Preface

Legal procedures determine what the law is and what may be possibly enforced. Normally left to the practitioners their role particularly in the field of the grey zones of international law merits closer attention. This book introduces a procedural perspective to better deal with the often inchoate nature of international law both in practice and doctrine.

International private law or the conflict of laws have probably rendered the greatest service to an understanding of procedural as opposed to substantive law due to the precedence on the *lex loci proceduralis* over any foreign *lex causae*. To better deal with "Italian Torpedoes" and other inconsistencies of the international judicial system an overview of the different bases of national jurisdictions is provided in Chapter 4.5. which is possibly the first of its kind. It can give a first orientation to the practitioner in international litigation and inform doctrine.

Jurisdiction and other procedural issues may only be fully appreciated when international law both public and private may shed its light on the varied legal procedures generating international law both nationally and internationally.

I am nevertheless all too conscious of the incompleteness of this attempt to establish a genuine procedural perspective in international law. Challenging to the reader, I only hope that any deficiencies in this attempt will prove useful in illustrating the need for further detailed studies on the issue, if I may be so fortunate to take part in such endeavours or not be so privileged to do so again.

I feel particularly indebted to three great scholars; the late Professor F. A. Mann, Lord Justice Lawrence Collins and Professor Andreas Lowenfeld of New York University for giving credibility to a comprehensive understanding of all international law both public and private without which the ideas suggested here would not have seen the light of the day. This is an understanding which in the German context is only a distant memory associated with Wilhelm Wengler and Count Helmuth James Moltke.

More immediately I have to acknowledge the contribution of Professor Hilary Delany who drafted the final chapter and helped on all stages of the book. I am at a loss to explain her friendly intellectual support reaching far beyond her duties as Head of the Law School of Trinity College Dublin. However, I gladly reciprocate her last book's dedication. (The Right to Privacy, Thomson Round Hall 2008). Mr. Conor Wright MA (Dubl.) BL helped to draft the national bases of jurisdiction, Herr Jochen Rauber did the same for the case law in Chapter 6 and Miss Brenda Carron LL.B. (Dubl.) compiled the tables and index and did most of the proof reading. All contributed greatly and fulfilled their tasks with admirable skills.

Frau Dr. Brigitte Reschke, Legal Editor at Springer Heidelberg, made this book possible. From the first mentioning of the idea at a Staatsrechtslehrertagung right up to the printing stage her friendly and most efficient support made it a pleasure to work together.

July 2008 Gernot Biehler

Chapter 2

Procedures in International Law

While in any country legal procedures are administered primarily if not entirely[1] by courts this is much less so on the international level. The full range of what could be seen as international legal procedures take place in an unco-ordinated variety of different *fora* reflecting the fact that global courts lack compulsory jurisdiction. An example is the jurisdiction of the ICJ which is provided for in the following terms in Article 36.1 of its Statute:

> "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."

The decisive difference from national procedures is "s" in "parties", indicating that both applicant and respondent must agree to submit the case to the Court. The requirement that the respondent assent to being sued is unknown in national contexts as usually court procedures are only initiated to coerce a respondent or defendant against his will to stand trial. Even if a formal consensus can be secured between two states to submit an issue to the ICJ any lack of goodwill on the side of the respondent regularly renders the decision moot; occasionally the respondent party does not take part in the proceedings and eventually ignores the judgment and it must be asked what kind of law such a procedure generates. It is this consensual nature of international adjudication which distinguishes it from its national equivalent. Only in retrospect may it be said whether such adjudication has been successful; it is the defendant's adherence to the decision rather than the decision itself which forms international law; it is the adherence of a respondent state to a decision rather than its text which may be regarded as state practice and *opinio iuris*. This consensual, horizontal and non-hierarchical nature of international law is reflected in its procedures which would appear to be different from those em-

---

[1] Certainly, in most national legal orders other *fora* rather than just courts exist, *e.g.* employment tribunals, arbitration bodies or special internal jurisdictions of certain bodies like some traditional universities. However, all decisions made in these contexts will be ultimately reviewable by the ordinary courts which will have the final say. Also the particular diversity of jurisdictions in the UK or the US would multiply but not falsify the observation that legal procedures lie with the ordinary courts established by the sovereign or the state.

ployed by national courts in hierarchical structures which render effectively binding judgments.

Therefore, it is necessary to clarify what is meant here when discussing procedures in international law. One understanding takes the procedural provisions and practices of courts, tribunals, panels and other bodies established by international treaties which work in a seemingly similar way to national courts.[2] The advantage of such an approach is that despite the recent proliferation of judicial bodies in the international arena they could be clearly defined by their origin which is international law as opposed to national law. Their number is still so low that it is possible for those working in the field to follow their activities. At least by appearance they form the core of judicial bodies dealing with international law. As established by international law they would primarily if not entirely[3] apply international law as expressed, for example, in Article 38 of the ICJ Statute.

Although it may be appealing to use this approach in determining procedures in international law because of its clarity and simplicity, it would miss the point. It would be rather reviewing what certain bodies established by international legal instruments do when they act in ways resembling national courts. It would miss the central issue of selecting the procedures rather than the institutions which determine and create international law. Certainly, international judicial bodies will determine international law in many instances; however, sometimes a seemingly judicial decision which is not adhered to may scarcely claim to have determined international law effectively nor decided the case brought before it. Although these decisions seem to bind according to Article 59 of the ICJ Statute, they cannot actually do so. The binding force as determined in Article 59 must be seen as fictional in such cases because of the lack of any enforcement measures. This was exemplified again recently by the US Supreme Court in *Medellín*.[4] These non-compliance cases starting, for example, with Albania's disregard of *Corfu Channel*[5] to the current US stance towards ICJ decisions in *LaGrand*[6] and *Avena*,[7] give evidence that under international law such a decision, albeit apparently binding under Article 59 of the ICJ Statute, is not backed up by state practice but on the contrary, is obviously understood to be non-binding by those concerned.

---

2 This is the approach of Brown, Chester, *A Common Law of International Adjudication* (OUP, 2007).

3 Mainly s. 1 "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it …" National law can influence and even determine international law in the context, for example, of the "general principles of law" of Article 38.1.c of the Statute, however, national law roots then become part of international law itself.

4 *Medellin v Dretke* 544 US 660 (2005). See also *Medellin v Texas* 128 S Ct 1346 (2008).

5 *UK v Albania* (Corfu Channel) ICJ Judgment of 9 April 1949.

6 [2001] ICJ Rep 497.

7 43 ILM 581 (2004).

On the other hand there are national courts which determine, apply and enforce international law which even from the international law perspective may be accepted at least as state practice and *opinio iuris* of the forum state. The undetermined variety of procedures provided by international law, their occasional failure to effectively determine the parties' behaviour and the significance of national *fora* for the formation of international law may indicate that an understanding of procedures in international law tied only to those judicial institutions established by instruments of international law would not cover all procedures which determine it. Furthermore, it would take in those cases and decisions of international bodies which by lack of adherence of the parties and maybe other subjects of international law would hardly qualify as determining international law within the meaning of Article 38.1.a-c of the ICJ Statute. In addition, the increasing divergence of decisions of international bodies from those of other national or international courts without any chance of effectively suggesting which decisions will eventually be effective, adds to the caution of any approach linked to institutions.

Therefore, a functional approach is suggested here. It is only but always when international law is authoritatively and effectively determined in a contentious case that it is suggested that one can speak of procedures in international law. Neither the name of an institution nor its label as judicial should be necessary nor sufficient; it is the effect of its decision which is relevant. If any institution applies international law in the strict sense of Article 38 of the ICJ Statute, we may speak of procedures in international law. This strict but open reading of international legal procedures reflects the principle of effectiveness in international law.[8] It is more what states do which counts in international law, rather than principles or theories which do not reflect state practice. Efficacy, above all, is the main principle which governs international relations. It may possibly provide help towards finding an answer to the question of whether international law is law at all, or whether sometimes the label of "law" would be better replaced by "standard" or "practice", to focus on those determinations of international law which determine authoritatively and effectively what is regarded as international law. It takes account of the decentralised nature of international law, its non-hierarchical structure and its partly purposefully undetermined procedures. In international law it may be best, therefore, to identify procedures by reference to their function in determining international law rather than by how they are labelled.

This strict but open reading of procedures would fit all national procedures too when applying either international or national law. Therefore, a general functional understanding of procedures in law may still be upheld until other reasons are recognised to justify departing from such a joint understanding comprising procedures both in national and international law.

All these preliminary thoughts do not obviate the need to explain how the profile of procedural law defined in the preceding chapter may inform or help us to understand specifically international legal procedures and what would be the bene-

[8] Biehler, *International Law in Practice* (Thomson Round Hall, 2005) para. 1-08.

fit of determining procedures in international law in the way done here. This certainly must mainly emerge from analysing legal practice usually found in case law. Before embarking on this analysis a general appreciation of the distinctions between national and international law in relation to procedures determining law may help. The lack of compulsory adjudication, judicial hierarchies and the immense variety of dispute settlement practices and procedures in the international sphere merits attention as they will determine to a large extent what is understood as procedures. When these features of international law and adjudication have been reviewed in relation to their procedural effects and the relations between international and national legal procedures considered, hopefully an idea of what use a procedural perspective of international law may have when applied to the case law and legal practice in the following chapters, will emerge.

2.1 Lack of Compulsory Procedures

Some principles which are well established in national legal procedures do not extend to international law. There is no court of final appeal, no enforcement of a court or tribunal decision and no established body of procedural law should a state, a corporate entity or an individual seek to bring proceedings based in international law. This reflects the co-operative horizontal nature of international law as opposed to the hierarchical and vertical one of national legal orders. International law is often indistinguishably embedded in international relations and politics and has its own variety of procedures, comprising court decisions, arbitration, diplomacy, the military, secret service and public policy. The list of courts and tribunals created in the last 60 years is impressive.[9] No co-ordination is provided which is reflected in the following statement in *Prosecutor v Tadic*:[10]

> "International law, because it lacks a centralised structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects of components of jurisdiction as a power could be centralised or vested in one of them but not in others. In international law, every tribunal is a self-contained system (unless otherwise provided)."

There is a need to strengthen international law by giving structure to its current system of procedural law. Lawyers involved in the relatively low number of cases relating to international law are by no means the only practitioners of international law. Legal advisers in foreign ministries, diplomats, political and military leaders,

---

[9] Guillaume, "The Future of International Judicial Institutions" (1995) 44 ICLQ 848, 848-9 provides such a list for the last 50 years which could be augmented with some international or internationalised courts in the field of criminal law.

[10] ICTY (AC) Judgment of 2 October 1995.

public prosecutors in both national and international contexts may embark on international legal procedures not necessarily open to judicial review resulting in decisions as final and determinate in the field of international law as any *res judicata* before a final court of appeal. It may be a task for an academic lawyer admitted to be competent to determine the rules of international law[11] to not only collect the variety of procedures in international law[12] but to analyse them with a view to considering what judicial service each of these renders which makes it worthwhile to label it a judicial procedure in the usual meaning derived from the national legal orders. Adopting a procedural perspective may help to identify current practices and opinions within international law and consolidate the most useful of these. It should be noted that certain procedural rules may fulfil an entirely different function in international law than they do in the national legal context.

Procedural clarity should help to identify the substantive law, particularly when issues of politics and international law appear to overlap. Although it may interfere with political aims lawyers have an obligation to their clients whether they are states or individuals to identify procedural and substantive law. All international lawyers should foster the aims embodied in the Charter of the United Nations, including "establishing conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained".[13]

The limited jurisdiction and binding force of decisions of international courts are the product of the actual will of states and it is recognised that no state is obliged to submit to a dispute before an international judicial body. Therefore, the actual consent of a state defendant not only to be bound by a decision but to submit a dispute and participate in proceedings is essential before international *fora*.[14]

Clear references to procedures in international law are rare. Decisions in international law frequently boil down to a consensus of the parties concerned, rather than an assertion of authority by agents of the global community or the United Nations embodied in a court or tribunal. States and international organisations often adopt a remarkably cavalier attitude towards decisions they are reluctant to follow. There remains, however, a need for procedures to determine and ultimately enforce international law. Their role in national and international law is identical and

---

[11] Article 38.1.d of the ICJ Statute stipulates that the court should apply in the same way at it applies the decisions of courts "the teachings of the most highly qualified publicists of the various nations", see Biehler, *International Law in Practice* (Thomson, Round Hall 2005) p. 109.

[12] Christine Gray, *Judicial Remedies in International Law* (OUP, 1987); "Is there an International Law of remedies?" (1985) 56 BYIL 25; "Types of Remedies in ICJ Cases: Lessons for the WTO?" in Friedl Weiss (ed.), *Improving WTO Dispute Settlement Procedures* (Cameron May, 2000) p. 401; Jean Allain, *A Century of International Adjudication: The Rule of Law and its Limits* (Kluwer Law, 2000).

[13] Preamble of the Charter of the United Nations 3rd paragraph.

[14] Shabtai Rosenne, *Law and Practice of the International Court, 1920-2005* (2006).

involves giving structure to the law. They allow fundamental questions to be answered before an action can be brought. Who is the party to be sued? Before which court should the claim be brought? What reliefs are available?

Often the primary objection to courts' jurisdiction in international law is the issue of why sovereign, independent states should submit to any form of judicial authority. The question goes to the heart of international law. International law is often viewed as a collection of non-mandatory methods of dispute resolution and co-operation between states as opposed to a distinct set of formal legal procedures. There is, for example, a certain honour in the ability of states to resolve conflicts peacefully. This has, in part, led to the establishment of the Permanent Court of Arbitration, the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ), although their success has been somewhat limited. The link between peaceful dispute resolution among states and legal solutions is embodied in Article 2.3 of the UN Charter: "All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." Prohibition of the use of force is also enshrined in Article 2.4 of the UN Charter.

A gradual emergence of legal procedures, albeit in a fragmented form, can be seen, therefore, not only in the Preamble and Article 2 but also Chapter VI of the United Nations Charter. It is worthwhile to attempt to bring a degree of coherence to the system by addressing them further.

2.1.1 General Procedural Provisions in International Instruments

International treaties establishing judicial bodies like the ICJ or the WTO Panels usually provide some direction in relation to the procedures to be followed. This is, for example, done in Article 30 of the ICJ Statute which enables the ICJ to use its own set of procedures: "the Court shall frame rules for carrying out its functions", which the ICJ has formulated in its own "Rules of the Court". However, many constitutive instruments of international courts do not contain detailed provisions on the applicable procedure or the available remedies. In drafting the Statute of the PCIJ, the ICJ's predecessor, no effort was made to establish a set of procedures to be applied by the new court, but only a few general rules were adopted.[15] As later held for the ICJ in Article 30 of its Statute it was understood that the courts should be allowed a wide freedom in framing its rules. This feature is also contained in many other statutes of international courts which confer on such bodies an express power to frame rules of procedure and to make procedural orders for the conduct of their proceedings.[16] Although this competency to make

[15] Statute of the PCIJ, PCIJ Publications, Ser. D (No. 1) p. 7; Antonio Sanchesz de Bustamente, *The World Court* (1925) p. 220; Manley Hudson, *The Permanent Court of International Justice: A Treatise* (1934) pp. 154, 258.

[16] Article 30 ICJ Statute; Article 16 ITLOS Statute; Article 26.d European Convention on Human Rights; Article 60 Inter American Convention on Human Rights; Article 25

rules of procedures is often expressly conferred on international courts by their constitutive instruments, these rules do not need to be ratified by the state parties. An exception is Article 51 of the Rome Statute of the ICC which provides that the ICC's rules must be adopted by a two thirds majority of the Assembly of State Parties. The lack of any need for general consensus of the states regarding the rules of procedure adopted by the international courts is surprising because of the consensual nature of these courts' existence. While the rules of procedure may be regarded as a source of procedural law which is ultimately derived from the consent of the states, the states have no control over the rules made by the courts as it is the members of the international courts who determine the content of these instruments. The provisions contained in the rules of procedures so created thus represent a source of law which is only indirectly derived from the consent of states and rather reflects the international courts' authority to carry out their functions properly.

Against this background of only a remote interest and influence of the states on the procedural rules of international courts and tribunals some specific provisions may clarify the nature of these rules of procedure; under the ICJ, ICSID and the ITLOS rules the parties to a dispute may jointly propose modifications to the rules.[17] This brings back the seminal consensus of states to the procedures through the provisions of the procedures themselves. This gives the parties some degree of control over the rules should they so require it. In the instances of the ICJ and ITLOS the states' suggestion that the rules be altered must be approved by the courts as "appropriate". However, in the case of the ICSID such modifications of the rules by the parties are immediately binding on the tribunal. There will be no substantial difference between both alternatives; neither the ICJ nor the ITLOS would possibly come to the conclusions that alterations proposed by the parties to a case before them would be "inappropriate" as this would put these courts in the superior position of an arbiter not only between the parties but over the parties' submissions, a position which cannot be upheld in the face of the consensual character of international law and all courts established under its rules. In practical terms such an attitude on the part of any international court would soon deprive it of any state clients and would be likely to cause its own redundancy.

Although rarely made explicitly, such amendments to the rules by state parties have been made.[18] The opportunity to do so is deeply embedded in the consensual character of international law which would hardly allow for a coercive character of procedures in the sense known from national laws. A rule allowing for the choice of procedural law rather than substantive law as found, *inter alia*, in Article

Resolution IX-79 IACtHR Statute; Article 17.9 DSU; Article 245 ECT; Article 15 Statute of the ICTY; Article 14 Statute of the ICTR; see generally Rosenne, *Law and Practice of the International Court, 1920-2005* (2006) Vol III, p. 584 *et seq*.

[17] Article 101 ICJ Rules; Article 44 ICSID Convention; Article 48 ITLOS Rules.

[18] *Chile v EU* (Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean) Order of 20 December 2000, 40 ILM 475 (2001).

101 of the ICJ Rules by the parties or otherwise will not be found in national law. The *lex fori proceduralis* of national courts is not subject to the discretion of the parties although the *lex causae* may be subject to the choice of law of the parties to a case. Therefore, the provisions of international courts allowing for such discretion in relation to the procedural rules of the forum show the distinct nature of such procedural rules in contrast to those known nationally. As expressed by Article 38 of the ICJ Statute it is the states not any body distinct from them which create and use international law, of which the international courts' rules of procedure form part. This extends to its consensual nature which applies both to substantive and procedural law applied by international courts. Therefore, it may be concluded that even in relation to those rules of procedure of international judicial bodies which do not explicitly provide for the discretion or choice of the parties in relation to the procedures followed as the ICJ, ITLOS and ICSID rules do, such a flexibility of international courts and tribunals regarding the state parties' wishes can be assumed to be generally inherent in international procedures. This control of the parties over the rules should they require it is linked to the non-coercive nature of international law and adjudication distinguishing it from its national equivalents. It is not the international judges' bench but the state parties who exercise ultimate control over procedures by virtue of their status in international law.

The rules of international courts are indeterminate and vague compared to those of their national counterparts. They are primarily concerned with the internal structures and administration of the courts. Rules on evidence, if they exist, would be rather imprecise leaving a maximum of discretion to the courts. This is despite the fact that most international courts hear evidence concerning the facts underlying the dispute. This is to enable the courts to discover the truth in relation to the conflicting claims of the parties before it.[19] As in national proceedings the rules concerning evidence can be crucial in the process of adjudication before international courts and tribunals too.[20] International courts have been left to develop their own case law on the rules to follow in relation to the applicable rules of evidence because the constitutive instruments of the courts and the rules of procedure rarely make extensive provisions for such rules on evidence. It is this lack of prescription, for example, in relation to rules of evidence in the constitutive instruments of international courts and in other areas of procedural law which distinguishes the procedures of international courts from their national counterparts. This does not exclude certain coherence in applying rules of evidence, particularly if there are coherent practices in national legal orders, which would then be mirrored by international courts' practices. However, in cases where no coherence among national procedural practices can be observed no determination by the rules or practices of international courts may be found. Cross-examination as a

---

[19] Durward Sandifer, *Evidence Before International Tribunals* (2nd ed., 1975) p. 1.

[20] British Institute of International and Comparative Law, *Evidence before International Tribunals* (2002) p. 20.

regular procedural feature of common law jurisdictions would be incompatible with the judge's right to ask and examine a witness sometimes even to the exclusion of the parties known to civil law jurisdictions. It is in such fields that international courts' rules or court practices would simply not pronounce or determine anything but would keep the issue open leaving it to the parties to come forward to make their suggestions regarding questioning of witnesses and most certainly if no consensus emerges among the parties not to do anything at all. Article 65 of the ICJ Rules provides an amazing cross over between potentially allowing cross-examination while upholding the judges' right to conduct and examine the witnesses according to their discretion. It reads:

> "Witnesses and experts shall be examined by the agents, counsel or advocates of the parties under the control of the President. Questions may be put to them by the President and by the judges …"

Even the terminology is telling; we read that witnesses shall be examined by counsel but questions may be put to them by the judges. This reflects usages in the common law world where witnesses are examined while in civil law countries witnesses are asked questions (primarily) by the judge. Although it is good to have this and other procedural rules of international courts as a point of reference, such rules could have well stayed unwritten as they do not decide anything which is different from the situation if they did not exist. This indeterminate character of rules in all instances where parties may differ reflects the leading role of the state parties towards the international bench. This can be exemplified even in the more general rules of the ICJ adopted according to Article 30 of the ICJ Statute. Another rule of evidence in this context may be quoted. In Article 58.2 of the Rules of the ICJ, and in more general terms in Article 31 of the rules, for all questions of procedure before the Court the role of the parties is explicitly mentioned. Article 58.2 reads:

> "The order in which the parties will be heard, the method of handling the evidence and of examining any witnesses and experts, and the number of counsel and advocates to be heard on behalf of each party, shall be settled by the Court after the views of the parties have been ascertained in accordance with Article 31 of these Rules."

And ICJ Rules Article 31 reads:

> "In every case submitted to the Court, the President shall ascertain the views of the parties with regard to questions of procedure. For this purpose he shall summon the agents of the parties to meet him as soon as possible after their appointment, and whenever necessary thereafter."

This explicit mentioning of the roles of the parties in relation to questions of procedure may be found some dozen times in the ICJ Rules. This indicates a soft spot

in the procedural rules of the ICJ towards the ideas of the parties on how to conduct the trials. It may be found in other rules of international *fora* as well, and even if not expressed explicitly in some rules it may be deemed to be common to all international courts as it reflects the horizontal, non coercive, indeterminate and co-operative character of international law different from national legal orders which are hierarchical, coercive and determinate. This distinction between national and international procedural law is particularly clearly evidenced in these provisions. A rule, comparable to Article 31 of the ICJ Rules, asking a national court to ascertain the views of the parties with regard to questions of procedure in every case would be inconceivable. This would run counter to the status of the national courts and their task of administering justice by authority different from that of the parties witnessed by the exclusivity and superiority of their own rules of procedure, the *lex fori proceduralis*, which is neither to be disposed of by the parties nor by any other rules of choice of laws. To conclude, international procedural rules do not determine anything which does not go without saying, nor do they contain anything which is possibly contentious or hardly welcomed among the parties and their legal counsel.

Article 49 of the ICJ Statute may be understood to hint in a different direction. It reads:

> "The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanation. Formal note shall be taken of any refusal."

This can be understood as a prescriptive rule of procedure which allows the ICJ to require any party to produce any documents not in line with the general observations drawn from the other provisions giving the state parties the ultimate discretion in procedural issues before international courts. But even Article 49 is not expressed in mandatory terms either; the ICJ can "call upon" the parties to produce evidence, rather than demand or require them to do so. This suggests that such calls are exhortative rather than compelling in effect. The consequences of non compliance are far from anything which could be compared to a contempt of court in the national context; the sanction is that formal note shall be taken of any refusal to comply. It does not suggest that non compliance is a wrongful act which could give rise to international legal responsibility. The drafters of Article 49, who were state representatives, did not envisage any more serious an outcome in cases of non compliance.[21] One would imagine that the debate might have been more vivid were Article 49 to have the effect of creating a binding obligation on the parties. Interestingly, the same formula to "call upon" is found in the relevant provisions of the ITLOS Rules, under Article 77.1. ITLOS can call upon the parties to produce evidence, which implies that this call is to have exhortative force only.

---

[21] Chester Brown, *A Common Law of International Adjudication* (OUP, 2007) p. 106 *et seq*.; Manley Hudson, *The Permanent Court of International Justice 1920-1942* (1943) p. 202.

However, in the statute of the Permanent Court of Arbitration of 1907 in Article 69 it is provided that the Court can require from the parties all evidence necessary and demand all explanations that are needed. However, again the sanction is the same as in Article 49 of the ICJ Statute, which is that in cases of non compliance the Court will simply take formal note. The "call upon" formula is found in Article 43.a of the ICSID Convention in relation to the production of documents and other evidence and the same language can be found in Article 34.2.a of the ICSID Arbitration Rules. The close links between Article 49 and those formulas found in the arbitration context do not suggest that any binding coercive force is associated with Article 49 of the ICJ Statute or any of the other provisions. What could be said explicitly for ITLOS, PCA, ICJ and ICSID may therefore generally be assumed for international courts' interstate procedures. This enormous flexibility of procedures regarding the international legal character of its adjudication is best expressed in Article 11 of the ITLOS Procedures:[22]

> "1. The Tribunal may decide to vary the procedures and arrangements set out above in a particular case for reasons of urgency or if circumstances so justify."

The sanction for non compliance with the Court's requests provided for in Article 49 of the ICJ statute is to take "formal note." This is certainly more than just ignoring the state's refusal to provide the requested information or the necessary evidence, however, taking note of something "does not have any particular teeth in itself".[23] It may suggest that the international court may be able to draw an adverse inference from the failure to produce requested evidence. This is premised on the view that non produced evidence may be contrary to the interests of the party in possession of that evidence. When Jessup J. said in *Barcelona Traction* "[a]ll of these presentations and others not noted here, do not suffice to discharge the burden of proof which rested on the Applicant", he draws adverse inferences from the lack of proof given by Belgium in this case.[24] However, the decision did not hinge on this and in the practice of the ICJ such adverse inferences from the failure to produce evidence can hardly be observed. In *Corfu Channel*,[25] the UK was asked to produce certain documents relating to its military operations in the Channel. The UK did not conform and did not answer any question in connection with the requested documents pleading "naval secrecy", probably a derivative of the Royal Prerogative accepted in UK courts, which, however, was not appreciated by the Court. The ICJ noted the UK's refusal but did not draw any inferences adverse to the UK's case. Indeed, Albania was held to be liable to pay compensation, which

---

[22] ITLOS/10, Resolution on the internal judicial practice of the Tribunal, adopted according to Article 40 of its Statute (which reflects Article 30 of the ICJ Statute) on 31 October 1997.

[23] Chittharanjan Amerasinghe, *Evidence in International Litigation* (2005) p. 132.

[24] ICJ Judgment of 5 February 1970, separate Opinion of Jessup J, para. 87.

[25] *UK v Albania* (Corfu Channel) ICJ Judgment of 9 April 1949.

holding, however, was ignored by the latter. In the *Tehran Hostages*[26] case the ICJ asked the US agent a question which he did not answer. In this case, as in *Corfu Channel*, the ICJ did not draw any inferences from this refusal

2.1.2 Different Features Regarding Non-state Party Procedures

In contrast to what has been observed in relation to the ICJ procedures, the Appeals Chambers of the ICTY has held that it has the power to issue binding orders to states, including orders for the production of evidence, and subpoenas to individuals acting in their private capacity.[27] In *Marija v Prosecutor*[28] it was confirmed on appeal "that the Tribunal possesses an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction is not frustrated and that its basic judicial functions are safeguarded." This jurisdiction extends to conduct which obstructs, prejudices or abuses the International Tribunal's administration of justice. Those who knowingly and wilfully interfere with the International Tribunal's administration of justice in such a way may, therefore, be held in contempt of this International Tribunal. Indeed, the appellant was held in contempt of court by the ICTY. This is in stark contrast to the findings in relation to procedural attitudes of international courts towards state parties. It obviously depends largely on the nature of the relationship between the international court or tribunal and the parties before it; an accused individual, particularly if branded by the Security Council, is in a different position than an independent and powerful state. Furthermore, the ICTY has even held that it has the power to issue binding orders to states, including orders for the production of evidence, and subpoenas to individuals. Persuasively, it has been argued that this hierarchical coercive attitude of an international tribunal so unlike other international courts' practices is not only due to the fact that it is primarily individuals that are parties before the ICTY but also that it was not created by an international instrument reflecting a consensus among states but by a Resolution of the Security Council of the United Nations under Chapter VII of the UN Charter.[29] Chapter VII authorising the use of armed force and other measures like sanctions is the most coercive structure international law has in store and it is meant to be different from other aspects of international law. Therefore, para. 4 of the Security Council Resolution establishing the ICTY[30] and Article 29 of the ICTY imposes on all states the "obligation to lend co-operation and judicial assistance" to the ICTY. The binding character of this obligation according to the ICTY

---

[26] *US v Iran* (Teheran Hostages, provisional measures stage) [1979] ICJ Rep 7, 10.

[27] *Prosecutor v Blaskic*, 110 ILR 688 (ICTY App. Ch. 1997) pp. 698-704, 713-716.

[28] Case IT-95-14-R77.2-A, Judgment of 27 September 2006.

[29] Chester Brown, *A Common Law of International Adjudication* (OUP, 2007) p. 107.

[30] SC Res 827 (1993), UN Doc SC/RES/827 (1993).

> "derives from the provisions of Chapter VII and Article 25 of the United Nations Charter and from the Security Council Resolution adopted pursuant to those provisions. The exceptional legal basis of Article 29 accounts for the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign states."[31]

As suggested, this power is specific to the method and creation of the ICTY and the ICTR as it is the exceptional indirect hierarchical and political authority of the Security Council under Chapter VII of the UN Charter which is exercised by the Tribunals established by it both over states and individuals before it. The procedures applied reflect the authority creating the forum.

Another group of cases where procedural requests were held to be binding on states are those relating to the WTO Panels. These international bodies adjudicating in trade matters according to the WTO Dispute Settlement Understanding (DSU) may authorise far reaching trade measures under international law with considerable effect on the states concerned. Article 13.1 of the DSU provides that "a member should respond promptly and fully to any request" for information which in the context means a request for evidence. The Panel decided that Article 13.1 creates a duty to respond promptly and fully to requests made by panels. If Article 13.1. did not connote a duty of this kind, then the Panel's right to information would be devoid of meaning, and the party before it could

> "thwart the panel's fact-finding powers and take control itself of the information gathering process that articles 12 and 13 place in the hands of the panel. A Member could, in other words, prevent a panel from carrying out its tasks of finding the facts constituting the dispute before it and, inevitably, from going forward with the legal characterisation of those facts. … So to rule would be to reduce to an illusion and a vanity the fundamental right of Members to have disputes arising between them resolved through the system and proceedings for which they bargained in concluding the DSU."[32]

In *Canada – Aircraft*[33] Canada refused to provide information requested by the DSU Panel. The Panel considered whether adverse inferences might be drawn from this refusal at its appeal stage. It noted that the DSU did not state "in what detailed circumstances inferences, adverse or otherwise, may be drawn by panels from infinitely varying combinations of facts." [34] It was held that the drawing of inferences was "an inherent and unavoidable aspect of a panel's basic task of finding and characterising the facts making up the dispute … Clearly the Panel had the

---

[31] *Prosecutor v Blaskic*, 110 ILR 688 , 699 (ICTY App Ch 1997).

[32] *Canada-Aircraft* DSR 1999-III, 1377, 1427.

[33] *Ibid.* at 1427, 1430-33.

[34] *Ibid.* at 1430.

legal authority and the discretion to draw inferences from the facts before it – including the fact that Canada had refused to provide information sought by the Panel."[35]

The DSU Panel and the ICTY leave no doubt in their pronouncements that they are in charge of the procedures to be followed and the parties consequently have to obey their orders. This is in marked contrast to the ICJ's procedures and to other interstate practices before international courts. The ICTY and the ICTR are distinguished from other international courts because of the authority that creates them which is the Security Council and it may be assumed that their procedural measures reflect the authority of this powerful political body. However, this cannot necessarily be said about the DSU Panel. It is established under an international instrument and reflects the consent of its member states. The distinguishing mark here is the grave effect on international trade which the Panel may authorise. The member states establishing the DSU Panels wanted it to be independent of the actual consent of the respondent before it. Therefore, the Panel proceedings share this evident coercive character which is rarely encountered on the international plane with the criminal tribunals established by the Security Council despite their different field of adjudication.

This distinguishes both the WTO/DSU Panel proceedings and those of the Security Council's Tribunals (ICTY, ICTR) from the ordinary international courts which exercise jurisdiction according to the parties' wishes and align their procedures accordingly. These procedural features, here exemplified by the drawing of adverse inferences, which are not primarily focused on the parties' authority but rely effectively on those procedural competencies vested in the international bench, may be regularly observed in the field of international trade,[36] investment and economic arbitration and adjudication. It is that the determination of law in a decision is linked to a real sanction be it criminal or economic which gives teeth to the procedures of those international courts and bodies which is not known to either the ICJ or any traditional interstate adjudication under international law. Concerning both the parties, who may be individuals or states, and the subject matter of adjudication these international bodies which apply some features of binding procedure are located between the classical national procedures in criminal and economic matters before national courts and traditional inter state adjudication represented mainly by the ICJ. They often settle private disputes (ICSID, NAFTA, PCA, Arbitration), represented by a private party litigating with a state, rather than aligning state interests, or assess individual wrongdoing and personal guilt rather

---

[35] *Ibid.* at 1433.

[36] *Biwater Gauff (Tanzania) Ltd v Tanzania* ICSID Case No. ARB/05/22, Procedural Order No.1 of 31 March 2006, paras. 104-6 and Procedural Order No.1 of 24 May 2006, paras. 8-9;*Tanzania Electric Supply Co Ltd v Independent Power Tanzania* ICSID Case No ARB/98/8, Award of 22 June 2001, paras 43-44; *Feldmann v Mexico* ICSID Case No ARB/99/1, Award of 16 December 2002; *Plama Consortium Ltd v Bulgaria* ICSID Case No ARB/03/24, Decision on Jurisdiction of 8 February 2005, para 16.

than state responsibility (ICTY, ICTR). Therefore, these international procedures come a little closer to those known in the national contexts and cannot be taken as a model and precedent for typical international legal procedures followed by international courts, a privilege still enjoyed by those traditional interstate bodies such as the ICJ, ITLOS or bodies rendering arbitral awards among state parties. However, it is the judicial bodies mentioned earlier, mostly of more recent origin, which reflect the integration of the international global legal community by sanctioning procedures and giving them force and structure.

The traditional lack of compulsory enforcement and adjudication in the field of international law is reflected in the soft procedures applied almost at the discretion of the parties by the classical judicial bodies established by international legal instrument, notably the ICJ and ITLOS. This almost deferential practice of the international bench hints at the parties being the real authority in those procedures which is facilitated by the judicial structures rather than directed by them. On the other hand there are judicial bodies established under international legal instruments endowed with some economic or criminal coercive power which directly translates into more coercive procedures towards the parties concerned both individuals and states. In those cases it is not the parties who may be seen as the real authority governing the procedures but rather the bench and it is no surprise that these procedures are closer to those known in the national context as they display some coercive character.

2.2 Variety of Procedures

It is the indefinite variety of procedures which distinguishes international law from national law. There is neither a definite hierarchy nor a fixed number of courts, tribunals or judicial procedures established by international law. Nor do those judicial institutions have compulsory jurisdiction comparable to the jurisdiction exercised nationally although some tendency towards more “biting” procedures could be observed in relation to the WTO DSU Panels and the ICTY and ICTR. However, on the international plane, they are the exception to the rule of a very far reaching autonomy of the state parties marking them as custodians of jurisdiction, procedures and enforcement. Combined with their lack of compulsory character the variety of procedures indicate strongly that there is no fixed procedural law of international bodies but a floating variety of procedural practices and rules taking account of numerous legal and extralegal circumstances in any case litigated before an international judicial body. This variety of procedures reflects the variety of *fora* established under international law. If states decide to ask an individual on an *ad hoc* basis to adjudicate this may well result in a decision not less significant for the determination of international law than a decision of the ICJ. The request of New Zealand and France to the then Secretary General of the United Nation Perez de Cuellar to settle their conflict around the “Greenpeace” Affair is a prime example.

This would strongly indicate that any review of procedures in international law should not be linked to institutions established by such law but to their function in determining international law, whether this is done in the framework of a judicial body, or by adjudication of the Secretary General of the United Nations, by diplomatic negotiations leading to a result which qualifies as international law, international conferences creating legal standards or national courts pronouncing on the matter. To fix and determine procedures in international law from a strictly functional perspective may focus on the essential law creating process which is decentralised, indefinite and non hierarchical which is also what international law is. It opens up the opportunity to see procedures observed in less institutionalised contexts which look like those procedures usually followed by courts at face value. However, they should be examined for the effects they have in relation to the creation of international law within the meaning of Article 38.1 of the ICJ Statute. The suggested focus on the functional value of any remotely judicial procedure relating to international law including both national and international *fora* of any suitable kind allows a consideration of a great variety of judicial contexts including those leading to a *non liquet* all too well known in international law, connected, for example, to doctrines of judicial restraint, immunities, want of jurisdiction or supervening action of states. It is then necessary to determine the procedures which are specific to international law abandoning any fixed institutional set which will help to define more clearly what procedure in international law is.

Chester Brown has presented an excellent study from the other perspective. Focusing on the practices and procedures of international judicial institutions, he was able to identify a number of common features applied by those institutions which may develop towards a "Common Law of International Adjudication".[37] These observations are of great value in understanding the practices of judicial institutions created by international legal instruments and may certainly help here too. However, the task and focus of this institutionally predetermined mainly empirical study is different from the desire to identify the character and properties of legal procedures in international law. This slightly different approach is motivated by the suggestion that probably only the lesser part of adjudication in relation to international law takes place before international judicial bodies, most of it occuring in national courts and those varied *fora* and procedures listed by Article 33 of the UN Charter beyond the international judicial bodies.

Although procedures in international law should not be seen as limited to the procedures applied by judicial institutions established under international law the value of contributing to structuring the area under review in line with the different institutions is evident. As indicated the ICJ and ITLOS have different procedural practices not only from the ICTY or the WTO/DSU Panels but from national courts too. Starting from their respective provisional provisions they must be treated in their contexts which will be largely defined by their institutional structure and belonging. The role of the parties, bench and enforcement authority in

[37] Chester Brown, *A Common Law of International Adjudication* (OUP, 2007).

this judicial method of international law formation will determine the procedures substantially, which obviously leads to categories in line with the institutional background of the *fora*.

A number of modern scenarios randomly chosen may demonstrate the often unexpected effect of procedural aspects on the application of international law in different *fora* and is meant to exemplify the variety of contexts envisaged as a basis for extracting general principles of procedures in international law:

a. An Irish soldier of the UNIFIL peacekeeping force was killed in a non combat road accident in Lebanon. His widow believes that UN officials' disregard of acceptable standards in maintaining the vehicle involved in the accident led to his death. She seeks to claim damages.[38]

b. Three diplomats from Germany, the US and Britain were killed in a helicopter accident in a Caucasian republic. The helicopter was leased by the UN from the Ukraine. UN maintenance standards had not been met, a fact of which UN officials were informed before the flight took off. However, the UN wanted to keep this information confidential. The diplomats' widows were supported by their home countries in their claim for damages.[39]

c. The International Tin Council is unable to meet the claims of its creditors as a direct result of unauthorised speculative market trading by some of its staff.[40] The creditors seek their money from the member states.

d. A national bank does not honour the letters of credit issued earlier to support contracts benefiting the state.[41]

e. Staff members of an international organisation are unfairly dismissed and seek remedies.[42]

f. An individual is abducted or extradited in violation of national legal requirements by agents of another state.[43]

---

[38] *O'Brien v Ireland* [1995] 1 IR 568.

[39] Settled out of court, for the facts see Biehler, *Auswärtige Gewalt* (Mohr & Siebeck, 2005).

[40] *JH Rayner (Mining Lane) Ltd v Department of Trade and Industry* (*International Tin Council Appeals)* [1990] 2 AC 418 (HL); see *Algemene Bank Nederland v Kf* Hoege Raat (Dutch Supreme Court) 22 December 1989; (1994) 96 ILR 353, 355 allowing the release of confidential information relating to the operation of the International Tin Council, see August Reinisch, *International Organisations before National Courts* (CUP, 2000) p. 158 at footnote 655 with further references.

[41] *Trendtex v Central Bank of Nigeria* [1977] 1 All ER 881.

[42] *Yakimetz* [1987] ICJ Rep 18; *Waite and Kennedy v Germany* ECtHR judgment of 18 February 1999; 116 ILR 121.

g. A Kosovan celebrating boisterously is shot by a panicked British UN soldier.[44]

h. A public report on the implementation of UN sanctions contains incorrect information on non-compliance by private companies, which, as a result, sustain considerable financial and economic losses.[45]

All these cases ultimately helped to clarify procedural aspects of international law even if there was a *non liquet*. Even this is a procedural outcome and a result that is also open to interpretation in the context of Article 38 of the ICJ Statute The examples given indicate how important it can be in certain circumstances to inform the client about the legal remedies and means of redress available. What these and many other cases have in common is that they would cause even experienced practitioners some difficulty in answering fundamental procedural questions. Compulsory legal procedures under international law could not apply to these cases and no international court or tribunal would be ready to take on any of them. Equally, national courts will generally avoid such issues. Service of proceedings can also lead to considerable difficulties. How can they be served on the UN or on a foreign state unwilling to accept them? Exceptional injunctive relief in respect of financial assets must often be contemplated. The resulting lack of normal compulsory legal procedures regularly encountered in the context of international law is often a source of frustration for affected parties and their lawyers, who may feel they are not in a position to advise effectively on how to seek redress.

In this sense, the procedural aspects of international law are critical in giving wider international law its substance. The same procedures are often employed by the executive branches of Government in international law to avoid independent judicial scrutiny of their actions. They include executive certificates, *amicus curiae* briefs, privilege and immunity. Procedural difficulties are, therefore, often a considerable impediment for individuals, companies and states in seeking to invoke international law.

Judicial decisions and legal publications are a subsidiary means of establishing the content of international law.[46] International treaties which provide for some procedural remedy are the most obvious and accessible. State involvement in judicial procedures and particularly adherence to decisions of benches may form state practice and *opinio iuris* creating custom. All international courts and tribunals are

---

[43] *Ocalan v Turkey* (2003) 37 EHRR 10; *R. v Horseferry Road Magistrates Court, ex p. Bennet* [1994] 1 AC 42; the US "extraordinary rendition" cases may be added as soon as case law is available.

[44] *Bici v Minister of Defence* [2004] EWHC 786 (QB).

[45] Example taken from Karel Wellens, *Remedies against International Organisations* (CUP, 2002) p. 13.

[46] Article 38 para. 1 of the ICJ Statute; Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 81 *et seq*.

founded on some international treaty instrument. Even some seemingly very customary procedures such as diplomatic remedies[47] have their codifications.[48] Military conduct is also regulated by treaty procedures in the Hague and Geneva Conventions. Despite this, military and diplomatic practice is mainly governed by custom and should be assessed from this perspective. The body of international law subject to legal proceedings is complex and the ultimate functional perspective of any legal proceedings may help to deal efficiently with this body of law.

At this preliminary stage this just indicates the spectre which opens itself up when employing such a liberal understanding of international legal procedures, although the *fora* indicated look randomly chosen, arbitrary and indefinite. However, this reflects the way international legal practice either steers its way through existing precedents and procedures or creates new ones, inventing new hitherto unknown authorities and notions sometimes meant rather to escape existing legal categories than to adhere to them. The "extraordinary renditions", procedural justifications based on "terrorism", the activities of the NATO, EU and UN in Afghanistan and Kosovo and their relations with the territorial (avoiding the term sovereign) states and their laws give ample evidence of this flexibility of international practices. However, eventually they all have to be brought into legal categories and only a most strictly functional approach will be able to identify procedures.

Not to limit certain practices applying international law to any fixed institutional judicial background when analysing their effects in determining international law corresponds to the decentralised structure of substantive international law. It takes the perspective of recognising where something relevant happens and where this is not the case. The possible lack of available procedures sometimes encountered in the international law context obviously indicates that a claim on the merits will not be judicially determined or enforced. Starting with the frustrated claim of the United Kingdom against Albania for compensation exceeding £800,000 in the ICJ's *Corfu Channel* Case[49] more than fifty years ago, which has already been mentioned, to the current desire of Congo to cash in on its claim against Uganda according to an ICJ decision;[50] these practices should serve as a continuing reminder that international law is not only applied by a fixed set of international judicial bodies. A strictly functional approach may reveal procedures which clarify who authorises what is actually practiced and accepted as law in the international arena, which is not necessarily the ICJ in these instances.

---

[47] Mainly diplomatic protection of individuals and companies; see *Liechtenstein v Guatemala* [1955] ICJ Rep 4; *Canada v Spain* (*Barcelona Traction*) [1970] ICJ Rep 3; 46 ILR 178.

[48] The Vienna Convention on Diplomatic Relations of 1961.

[49] *UK v Albania* (Merits) [1949] ICJ Rep 4, 18 and 157.

[50] *Congo v Uganda*, decision of 19 December 2005, para. 259 *et seq.*, clarifying that Uganda had to make full reparation which would be determined by the court if the parties did not agree about it.

A close look at the parties to any procedures, the authorising power behind any adjudication and the method of enforcement or the lack thereof will be regularly used as criteria when reviewing international legal procedures. The spectre as shown in a preliminary way at this stage is only meant to sharpen the initial understanding of procedures necessary to see any structure and order in the variety of possible international procedures. The procedural specificities may be unfolded later when examining the various procedures on their own merits.

2.3 National and International Legal Procedures

It is sought to maintain a single notion and understanding of procedures in international law comprising procedures before both national and international *fora*. In view of the very different procedures observed at different levels of adjudication this can possibly be done by focusing on the function of determining international law in the light of potential sanctions, taking the "procedural authority", the power authorising the proceedings and lending it legal force, into consideration. Observations drawn from national court procedures, mainly distinguishing them from substantive law in the context of conflicts of laws as *lex loci proceduralis* rather than the *lex causae*, is meant to inform this general understanding of procedures in equal measure as is the very different and open approach necessitated by the indeterminate structure of international adjudication. The national notion of procedures seems highly developed, rather technical and sophisticated compared to the very flexible non hierarchical and floating nature of procedures employed on the international level to solve conflicts. Although these different characteristics reflect the varied nature of the authorities empowering adjudication in the different spheres, they should not be considered as principally distinct but as two sides of a coin, rather than pears and apples. International law is adjudicated upon, determined and enforced in both national and international *fora*, which would indicate that one functional procedural perspective linked to the determination of international law rather than to the institutions would help. It would be immodest to suggest that this has succeeded and proved useful at this early stage; however, as an approach it shall hereby be introduced and left to a later stage to either discard or develop further.

2.3.1 National Procedural Law as International Law

In discussing the link between the observations on both national and international procedures it may be useful to note that national procedural principles when applied by international bodies may be mostly seen as part of international law itself. If not found in instruments or settled custom they often will form part of the general principles recognised by civilised nations within the meaning of Article 38.1.c of the ICJ Statute. This shows that from the perspective even of international law the legally refined notions of procedure found in national law when applied may

not only inform international public law but may be considered to be part of it despite their origin in the practice and laws of national courts. How they could be understood to a certain extent to form general principles of law within the meaning of Article 38.1.c of the Statute of the ICJ shall be briefly reviewed. It was outlined by Ammoun J in *North Sea Continental Sea Shelf*[51] that:

> "The general principles of law are indisputable factors which bring morality into the law of nations, inasmuch as they borrow from the law of nations principles of the moral order such as those of equality, responsibility and *faute, force majeure* and act of God, estoppel, non-misuse of right, due diligence, the interpretation of legal documents on the basis of spirit as well as the letter of the text and finally equity in the implementation of legal rules, from which derive the principles of unjust enrichment *enrichissement sans cause*, as well as good faith which is no more than a reflection of equity and which was born from equity."

Even a cursory glance at the procedural provisions in international instruments establishing courts, tribunals or other *fora* by a modestly trained lawyer will show that their state and sophistication may not even remotely match the standards attained in national procedural laws. This sometimes "primitive" state of international law is well known to the international lawyer and is due to the lower integration between power and law in international affairs as compared to in any national legal order. The increasing rapprochement of international law to the standards of national laws in this field may be seen as directly proportionate to its legal quality measured against the standard of "law recognised by civilised nations". The inquiries into the nature of the hinted equations between international and national legal procedures are still mostly unwritten and international case law gives only a modest account of which general legal principles of national procedural law may further international law.[52]

The background of the frequent resort to national procedural principles before international courts and tribunals is due to the rudimentary legal determination of procedures in public international treaties or custom. Although all international instruments establishing international *fora* such as the International Court of Justice contain some procedural provisions[53] usually concerning their jurisdiction,[54] the binding force of the judgment,[55] enforcement of the judgment[56] and costs[57] it is

---

[51] *Germany v Denmark; Germany v The Netherlands* [1969] ICJ Rep 3; 41 ILR 29, 38.

[52] Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 94.

[53] See, for example, Chapter III (Articles 39 to 64) of the ICJ Statute.

[54] See, for example, Article 36 of the ICJ Statute.

[55] See, for example, Article 59 of the ICJ Statute and Article 94.1 of the UN Charter.

[56] See Article 94.2 of the UN Charter.

[57] See, for example, Article 64 of the ICJ Statute.

the reference to the national procedural laws which enables these basic public international provisions to become a comprehensive law of procedure suitable for addressing the relevant questions. This transfer from national to international procedural law may be done through Article 38.1.c of the ICJ Statute which reads:

> "The Court, whose function is to decide in accordance with international law such disputes, as are submitted to it, shall apply … the general principles of law recognised by civilised nations …"

This clause which is accepted as forming part of a general definition of international law is able to transform principles of national law into the body of international law when necessary. In a more modern formula the same clause is codified, although only in the context of the International Criminal Court (ICC), in Article 21 of the Statute of the ICC, one of the most recent and developed public international law instruments establishing an international forum, which reads:

> "Applicable law.
>
> The court shall apply: … general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of the States that would normally exercise jurisdiction …, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards."

However, what Lauterpacht,[58] formerly a judge at the ICJ, wrote on this is still true:

> "In the whole field of international law there is hardly a question of equal practical and theoretical importance to which less systematic attention has been paid than the problem of private law sources and analogies in international law."

It is by relying on the general principles common to both international law and national laws[59] that the lack of compulsory procedural provisions in the remaining parts of international law, considered often as the *fons et origio malis*, can be mainly remedied by applying basic procedural guarantees common to all civilised nations in the international field. Rights such as the access to court, due process of law or the equitable maxim that where there is a wrong there is a remedy must be tested to assess the extent to which they may provide a counterweight to adverse considera-

---

[58] Hersh Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, London, 1927) p. 5.

[59] A source of international law within the meaning of Article 38.1.c of the ICJ Statute often underestimated in its value, see Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 92 *et seq*.; Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, London, 1927) p. 5.

tions mentioned before such as organisational or state privileges and immunities in the context of establishing jurisdiction, not least before national courts.

The recourse to national laws when determining international law set out in Article 38.1.c of the ICJ Statute in itself is a customary but hitherto unwritten practice[60] which may be applied to integrate established legal determinations of substance and procedure stemming from national law into the body of public international law. To this end they must be shown to be common to various legal orders to qualify as "general" and to address the same needs both in international and national law. These conditions may be easily met as the distinction between substance and procedure and their legal determinations are common to all national rules in conflicts of laws and must be seen as sufficiently general. The rudimentary character of the existing procedural rules of public international law make it more necessary to let national procedural principles inform international ones. *Fora* established by international instruments may have to ascertain their sometimes unwritten procedures, for example, in relation to evidence, injunctions, *in camera* procedures or limitation periods informed by the practices of national courts. Therefore, the national courts' experiences and jurisprudence may translate into international law before international fora.[61]

In addition to characterising the decisions and procedural practices of national courts as general principles within the meaning of Article 38.3.c of the ICJ Statute, when applied by other *fora*, they can be seen as state practice within the meaning of section (b) of the said article too. The PCIJ said in the *Certain German Interests* case:[62]

> "From the standpoint of international law and of the court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures."

This understanding of national courts' decisions as state practice has been affirmed in later decisions. To characterise them as "facts" brings to mind the characterisation of foreign laws by national courts as "facts" too. These attitudes of a forum towards other laws on which it usually does not pronounce itself because they are "national" or "foreign" as "facts" may be helpful in characterising the forum itself.

In *Monte Confurco*[63] the ITLOS held that:

---

[60] Cassese, *International Law* (OUP, 2005) p. 191 provides examples of procedural principles from national law sources applied by the PCIJ (the predecessor of the ICJ) and other international courts. See also p. 192 at footnotes 18 -27.

[61] See *e.g.* Article 38.1 of the ICJ Statute "The court, whose function is to decide in accordance with *international* law …".

[62] [1925] PCIJ (Ser A) No. 7 at 19.

[63] *Seychelles v France* ITLOS judgment of 18 December 2000, para. 72.

> "… When determining whether the assessment made by the detaining State in fixing the bond or other security is reasonable, the Tribunal will treat the laws of the detaining State and the decisions of its courts as relevant facts. The Tribunal, however, wishes to make it clear that, under article 292 of the Convention, it is not an appellate forum against a decision of a national court."

This assessment by the forum of non applied laws as "facts" combined with a reference to non interference into the national jurisdiction is probably one of the best self characterisations of international adjudication.

2.3.2 General Character of Procedures

A general notion of procedural law will be used which is not linked to certain judicial institutions but comprises instances in which international law is effectively determined in a judicial way. This will leave us with a fairly general understanding of procedure. A close look at the establishing authority which provides the power exercised in proceedings would be useful as this will determine the relationship between bench and parties which can vary significantly in different proceedings. It provides an answer to how the pre-eminence of procedure over substance, so well established in national laws with the *lex fori proceduralis*, will not only give a face to the judicial power exercised but clarify who actually determines international law and practice relevant under the definitions provided in Article 38.1 of the ICJ Statute. The initial feature of all legal proceedings both national and international is to determine jurisdiction. This self-assertion or self-determination of authority, power and competency is then executed in its further proceedings. Therefore, the approach to jurisdiction is also significant for procedures and must be carefully monitored. In addition, the written and unwritten procedural practices relevant to the case could be valued for what they do for international law.