwegian Loans* case.<sup>75</sup> Here the French application was based exclusively on the 'optional clause' in Article 36(2) of the Statute. During the course of the proceedings on preliminary objections, the French Government sought without success to establish an alternative basis for the jurisdiction of the Court. That attempt, as Professor Rosenne has observed, was dismissed by the Court somewhat abruptly.<sup>76</sup> The European Court, whose jurisdiction is not dependent on any evidence of the parties' submission to jurisdiction save that found in the Treaty rules which invest it with its general competence, does not demand of the Applicant that it should specify the provision on which the jurisdiction is founded. Rather, the Court will address these issues *proprio motu*.<sup>77</sup>

## VI. Preliminary Rulings

In recent years the jurisdiction and procedure of the European Court has been invoked by some advocates of a reformed jurisdiction for the International Court. The question has been raised whether the latter should not be empowered to give preliminary rulings on points of international law referred, directly or indirectly, by national courts.<sup>78</sup>

<sup>72</sup> Joined Cases 46 and 47/59, *Meroni v. High Authority*, [1962] ECR 411.

<sup>73</sup> Joined Cases 19 and 21/60 and 2 and 3/61, *Fives Lille Cail v. High Authority*, [1961] ECR 281, 295.

<sup>74</sup> Article 32.

<sup>75</sup> ICJ Rep. (1957) 9.

<sup>76</sup> *Supra* note 5, at 477.

<sup>77</sup> The Court does, of course, require to be satisfied of its jurisdiction, which is one of attribution, but in common with the courts of the Member States, it possesses *kompetenz-kompetenz*. See Case 44/84, *Hurd v. Jones*, *supra* note 44. For the International Court, see S. Shihata, *The Power of the International Court of Justice to Determine its own Jurisdiction* (1965).

<sup>78</sup> Sohn, 'Broadening the Advisory Jurisdiction of the International Court of Justice' 77 *AJIL* (1983) 124; Schwebel, 'Allowing Federal Courts Access to International Court of Justice Advisory Opinions', 6 *Hastings Int. and Comp. L. Rev.* (1983) 745; *ibid.*, 'A Nascent Proposal for Expanding the Advisory Jurisdiction of the International Court of Justice', 10 *Syr J Int L. and Comm.* (1983) 215; *ibid.*

As Judge Schwebel has observed,<sup>79</sup> the idea is not new, although the influence of the European Court has led to its revival. Sixty years ago Dr Hersch Lauterpacht (as he then was) proposed that formal applications might be made from the highest judicial authorities of a Member State to the Permanent Court of International Justice for a ruling on any important question of international law pending before the municipal court.<sup>80</sup> The idea was later embraced by Leo Gross.<sup>81</sup> In 1983 Louis Sohn suggested that a reference procedure might even be established without the necessity of amending the International Court's Statute. Following the practice applied with regard to the United Nations Administrative Tribunal, the General Assembly could establish a committee to receive and filter requests from national courts and to refer them to the International Court for the latter's advisory opinion.<sup>82</sup>

In a recent article, Professor Rosenne expressed his emphatic opposition to the proposal.<sup>83</sup> He gave three reasons in particular. Firstly, the International Court has itself been critical of the screening process applied in relation to the United Nations Administrative Tribunal, observing that the Court itself has been put to the trouble of having to find out what the referring Committee meant before addressing the question.<sup>84</sup> This problem will persist, and will probably be exacerbated, if the screening process were extended as has been proposed. Secondly, Professor Rosenne questions whether independent persons, or even representatives of states, will readily be available to take on the onerous burdens of membership of the screening body. Thirdly, the political nature of the international system is such as to lend the proposed system to abuse. Professor Rosenne asks 'Why should not the supreme court of, say, Cuba, not initiate such a reference procedure regarding actions of the United States in Central America, or in the Middle East, or anywhere else for that matter?'<sup>85</sup>

If these were the only objections to the proposal, the experience of the European Court would afford a basis for believing that they could be overcome. That Court, no less than the International Court, has experienced questions phrased in an obscure or inapt form; and it has shown itself quite capable of reformulating the questions received, so as to extract from the materials submitted to it the essential ele-

79 Schwebel, 'Preliminary Rulings by the International Court of Justice at the Instance of National Courts', 28 *Va J Int'l L.* (1988) 495.

80 Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law', 10 *BYIL* (1929) 65, 94-95.

81 Gross, 'The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order', 65 *AJIL* (1971) 253.

82 *Supra* note 78, at 128-129.

83 Schwebel, 'Preliminary Rulings by the International Court of Justice at the Instance of National Courts: A Reply', 29 *Va J Int'l L.* (1989) 401.

84 Reference is made to the Individual Opinion of Judge Elias in *Application for Review of Judgment 333 of the United Nations Administrative Tribunal*, ICJ Rep. (1982) 18, 78.

85 *Supra* note 83, at 411.

## Rules of Procedure

ments of law requiring resolution at the European plane.<sup>86</sup> The European Court has also confronted the problem of references for preliminary rulings posed for the purpose of resolving disputes which are essentially political rather than legal;<sup>87</sup> and it has declined to accept a reference from a national court when collusive proceedings were initiated by parties who were in agreement as regards the result, but who sought thereby to put in issue the conduct of another Member State.<sup>88</sup> If a real problem arises from the necessity of making available persons of sufficient competence to screen the references, that problem could be overcome by restricting to the higher courts of Member States the right to draft the questions and to take the decision to refer them. This is done in the cases of the interpretation by the European Court of the Brussels Convention.<sup>89</sup>

There is, however, a more fundamental objection to the proposal: one related to the distinct functions of the two tribunals.<sup>90</sup> The International Court of Justice is charged with the judicial resolution of disputes between states and other legal persons. Its judgments apply 'horizontally' between those persons. If those judgments are also applicable 'vertically', between subjects of international law and subjects of domestic law, this is because domestic law so provides. The European Court, by contrast, administers law applicable both horizontally and vertically, between states, in litigation between states and Community institutions, between states or Community institutions on the one hand and private persons on the other, and between private persons involved in disputes against each other. Thus, the European Court's system demands the intimate involvement of national courts, irrespective of national constitutional requirements. The system of references for preliminary rulings responds to a need which is absent in the case of public international law (or present only to the extent that constitutional law creates it). Indeed, it would not be difficult to imagine circumstances in which the adjudication of international disputes by the International Court might be hindered by the extension of a system of references for preliminary rulings. States might be reluctant to seal the outcome of their negotiations in treaties if, by so doing, they exposed themselves to the risk of references to the International Court, not only at the instance of their own courts but also at the instance of courts of other states.<sup>91</sup>

<sup>86</sup> Case 292/82, *Merck v. Hauptzollamt Hamburg-Jonas*, [1981] ECR 3781; Case 244/78, *Union Lévière Normande*, [1979] ECR 2663. See Bergères, 'La reformulation des questions préjudicielles en interprétation par la CJEC', *Dalloz* (1985) C. 155.

<sup>87</sup> Case 98/73, *Mattheus v. Doego*, [1978] ECR 2203.

<sup>88</sup> Case 104/79, *Foglia v. Novello (No. 1)*, [1980] ECR 745; Case 244/80, *Foglia v. Novello (No. 2)*, [1981] ECR 3045. See Barav, 'Preliminary Censorship?', 5 *EL Rev.* (1980) 443; Wyatt, 'Following up Foglia: Why the Court is Right to Stick to its Guns', 6 *EL Rev.* (1981) 447.

<sup>89</sup> 27 September 1968; Cmnd. 7395; OJ (1978) L 304/77; Protocol on Interpretation by European Court, 3 June 1971, *Bull. EC Suppl.* 7, 1971, Article 37.

<sup>90</sup> *Supra* text at notes 12-21.

<sup>91</sup> For further reading on preliminary rulings in the European Court see Dausés, 'Algunos aspectos del incidente prejudicial previsto en el artículo 177 CEE', 31 *Gazeta jurídica de la CEE* (1977) 209; Calogeropoulos, 'Les sections et chambres des cours et tribunaux nationaux: sont-ils juridic-

## VII. Interim Relief

The International Court and the European Court have both been endowed with an extensive jurisdiction to afford interim relief to litigants. In the case of the International Court, Article 41 of the Statute provides that if it considers that circumstances so require, the Court shall have the power to indicate any provisional measures which ought to be taken to preserve the respective rights of either party.<sup>92</sup> This provision is amplified in Articles 73-78 of the Court's Rules of Procedure. In particular, Article 75 provides that the Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures *which ought to be taken or complied with* by any or all of the parties.

The extent of the International Court's jurisdiction to prescribe interim measures remains, nevertheless, controversial. On the one hand, there is some authority for the proposition that jurisdiction to indicate interim measures of protection exists only where there is jurisdiction as to the merits.<sup>93</sup> On the other hand, it has been contended that the power of the Court to indicate interim measures of protection is part of its *incidental* jurisdiction and is not dependent on its competence to determine the merits.<sup>94</sup> The second view appears to be not only correct in principle but is also supported by the preponderance of authority; however, it must be qualified by an important reservation: the Court will not exercise its jurisdiction to grant interim relief unless satisfied that there is an arguable case in favour of establishing jurisdiction on the merits.<sup>95</sup>

In the case of the European Court, the EEC Treaty provides that actions before the Court shall not have suspensive effect but the Court may, if it considers that circumstances so require, order that the application of the contested act be suspended.

tions au sens de l'art. 177 CEE?', 23 *Rev. trim. dr. eur.* (1987) 35; Bebr, 'Arbitration Tribunals and Article 177', 22 *CML Rev.* (1985) 489; O'Keefe, 'Appeals Against an Order to Refer under Article 177', 9 *EL Rev.* (1984) 87; Rasmussen, 'The European Court's acte clair Strategy in CILFIT', 9 *EL Rev.* (1984) 242; Lenaerts, 'La modulation de l'obligation de renvoi préjudiciel', [1983] *Cah. dr. eur.* 466; Robert, 'L'arbitre: peut-il saisir directement la CJCE?', *Dalloz* (1983) C. 633.

<sup>92</sup> See generally, J. Elkind, *Interim Protection* (1981); Fitzmaurice, *supra* note 16, at 107; Mendelsohn, 'Interim Measures of Protection in Cases of Contested Jurisdiction', 46 *BYIL* (1973) 308; Kós, 'Interim Relief in the International Court: New Zealand and the Nuclear Test Cases', 14 *Vict. Univ. Wellington L. Rev.* (1984) 357.

<sup>93</sup> See the Dissenting Opinion of Judges Winiarski and Badawi Pasha in the *Anglo-Iranian Oil Company* case, ICJ Rep. (1951) 89, 97; also the Separate Opinion of Judge Morozov in the *Aegean Sea Continental Shelf* case, ICJ Rep. (1976) 3, 22; and the Dissenting Opinion of Judge Forster in the *Nuclear Tests* case, ICJ Rep. (1973) 99, 111; cited by Mendelsohn, *supra* note 91, at 307.

<sup>94</sup> Mendelsohn, *supra* note 91, at 308.

<sup>95</sup> *Interhandel* case, ICJ Rep. (1957) 105, 119 (Separate Opinion of Judge Lauterpacht); *Aegean Sea Continental Shelf* case, *supra* note 93, at 16 (Separate Opinion of Judge Jimenez de Arechaga); *Fisheries Jurisdiction case (UK-Iceland)*, ICJ Rep. (1972) 12, 16; *Nuclear Tests* case, *supra* note 92, at 138; *U.S. Diplomatic and Consular Staff in Teheran*, ICJ Rep. (1979) 7, 19. For further reading on the subject, see J. Szuicki, *Interim Measures in the Hague Court: An Attempt at a Scrutiny* (1983).



## Rules of Procedure

Further, it provides that the Court may, in any cases before it, prescribe any necessary interim measures. By Article 83 of the Rules of Procedure, an application for the suspension of operation of a measure is admissible only if the applicant is challenging that measure in proceedings before the Court and an application for the adoption of any other interim measure is admissible only if it is made by a party to a case before the Court and relates to that case. Article 36 of the Statute authorizes the President of the Court to adjudicate on applications for the suspension of execution of contested acts or to prescribe interim measures. The President can, however, refer such matters to the Court.<sup>96</sup>

The principal difference which emerges from a comparison of the two Courts' powers to afford interim relief is that in the case of the European Court alone a distinction is drawn between the suspension of operation of a contested act and interim measures generally. This, however, reflects the fact that the European Court possesses a jurisdiction withheld from the International Court: that is the power to annul Community acts which are (i) in violation of the Treaty or of any rule of law relating to its application, or (ii) breach an important procedural requirement or (iii) are found to have been taken in the absence of power or by a misuse of power.<sup>97</sup> The true comparison, therefore, is between the International Court's power under Article 41 of its statute and the European Court's power under Article 186 of the EEC Treaty to prescribe interim measures. An examination of the European Court's exercise of that power reveals the fact that it is in practice prepared to prescribe interim relief when satisfied that it is presented with a good arguable case. The Court's judgment at the interim stage does not amount to a definitive establishment of jurisdiction on the merits; conversely, interim relief will not be granted where there is a manifest lack of jurisdiction on the merits.

The first limb of that rule is illustrated in Case 23/86R *United Kingdom v. Parliament*.<sup>98</sup> In the main action the United Kingdom sought the annulment of the act whereby the President of the European Parliament declared the final adoption of the budget of the European Communities for 1986. The Parliament challenged the admissibility of the action, on jurisdictional and other grounds. The United Kingdom sought interim relief pending the determination of the main action. The President ruled that the admissibility of the main application was irrelevant in proceedings relating to an application for interim measures: this was a matter which must be reserved for examination of the main application. Interim relief was granted.

<sup>96</sup> CJEC Statute, Article 85.

<sup>97</sup> EEC Treaty, Article 173; Euratom Treaty, Article 146; ECSC Treaty, Article 33; ECSC Statute, Article 39; CJEC Rules of Procedure, Article 81.

<sup>98</sup> [1986] ECR 1085. The case had venerable antecedents: see Case 75/72R, *Perinciole v. Council*, [1972] ECR 1201; Case 186/80R, *Susa v. Commission*, [1980] ECR 3501. For the application of a similar rule in relation to the suspension of operation of a measure, see Case 221/86R, *Group of the European Right and National Front Party v. European Parliament*, [1986] ECR 2969. For a more recent application of the same rule, see Case 65/87R, *Pfizer v. Commission*, [1987] ECR 1691.

The second limb of the rule is illustrated by the first *FEDESA* case<sup>99</sup> in which an association of pharmaceutical manufacturers sought the annulment of a Directive which prohibited the use of certain hormonal growth promoters for the purpose of fattening cattle. They also sought interim measures, which the President refused, holding that there were 'no grounds for concluding *prima facie* that the main action is admissible'.

### VIII. Intervention

The procedure of intervention in the International Court is employed only infrequently. States which consider that their legal interests may be affected by the decision in a case may submit a request to be permitted to intervene;<sup>100</sup> and states which are parties to a Convention whose construction is put in question by proceedings in that Court initiated by other states have the right to do so.<sup>101</sup> Only five applications for intervention have been filed at the International Court;<sup>102</sup> and in only one case was the intervention declared admissible.<sup>103</sup>

Even in those cases in which states claim to exercise the right to intervene, as parties to a Convention falling to be construed by the Court, it is established that 'a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject matter of the pending proceedings'. Accordingly, the Court will scrutinize the declaration made by the third party in order to satisfy itself that the object of the intervention is in fact the interpretation of the Convention to which it is a party.<sup>104</sup>

Thus, in the International Court the rules governing intervention are considerably more restrictive, both in their phraseology and in their application, than those applied by the European Court. The latter is open to intervention as of right by Member States and Community institutions, without restriction.<sup>105</sup> All are parties to the founding treaties, or creatures of those treaties, and in that sense all have an interest in the law derived from them. The European Court has not found it neces-

<sup>99</sup> Case 160/88R, *FEDESA v. Council*, [1988] 3 CMLR 534.

<sup>100</sup> ICJ Statute, Article 62; ICJ Rules, Articles 81, 83, 84, 85.

<sup>101</sup> ICJ Statute, Article 63; ICJ Rules, Articles 82, 83, 84, 86.

<sup>102</sup> *Haya de la Torre* case, ICJ Rep. (1951) 71 (application by Cuba); *Nuclear Tests* case, *supra* note 92, at 320 (application by Fiji); *Tunisia-Libya Continental Shelf* case, ICJ Rep. (1981) 3 (applications by Malta and Italy); and *Military and Paramilitary Activities* case, ICJ Rep. (1984) 215 (application by United States). In addition, Poland applied to intervene in the *Wimbledon* case, PCIJ Rep. Series A. No. 1 (1923). See Chinkin, 'Third Party Intervention before the International Court of Justice', 80 *AJIL* (1986) 495, McGinley, 'Intervention in the International Court of Justice', 34 *ICLQ* (1985) 671; Licari, 'Intervention under Article 62 of the Statute', 8 *Brooklyn J. Int. L.* (1982) 267; Jessup, 'Intervention in the ICJ', 75 *AJIL* (1981) 903.

<sup>103</sup> I.e. the Cuban intervention in the *Haya de la Torre* case, *supra* note 102, at 77.

<sup>104</sup> *Ibid.*, 76-77.

<sup>105</sup> EEC Statute, Article 37.

## Rules of Procedure

sary to insist that the object of the intervention is the interpretation of the convention forming the subject of the proceedings, as the International Court has done, in the case of a declaration made by a state as a party to a treaty called in question before that tribunal. No objection was raised to the Spanish Government's intervention in proceedings<sup>106</sup> initiated by the Government of Gibraltar, challenging that part of a Directive<sup>107</sup> which purported to exclude the airport of Gibraltar from a Community system of air transport licensing; and this was so even though much of the Spanish intervention was devoted to ventilating its dispute with the United Kingdom over the colonial status of Gibraltar and its boundary with Spain.

Nor are the intervener's observations confined to the interpretation of the provisions disputed between the parties. Indeed, it is normal for the Commission to intervene in all cases in order to explain its view on all of the issues which appear to it to be appropriate in resolving the dispute. When France initiated proceedings against the United Kingdom for a declaration that the latter had breached Article 102 of the Act of Accession by adopting the Fishing Nets (North East Atlantic) Order 1977,<sup>108</sup> the Commission intervened for the purpose of contending that the United Kingdom had also breached a Regulation<sup>109</sup> which required Member States to notify the Commission of measures taken with regard to fisheries management.<sup>110</sup> In actions initiated by private individuals or corporations before national courts, and referred to the European Court for preliminary ruling, Community institutions and Member States commonly intervene for the purpose of making submissions entirely separate from those advanced by the parties.<sup>111</sup>

Whereas discretionary intervention in the International Court is available only to states which consider that their legal interests may be affected by the decision in a case, the European Court is available for corresponding intervention by persons establishing an interest in the result of any case submitted to the Court.<sup>112</sup> The intervener's interest need not be 'legal' in the sense of a proprietary right liable to be affected by the judgment. Thus, small West Indian states dependent on the banana market were able to intervene in a case concerning Community legislation affecting banana imports.<sup>113</sup> In a similar spirit, the association of the bars of the Member States was permitted to intervene in a case concerning legal professional privilege.<sup>114</sup> It is certainly possible to point to cases to the opposite effect, as when an association of retailers in the United Kingdom of Ford motor cars was refused leave

<sup>106</sup> Case 298/89, *Government of Gibraltar v. Council*, pending.

<sup>107</sup> Directive 89/463 of 18 July 1989, OJ (1989) L 226/14, Article 2(2).

<sup>108</sup> S.I. 1977 No. 440; S.I. I, 1608.

<sup>109</sup> Council Regulation 101/76 of 19 January 1976, OJ (1976) L 20/19.

<sup>110</sup> Case 231/78, *Commission v. France*, [1979] ECR 1447.

<sup>111</sup> See for instance the United Kingdom's intervention in Case 246/81, *Lord Bethell v. Commission*, [1982] ECR 2277.

<sup>112</sup> EEC Statute, Article 37; Euratom Statute, Article 38; ECSC Statute, Article 34.

<sup>113</sup> Joined Cases 91 and 200/82, *Chris International Foods v. Commission*, [1981] ECR 417.

<sup>114</sup> Case 155/79, *AM. & S. Europe v. Commission*, [1982] ECR 1575.

to intervene in proceedings between Ford of Europe and the Commission about parallel imports;<sup>115</sup> and it must be admitted that it would be difficult to discern in the case-law a consistent set of principles governing the European Court's exercise of its discretion with respect to interventions. Nevertheless, it is plain that the European Court is remarkably open to intervention by third parties, as is appropriate for a tribunal whose functions transcend the resolution of disputes between the parties to the litigation.

Among the problems common to the International Court and the European Court is that of determining whether intervention is available to states other than those which are parties to the Court's statute. In the case of the International Court, this issue remains unsettled; and it appears at first sight that only parties may intervene. Article 35 of the Statute begins as follows:

- (1) The Court shall be open to States parties to the present Statute.
- (2) The conditions under which the Court shall be open to other States shall, subject to special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such provisions place the parties in a position of inequality before the Court.

It must be acknowledged, however, that this language is inconclusive. The Articles of the Statute dealing with intervention may indeed amount to 'special provisions contained in treaties in force' within the meaning of Article 35(2). Those Articles speak of intervention by 'States',<sup>116</sup> whereas the Statute speaks elsewhere of action to be taken by 'the States Parties to the present Statute'.<sup>117</sup> Thus grammatical considerations do not exclude the possibility of intervention by states not being parties to the Statute.<sup>118</sup>

In the case of the European Court, the language used in the Statute<sup>119</sup> is also inconclusive. While intervention as of right is available only to 'Member States', discretionary intervention is open to 'any other person establishing an interest in the result of any case...'. The Court has construed the word 'person' so as to embrace a state;<sup>120</sup> but it must be added that intervention by third states, or by other persons, is expressly excluded in the case of actions in the European Court between Member States.

115 *Joined Cases 228 and 229/81, Ford v. Commission*, [1984] ECR 1129.

116 Articles 62 and 63.

117 Articles 36, 37 ('parties to the present Statute').

118 This view is expressed by Rosenne, *supra* note 102, at 523-4 and Szucki, 'Intervention under Article 63 of the ICJ Statute', 79 *AJIL* (1985) 1005.

119 EEC Statute, Article 37; Euratom Statute, Article 38; ECSC Statute, Articles 34 and 41.

120 *Joined Cases 91 and 200/82, Chris International Foods v. Commission*, *supra* note 113. Plender, 'Intervening in Cases before the European Court: A New Avenue for Commonwealth Governments', 9 *Comm. Law Bull.* (1983) 1059.

## IX. Written Procedure

In both Courts the hearing is divided into two phases: the written and the oral phase.<sup>121</sup> The written proceedings consist of a Memorial (or Application); a Counter Memorial (or Defence); a Reply and a Rejoinder;<sup>122</sup> save that in the case of references for preliminary rulings in the European Court the parties submit a single text of Written Observations.<sup>123</sup> In both Courts, provision is made for dispensing with Replies and Rejoinders; and use has been made of that provision – for instance, in the *Haya de la Torre* case in the International Court<sup>124</sup> and the *Maclaine Watson* case in the European Court.<sup>125</sup> The written pleadings are explicitly required to contain a statement of law and submissions as well as of facts.<sup>126</sup> Thus, they contrast sharply with pleadings prepared for courts (other than the House of Lords and Privy Council) in the United Kingdom.<sup>127</sup> Such is their importance that the United States has even proposed that the International Court should dispense with oral hearings altogether,<sup>128</sup> and in the European Court, the *Notes for Guidance of Counsel* stipulate that save with the leave of the tribunal, speeches should not exceed thirty minutes.

By contrast with pleadings in the English courts (which are regarded as matters of public record) the written proceedings in the International Court and European Court retain a degree of confidentiality. The extent of the confidentiality differs, however, in the case of the two tribunals. Article 44 of the Rules of Procedure of the International Court enables that body, after obtaining the views of the parties, to direct the Registrar to make the pleadings and annexed documents in any case available to any Member of the United Nations or any state entitled to appear before the Court. According to Professor Rosenne, there has been no instance, since 1946, in which one or other of the parties did not consent to the remission of the documents to a state making application for them.<sup>129</sup> By Article 44(3) of the Rules, all the documents in a particular case may, with the consent of the parties, be made accessible to the public; and after the case is terminated, the documents are no longer secret, but are publishable in the Court's publications.

The practice in the European Court has been to treat as confidential the text of the written observations of the parties, unless the latter expressly consent to their

121 ICJ Statute, Article 43; ECSC Statute, Article 21; EEC Statute, Article 18; Euratom Statute, Article 18.

122 ICJ Rules, Article 45; CJEC Rules, Articles 38–41.

123 CJEC Statute, Article 20; CJEC Rules, Article 103.

124 *Supra* note 102, at 71 and 73.

125 Case 241/87, *Maclain Watson v. Council and Commission*, pending.

126 ICJ Rules, Article 49; CJEC Rules, Article 38.

127 Waldock, *supra* note 25.

128 Rosenne, *supra* note 5, at 120.

129 *Supra* note 43, at 566.

disclosure.<sup>130</sup> The substance of the written observations should be conveyed in the Report for the Hearing, prepared by the Judge Rapporteur (nominally as first part of the oral proceedings, but nowadays amounting in fact to the closure of the written proceedings).<sup>131</sup> The Report for the Hearing is eventually published with the judgment.<sup>132</sup> Nevertheless, the Judge Rapporteur's summary is of necessity a condensation of arguments which have generally been prepared by the parties with great care; and the disclosure of the full written observation may be of great benefit to scholars and to litigants, including Member States. There appears therefore to be a strong case in favour of reversing the present rule of practice, so that full written proceedings would remain available for inspection at the Court unless the President should otherwise direct, whether on the application of the author or not. The experience of the International Court suggests that such a rule would be both manageable and beneficial.

The provisions governing languages in the International Court benefit from their simplicity. The official languages are French and English. The parties may agree that the case shall be conducted exclusively in one of these languages; and in the absence of agreement each may use the language which it prefers. At the request of a party, the Court will authorize a language other than French or English to be used by that party.<sup>133</sup>

Whereas the International Court uses as its working languages only two of the five official languages of the United Nations, the European Court has ten working languages; one more than the European Community itself.<sup>134</sup>

In a direct action against a Member State or a national of a Member State, the language of the case is that of that state. In all other cases the language is chosen from among the working languages of the Court by the applicant, save that at the joint request of the parties the Court may authorize the use of another of those working languages for all or part of the proceedings; and at the request of one party (other than a Community institution) and after hearing the other party and the Advocate General, the Court may authorize the use of another of its working languages for all or part of the proceedings.<sup>135</sup> Where a witness or expert states that he is unable adequately to express himself in one of the Court's working languages, he may be authorized to give his evidence in another language.<sup>136</sup>

<sup>130</sup> The rule of practice is not explicitly required in the Instructions to the Registrar, OJ (1974) L 350/33; OJ (1982) C 39/35.

<sup>131</sup> *Supra*, Section V.

<sup>132</sup> *Supra*, text at notes 68-70.

<sup>133</sup> ICJ Statute, Article 39; ICJ Rules, Article 51.

<sup>134</sup> CJEC Rules, Article 29: Danish, Dutch, English, French, German, Greek, Irish, Italian, Portuguese and Spanish. The provision authorizing use of the Irish language is anomalous, since Community legislation and European Court Reports are not available in that language. To date no litigant has opted for the use of Irish.

<sup>135</sup> CJEC Rules, Article 29(1), (2).

<sup>136</sup> CJEC Rules, Article 29(4).

## Rules of Procedure

In making provision for the use of a multiplicity of languages, the draftsmen of the European Court's Rules appear to have given weight to the desirability of making the Court open to individual litigants from all Member States with the minimum of inconvenience. In practice, it is very often the representatives of Member States who choose to address the Court in one of their own official languages, even when the language of the case is different; and there can be no doubt that the Court's staff is swollen and the speed of publication of its reports much reduced by the necessity of ensuring translation into nine languages. In these circumstances it seems appropriate that the European Court has only a discretion to permit the use of languages other than the working languages: by contrast with the International Court which is required to permit the use of languages other than English and French, when a party so demands.<sup>137</sup>

## X. Oral Procedure

The Statute of the International Court provides that the parties shall be represented by agents and may have the assistance of Counsel or advocates.<sup>138</sup> As Sir Humphrey Waldock has observed<sup>139</sup> there is no express requirement that the representative should be a lawyer, and it is not unknown for non-lawyers to address the Court.<sup>140</sup> Some colour is given to the word 'agent' by Article 60(3) of the Rules, which provides that at the conclusion of the last statement made by a party at the hearing its agent shall read that party's final submissions.

Adapting the language of the International Court's Statute, that of the European Court provides that Member States and institutions shall be represented by agents, assisted by advisers or 'lawyers' qualified to practise before a Court of a Member State.<sup>141</sup> For these parties there is no requirement that the agent or representative should be a lawyer. Occasionally, non-lawyers have appeared on behalf of such litigants;<sup>142</sup> more commonly lay agents have been accompanied by lawyers entrusted with the task of advocacy.<sup>143</sup> Parties other than Member States and Community in-

<sup>137</sup> ICJ Statute, Article 39(3). The word 'shall' was substituted at the Washington Conference for the word 'may' in the Permanent Court's Statute: 14 UNCTAD 171, 671; Roseme, *supra* note 43, at 556 note 3.

<sup>138</sup> Article 42.

<sup>139</sup> *Supra* note 25.

<sup>140</sup> As in the *Corfu Channel* case, ICJ Rep. (1949) 4 (naval commander addressed Court).

<sup>141</sup> EEC Statute, Article 17; Euratom Statute, Article 17; ECSC Statute, Article 20.

<sup>142</sup> E.g. the Secretary of the Court of Auditors in Case 184/80, *Van Zaanen v. Court of Auditors*, [1981] ECR 1951.

<sup>143</sup> Indeed, as the functions conferred on the agents by the rules are principally notarial, states commonly designate as agents members of their missions to Luxembourg or of their appropriate legal service (such as the Treasury Solicitors Department) who are then 'assisted by lawyers (in an important case, the latter may be Law Officers of the states concerned).

stitutions must, however, be represented by 'a lawyer qualified to practise before a Court of a Member State'. That expression gives rise to difficulty.

In a direct action, it appears to be sufficient that the 'lawyer' is one of the genera of lawyers listed in the 'Lawyers' Services Directive',<sup>144</sup> and is entitled to practise before some court in a Member State. It is not required that he or she should be entitled to practise before the highest court,<sup>145</sup> nor is it required that the lawyer should follow before the European Court the rules of professional conduct which are incumbent on him when appearing in a national court.<sup>146</sup> On the other hand, in the case of references for preliminary rulings, the Rules of Procedure provide that 'as regards representation ... the Court shall take account of the Rules of Procedure of the national court or tribunal which made the reference'.<sup>147</sup> From this we may infer that the Court may, in such a case, permit a non-lawyer to appear, where he has appeared before the referring Court;<sup>148</sup> and conversely it may presumably (but need not) necessarily refuse to hear a lawyer who was not qualified to appear before the referring Court.<sup>149</sup>

Both Courts have endeavoured to limit the length of oral proceedings. Article 60 of the International Court's Rules of Procedure states in terms that the oral statements made on behalf of each party shall be as succinct as possible within the limits of what is requisite for the adequate presentation of that party's contentions at a hearing. Accordingly, they should be directed to the issues that still divide the parties and not repeat the facts and arguments contained in the pleadings. A similar injunction is contained in the *Notes for the Guidance of Counsel* at Oral Hearings, issued by the European Court. Although the European Court's injunction has not been embodied in a formal rule, it is enforced with a degree of severity unknown at The Hague. No doubt the Court's practice on this issue is determined principally by its extraordinary volume of business; but the practice has not escaped criticism; and this may be merited in a case in which the oral hearing presents the applicant with his only opportunity to respond to points of substance and technical complexity made by interveners, whose submissions differ from those of the respondent.<sup>150</sup>

<sup>144</sup> Council Directive 77/249 of 22 March 1977, OJ (1977) L 78/17. But see Lasok, *supra* note 11, at 71, who contends that 'lawyer' means 'advocate'.

<sup>145</sup> Thus, English solicitors can appear in the European Court, even in advance of the entry into force of the Courts and Legal Services Act 1990; as was done in the *Maclaine Watson* case, *supra* note 125. See also Case 175/80, *Tüher v. Commission*, [1981] ECR 2345.

<sup>146</sup> Such as the obligation of a barrister to act on instructions of a solicitor in domestic proceedings. For a contrary view, see Lasok, *supra* note 11, at 74.

<sup>147</sup> Article 104(2).

<sup>148</sup> As in Case 39/75, *Coenen v. Sociaal-Economische Raad*, [1975] ECR 1547.

<sup>149</sup> No such case appears to have arisen. Indeed, in Case 234/81, *Du Pont v. Customs and Excise*, [1982] ECR 3515 the Applicant was represented by a lawyer not qualified to appear in the referring court. It would seem appropriate, however, to deny audience to a lawyer not qualified in the referring court where the interests of justice so require (e.g., if procedural issues involving the practice of the referring court are intimately involved in the question referred).

<sup>150</sup> See the strictures of Mr Jeremy Lever, QC in the *Maclaine Watson* case, *supra* note 125.



## Rules of Procedure

Certainly, the experience of the European Court suggests that the International Court has it within its power (subject only to considerations of diplomacy) to restrain the prolixity of the oral procedure, without the necessity of amending the Statute and Rules in the manner suggested by the United States.<sup>151</sup> In both Courts, the oral procedure offers the Courts themselves an opportunity to play a part in narrowing the difference between the parties. It ensures the publicity of proceedings, which is itself an important element in the administration of justice.<sup>152</sup> It affords an opportunity for the members of the Courts to put questions, and supplementary questions, to the agents, counsel and advocates. In this way the Courts can test the strength of submissions made by the parties and the strength and repercussions of propositions which members of the Courts might consider advancing in the judgment. These are valuable aspects of the procedure, which should not be abandoned or compromised without overwhelming cause.

### XI. Judgments: Collegiate and Dissenting

In order to ensure that its judgments would carry maximum obligatory force, even when directed against Member States of the Community, the draftsmen of the Statute and Rules of the European Court demanded that the Court's judgments should always be those of the college as a whole. Separate and dissenting judgments have always been excluded, and although an Advocate General's Opinion partakes in some respects of the aspects of a separate judgment,<sup>153</sup> there is no doubt that its status is subordinate to that of the judgment of the Court. The collegiate nature of the judgment is reinforced by the European Court's rules governing the secret conduct of deliberations.

These are under the control of the President, who is likely to seek consensus when this appears achievable. When consensus cannot be reached, a majority must suffice. The dissenting minority can and must preserve its anonymity, for by Article 33 of the statute, judgments are to contain the names of 'the Judges who took part in the deliberations'—not those who subscribed to the views expressed in the judgment. This wording is to be contrasted with that of Article 56 of the Statute of the International Court, which states that the judgment shall contain the names of the Judges who have taken part in the decision.

No doubt the collegiate nature of the European Court's judgments serves further functions valuable to the Community. It helps to ensure the judges' independence of the Member States: a point which has in some respects greater immediacy in the European Court than at the International Court. For Judges at the European Court are not appointed for nine years but for six, or, if appointed to fill an unexpired pe-

<sup>151</sup> *Supra*, text at note 128, 153.

<sup>152</sup> ICJ Rules, Article 59; CJEC Rules, Article 64.

<sup>153</sup> Warner, 'Some Aspects of the European Court of Justice', 14 *JSPPL* (1976) 15.

riod of office of a predecessor, for that unexpired period. Moreover, while it is true that collegiate judgments can often be reached only by a process of compromise, which is sometimes achieved by the deliberate use of ambiguity, they are nevertheless conducive to the rapid development of a body of judge-made law.<sup>154</sup> Thus, the collegiate judgment in the European Court contributes to the rapid development of the body of rules required for the purpose of forming an integrated Community.

It is, therefore, with good reason that the founders of the Community eschewed the rule embodied in Article 57 of the Statute of the International Court. This authorizes judges to deliver separate judgments and dissenting opinions, however it is generally accepted that such judgments or opinions should be written in correlation to the actual contents of a judgment, and not in relation to extraneous grounds which might be the subject of future litigation.<sup>155</sup>

## XII. Judgments: Their Binding Effect

By Article 171 of the EEC Treaty, states are explicitly 'required to take the necessary measures to comply with the judgment of the Court of Justice'. It is true that in the case of the EEC and Euratom Treaties,<sup>156</sup> no provision is made for the imposition on Member States of sanctions to enforce judgments against them; and on at least one occasion a Member State failed to comply for so long that the Court was led to expostulate that its judgment 'amounts to a prohibition having the full force of law on the competent national authorities' and that 'the State concerned is required to take the necessary measures to remedy its default and may not create any impediment whatsoever'.<sup>157</sup> Such occasions are, however, relatively rare. The European Court is generally able to expect that Member States will respect its judgments by rescinding national measures found to be in breach of Community law and by making reparation for any unlawful consequences which have ensued.<sup>158</sup> By contrast, Article 59 of the Statute of the International Court provides that its decisions have no binding force except between the parties and in respect of that particular case.

One must take care not to overstate this difference. Both Courts aspire to establish a consistent jurisprudence and in this sense the *res judicata* extends beyond the strict limits of the case decided, even in the case of the International Court of Justice.<sup>159</sup> Article 59 of the Statute of that Court limits the binding force of the

<sup>154</sup> Plender, 'In Praise of Ambiguity', 8 *EL Rev.* (1983) 313.

<sup>155</sup> Judge Gros in *Aegean Continental Shelf case*, *supra* note 93, at 49.

<sup>156</sup> In the case of the ECSC Treaty, Articles 91-92 envisage suspension of payments due to Member States pending compliance.

<sup>157</sup> Joined Cases 24 and 97/80, *Commission v. France*, [1980] ECR 1319.

<sup>158</sup> Case 6/60, *Humblet v. Belgium*, [1960] ECR 559, 569.

<sup>159</sup> *Per Arbitral Tribunal in the Lighthouses Arbitration (France v. Greece)*, 23 ILR (1956) 81.

## Rules of Procedure

'decision': not the 'judgment', which, by Article 60, is 'final and without appeal'. The word 'decision' corresponds with 'order' or 'operative part of the judgment' (*dispositif* in French). It is to be contrasted with the reasoning (or *motifs*).<sup>160</sup> Thus, in the *Temple of Preah Vihear* case (*Preliminary Objections*)<sup>161</sup> the Court acknowledged that by reason of Article 59 of the statute Thailand could not be bound by the decision in the *Aerial Incident* case between Bulgaria and Israel<sup>162</sup> but it appears that the Court was prepared to follow what the Court in the earlier case considered to be the correct legal position.

The fact remains that Article 59 of the Statute imposes on the International Court an inhibition under which the European Court does not suffer. Even when it construes a multilateral treaty, for the purpose of resolving a dispute between two of the parties, the International Court of Justice does not, by its judgment, bind the parties to the treaty which were neither parties nor interveners in the proceedings. This is made plain in Article 63(2) of the statute, which provides that the construction given by the Court will be equally binding on states which exercise the right to intervene. Moreover, Article 59 signals to the International Court that it should take care to avoid calling in question the claims of states not parties to the litigation. Thus, in the *Libya-Malta Continental Shelf* case,<sup>163</sup> the International Court declined to define the continental shelf which appertained to the parties, as it had been asked to do in the Special Agreement, in view of the interest of Italy in the proceedings. The Court confined its judgment to ascertaining the areas to which one party had established a better claim than the other.

The European Court shows no corresponding sensitivity to the interests of states not participating in the litigation, for its function is not merely to determine the competing claims of states<sup>164</sup> but to ensure that in the interpretation and application of the Treaty, the law shall be observed.<sup>165</sup> For that Court it is axiomatic that the judicial construction given to a Community treaty is binding upon all Member States – and indeed on other interested parties – whether they participated in the litigation or not.<sup>166</sup> In Case 812/79 *Attorney General v. Burgoa*<sup>167</sup> the Court was not prevented from pronouncing upon the London Fisheries Convention<sup>168</sup> or on the effect of an agreement between the Community and Spain, by reason of the fact that

<sup>160</sup> S. Rosenne, *supra* note 43.

<sup>161</sup> ICJ Rep. (1961) 17, 27.

<sup>162</sup> ICJ Rep. (1954) 103.

<sup>163</sup> ICJ Rep. (1985) 13, 25.

<sup>164</sup> Indeed, inter-state cases are exceptional forms of litigation in the European Court: See EEC Treaty, Article 170.

<sup>165</sup> EEC Treaty, Article 164.

<sup>166</sup> See, for example, Case 237/86, *Netherlands v. Commission*, [1987] ECR 5263, 5267-65, in which the Netherlands was bound by the construction given by the Court to Article 5 of the EEC Treaty in Case 804/79, *Commission v. United Kingdom*, [1981] ECR 1045.

<sup>167</sup> [1980] ECR 2787, 2807.

<sup>168</sup> 9 March 1964, 581 UNTS 57.

Spain was not at that date a member of the Community. Nor has the Court abstained from attributing direct effects to provisions in treaties with third states, although the courts of the latter might not recognize the effects so attributed.<sup>169</sup> Moreover, in view of the Court's insistence upon the obligatory force of its judgments, it seems doubtful that the Arbitral Advice given by Professor Sauser-Hall in the case concerning *Gold Looted from Rome* could be applied, by parity of reasoning, to a judgment of the European Court.<sup>170</sup> Where a judgment is given against a Member State, all of the Member States must draw the necessary consequences, to the extent of modifying their domestic law.<sup>171</sup>

The difference between the effects of a judgment of the two Courts is all the more remarkable if one compares (as one can do only with great reserve<sup>172</sup>) the effect of an Advisory Opinion with that of the closest analogy in the armoury of the European Court. The Statute of the International Court of Justice does not define the effects of Advisory Opinions; but on several occasions the Court has commented on their effect. It distinguishes between these and judgments in contentious cases, on the ground that the former have 'no binding force'.<sup>173</sup> Rather, the effects of such opinions are of a moral character, in the sense that they express the views of the most highly qualified tribunal, from which Member States of the United Nations may, however, dissent.

The opinions of the European Court never have that advisory character. Pursuant to the second paragraph of Article 228(1) of the EEC Treaty, the European Court may give an 'opinion' on the compatibility of a proposed agreement with that Treaty.<sup>174</sup> But where the Court's opinion is adverse, the agreement may enter into force only after amendment of the EEC Treaty.<sup>175</sup> Preliminary rulings given pursuant to Article 177 of the EEC Treaty must be considered as binding not only on referring courts but on courts of Member States generally. It was in the course of such a preliminary ruling that the European Court interpreted the EEC Treaty and the law stemming therefrom as to be paramount because of their special and original nature, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

<sup>169</sup> Case 181/73, *Haegemann v. Belgium*, [1974] ECR 499, 460; Case 104/81, *Hauptzollamt Mainz v. Kupferberg*, [1982] ECR 3641.

<sup>170</sup> 20 ILR (1953) 441.

<sup>171</sup> See Joined Cases 314-316/81 and 83/82, *Procureur de la République v. Waterkeyn and Others*, [1982] ECR 4337.

<sup>172</sup> See *supra*, text at notes 9-10.

<sup>173</sup> *Peace Treaties case*, ICJ Rep. (1950) 65, 71; *ILO Administrative Tribunal case*, ICJ Rep. (1956) 77, 84; *South West Africa cases (Preliminary Objections)* ICJ Rep. (1962) 319, 337.

<sup>174</sup> See Opinion 1/75 [1975] ECR 1355 and Opinion 1/76 [1977] ECR 741.

<sup>175</sup> This is the apparent (but uncertain) meaning of Article 228 which states that such agreements shall enter into force 'only in accordance with Article 236'.

'Consequently, Article 177 is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise.'<sup>176</sup>

### XIII. Conclusions

The Rules of Procedure of the International Court and the European Court are similar in their origins, in their structure and in the wording of many of their provisions; but the functions of those courts differ in some fundamental respects. In particular, the International Court, in the exercise of its contentious jurisdiction, has as its principal function the peaceful settlement of bilateral disputes: and in such cases, its decisions are not binding on third states (other than those which have been permitted to intervene) even when those third states are parties to a treaty whose provisions have been the subject of judicial interpretation. By contrast, the European Court has as its function the promotion of closer relations between all the Member States, in the interpretation and application of the founding treaties.

This difference explains several of the distinctions between the Rules of Procedure of the two Courts, or the distinctions between those two Courts' interpretation of common rules. In particular, it explains the fact that national representation plays a greater role in the composition of the International Court than the European Court, both as a *plenum* and as a chamber. In the case of the International Court, it warrants the composition of members of a chamber from among those nominated by the parties to the dispute, without the necessity of securing the widespread geographical representation appropriate to the full Court. Equally, it explains the greater use of chambers in the European Court, even for cases involving the interests of states not being parties to the dispute; and it justifies the European Court's insistence upon collegiate judgments. Furthermore, whereas the International Court adjudicates upon a system of law applying horizontally, between states, the European Court interprets and applies a system applicable both horizontally and vertically, not only between states and institutions but also between natural or legal persons and between the latter *inter se*. This explains and warrants the use of a wider range of languages in the European Court, and a more liberal attitude by the International Court to the question of rights of audience. (States can be expected to exercise a very high degree of discrimination in their selection of advocates; whereas individual or corporate litigants might, for reasons of economy or otherwise, prefer to be represented by those who, by their training or their subjection to professional discipline, are less suited to the conduct of advocacy, especially in the context of a dispute originating in proceedings before a national court.)

The differences in function between the two Courts are not so great as to prevent the one from applying lessons learned from the experience of the other. The practices of the two Courts are already remarkably congruent in respect of recusal. The

<sup>176</sup> Case 6/64, *Costa v. Enel*, *supra* note 11.

Richard Plender

European Court's practice on interim relief shows that it is not necessary to establish jurisdiction on the main issue in order to enable the tribunal to provide interim protection. By way of analogy, it seems appropriate to conclude that a similar rule should apply in the International Court. Neither the Rules of Procedure of the European Court nor those of the International Court are so clearly drafted as to determine whether a state other than a party to the statute may be permitted to intervene. The European Court has interpreted its rules in a liberal fashion, so as to admit the possibility of such intervention. There appears to be no compelling reason to prevent the International Court from following suit.

A comparison of the practice of the two Courts affords a basis for offering several responses to proposals for reform. In particular, the functions of the two Courts are so distinct that the European Court jurisdiction to give preliminary rulings appears inappropriate as a model for the International Court. On the other hand, the European Court's experience suggests that it is open to the International Court to restrict the prolixity of oral proceedings without the change in the Statute suggested by the United States. The European Court's reticence to use chambers in cases in which Member States are the parties to the litigation appears unjustified, when viewed in the light of the practice of the International Court. An expansion in the use of chambers in the European Court appears warranted on this basis. Finally, the International Court's experience suggests that it would be both manageable and useful to reverse the present rule governing disclosure of written observations, so that these would be available for inspection unless the President should rule to the contrary, whether on the application of a party or otherwise.